The American Journal of Comparative Law

Fall, 2002

50 Am. J. Comp. L. 643

LENGTH: 11160 words

AMERICAN LAW IN A TIME OF GLOBAL INTERDEPENDENCE: U.S. NATIONAL REPORTS TO THE XVITH INTERNATIONAL CONGRESS OF COMPARATIVE LAW: SECTION V Prosecutorial Discretion and Its Limits

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LEXISNEXIS SUMMARY:
... At the core of the prosecutor's broad discretion lies the charging function, which is the focus of the general rapporteur's careful definition of the problems to be addressed in this report. This report is therefore limited to discussion of the charging function. ... The Charging Function: Institutional Setting and the Nature of Prosecutorial Discretion ... In general, prosecutors also exercise the charging function with statutory limitations, although again legislatures have acted to impose some constraints as to certain classes of offenses or persons. ... Broad prosecutorial discretion in the exercise of the charging function is firmly entrenched. ... Since the 1960s, amid a general trend in U.S. law toward development of legal standards, criteria for prosecutors' exercise of the charging function have been articulated in a variety of forms. ... Another legislative approach to pre-trial diversion dilutes prosecutorial autonomy by introducing other agencies into the charging function. ... Some of these changes have had an impact on prosecutorial discretion in the charging function. ... The State of Washington statutory guidelines for prosecutors also direct prosecutors to take victims' interests into account to a certain degree in the charging function. ...

TEXT:
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I. Introduction

In the United States, prosecutors play the central role in the criminal justice systems of the federal and state governments. n1 Their decisions determine the course of the criminal process, n2 and in making those decisions, they act with broad, generally unregulated discretion. n3 Indeed, the scope of prosecutorial discretion has steadily expanded in recent decades. n4

At the core of the prosecutor's broad discretion lies the charging function, n5 which is the focus of the general rapporteur's careful definition of the problems to be addressed in this report. This report is therefore limited to discussion of the charging function. Following a short description of certain relevant institutional aspects of criminal justice administration, and examination of the nature of the charging function, this report will focus on those questions identified by the rapporteur: written charging criteria; pre-trial diversion; regulatory [*644] prosecution; the relationship between prosecutors and crime victims; and prosecutions of alleged police misconduct.

II. The Charging Function: Institutional Setting and the Nature of Prosecutorial Discretion

A. Institutional Setting

Prosecutorial functions are widely dispersed among different offices in the United States. Fifty-two jurisdictions - the federal government, each of the fifty states, and the District of Columbia - are competent to enact their own criminal

laws and laws of criminal procedure, n6 and to establish their own criminal justice systems. The only source of legal regulation that is applicable to all of these jurisdictions is the U.S. Constitution, which provides a common core of basic principles in the structure of criminal procedure. n7 As to statutory law, there is a "fair degree of uniformity" among the different jurisdictions. n8 Although the scope and volume of federal criminal statutes have expanded dramatically over the past several decades, n9 most criminal laws are those of the states, and the vast majority of criminal cases are prosecuted by state and local authorities. n10

All fifty-two jurisdictions have their own, separate, prosecutorial organizations. Within the state systems, the prosecution function is de-centralized, so that in most states local prosecutorial offices function autonomously and the state attorneys general exercise very little effective control over them. n11 Federal government prosecutorial agencies, meanwhile, are found in the United States Department of Justice and in offices within federal regulatory agencies. The Department of Justice includes the headquarters in Washington, D.C. and the ninety-three United States Attorneys who are located in the federal judicial districts throughout the United States. n12

[*645] The great majority of prosecutorial offices are led by chief prosecutors who are elected officials. n13 Most are elected local officials who in turn appoint their assistant prosecutors. n14 In four states (Connecticut, Delaware, New Jersey, and Rhode Island), local chief prosecutors are appointed by elected officials. In the federal system, the Department of Justice is led by the U.S. Attorney General, who is nominated by the President of the United States and approved by the U.S. Senate. United States Attorneys are appointed by the President, and Assistant U.S. Attorneys are appointed by the Attorney General.

B. The Nature of Prosecutorial Charging Discretion

The charging function has two decision-making components: the initial screening determination as to whether or not to charge (the "screening function"); and, if the answer is yes, the subsequent decisions as to choice and number of charges (the "selection function"). n15 The extent of the prosecutor's discretion in making these decisions is measured by examining two separate indicia: the degree of freedom to act unilaterally in making the charging decisions themselves ("charging autonomy"); and the degree of insulation from subsequent judicial review of those decisions ("review autonomy"). n16

In general, legislatures and courts rarely have taken steps to interfere with the prosecutorial exercise of discretion in the charging function; as a result, particularly in regard to review autonomy, prosecutors act with nearly unfettered independence. Many justifications have been articulated for this maximization of the prosecutor's decision-making. Those advanced or identified by courts, n17 other public officials, and commentators can be grouped in four categories: constitutional separation of powers theories, grounded in the commonly- [*646] held view that the prosecutorial function lies in the executive branch of government; n18 deference to prosecutorial expertise; administrative necessity; n19 and individualized justice. n20 According to the proponents of broad discretion, the positive public benefits derived from it dictate that the most appropriate mechanism for monitoring and curbing abuse of the charging function is the electoral process, not legal regulation. n21

1. Charging Autonomy

In theory, mechanisms for limiting charging autonomy could include legislative or judicial measures injecting external agencies or individuals into the decision-making process, as well as legislative or judicial rules circumscribing the scope of the prosecutor's discretionary charging authority. In practice, these are not widely employed.

Prosecutors enjoy something close to a monopoly on the use of prosecutorial authority. For one thing, the opportunities afforded by the criminal justice systems for private prosecutions are sparse and rarely utilized. n22 For another, prosecutors generally discharge their charging responsibilities without any legal mandate to include other agencies in that process, although legislatures have required such intrusion in certain specific areas. n23 However, it is also important at the same time to note one example of shared decision-making in all U.S. criminal justice systems that often is overlooked. As one commentator has noted, the systems provide "reasonably effective controls" in the form of judicial checks against abusive prosecutions not grounded in sufficient evidence. n24 Thus, it can be said in this regard that prosecutors must in theory share decision-making authority with the judiciary on the question of whether a case will advance to [*647] the trial phase, and that it will not in that small number of cases when evidence for so proceeding is insufficient. It is in those cases where there is sufficient evidence to go forward that judicial intervention gives way and the prosecutor in practice exercises exclusive authority as to whether to press and maintain formal charges. This report will focus primarily on issues related to prosecutorial discretion in the latter category of cases.

In general, prosecutors also exercise the charging function with statutory limitations, although again legislatures have acted to impose some constraints as to certain classes of offenses or persons. An example of legislative limitation on discretion in the screening function is in a State of Minnesota Statute that requires local (county) prosecutors to file charges for failure to report physical or sexual child abuse or neglect, certain acts of criminal sexual conduct, and environmental law violations. n25

2. Review Autonomy

The courts very infrequently will uphold challenges to prosecutorial charging decisions. Put another way, they rarely compel prosecutors either to charge or to withdraw charges. n26

a. Decisions Not to Charge

Although judicial mechanisms exist in the U.S. legal systems for individuals to compel a prosecutor to bring charges, n27 it is generally accepted that they are used infrequently and are rarely successful. n28 In many states, the attorneys general of the various states have the power under judicially-created remedies to initiate local prosecution, but again this rarely occurs. n29 The situation is slightly different in cases where the prosecutor has filed charges and then seeks to withdraw them without any negative consequences for the accused, the act known as nolle prosequi in the common law. In such cases, statutes in some jurisdictions require judicial approval of such an action. n30 However, the courts have ruled that they will not interfere with a prosecutor's withdrawal of charges unless it can be shown that dismissal of the charges is clearly contrary to a manifest public interest - a finding that rarely is made. n31

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b. Decisions to Prosecute

The criminal justice systems afford some opportunity for individuals or government actors to challenge decisions to file charges. However, in reality, the chances for successful pursuit of such opportunities are extremely limited. One reason is that the remedies are limited. In this regard, one potential vehicle for subsequent judicial review - a civil damages remedy - is not generally available to defendants who claim that prosecutors acted unconstitutionally in bringing charges against them. In a 1976 decision, the U.S. Supreme Court extended absolute immunity to prosecutors in regard to such civil lawsuits. n32

Thus, the only judicial remedy available against a decision to charge is dismissal of the prosecution. However, the grounds upon which courts will uphold a challenge are strictly limited to certain specific constitutional claims of denial of equal protection or due process, and courts have taken this interventionist step in only a very few cases. n33

An equal protection challenge must allege discriminatory or selective prosecution, n34 and must overcome a "presumption of regularity" that supports prosecutorial decisions. n35 In this regard, the U.S. Supreme Court has ruled that "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." n36 In order to overcome the presumption of regularity, a defendant must satisfy what the U.S. Supreme Court has recognized as a "demanding" standard: a showing, based on "clear evidence to the contrary", that (1) other persons similarly situated to the defendant have not been prosecuted; and (2) the prosecution's selection of this particular defendant for prosecution was invidious (based on constitutionally impermissible grounds such as race or religion) or in bad faith. n37

As to invidiousness, a claimant must demonstrate that the prosecutor's decision had a discriminatory effect and was motivated by a discriminatory purpose. n38 The latter element calls upon a defendant [*649] to ascertain the prosecutor's motives by obtaining factual information that usually will be found only in the possession of the prosecutor. In United States v. Armstrong, the U.S. Supreme Court imposed a "rigorous standard" for such discovery, requiring the defendant to produce as a threshold requirement "some evidence tending to show the existence of the essential elements of the defense". n39 In justifying such a significant barrier to discovery, the Court cited the costs that discovery requirements would impose on the prosecutor, diverting resources and perhaps disclosing the prosecutor's litigation strategy. n40

Another potential basis for challenging the decision to prosecute is that of prosecutorial "vindictiveness" - i.e., punishment, in violation of due process rights, of a defendant in retaliation for his or her decision to exercise a constitutional right. Thus, a successful claim of vindictive prosecution might be one that shows that the prosecutor added more severe charges against a defendant who rejected a plea bargain in favor of exercising the constitutional right to a trial with a jury of one's peers. Commentators point out that the judicial standards governing the resolution of vindictiveness

claims are not uniform; however, the U.S. Supreme Court has signaled that some measure of vindictiveness on the prosecutor's part is acceptable. Therefore, each case will rest on its particular facts to permit determination of the sufficient level of vindictiveness for a claimant to succeed. n41

III. The Specific Issues

Broad prosecutorial discretion in the exercise of the charging function is firmly entrenched. n42 At the same time, critics of unregulated discretion have long sought the institution of safeguards against arbitrary or discriminatory conduct and of mechanisms for increased accountability of prosecutors for their actions. n43 Generally, these critics have not sought the elimination of charging discretion, even if such an objective were realistically possible - instead, they seek methods of accommodating it with the goals of fairness and predictability in the criminal justice system. n44 The nature of this on-going quest for balancing of the many, often conflicting, policy goals [*650] associated with prosecutorial discretion n45 is the central theme that runs through the discussion below.

A. Written Charging Criteria

1. Written criteria exist, although not everywhere, in a variety of forms and for a variety of purposes.

Since the 1960s, amid a general trend in U.S. law toward development of legal standards, criteria n46 for prosecutors' exercise of the charging function have been articulated in a variety of forms. The goal has been to establish pre-established, objective, criteria in order to advance impartiality in prosecutorial decision-making.

It is possible to identify four categories of forms in which written criteria can be found:

a. Prosecutorial rule-making: internal standards adopted by prosecutorial offices. The most well-known articulation of internal standards is the Principles of Federal Prosecution of the U.S. Department of Justice; n47 in addition, some local prosecutorial offices have formally adopted written standards. n48 The Principles of Federal Prosecution set forth detailed rules and standards accompanied by official commentary. The questions they address include matters such as the available options for prosecutors at the time of the charging decision, the permissible grounds for choosing to charge and the impermissible grounds for choosing to charge or not to charge.

At the state level, at least one legislature has acted to require all local prosecutors to adopt their own standards. A State of Minnesota [*651] statute requires each county attorney to adopt written guidelines "governing the country attorney's charging and plea negotiation policies and practices." It stipulates that the guidelines must address certain matters, but need not be limited to them. n49

b. Model standards. In order to promote the adoption of standards by prosecutorial offices, certain professional organizations have adopted model charging standards as components of comprehensive guidelines for prosecutorial conduct. Examples include: the American Bar Association's Standards for Criminal Justice Relating to the Prosecution Function n50 and the National Prosecution Standards of the National District Attorneys Association. n51 Some state prosecutors' associations have also adopted model standards for adoption by local prosecutors. n52

c. Legislative guidelines. In at least one jurisdiction, the State of Washington, the legislature has enacted legislation containing recommended guidelines which go into considerable detail and are accompanied by commentary. n53 The Statute addresses the "evidentiary [*652] sufficiency" for both decisions not to prosecute n54 and to prosecute. n55 The Statute also sets forth guidelines for the exercise of the selection function, including the directive that the prosecutor "should not overcharge to obtain a guilty plea", and states that "overcharging" includes "charging a higher degree" or "charging additional counts". n56

d. Ethical rules. All jurisdictions in the United States have rules that address the ethical responsibilities of prosecutors. n57 These rules are found within comprehensive ethical rules for attorney conduct, n58 and are based on the American Bar Association's Model Rules of Professional Conduct, n59 or the older ABA Model Code of Professional Responsibility (1980). n60

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2. Issues concerning criteria.

a. Their potential uses.

The various forms of criteria identified above lend themselves to different potential uses. The first of these is a model grounded in strict judicial supervision. Courts could assess the substance of the criteria themselves for their constitutional or legal validity. Also, a prosecutor's departure from the criteria could be a basis for an individual's defense or a cause of action.

Such a model of strict judicial supervision has not been put into place by courts in the United States. In this regard, in addition to the general judicial reluctance to supervise the prosecutorial exercise of discretion, the authors of criteria themselves have stated that the criteria are not intended to serve as a basis for judicial review. The ABA Standards, for example, state clearly that they are not intended to serve as criteria for judicial examination, although they also state that they might be "relevant", depending upon "all the circumstances". n61 Also, the State of Washington Legislature stated explicitly that its guidelines n62 are intended solely for the guidance of prosecutors and "may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party in litigation with the state." n63

A second possible use, centering on internal criteria, is based on administrative law models. n64 Under this approach, prosecutors would be required to set forth internal regulations, with such standards serving as criteria for both internal supervision and as a basis for challenging charging decisions in a judicial forum. n65 In effect, it equates the prosecutorial office with an administrative agency, operating with delegated authority from the legislature, and subject to judicial review on constitutional due process grounds and administrative law standards of arbitrariness or capriciousness. In regard to the latter, judicial review would function primarily, or perhaps entirely, to police application of the standards in individual cases, as opposed to review of the substance of the standards themselves. n66 It would grant prosecutorial offices a certain degree of deference, not [*654] placing strict burdens (strict scrutiny standard) on those offices to justify each charging decision.

Despite its considerable popularity among commentators, this model has received little practical application, perhaps for many of the same reasons as those set forth above regarding strict judicial supervision. In practice, the courts have declined to supervise prosecutors as they would administrative agencies, and legislatures have not imposed such duties on them. Instead, the courts consistently have held to the view that the prosecutorial function is an executive one, not subject to judicial review under separation of powers considerations as well as the other policy reasons favoring broad prosecutorial discretion. As a result, courts consistently have ruled that a prosecutor's failure to follow applicable written criteria cannot serve as a defense or cause of action. n67 In addition, at least one court has ruled that a prosecutor's failure to adopt written criteria cannot serve as a constitutional objection to prosecution. n68

A third use of written criteria is linked to notions of professional responsibility under systems of professional self-governance. n69 Here, the remedy for a violation of ethical rules is a disciplinary professional responsibility complaint against the prosecutor. n70 Indeed, this course of action is available in every jurisdiction, but in practice it is rarely employed, and prosecutors rarely face professional discipline for their discretionary decisions. n71 It is particularly noteworthy that this is the case because one of the U.S. Supreme Court's stated justifications for immunizing prosecutors from civil lawsuits was the availability of professional discipline as an alternative remedy for prosecutorial misconduct. n72

The fourth possible use has been implemented more broadly than the first three. It is a bureaucratic model, assuming a hierarchical agency structure, centering on internal supervision, and is consistent with the dominant policy determination favoring insulation of the prosecutor from external supervision other than the electoral process. In recognition of this acceptance and the lack of acceptance of other models, commentators have articulated proposals for reinforcing such internal supervision through expanded educational programs n73 and refinement of ethical standards and moral judgment. n74

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b. Substantive aspects of the criteria.

A number of commentators criticize the criteria for lack of specificity and their failure to furnish any predictive value. n75 More specifically, the "probable cause" threshold which lies at the heart of the ABA Standards and ABA Model Rules and ABA Model Code has been subjected to widespread criticism from commentators. Some claim that it is too lenient, while others charge that it is too vague to provide any effective guidance for prosecutorial decision-making. n76 One treatise writer is also critical of some of the other, more specific criteria in the ABA Standards, stating that they are not realistic in light of the practical experience of defense attorneys. n77 Meanwhile, the authors of the ABA Standards defend the "probable cause" standard, stating that "the exercise of discretion cannot be reduced to a formula" and that

the standard is not intended to serve as a substitute for the development of "appropriate prosecution policies on a local level." n78

Another difficult question addressed in the criteria is the question of whether it is appropriate for a prosecutor to condition a decision not to prosecute, or to agree to pre-trial diversion, upon an accused's promise to waive (release) potential civil liability claims against law enforcement personnel for alleged violations of the suspect's constitutional rights. The U.S. Supreme Court ruled in 1987 that such promises, given in exchange for a promise of non-prosecution, are not automatically void as a matter of public policy. Instead, the Court suggested that courts may uphold such agreements if the suspect is adequately represented by counsel and knowingly makes the promise. n79 The ABA Standards and the NDAA Standards, while differing somewhat on the specific criteria, reflect this approach. n80

A pressing question, directed particularly to internal systems of prosecutor supervision, is whether internal standards should be open [*656] to the public. This question has implications for public accountability and the effectiveness of electoral limits on prosecutors' exercise of discretion. Transparency advocates, responding to supporters of broad discretion who rely on the electoral process as the most appropriate and effective check on the exercise of prosecutorial discretion, argue that openness is essential to any kind of public accountability. On the other hand, some prosecutors warn that ready availability of such guidelines would be of benefit to potential wrongdoers. n81 The extensive Principles of Federal Prosecution indicate the U.S. Department of Justice has to considerable extent answered this question in the affirmative.

From another perspective has issued a challenge to the precepts underlying the movement toward adoption of written criteria such as those found in the existing standards and rules. This argument, arising in particular out of concerns about perceived prosecutorial reluctance to pursue prosecution of police officers allegedly engaged in racially-motivated violence, states that "color-blind" standards and ethical rules have a disparate impact on racial minorities by failing to place priority on race-conscious, community-based interests. n82 According to its proponents, such a racially-conscious approach would lead to prosecutorial recognition of a duty to prosecute grounded in such a community oriented ethic n83 and would enlist them not only as legal actors involved in concrete individual cases of litigation, but also as public-policy advocates for articulation of existing injustices and the initiation of corrective measures. n84

B. Pre-Trial Diversion

Traditionally, an important element of prosecutorial discretion has been the unilateral power to decline or defer prosecution n85 in favor of pre-trial diversion to some form of alternative to incarceration. n86 However, in recent years, pre-trial diversion has become an area in which legislatures to a certain extent have diluted prosecutorial charging autonomy. They have not attempted to alter the prosecutor's traditional review autonomy.

[*657] The legislative initiatives have taken several approaches. One is to create statutory eligibility requirements for pre-trial diversion by establishing certain classes of offenders (for example, first-time offenders) and/or certain classes of offenses. For example, legislation adopted by the Commonwealth of Kentucky in 1998 provides that defendants charged with certain felony crimes are eligible for pre-trial diversion if, among other things, they have not committed a felony in the ten years preceding the commission of the current offense, or were not on parole or probation during that ten-year period. In addition, a person cannot be eligible for pre-trial diversion more than once in any five-year period. n87

Also, the State of California, through the vehicle of a voters' direct action (referendum) in 2000 which reflected broad societal concern over administration of juvenile justice, enacted a statute that automatically assigns jurisdiction over minors charged with certain crimes - murder or certain enumerated sex offenses - to the adult criminal courts without the possibilities for pre-trial diversion available in juvenile proceedings. n88 It is noteworthy, however, that this legislation, while stripping prosecutors of the discretion to grant pre-trial diversion as part of their screening function, simply transfers that exercise of discretion to the prosecutor's selection function by making the decision as to what crime to charge - a decision not regulated by statute nor shared with other legal actors under the new law - the question of highest importance. n89

Another legislative approach to pre-trial diversion dilutes prosecutorial autonomy by introducing other agencies into the charging function. In the 1998 Kentucky legislation, for example, the prosecutor is required to make a recommendation for or against each defendant's application for pre-trial diversion; however, the judge may diversion even though the prosecutor objects to it. Opponents of this measure expressed concern that this elimination of a prosecutorial veto power over diversion is constitutionally invalid under separation of powers principles. n90

An area in which the sharing of decision-making authority is quite widespread is in systems of juvenile justice. The California juvenile justice system presents an example of decision-making involving [*658] probation officer, prosecutor, and judge, in which all have input as to pre-trial diversion for juveniles accused of certain offenses. n91

Beyond the reach of legislatures and courts, these questions also have been addressed in internal standards and model standards. An example is the Federal "United States Attorneys' Pre-Trial Diversion Program". n92 Under this program, the decision about whether to defer prosecution is left to the judgment of the government attorney, who is directed to follow standards set forth in the U.S. Attorneys Manual in making this determination. n93

A significant policy issue also is posed by the decision of the U.S. Department of Justice to place priority on pre-trial diversion programs for corporate (white collar) defendants, in light of the conclusion that imposition of penal sanctions could have negative economic repercussions for investors, managers, and employees. n94

The NDAA Standards n95 address pre-trial diversion. Section 44.4 states that prosecutors should "exercise discretion to divert individuals from the criminal justice system" when they consider "it to be in the interest of justice and beneficial to both the community and the individual", and then goes on to list eleven factors which may be taken into account in making this decision. Undoubtedly reflecting prosecutors' concerns about possible judicial encroachment in this function, the NDAA Standards state that the prosecutor's decision as to whether or not to divert a particular defendant "should not be subject to judicial review". n96

C. Regulatory Prosecutions

Most prosecutions of federal and state "regulatory crime" statutes - those that address matters within the purview of federal, state, and local administrative agencies n97 - are of a hybrid nature. That is, the monitoring of compliance with such statutes is generally [*659] the responsibility of the administrative agencies, with the litigation matters assigned to the U.S. Department of Justice or its counterparts in the states. This "hybrid" approach also affects certain aspects of the charging function, due to the fact that the administrative agencies often make the initial determination that "probable cause" exists to believe that a particular suspect has violated the law, and it is only at that time that the matter is referred to the prosecutors with general jurisdiction. n98

This shared responsibility raises challenging questions about the extent of discretion in the charging decision. Unlike prosecutors of general jurisdiction, who enjoy broad insulation from subsequent judicial review of such decisions, administrative agencies are subject to administrative procedure laws that provide for judicial review of agency actions. However, judicial review is not available in those cases where statutes preclude it or agencies act with discretion as a matter of law (i.e, judicial determination). As an example of the latter, the U.S. Supreme Court has ruled that agency decisions to refrain from prosecution are not subject to judicial review unless a relevant statute provides guidelines for the agency to follow in exercising its enforcement powers. n99

In a regulatory area of great visibility and controversy - enforcement of environmental protection laws - federal agencies have established an elaborate, centralized system of intra-agency review. Before it refers a violation to the U.S. Department of Justice for criminal prosecution, the U.S. Environmental Protection Agency conducts a multi-step screening process which includes application of the EPA's own written criteria for distinguishing cases that warrant criminal investigation from those that should be handled through civil or administrative procedures. If a case is referred, the Department of Justice then conducts its own screening process, applying its general criteria under the Principles of Federal Prosecution, as well as written criteria that expressly address environmental violations. n100

This system of multi-layered, hierarchical intra-agency review reflects the more general practice of centralized decision-making in the area of regulatory crimes. In other words, discretion is not exercised by individual assistant prosecutors, but is the result of an elaborate [*660] process where charging decisions are made by superiors, n101 and often through the application of detailed charging criteria.

D. Victims' Interests

Traditionally, prosecutors have not been compelled to represent the interests of the victim. Indeed, prosecutors as a general matter continue to exercise broad, unreviewable discretion in determining the extent to which the wishes of the victim should govern considerations in the charging function. n102 Although in theory several remedies potentially are available to victims, commentators note that these are almost never invoked. n103 Meanwhile, as stated above, legal systems in the United States place stringent limits on private prosecutions. n104 Several policy considerations underlie the reluctance to place emphasis on victims' interests, including: the belief that crime in general is a matter of erga

omnes concern; concern that prosecutors not be influenced to the detriment of protection of the rights of suspects and defendants; and concern that suspects might threaten or otherwise unduly influence victims to request that prosecution not proceed.

However, in a comparatively recent development, steps have been taken in response to an active victims' rights movement to address the concerns of victims in the overall criminal justice process. n105 Some of these changes have had an impact on prosecutorial discretion in the charging function. More specifically, some jurisdictions have acted via legislation either to limit the breadth of prosecutorial discretion in the exercise of the charging decision, or to mandate subsequent judicial review in regard to certain specific classes of offenses. For example, in the past two decades some jurisdictions via controversial "no-drop" legislation have imposed mandatory prosecution of domestic violence cases, regardless of the desires of the [*661] victim. n106 Commentators have distinguished between "soft" no-drop approaches, where victims are encouraged to cooperate with prosecutors but may also exercise some discretion as to the extent of their participation in the proceeding, and "hard" no-drop approaches under which they may not drop charges under any circumstances and may be subject to subpoenas and contempt of court charges. n107 Other jurisdictions require prosecutors to consult with the victim before making a charging decision, at least in serious cases. n108

The area of victims' rights also includes one of the few examples of legislatively-mandated subsequent judicial review of prosecutorial charging decisions. In certain circumstances, federal legislation provides a remedy by which victims can bring federal civil rights actions alleging racially selective exercise of prosecutorial discretion. n109

Written criteria also address these questions to some degree, and in doing so they reflect the tension between competing interests raised by long-held concerns about victim influence and the goals of the victims' rights movement. Of the seventeen "factors to consider" in deciding whether to file charges listed in the NDAA Standards, one factor is the "interests of the victim" and another is "possible improper motives of a victim or witness". n110 The DOJ Principles do not include the interests of the victim in the text setting forth the standards; however, in discussing the question of whether there might be a "substantial federal interest" in pursuing or declining prosecution, the U.S. Department of Justice commentary states that one factor that is "obviously of primary importance is the actual or potential impact of the offense on the community and on the victim." n111

[*662] The ABA Standards n112 also reflect the countervailing issues at work in this aspect of the prosecution function. Among the factors "which the prosecutor may properly consider" in exercising his or her charging discretion, the Standards include "the extent of the harm caused by the offense" and the "reluctance of the victim to testify". Another factor, however, is "the possible improper motives of a complainant." n113

The State of Washington statutory guidelines for prosecutors n114 also direct prosecutors to take victims' interests into account to a certain degree in the charging function. Among the satisfactory reasons for declining prosecution, the statute includes cases in which a victim so requests; however, the statute narrowly confines such cases to several enumerated "crimes or situations", and warns that "care should be taken to insure that the victim's request is freely made and is not the product of threats or pressure by the accused." n115 Meanwhile, in cases where the prosecutor is considering pre-trial diversion or has decided in the screening function to proceed with prosecution, the statute permits discussion with victims as to the appropriateness of pre-trial diversion or the selection of charges in the selection function. As to pre-trial diversion, the statute states that prosecutors should take such discussions into account before reaching any agreement with the defendant. n116

E. Prosecuting Allegations of Police Misconduct

Recent years have witnessed a number of high visibility cases of prosecutions of police officers for misconduct, some of which resulted in verdicts of guilty and others not, particularly involving charges of unlawful violence against victims who are persons of color. n117 Nevertheless, critics charge that there is considerable selective prosecution, often race-based, and that prosecutions occur only in cases of high public visibility. n118

[*663] According to critics, who often cite statements of local prosecutors themselves, local prosecutors infrequently pursue prosecution of police officers. For one thing, it is difficult to obtain a conviction from a jury or judge. n119 For another, prosecutors work closely with police on an on-going basis, and their ability to succeed in their general responsibilities of prosecuting routine crimes depend to a considerable extent on the work and cooperation of police officers. Thus, when faced with the question of prosecuting a police officer, prosecutors often face "an impossible conflict of interest". n120 In addition, prosecutors also often confront intense political pressures from the police and government officials. n121 The severity of these apparent obstacles to local prosecution has led to proposals for other institutional or legal means of increasing the accountability of police officers. One such effort has been to direct investiga-

tion and prosecution of alleged police misconduct away from prosecutors of general jurisdiction, to creation of civilian review boards as a means of alternate disposition of charges of police misconduct. n122

Another approach has been to look to the federal government, raising the complex issues of dual, state/federal, prosecution. n123 A federal civil rights statute, *18 U.S.C. 242* ("Deprivation of rights under color of law"), has long been available for federal prosecution of public officials who willfully subject persons to the deprivation of any rights secured by the U.S. Constitution or laws. According to a U.S. Department of Justice official, recent years have not witnessed a pattern of local prosecutors' failure to pursue actively police misconduct. n124 However, many commentators have focused on the failure of state prosecution of police misconduct, claim that the federal statutory scheme is under-utilized, and that federal prosecutions under it are rare. n125 If this is the case, the question arises as to whether this [*664] is due to lack of assertiveness on the part of federal prosecutors, or some institutional problem. One commentator, focusing on the latter, argues that the current statutory requirement of a showing of specific intent to violate a federal right, as distinct from an intent simply to assault the victim, is a deterrent to federal prosecutions of police misconduct, and calls for substantial revision of the legislation. n126 In so doing, he analogizes the local/federal relationship in the United States to the efforts in the international community to establish a permanent international criminal court under the principle of complementarity, by which the ICC would prosecute certain international crimes only if national authorities are unable or unwilling to do so. n127

IV. Conclusion

Prosecutorial functions in the United States are marked by widespread dispersal of authority; at the same time, a common characteristic of prosecutors' activity is the breadth of discretion that they exercise in the charging function. In general, such broad discretion receives firm support from both legislatures and the courts, as well as professional organizations concerned with self-governance. Its critics are found primarily among commentators who have not succeeded in gaining institutional support, particularly in the judiciary, for significant revision of the system. Thus, it is the legislatures that have acted to place certain limits on prosecutorial discretion in specific areas such as in juvenile proceedings and domestic abuse, and professional organizations that have drafted written charging criteria.

In the presence of strong institutional support for continued latitude for prosecutors in the charging function, much of the focus of government actors, as well as many commentators, has been on the development and refinement of internal safeguards within prosecutorial offices against arbitrary or discriminatory decision-making. In some cases, the legislatures have acted to advance such developments by enacting guidelines or mandating that prosecutors themselves adopt written criteria. It can be expected that assessment of systems of internal supervision will remain at the center of the on-going dialogue over prosecutorial discretion.

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawEqual ProtectionScope of ProtectionCriminal Law & ProcedureGuilty PleasGeneral OverviewEvidenceProcedural ConsiderationsJudicial Intervention in TrialsGeneral Overview

FOOTNOTES:

n1. Davis, "Prosecution and Race: The Power and Privilege of Discretion," *67 Fordham L. Rev. 13, 18 (1998);* Misner, "Recasting Prosecutorial Discretion," 86 Journal of Criminal Law and Criminology 717, 741, 742 (1996).

n2. Griffin, "The Prudent Prosecutor," 14 Georgetown Journal of Legal Ethics 259, 266-274 (2000); Podgor, "The Ethics and Professionalism of Prosecutors in Discretionary Decisions," *68 Fordham L. Rev. 1511, 1525 (2000);* Little, "Proportionality as an Ethical Precept for Prosecutors in Their Investigative Role," *68 Fordham L. Rev. 723 (1999);* Misner, supra n.1, at 748 (impact on sentencing). A comprehensive treatise on criminal procedure in the United States is Wayne R. LaFave, Jerold H. Israel, and Nancy J. King, Criminal Procedure (3rd ed. 2000).

n3. Griffin, supra n. 2, at 265. An immense scholarly literature exists on the topic of prosecutorial discretion. See Misner, supra n. 1, at 718 n.4. Space constraints preclude a detailed listing of sources in this report. Instead, I will cite to a minimal number of recent publications that have been selected both to serve as examples of particular questions and as repositories of extensive bibliographic citations on the literature spanning recent decades. For a detailed listing of articles on various aspects of prosecutorial discretion, see Anthony V. Alfieri, "Prosecuting Race," *48 Duke L.J. 1157, 1204-1206 (1999).* A detailed bibliography and listing of court decisions may be found in "Prosecutorial Discretion," *88 Geo. L. J. 1057 (2000).*

n4. Griffin, supra n. 2, at 265; Misner, supra n. 1, at 718, 744. One reason for federal prosecutors' increased discretionary power has been the enactment of federal sentencing guidelines, which have had the effect of transferring discretion in sentencing from judges to prosecutors. Podgor, supra n. 2, at 1531.

n5. Misner, supra n. 1, at 750.

n6. LaFave, et al., supra n. 2, 1.2(a); Blakesley, "La Preuve Penale et Tests Genetiques: United States Report," *46 Am. J. Comp. L. 605* (1998 Supplement).

n7. LaFave, et al., supra n. 2, 1.2(c).

n8. LaFave, et al., supra n. 2, 1.2(d).

n9. Simons, "Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization," *75 NYU L. Rev. 893, 897 (2000)* (citing one estimate of more than 3,000 federal crimes).

n10. Each year, the federal system is responsible for less than two percent of the total number of criminal prosecutions in the United States, and less than four percent of the felony prosecutions. LaFave, et al., supra n. 2, 1.2(b).

n11. All states are sub-divided into counties, and most prosecutorial offices (approximately 89%) are based on a jurisdiction of a single county. "Prosecutors in State Courts, 1996," Bureau of Justice Statistics Bulletin, at 2 (available at http://www.usdoj.gov). In a few states, some municipalities as well have their own separate prosecutors. Misner, supra n. 1, at 732. In four states (Alaska, Connecticut, Delaware, and Rhode Island), local prosecutors operate under the control of the state attorney general. Id.

n12. Detailed information about the organization of the U.S. Department of Justice is available in the United States Attorneys' Manual (hereafter USAM), Titles 1 (organization and functions) and 3 (U.S. Attorneys). The USAM is available at the Department's web site [http://www.usdoj.gov].

n13. In 1996, the U.S. Department of Justice estimated that there were 2,343 chief prosecutors in the United States who tried felony cases. "Prosecutors in State Courts, 1996," supra n. 11, at 1.

n14. Davis, "The American Prosecutor: Independence, Power, and the Threat of Tyranny," *86 Iowa L. Rev. 393, 450-51 (2001)* (describing the movement toward elected prosecutors that began in the era of Jacksonian democracy in the1820s). Approximately 95% of the chief prosecutors in the United States are elected locally. "Prosecutors in State Courts, 1996," supra n. 11, at 1. In 1996, there were approximately 24,000 assistant local prosecutors in the United States. Id., at 2.

n15. The terms "screening function" and "selection function" will be used throughout this report.

n16. The terms "charging autonomy" and "review autonomy" will be used throughout this report.

n17. An often-cited example is the summary of justifications set forth by the U.S. Supreme Court in *Wayte v. United States, 470 U.S. 598, 607-608 (1985)* (citing factors supporting the "recognition that the decision to prosecute is particularly ill-suited to judicial review"). For detailed discussion of the justifications, see: Griffin, supra n. 2, at 263-66; Kwei Yung Lee, "Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines," *42 UCLA L. Rev. 105, 159-66 (1994);* and Joseph F. Lawless, Prosecutorial Misconduct 3.01-3.07 (2nd ed. 1999).

n18. For historical development of this view, as well as controversy over whether such was indeed the intent of the framers of the U.S. Constitution, see Davis, supra n. 13, at 448-58.

n19. This grouping of justifications incorporates recognition of a number of factors relating to managerial problems: the limited resources of prosecutors and the judiciary; related concerns about administrative backlogs and judicial economy; and legislative over-criminalization.

n20. This justification is based on two policy considerations: providing the prosecutor the flexibility to respond to the fact that criminal codes deal with general categories of conduct and do not take individual circumstances into account; and giving prosecutors the flexibility to negotiate deals with small time offenders in order to catch major criminals, Lee, supra n. 17, at 165-66; Lawless, supra n. 17, at 188.

n21. Griffin, supra n. 2, at 281; Pizzi, "Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform," *54 Ohio St. L.J. 1325, 1336-39 (1993).*

n22. Dubber, "The Victim in American Penal Law: A Systematic Overview," 3 Buffalo Crim. L. R. 3, 19 (1999). One widely-supported objection to that private prosecutions is that they present a serious risk that the criminal process will be used vindictively. LaFave, et al., supra n. 2, 13.3(b).

n23. Examples of these will be discussed in sections III.B. and III.D., infra.

n24. LaFave, et al., supra n. 2, 13.2(g).

n25. *Minn. Stat. sec. 388.051,* Subd. 2(c). For other examples, see discussion infra at sections III.B. and III.D.

n26. Misner, supra n. 1, at 743 ("virtually unreviewable").

n27. LaFave, et al., supra n. 2, 13.3(a) and (b).

n28. Id.; Griffin, supra n. 2, at 278.

n29. LaFave, et al., supra n. 2, 13.3(e).

n30. For example, *Rule 48(a) of the Federal Rules of Criminal Procedure.*

n31. Meares, "Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives," *64 Fordham L. Rev. 851, 862 (1995).*

n32. *Imbler v. Pachtman, 424 U.S. 409 (1976).* See Williams, "The Civil Regulation of Prosecutors," *67 Fordham L. Rev. 3441 (1999).*

n33. For listing of these decisions, see: Lawless, supra n. 17, 3.10 (characterizing them as a "handful" of cases); and Henning, "Prosecutorial Misconduct and Constitutional Remedies," *77 Wash. U.L.Q. 713, 746-49 (1999).*

n34. The U.S. Supreme Court has stated that this claim is not a defense on the question of guilt or innocence, but is instead an independent assertion of a constitutional defect in the manner of prosecution. *United States v. Armstrong, 517 U.S. 456, 463 (1996).* Thus, it is an application to the court for dismissal of the prosecution. LaFave, et al., supra n. 2, at 13.4(a).

n35. *United States v. Armstrong, supra n. 34, 517 U.S. at 464.*

n36. *Oyler v. Boles, 368 U.S. 448, 456 (1962).*

n37. *United States v. Armstrong, supra n. 34, 517 U.S. at 463, 465.* See also LaFave, et al., supra n. 2, at 13.4(a), and Lawless, supra n. 17, 3.23.

n38. *United States v. Armstrong, supra n. 34, 517 U.S. at 465.*

n39. *United States v. Armstrong, supra n. 34, 517 U.S. at 468.*

n40. Id.

n41. LaFave, et al., supra n. 2, at 13.5(a); Lawless, supra n. 17, 3.31; Henning, supra n. 33, at 735-46.

n42. LaFave, et al., supra n. 2, at 13.2(a).

n43. LaFave, et al., supra n. 2, at 13.2(d).

n44. See LaFave, et al., supra n. 2, 13.2(d) ("the issue is not discretion versus no discretion"), and Davis, supra n. 1, at 20 ("it is difficult to imagine a fair and workable system that does not include some level of measured discretion in the prosecutorial process").

n45. Leslie Griffin has described the tension between the competing policy goals inherent in prosecutorial discretion: "the goal of ensuring that prosecutors charge in a uniform, consistent, and non-arbitrary manner must be balanced against the need for sufficient latitude, flexibility, and sensitivity in adjusting charging decisions to individual circumstances." Griffin, supra n. 2, at 265.

n46. Throughout, unless otherwise stated, the term "criteria" incorporates both "standards" and "rules". In its use of the terms "standards" and "rules," this report seeks to make use of the terminology employed in Sullivan, "The Supreme Court 1991 term: Foreword: The Justices of Rules and Standards," *106 Harv. L. Rev. 22, 57-59 (1992)* (Rules, once formulated, afford decisionmakers less discretion than do standards; standards give the decisionmaker more discretion than do rules, allowing the decisionmaker to take into account all relevant factors or

the totality of the circumstances). In the sense I am using these terms, "rules" are more directly enforceable than "standards".

n47. Hereafter, the "DOJ Principles". First published by the Department of Justice in 1980, the DOJ Principles are set forth in 9-27.000 of the USAM, supra n. 12. Each stated Principle is also followed by an official comment.

n48. I have not found statistics showing the number of local prosecutorial offices that have formally adopted written criteria. However, the available indicators suggest that the number that have done so are a small minority. In 1996, for example, the U.S. Department of Justice reported that approximately 12% of all local prosecutorial offices surveyed had written criteria regarding the handling of juvenile cases. Of the thirty-four largest prosecutorial offices in the United States, which cumulatively serve some 24% of the U.S. population, approximately one-half had criteria for proceeding with juvenile cases. "Prosecutors in State Courts, 1996," supra n. 11, at 4, 7.

n49. *Minn. Stat. 388.051*, Subd. 3. The Statute is addressed primarily to standards for plea negotiation, but the charging function is included as well. The mandatory items are: (1) the circumstances under which plea negotiation agreements are permissible; (2) the factors that are considered in making charging decisions and formulating plea agreements; and (3) the extent to which input from other persons concerned with a prosecution, such as victims and law enforcement officers, is considered in formulating plea agreements. *Minn. Stat. 388.051*, Subd. 3(a) (1)-(3).

n50. Hereafter, the "ABA Standards". Standard 3-3.9(a) states in full: "A prosecutor should not institute, or cause to be instituted, or permit the continued pendency of criminal charges when the prosecutor knows 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." The words "probable cause" are a legal term of art that means "[a] reasonable ground to suspect that a person has committed or is committing a crime." Black's Law Dictionary (7th ed. 1999).

The ABA Standards were drafted by the ABA's Criminal Justice Section. The most recent edition (1993) is available at the ABA's web site: [http://www.abanet.org/crimjust/standards]. According to of the ABA/BNA Lawyers' Manual on Professional Conduct: Trial Conduct (1997), sec. 61.601, "some" jurisdictions have adopted the Standards as charging criteria for prosecutors, and "the ABA standards themselves seem to wield considerable persuasive power even in jurisdictions that have not adopted them formally."

n51. National Prosecution Standards (2nd ed., 1991) [Hereafter, the "NDAA Standards"]. Section 43 directs that prosecutors should file only those charges that they reasonably believe can be substantiated by admissible evidence at trial (43.3), and should not attempt to use the charging function "only as a leverage device in obtaining guilty pleas to lesser charges" (43.4). It also states that prosecutors should file only those charges which they consider to be "consistent with the interests of justice" and lists seventeen factors (such as the "probability of conviction" and "nature of the offense") which may be considered in making this decision (43.6).

n52. See, for example, 4.2 ("Crime Charging") of the Ethics and Responsibility for the California Prosecutor, adopted by the California District Attorneys Association (set forth in David C. James, "The Prosecutor's Discretionary Screening and Charging Authority," The Prosecutor, 1995 (March/April), 22, 25).

n53. Chapter 9.94A ("Recommended Prosecuting Guidelines for Charging and Plea Dispositions") is part of the State of Washington criminal code ("Crimes and Punishments").

n54. A prosecutor may decline to prosecute, even where sufficient evidence to prosecute exists, "in situations where prosecution would serve no public purpose, would defeat the underlying purpose of the law in question or would result in decreased respect for the law." Section 9.94A.440(1). The statutory language is then fol-

lowed by a detailed "Guideline/Commentary" which provides numerous examples of reasons not to prosecute that could satisfy the standard.

n55. The standard for decisions to prosecute includes a screening threshold that is higher than "probable cause". It distinguishes between crimes against "persons" and crimes against property or "other" crimes, stating as to crimes against persons that they will be filed if:

sufficient admissible evidence exists, which, when considered with the most plausible, reasonable foreseeable defense that could be raised under the evidence, would justify conviction by a reasonable and objective fact-finder.

Section 9.94A.440(2)(a).

Charges for crimes against property or "other" crimes will be filed if:

the admissible evidence is of such convincing force as to make it probable that a reasonable and objective fact-finder would convict after hearing all the admissible evidence and the most plausible defense that could be raised.

Id.

n56. Section 9.94A.440(2)(a)(i)(B)(i).

n57. Professional self-governance in the United States is a matter for the legal professions of each of the individual states and the District of Columbia. Each state therefore decides upon the substantive body of ethical rules (in practice, a version of the models of the American Bar Association) and the structure of attorney discipline for professional enforcement of those rules.

n58. This system reflects the fact that all attorneys, whether employed as prosecutors, private practitioners, etc. are viewed as members of a single legal profession, although different provisions in the ethical codes (such as 3.8) might apply only to certain functions, such as that of the prosecutor.

n59. Hereafter, the ABA Model Rules. The Model Rules are available at the ABA web site [http://www.abanet.org/cpr/mrpc/mrpc home.html]. Rule 3.8(a) ["Special Responsibilities of a Prosecutor"] states in full: "The prosecutor in a criminal case shall: (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause." The authors of an on-going assessment of the ABA Model Rules have proposed that no substantive changes be made to the text of Rule 3.8. Ethics 2000, par. 27 (available at the ABA web site, section for the Center for Professional Responsibility [http://www.abanet.org/cpr/ethics2k.html]; visited September 5, 2001). The first paragraph of the report states that forty-one states and the District of Columbia have adopted some version of the ABA Model Rules.

n60. Hereafter, the ABA Model Code. DR 7-103(A) ("Performing the Duty of Public Prosecutor or Other Government Lawyer") states: "A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause." Those jurisdictions that have not adopted the ABA Model Rules all have versions of the ABA Model Code.

n61. Standard 3-1.1 ("The Function of the Standards") states in full:

These standards are intended to be used as a guide to professional conduct and performance. They are not intended to be used as criteria for the judicial evaluation of alleged misconduct of the prosecutor to determine the validity of a conviction. They may or may not be relevant in such judicial evaluation, depending upon all the circumstances.

n62. See supra nn. 53-56 and accompanying text.

n63. Wash. Stat. 9.94A.430. This provision was upheld by the Washington Court of Appeals in the case of *State v. Lee, 847 P.2d 25, 26-27 (1993).*

n64. Pizzi, supra n. 21, at 1363.

n65. Griffin, supra n. 2, at 291-292; Vorenberg, "Decent Restraint of Prosecutorial Power," *94 Harv. L. Rev. 1521, 1565, 1570 (1981).*

n66. Griffin, supra n. 2, at 291-92 [p. 19].

n67. Podgor, supra n. 2, at 1512, 1531.

n68. Wayne R. LaFave, Jerold H. Israel, & Nancy J. King, Criminal Procedure: Criminal Practice Series, Vol. 4, 24 n. 85 (1999).

n69. Griffin, supra n. 2, at 282-86.

n70. Lawless, supra n. 17, 3.11. On the disciplining of prosecutors generally, see Zacharias, "The Professional Discipline of Prosecutors," *79 N.C. L. Rev. 721 (2001).*

n71. Zacharias, supra n. 70, at 734-38.

n72. Zacharias, supra n. 70, at 722 (citing *Imbler v. Pachtman, supra n. 32).*

n73. Podgor, supra n. 2, at 1513, 1530-34.

n74. Griffin, supra n. 2, at 295-306.

n75. Griffin, supra n. 2, at 268; Misner, supra n. 1, at 744; Vorenberg, supra n. 65, at 1544 (criticizing the DOJ Principles as "general, malleable, and unhelpful").

n76. Zacharias, supra n. 70, at 735 n. 57 (describing the views of other commentators); Griffin, supra n. 2, at 268.

n77. Lawless, supra n. 17, 3.12 (citing, for example, the directive that the prosecutor "should not bring or seek charges greater in number of degree than can reasonably be supported with evidence at trial or than are necessary to fairly reflect the gravity of the offense" in Standard 3-3.9(f)).

n78. Commentary to Standard 3-3.9, set forth in Lawless, supra n. 17, 3.12.

n79. *Town of Newton v. Rumery, 480 U.S. 386, 394 (1987).*

n80. The ABA Standards, Sec. 3-3.9(g), state that the prosecutor should not make such an agreement, "unless the accused has agreed to the action knowingly and intelligently, freely and voluntarily, and where such waiver is approved by the court." The NDAA Standards, section 42.3(o), state that an accused's "express desire" to agree to such release of civil claims may be a factor in the prosecutor's screening decision, "where such desire is expressed after the opportunity to obtain advice from counsel and is knowing and voluntary." The accompanying commentary states that the NDAA Standards reject the ABA Standards to the extent that they refuse to follow the decision in Town of Newton v. Rumery.

n81. See the discussion in LaFave, et al., supra n. 2, 13.2(f). See also Misner, supra n. 1, at 770-71.

n82. Alfieri, supra n. 3, at 1203-08; Davis, supra n. 1, at 34-38.

n83. Alfieri, supra n. 3, at 1228-45.

n84. Davis, supra n. 1, at 51.

n85. Under deferral, the diversion program is made available contingent upon successful completion of the program or other requirement (such as restitution to the victim).

n86. For descriptions of the diversion process and governing standards, see LaFave, et al., supra n. 2, 13.6(a)-(c). Regarding diversion programs generally, see the detailed compilation in "Developments in the Law: Alternatives to Incarceration," *111 Harv. L. Rev. 1863 (1998).* Diversion programs have been adopted by nearly all jurisdictions in the United States. NDAA Standards, Commentary to 44.

n87. Bartlett, "Alternative Sanctions and the Governor's Crime Bill of 1998 (HB 455): Another Attempt at Providing a Framework for Efficient and Effective Sentencing," *27 N. Ky. L. Rev. 283, 312-13 (2000).*

n88. Proposition 21 (the Juvenile Crime Initiative Statute). See Griffin, supra n. 2, at 265-66; Thakur, "Juvenile Sex Offenders: Proposition 21 - the Hope for a Better Solution," 21 Journal of Juvenile Law 97, 107-09 (2000).

n89. Griffin, supra n. 2, at 266.

n90. Bartlett, supra n. 87, at 314. In adopting this measure, the Kentucky legislature rejected an alternate approach that would have required prosecutorial approval for each grant of pre-trial diversion. Id.

n91. Panzer, "Reducing Juvenile Recidivism Through Pre-Trial Diversion Programs: A Community's Involvement," 18 Journal of Juvenile L. 186, 191, 195 (1997).

n92. The Program is found in the USAM, supra n. 12, at 9-22.000. Part of the introduction to subsection 9-22.010 states "In the majority of cases, offenders are diverted at the pre-charge stage. Participants who successfully complete the program will not be charged or, if charged, will have the charges against them dismissed; unsuccessful participants are returned for prosecution." Regarding the Program, see Warin &Schwartz, "Deferred Prosecution: The Need for Specialized Guidelines for Corporate Defendants," 23 J. Corp. L.121, 123 (1997).

n93. Comment to 9-27.230, USAM (supra n. 12).

n94. Warin & Schwartz, supra n. 92, at 131, 133.

n95. See supra at n. 51 and accompanying text.

n96. NDAA Standards, 44.1.

n97. It is estimated that at least 300,000 federal regulations, enforced by some 200 different federal agencies, provide for criminal penalties. Green, "Why It's a Crime to Tear the Tag off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses," *46 Emory L. J. 1533, 1544 (1997).* Generally, much controversy has attended the enforcement of regulatory crime statutes, with critics voicing concerns about selective, arbitrary enforcement.

n98. Green, supra n. 97, at 1544-45.

n99. *Heckler v. Chaney, 470 U.S. 821, 831-833 (1985).* The Court explained that agency decisions to decline enforcement are generally unsuitable for judicial review due to the agency's expertise and familiarity with the variables involved in its enforcement priorities, as well as the fact that when an agency refuses to act it does not exert its coercive power over an individual's liberty or property rights, and "thus does not infringe upon areas that courts often are called upon to protect." *Id., 470 U.S. at 831-32.*

n100. Brickey, "The Rhetoric of Environmental Crime: Culpability, Discretion, and Structural Reform," *84 Iowa L. Rev. 115, 130-31 (1998).*

n101. According to one commentator, centralized decision-making in environmental prosecutions has been a source of "highly publicized friction" between U.S. Attorneys in their districts around the country and the headquarters of the U.S. Department of Justice in Washington. Brickey, supra n. 100, at 131 n. 93.

n102. Griffin, supra n. 2, at 278-79. A thorough survey of issues associated with the role of victims in the criminal process is found in Dubber, supra n. 22, at 16-27.

n103. Dubber, supra n. 22, at 18.

n104. See supra at n. 22 and accompanying text.

n105. A major objective of the victims' rights movement in the United States has been either the abolition of plea bargaining or the participation of victims in the plea bargaining process. Dubber, supra n. 22, at 22-23. Also, as to conduct of the trial, some states have enacted legislation requiring mandatory participation of the victim. Dubber, supra n. 22, at 23-24. Victims can also play a role in sentencing. Dubber, supra n. 22, at 24-26. There are also laws on mandatory arrest (as opposed to mandatory prosecution) in some jurisdictions. See Dubber, supra n. 22, at 17. In support of mandatory arrest, see Hoctor, Note, "Domestic Violence as a Crime Against the State: The Need for Mandatory Arrest in California," *85 Cal. L. Rev. 643, 695-97 (1997)* (noting that prosecutors often determine how the criminal justice system addresses domestic violence).

n106. Coker, "Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review," 4 Buffalo Crim. L. R. 801, 805-06 (2001) (identifying mandatory arrest and no-drop prosecution policies the "two

most controversial criminal justice reforms in domestic violence cases"); O'Connor, "Domestic Violence No-Contact Orders and the Autonomy Rights of Victims," *40 BC L. Rev. 937, 942-46 (1999).* Under no-drop legislation, the trial proceeds either without victim testimony or with the victim required to testify. Measures which mandate prosecution even if the victim objects are viewed as raising sensitive issues about thye imposition of controls on individual women and protection of victims' rights of privacy. Coker, supra, at 806-07; O'-Connor, supra, at 950-52.

n107. Coker, supra n. 106, at 806 (citing Hanna, "No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions," *109 Harv. L. Rev. 1849, 1863 (1996)).*

n108. Dubber, supra n. 22, at 17 n.30 (listing jurisdictions).

n109. Davis, supra n. 1, at 40.

n110. NDAA Standards, 43.6 (h) and (i).

n111. USAM, supra n. 12, 9-27.230. The commentary adds that:

Economic, physical, and psychological considerations are also important in assessing the impact of the offense on the victim. In this connection, it is appropriate for the prosecutor to take into account such matters as the victim's age or health, and whether full or partial restitution has been made. Care should be taken in weighing the matter of restitution, however, to ensure against contributing to an impression that an offender can escape prosecution merely by returning the spoils of his/her crime.

n112. See supra n. 50 and accompanying text.

n113. ABA Standards, 3-3.9(b).

n114. See supra nn. 53-56 and accompanying text.

n115. Section 9.94A.440(1)(i). The specific cases are: (1) assault crimes where the victim has suffered little or no injury; (2) crimes against property, not involving violence, where no major loss was suffered; and (3) where the decision not to prosecute would not jeopardize the safety of society. The statute adds that prosecutors are encouraged to notify the victim, when practical, about a decision not to prosecute.

n116. Section 9.94A.440(2)(b)(v).

n117. Jacobi, "Prosecuting Police Misconduct," *2000 Wis. L. Rev. 789, 792-802 (2000).*

n118. Human Rights Watch, "Shielded From Justice: Police Brutality and Accountability in the United States" (1998) (hereafter, "HRW Report"). This lengthy, detailed report, which includes chapters entitled "Local Criminal Prosecution" and "Federal Criminal Civil Rights Prosecution", is available at the Human Rights Watch web site: http://www.hrw.org/reports98/police. See also, Jacobi, supra n. 117 at 802-06; and Davis, supra n. 1, at 31-38. Often, such claims are made in the broader context of charges that prosecutorial discretion is a major cause of racial inequality: see Davis, supra n. 1, at 17. See also discussion, supra III.A.4, regarding the challenge to neutral charging criteria.

n119. HRW Report, supra n. 18, chapter "Local Criminal Prosecution".

n120. Jacobi, supra n. 117, at 804 (discussing "Failure of State Prosecution").

n121. Jacobi, id.

n122. HRW Report, supra n. 18, chapter "Citizen Review Mechanisms".

n123. Alfieri, supra n. 3, at 1172-73.

n124. "The Nexus Between Race and Policy: Interview with Bill Lann Lee, Acting Assistant Attorney General for Civil Rights, US Department of Justice," 4 Georgetown Public Policy Review 119, 121 (1999). In the interview, Mr. Lee stated:

How often is our criminal jurisdiction used? Over the last five years, the Civil Rights Division and US Attorneys Offices have prosecuted some 300 police officers. This is a back-up jurisdiction. The arm of government that principally polices the police is the local district attorneys and the state attorneys general. It is important, however, for the federal government to have that back-up jurisdiction, because sometimes in our nation's history, the local authorities have not prosecuted the police when they have engaged in misconduct. That hasn't happened as a systemic matter in many years. But it is still important that the federal government have that jurisdiction.

n125. Jacobi, supra n. 117, at 810-11 (presenting detailed statistics); Alfieri, supra n. 3, at 1172 n. 98.

n126. Jacobi, supra n. 117, at 808-11.

n127. Jacobi, supra n. 117, at 835-47.