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Prosecutorial Discretion in an Adversary System

Kenneth J. Melilli*

I was a prosecutor for nearly five years,¹ and quite possibly, nothing else I ever do will so neatly define who I am in the eyes of others. Many students, colleagues, neighbors and others that I encounter have an unwarranted confidence that they understand my politics, ethics, ambitions and personality based upon little more than the fact that I once held this seemingly telling position.²

I have often resisted, and sometimes even resented, this stereotype. In fairness, however, I must confess that I identified myself, at least professionally, as a prosecutor. I did not consider myself a lawyer as such; lawyers were people who represented specific clients. I viewed myself as having a very different role, a view shared by many of my prosecutor colleagues. My understanding was that my obligation as a prosecutor was to the public interest, an obligation fundamentally different than that of lawyers to their private clients.

Moreover, my image of the prosecutorial function was developed even before I became a prosecutor. At least in my case, my view of a prosecutor as one not obliged to the interests of a particular client was precisely what initially attracted me to the profession. Like many of my fellow law students, and

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¹. From September 1982 through March 1986, I was an Assistant United States Attorney in the District of Columbia. From April 1986 through May 1987, I was an Assistant United States Attorney in Vermont.

². This is not to suggest that there has been any consensus among people as to the specific politics, ethics, ambitions and character traits of prosecutors. It is merely to suggest that the idea of a "prosecutor" seems to carry with it a much more personal definition than a host of other occupations, including the more generic identification of an individual as a lawyer.
like many of my own students today, I had some personal reservations about my role as a lawyer in an adversarial system of dispute resolution. Consequently, I regarded the special obligation of prosecutors to "seek justice" not as an additional burden, but rather as the fundamental attraction of the position. I viewed the obligation to "seek justice" as a liberation from the uneasy commitment to private interests inherent in the "ordinary" practice of law.

No doubt, people choose to become prosecutors for a variety and combination of reasons. There are very few, if any, comparable opportunities for relatively novice lawyers to gain valuable and marketable courtroom experience. For many, that experience is foreseen as challenging and enjoyable. For some, the position offers a degree of prestige and future political opportunity. Some—fortunately a very few in my experience—are driven by an overzealous and insatiable desire to rescue the world from criminals. But what may be surprising to the reader unfamiliar with prosecutors is that many arrive at the position motivated, at least in part, by disaffection for the "hired gun" model of private law practice. Indeed, I was by no means alone in my ambition to prosecute as a means of accomplishing an objectively different, and subjectively superior, code of conduct. Moreover, my guess is that many current fledgling and hopeful prosecutors will find a familiar chord in the above refrain.


I can't think of a better job than to be a prosecutor. It's an absolutely amazing opportunity. It's a luxury of a lifetime to be able to pursue only those things that are right. You are unencumbered by the bad ideas of a client who is paying you money. You are only encumbered by your own desire to do the right thing and to make sure that justice is done.

Is there some point to this monologue other than personal remembrances or soulful comradery? I think there is. In fact, I believe the way prosecutors view their roles in the adversary system provides the most useful tool for unraveling the difficult and perplexing problem of prosecutorial ethics.

The purpose of this article is to examine the prosecutorial function from the perspective of the prosecutor. The specific context for this examination will be the prosecutor's charging decision, which is the most significant aspect of the prosecutorial function. The issue is whether, and to what extent, a prosecutor's personal assessment of a defendant's guilt should affect those charging decisions. The article examines the extent to which the model of all lawyers as adversaries for the interests of their clients does, and should, influence a prosecutor's charging decision.

Part I of the article explores the need for prosecutorial charging discretion, the nature and extent of that discretion, and the various existing external constraints upon that discretion. Part II compares various self-imposed standards for the exercise of that discretion. Part III investigates institutional and other factors affecting the prosecutor's exercise of charging discretion. Part IV then examines the impact of the adversary model of lawyer behavior upon the prosecutorial charging function. Finally, Part V offers recommendations for prosecutorial standards in the exercise of charging discretion.

I. PROSECUTORIAL CHARGING DISCRETION

The decision to charge an individual with a crime is the most important function exercised by a prosecutor. No government official can effect a greater influence over a citizen than the prosecutor who charges that citizen with a crime.\(^7\) In many cases, the prosecutor determines the fate of those accused,\(^8\) at least in those cases where the evidence or statutory sentencing structure renders the ultimate outcome of the prosecution largely a foregone conclusion.\(^9\) Even when the

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9. Id. at 1525-26.
criminal charge does not result in conviction, the mere filing of a criminal charge can have a devastating effect upon an individual's life, including potential pretrial incarceration, loss of employment, embarrassment and loss of reputation, the financial cost of a criminal defense, and the emotional stress and anxiety incident to awaiting a final disposition of the charges. Such consequences may well have a permanent effect that is not cured even by an acquittal at trial. As a consequence, many prosecutors do, and all should, regard the possibility of charging an innocent person as "the single most frightening aspect of the prosecutor's job."  

In exercising the charging function, the prosecutor enjoys broad, indeed virtually unlimited, discretion. Indeed, the prosecutor has been fairly described "as the single most powerful figure in the administration of criminal justice." The prosecutor determines not only which cases and defendants to prosecute but also which charges to bring.

10. NISSMAN & HAGEN, supra note 7, at 13.  
12. MONROE H. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 84 (1975) [hereinafter FREEDMAN I]; MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 218 (1990) [hereinafter FREEDMAN II]; Fisher, supra note 11, at 232 n.152.  
13. KENNETH C. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 190 (1969); FREEDMAN I, supra note 12, at 84; FREEDMAN II, supra note 12, at 218; MILLER, supra note 11, at 3; Fisher, supra note 11, at 232 n.152; Vorenberg I, supra note 8, at 1525.  
14. FREEDMAN I, supra note 12, at 84; FREEDMAN II, supra note 12, at 218; MILLER, supra note 11, at 3; Fisher, supra note 11, at 232 n.152; Vorenberg I, supra note 8, at 1525.  
15. FREEDMAN I, supra note 12, at 84; FREEDMAN II, supra note 12, at 218; Fisher, supra note 11, at 232 n.152; Vorenberg I, supra note 8, at 1525.  
17. NISSMAN & HAGEN, supra note 7, at 13.  
20. Id. at 476.  
21. Id. at 480-81. This decision may be of greater practical significance than the decision to charge. For example, it may be a foregone conclusion that an individual who sells controlled substances to an undercover officer will be
The prosecutor generally retains the discretion to revisit the initial charging decision, either by reinstating voluntarily dismissed charges or by dismissing or altering previous charges. A decision not to prosecute, or to dismiss a pending prosecution, may be made even in the face of sufficient evidence for conviction. And indeed, a substantial percentage of arrests results in either declined or voluntarily aborted prosecutions. The extent of this discretion has been described as "the central issue today" in the American criminal justice system.

Some authors have charged that the concentration of discretionary power in the prosecutor is unnecessary, "resulting from default rather than a conscious legislative judgment." Some have opined that charging decisions—particularly decisions not to prosecute—are sometimes made for political, personal or other capricious reasons. As a result, there is a growing demand for some limitation upon prosecutorial discretion, either by legislation, administrative regulation, or centralized decision-making within the

prosecuted. But the decision to charge the offense as either a felony sale or a misdemeanor possession, perhaps based upon the quantity of drugs involved, may be of terrific consequence to the defendant in terms of likely punishment.

22. Id. at 478. Although office policies may determine charging decisions to a degree, individual prosecutors also exercise considerable discretion in the cases assigned to their personal attention. Fisher, supra note 11, at 205, 255. In some cases, individual prosecutors in nonsupervisory positions may possess and exercise authority to charge or dismiss individual cases. Even when the formal authority to charge or dismiss is limited to prosecutors in supervisory positions, however, line assistants still can exercise great influence upon those decisions by virtue of their superior familiarity with the cases assigned to their individual caseloads.


24. Cox, supra note 18, at 392.


26. DAVIS, supra note 13, at 222.

27. Vorenberg II, supra note 18, at 680.

28. DAVIS, supra note 13, at 224.

29. DAVIS, supra note 13, at 165, 216-17; DOUGLASS, supra note 5, at 226-27; Bubany & Skillern, supra note 18, at 490.

30. See, e.g., Vorenberg II, supra note 18, at 680-81. Professor Vorenberg offers the possibility of legislation requiring prosecutors to charge the most serious offense supported by probable cause, although he acknowledges that it would be unrealistic to expect such legislation in the short run, and allows for the possibility that there may be some circumstances where some discretion should be permitted.

31. See, e.g., Ernest van den Haag, Limiting Plea Bargaining and Prosecutorial Discretion, 15 CUMB. L. REV. 1, 19 (1984). Dr. van den Haag proposes a rule requiring prosecutors to bring all charges where there is or likely will be sufficient
Nevertheless, the notion of broad, prosecutorial charging discretion enjoys much support. Significantly curtailing prosecutorial discretion would accomplish consistency at the cost of individualized justice. If discretion to charge is justified, then that justification necessarily extends to the discretion not to charge. And that discretion justifies not only eliminating unprovable cases but also protecting citizens from charges that do not advance societal interests.

Whatever disagreement exists about the appropriate extent of prosecutorial discretion, there is a consensus that some degree of discretion is inevitable. To some extent, this consensus is born from a recognition that the resources of the criminal justice system do not permit the prosecution of all offenders. More significantly, even those who would limit prosecutorial discretion do not generally target prosecutorial assessment of the nature and strength of the evidence.

Within the broad notion of prosecutorial discretion, a distinction must be made between factors that lend themselves to some degree of systematization and those that do not. The former category focuses upon offenses generally, such as prosecutorial decisions not to enforce anachronistic penal laws like adultery, or decisions to charge felony sales of small quantities of controlled substances as misdemeanor possessions. The latter category would include case-specific evidence to make conviction possible, with a possible exception for cases that cannot lead to prison sentences.

32. See, e.g., North, supra note 16, at 133 (calling for the establishment of uniform charging policies within a prosecutorial agency).
35. Breitel, supra note 33, at 430.
36. Note, supra note 33, at 76.
38. See, e.g., Davis, supra note 13, at 195; Douglass, supra note 5, at 2; Breitel, supra note 33, at 427.
39. Jackson, supra note 7, at 5; North, supra note 16, at 133.
40. See Vorenberg I, supra note 8, at 1547.
41. See generally, Abrams, supra note 34, at 11; Charles W. Thomas & W. Anthony Fitch, Prosecutorial Decision Making, 13 Am. Crim. L. Rev. 507, 513-17 (1976) (classifying factors which influence charging decisions as objective or subjective).
factors, such as the quantity and quality of the evidence of
guilt. There is no serious quarrel with the proposition that a
prosecutor must engage in such case-specific evaluations, and most would agree that these evaluations require that the
prosecutor make some factual findings, including, in many
cases, assessments of the credibility of witnesses. It is this
latter category of discretion, or case-specific assessment, with
which we are here concerned. And there can be no serious
dispute that this type of discretion is not only inevitable, but
also desirable.

The desirability of case-specific evaluations by prosecutors
becomes clearer when one considers that the alternative is not
a system without discretion, but rather a system in which case-
specific discretion is abdicated entirely to the police. Police
officers have discretion to arrest or not to arrest, and the
exercise of that discretion enjoys a good measure of public
expectation and support. They may warn for minor
infractions. Even in serious cases, police officers sometimes
evaluate the credibility of witnesses in exercising their
discretion. Police officers are selective, not only in making
arrests, but also in determining where to devote limited

42. See, e.g., Miller, supra note 11, at 34.
43. See Fisher, supra note 11, at 229-30.
44. H. Richard Uviller, The Unworthy Victim: Police Discretion in the Credibility
45. Those who criticize American prosecutors as possessing unnecessary
discretion frequently point to their German counterparts as a model of a more
desirable system “where the discretionary power of prosecutors is so slight as to be
almost nonexistent.” Davis, supra note 13, at 224. See also id. at 191-95. It is true
that the German prosecutor theoretically has no discretion and is compelled by law
to prosecute all offenders (with certain limited exceptions). Klaus Sessar,
Prosecutorial Discretion in Germany, in THE PROSECUTOR 255, 255-57 (William F.
McDonald ed., 11 Sage Criminal Justice System Annuals, 1979). However, there is
considerably more discretion—at least in the case-specific evaluation sense of that
term—in practice than in theory. Id. at 262. German prosecutors do dismiss cases
for insufficient evidence, id. at 264, and German prosecutors use problems of proof
to create charging discretion, id. at 272.
46. Davis, supra note 13, at 18, 81-83; Joseph Goldstein, Police Discretion Not
to Invoke the Criminal Process: Low Visibility Decisions in the Administration of
Justice, 69 YALE L.J. 543 (1960); LaFave, supra note 23, at 532 n.2; Note, supra
note 33, at 75.
47. Uviller, supra note 44, at 28; Gregory H. Williams, Police Discretion: The
Institutional Dilemma—Who Is in Charge?, 68 IOWA L. REV. 431, 432 (1983); Note,
supra note 33, at 75.
48. Goldstein, supra note 46, at 559 n.27.
49. Uviller, supra note 44, at 28.
investigative resources, and these decisions are not normally controlled by the prosecutor.

Obviously, potential prosecutions screened out by police decisions not to investigate or not to arrest will ordinarily receive no review by the prosecutor's office. But the cases which the police bring to the prosecutor—either in the form of a completed arrest, an application for an arrest warrant, or a request for a grand jury investigation—will ordinarily receive some degree of independent scrutiny by the prosecutor. If that independent scrutiny does not take place—either because of some external or self-imposed limitation on the exercise of prosecutorial discretion—then the decision to charge will effectively have been made solely by the police.

Nevertheless, there are prosecutors who do not recognize the power to, or necessity for, reviewing police charging decisions. In some cases, prosecutors rely upon the arrest warrant, the grand jury or the preliminary hearing as a substitute for their own case-specific evaluation. None of these procedures, however, provides a significant check upon the prosecutor's decision to charge, and consequently, none provides any justification for the prosecutor's abdication or deference to the case-specific discretion of police officers.

The arrest warrant is obtained by an ex parte application to the court. Generally, the decision to issue the warrant is based solely on the affidavit of a police officer, and the court does not make any further inquiry of the officer at the time the warrant is issued. Moreover, when the officer is not an actual witness to the crime, the officer's affidavit simply relays information from others whose credibility has been evaluated, if at all, by the officer. The warrant is issued upon the minimal standard of "probable cause" that a crime

50. Id. at 15; Breitel, supra note 33, at 429.
51. DOUGLASS, supra note 5, at 157.
52. BRIAN A. GROSMAN, THE PROSECUTOR: AN INQUIRY INTO THE EXERCISE OF DISCRETION 44 (1969); Abrams, supra note 34, at 2 n.4; Goldstein, supra note 46, at 543; LaFave, supra note 23, at 532 n.2.
54. Id.
has been committed and that the individual named in the warrant committed it.\textsuperscript{57} The issuance of the arrest warrant, then, is hardly a significant check upon the police officer's judgment or the prosecutor's acquiescence thereto.\textsuperscript{58}

Likewise, the grand jury is not a significant check on the prosecutor's, or police officer's, decision to charge. Only about one-half of the states require a grand jury indictment, and even that requirement is generally limited to felonies.\textsuperscript{59} The grand jury process is ex parte and entirely controlled by the prosecutor, trial rules of evidence are not generally applicable, and the standard is, again, merely probable cause.\textsuperscript{60} For these reasons, the grand jury offers little, if anything, in the way of a screening mechanism on prosecutions,\textsuperscript{61} and is frequently referred to as a "rubber stamp" of the prosecutor.\textsuperscript{62}

The preliminary hearing exists in most states\textsuperscript{63} and, in contrast with the grand jury, is a judicial proceeding in which the defense participates. Nevertheless, the minimal standard of probable cause is routinely and easily met by the government.\textsuperscript{64} Moreover, where a grand jury indictment is available and returned prior to the date of the preliminary hearing, the preliminary hearing is generally unavailable.\textsuperscript{65} For these reasons, the preliminary hearing, like the arrest warrant and grand jury indictment, cannot be regarded as a significant check on the prosecutor's charging discretion.\textsuperscript{66}

\textsuperscript{57} Beck v. Ohio, 379 U.S. 89, 91 (1964). This evidentiary standard is less exacting than the "preponderance of evidence" standard applicable to most civil cases, CHARLES H. WHITERREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE § 3.03 (2d ed. 1986), and has been described by the United States Supreme Court as a "substantial chance" or "fair probability" of criminal activity. Illinois v. Gates, 462 U.S. 213, 244 n.13, 246 (1983).
\textsuperscript{58} Cf. Goldstein, supra note 56, at 1164-65.
\textsuperscript{60} See, e.g., George T. Frampton, Jr., Some Practical and Ethical Problems of Prosecuting Public Officials, 36 Md. L. Rev. 5, 19 (1976); Vorenberg I, supra note 8, at 1537-38.
\textsuperscript{61} Goldstein, supra note 56, at 1171; Vorenberg I, supra note 8, at 1537-38, 1556.
\textsuperscript{62} Bubany & Skillern, supra note 18, at 483-84; Frampton, supra note 60, at 6; Kaplan, supra note 5, at 177; Vorenberg II, supra note 18, at 678.
\textsuperscript{63} See Goldstein, supra note 56, at 1169 n.57.
\textsuperscript{64} Goldstein, supra note 56, at 1166, 1183; Vorenberg I, supra note 8, at 1538.
\textsuperscript{65} Bubany & Skillern, supra note 18, at 483-84; James R. Kavanaugh, Representing the People of Illinois: Prosecutorial Power and Its Limitations, 27 DePaul L. Rev. 625, 636 (1978).
\textsuperscript{66} Bubany & Skillern, supra note 18, at 483-84; Goldstein, supra note 56, at
Indeed, as long as the government meets the probable cause threshold, there is essentially no judicial review of the prosecutor's charging decision. Consequently, in most cases the trial itself is the only significant, formal stage of the process that protects the erroneously accused. By that point, of course, many of the incidents of suffering the formal criminal accusation are irreparable. Therefore, a prosecutor who fails to exercise case-specific charging discretion is, at least potentially, permitting the defendant to be brought to trial on either the decision of a police officer or, even more alarmingly, on the accusation of an individual from whom the police officer merely takes a report.

In the absence of any significant limitations within the criminal justice system upon prosecutors' exercise or abdication of their discretionary authority, one might expect to find more significant restraints in the ethical rules governing prosecutors' conduct. As a general proposition, however, the rules of ethical conduct for prosecutors' charging decisions require no more than the same minimalistic "probable cause" required by the criminal, adjudicative process.

Virtually every state has adopted, as its standard of professional responsibility for lawyers, some variation of either the American Bar Association Model Rules of Professional Conduct or the American Bar Association Model Code of Professional Responsibility. The Model Code, which was

1168-69, 1172; Vorenberg I, supra note 8, at 1556.
67. See, e.g., Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978); Powell v. Katzenbach, 359 F.2d 234, 235 (D.C. Cir. 1965); United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965); Pugach v. Klein, 193 F. Supp. 630, 634 (S.D.N.Y. 1961); State ex rel. Kurkierewicz v. Cannon, 166 N.W.2d 255, 260 (Wis. 1969). See also DOUGLASS, supra note 5, at 2; Kress, supra note 25, at 114. The usual reasons for this hands-off approach is the constitutional notion of separation of powers, see, e.g., Cox, 342 F.2d at 171-72; Pugach, 193 F. Supp. at 634; Philip J. Cardinale & Steven Feldman, The Federal Courts and the Right to Nondiscriminatory Administration of the Criminal Law: A Critical View, 29 SYRACUSE L. REV. 659, 689 (1978); Cox, supra note 18, at 394, the peculiarly executive function of weighing factors such as the allocation of prosecutorial resources, see, e.g., Newman v. United States, 382 F.2d 479, 480-81 (D.C. Cir. 1967), and avoidance of deterring prosecutorial beneficence, Cardinale & Feldman, supra, at 690. Judicial review of prosecutorial charging discretion is generally limited to those cases in which the defendant can show that criminal charges were brought on the basis of some impermissible discrimination, such as race, gender or religion. Vorenberg I, supra note 8, at 1540; Vorenberg II, supra note 18, at 679.
68. Goldstein, supra note 56, at 1172; Vorenberg I, supra note 8, at 1523.
69. See supra text accompanying notes 10-16.
70. See Frampton, supra note 60, at 19-20.
71. See generally NATIONAL REPORTER ON LEGAL ETHICS AND PROFESSIONAL
adopted by the American Bar Association in 1969,"72 is divided into three sections: canons, ethical considerations and disciplinary rules. Only the disciplinary rules are intended to be mandatory, as the first two categories are intended to be aspirational only.73 The relevant disciplinary rule prohibits prosecutors from instituting criminal charges which they know or should know are not based upon probable cause.74 The relevant aspirational pronouncement of the Model Code is less precise, encouraging prosecutors to "seek justice."75 This admonition appears throughout ethical codes of conduct,76 case law,77 and commentary,78 but is nowhere clearly defined.79


74. "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." MODEL CODE, supra note 4, DR 7-103(A).

75. The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts.

76. See, e.g., MODEL RULES, supra note 4, Rule 3.8 cmt. ("A prosecutor has the responsibility of a minister of justice . . . ."); I STANDARDS FOR CRIMINAL JUSTICE Standard 3-1.1(c) (Am. Bar Ass'n, 2d ed. 1980) ("The duty of the prosecutor is to seek justice, not merely to convict.") [hereinafter ABA PROSECUTION STANDARDS]; CANONS OF PROFESSIONAL ETHICS, Canon 5 (Am. Bar Ass'n 1908) ("The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done.").


79. Fred C. Zacharias, Structuring the Ethics of Prosecutorial Trial Practice:
Although the Model Rules are generally regarded as reflecting a certain distrust of the adversary system and a desire to restrain the zeal of attorney advocates, the only limitation the Rules place on prosecutors' charging discretion continues to be the familiar, and unimposing, probable cause standard. The ABA Prosecution Standards, which have been adopted in many jurisdictions, do permit prosecutors to take into consideration their reasonable doubt about the defendant's actual guilt, and do recommend charging based on sufficient admissible evidence to support a conviction. However, like the Model Code and Model Rules, the Prosecution Standards only sanction charges known not to be supported by probable cause.

An ethical prerequisite of probable cause is essentially meaningless. Probable cause is little more than heightened.


80. See Stark, supra note 73, at 965, 972.

81. "The prosecutor in a criminal case shall: (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause . . . ." MODEL RULES, supra note 4, Rule 3.8(a). See also FREEDMAN II, supra note 12, at 222. If anything, the Model Rules formulation appears to sound a retreat from the Model Code limitation. A violation of Rule 3.8 of the Model Rules appears to require actual knowledge of the absence of probable cause, while DR 7-103(A) of the Model Code appears to allow disciplinary action on the basis of the constructive knowledge of the prosecutor in some instances. See supra note 74. Charging someone with a criminal violation solely for the purpose of harassment is so manifestly improper that it need hardly be mentioned. DOUGLASS, supra note 5, at 235; MILLER, supra note 11, at 43. A rule that proscribes only charging with the knowledge that probable cause is absent is little more than a restatement of the unremarkable prohibition of charging solely for the purpose of harassment.

82. See MODEL RULES, supra note 4, Rule 3.8 cmt.

83. "Illustrative of the factors which the prosecutor may properly consider in exercising his or her discretion are: (i) the prosecutor's reasonable doubt that the accused is in fact guilty . . . ." ABA PROSECUTION STANDARDS, supra note 76, Standard 3-3.9(b).

84. "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." ABA PROSECUTION STANDARDS, supra note 76, Standard 3-3.9(a).

85. "It is unprofessional conduct for a prosecutor to institute, or cause to be instituted, or to permit the continued pendency of criminal charges when it is known that the charges are not supported by probable cause." ABA PROSECUTION STANDARDS, supra note 76, Standard 3-3.9(a).

For a further discussion of the three-tiered standard of the ABA Prosecution Standards, see FREEDMAN I, supra note 12, at 86; FREEDMAN II, supra note 12, at 222; H. Richard Uviller, The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the ABA, 71 MICH. L. REV. 1145, 1155-56 (1973).
suspicion, and it is not even remotely sufficient to screen out individuals who are factually not guilty. More importantly, the criminal justice system itself provides for an early finding of probable cause, thus allowing the ministerial prosecutor to avoid any case-specific evaluation, abdicating both to the antecedent judgment of the police officer and the subsequent determination of the court or the grand jury.

The recommended threshold of the ABA Prosecution Standards—sufficient admissible evidence to support a conviction—is likewise far too easily satisfied to provide any real limitation upon, or incentive to exercise, case-specific evaluation by the prosecutor. The standard is essentially that of a prima facie case, i.e., evidence sufficient to survive a motion for a judgment of acquittal at the end of the government’s case. Not only does that standard fail to require the prosecutor to consider defenses known to the prosecutor, but it also fails to require the prosecutor to evaluate witness credibility. Instead, the prosecutor is merely required to evaluate whether the government's evidence, if accepted, establishes the elements of the charged offense. Motions for judgments of acquittal are rarely successful, and an equivalent ethical standard falls far short of preventing the prosecution of cases that should not, or even cannot, result in conviction.

Other charging standards, lacking the external enforcement mechanisms of the professional responsibility


87. If the process is initiated by an arrest warrant or an indictment, then the court or the grand jury, respectively, will have determined probable cause prior to the defendant’s arrest or summons. In any event, if the defendant is to be held beyond the initial appearance, there must be a judicial determination of probable cause. Gerstein v. Pugh, 420 U.S. 103, 114 (1975).

88. Uviller, supra note 85, at 1156.
89. Frampton, supra note 60, at 20.
90. Uviller, supra note 85, at 1156. On a motion for judgment of acquittal, the court must deny the motion if a rational jury could find the defendant guilty beyond a reasonable doubt. In ruling on the motion, the court must draw all reasonable inferences, and resolve all credibility disputes, in favor of the government. See, e.g., Jackson v. Virginia, 443 U.S. 307, 319 (1979). Consequently, a prosecutor who self-imposes that same standard assumes that the government’s evidence is accurate and uncontested.

92. FREEDMAN I, supra note 12, at 86; Kaplan, supra note 5, at 183.
codes, are also available to the prosecutor. The National District Attorneys Association has adopted essentially the same standards as those found in the ABA Prosecution Standards. They recommend that a prosecutor file only charges which can be substantiated by admissible evidence at trial, and list "[d]oubt as to the accused's guilt" as a "factor[] which may be considered." The United States Department of Justice has issued standards requiring that a federal prosecutor go forward with a prosecution only when "the admissible evidence will probably be sufficient to obtain and sustain a conviction." The commentary equates this standard with that necessary to survive a motion for judgment of acquittal, the same standard discussed above.

One thing is clear from an examination of these standards. While Due Process requires that a conviction must be based upon proof beyond a reasonable doubt, there is no comparable degree of certainty required of prosecutors. Instead, the ethical rules, which focus upon the morality of the private practitioner, and which do not distinguish prosecutors from the ordinary model of zealous advocacy, have settled upon the virtually meaningless requirement of probable cause. This may be more dangerous than no standard at all. If a prosecutor can find no internal ethical command, he or she may adopt the ethical minimum of probable cause as the only morality for exercising charging discretion.

II. SELF-IMPOSED CHARGING STANDARDS

It is questionable whether professional disciplinary rules

93. See DOUGLASS, supra note 5, at 28.
94. NATIONAL DIST. ATTORNEYS ASSN, NATIONAL PROSECUTION STANDARDS § 43.3 (2d ed. 1991). See also FREEDMAN II, supra note 12, at 222.
95. NATIONAL DIST. ATTORNEYS ASSN, NATIONAL PROSECUTION STANDARDS § 42.3(a) (2d ed. 1991).
98. See supra notes 88-92 and accompanying text.
100. MILLER, supra note 11, at 22; Kavanaugh, supra note 65, at 633.
101. DOUGLASS, supra note 5, at 33-34.
102. Zacharias, supra note 79, at 52.
103. Id. at 103.
influence the behavior of lawyers to any significant degree.\textsuperscript{104} Such rules are infrequently and lightly enforced,\textsuperscript{105} and they are perceived in some quarters as merely aspirational and not mandatory.\textsuperscript{106} Moreover, the requirements of such rules are generally not burdensome, as the drafters of disciplinary rules have historically been cautious in their approaches.\textsuperscript{107} As a result, some lawyers set for themselves ethical standards more demanding than those required by disciplinary rules.\textsuperscript{108}

Prosecutors, too, are likely uninfluenced in their charging decisions by external ethical constraints. Prosecutors are rarely disciplined for violating rules of professional responsibility.\textsuperscript{109} Beyond the barely meaningful requirement of probable cause, the ethical rules and court decisions are too general to provide limits or guidance.\textsuperscript{110} As a consequence, charging and other decisions must be made by prosecutors on the basis of "personal standards of integrity and fairness."\textsuperscript{111}

Even within the prosecutors' office, charging policies tend to have little impact on the case-specific evaluations undertaken by individual line assistants. Office charging policies tend to focus on offense categories rather than the quantitative and qualitative evaluations of evidence in individual cases.\textsuperscript{112} Office guidelines tend to be broad and flexible, in part to avoid defense motions claiming violations of internal guidelines.\textsuperscript{113} Finally, decisions by prosecutors, including decisions to commence or continue criminal prosecutions, must often be made spontaneously and instinctively with infrequent opportunities for serious internal review.\textsuperscript{114}

\textsuperscript{104} Murray L. Schwartz, The Death and Regeneration of Ethics, 1980 AM. B. FOUND. RES. J. 953, 958.
\textsuperscript{108} See Schwartz, supra note 104, at 959.
\textsuperscript{109} Freedman I, supra note 12, at 96. It is not even clear that federal prosecutors are subject to discipline for violation of state ethical rules. Zacharias, supra note 79, at 106 & n.252.
\textsuperscript{110} Fisher, supra note 11, at 212; Frampton, supra note 60, at 8.
\textsuperscript{111} Edwards, supra note 5, at 514.
\textsuperscript{112} Cf. Bubany & Skillern, supra note 18, at 488-89.
\textsuperscript{113} Vorenberg II, supra note 18, at 680.
\textsuperscript{114} Cf. DOUGLASS, supra note 5, at 33.
Clearly, then, so much responsibility is vested in the hands of the individual prosecutor that much of the success of the criminal justice system depends upon the quality and integrity of prosecutors.\textsuperscript{115} Specifically, the key is the individual prosecutor's perception of his or her professional role, particularly in the context of the charging decision.\textsuperscript{116}

Most prosecutors are, in fact, attentive to the ethical appropriateness of their behavior\textsuperscript{117} and, in particular, concerned about the fairness of their charging decisions.\textsuperscript{118} Nevertheless, in describing how prosecutors view their professional roles\textsuperscript{119} including the standards used in the exercise of their charging discretion,\textsuperscript{120} few generalizations are safe. "Prosecutors are neither homogenous [n]or fungible," and consequently, differences exist both among offices and among individuals within the same office.\textsuperscript{121}

All prosecutors agree, as they must,\textsuperscript{122} that probable cause is required in pursuing criminal charges.\textsuperscript{123} Many prosecutors impose a higher standard of probability upon their charging decisions,\textsuperscript{124} but not all agree they should do so.\textsuperscript{125} As a general rule, prosecutors also require, at least at some point prior to trial, that the government's evidence be sufficient to survive a motion for judgment of acquittal.\textsuperscript{126} Furthermore, virtually all prosecutors require, at least at the time of trial, that the government's case present a reasonable likelihood of conviction.\textsuperscript{127}

That prosecutors impose upon themselves a "reasonable

\begin{footnotesize}
\textsuperscript{115} See Benjamin R. Civiletti, Preface to U.S. DEPT OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION (1980); Felkenes, supra note 6, at 98; Jackson, supra note 7, at 6.
\textsuperscript{117} See DOUGLASS, supra note 5, at vi.
\textsuperscript{118} See Felkenes, supra note 6, at 109.
\textsuperscript{119} Fisher, supra note 11, at 214.
\textsuperscript{121} DOUGLASS, supra note 5, at 1.
\textsuperscript{122} See supra text accompanying notes 70-87.
\textsuperscript{123} See NISSMAN & HAGEN, supra note 7, at 13.
\textsuperscript{124} MILLER, supra note 11, at 34.
\textsuperscript{126} See Kaplan, supra note 5, at 182. See also Kavanaugh, supra note 65, at 634-35.
\textsuperscript{127} MILLER, supra note 11, at 35.
\end{footnotesize}
likelihood of conviction" standard is entirely unremarkable. Given limited resources and full, if not burgeoning, caseloads, there is simply no practical and legitimate reason for a prosecutor to proceed to trial in a case that has no reasonable prospect of resulting in a conviction. Thus, as a purely tactical matter, prosecutors will not proceed, to trial at least, with cases presenting no reasonable likelihood of conviction.128

The truly ethical question is presented by a case where, despite evidence presenting a reasonable likelihood of conviction, the prosecutor has some doubt as to the actual guilt of the defendant. Some prosecutors present such cases to the jury at trial, due either to an unwillingness to act on their personal judgment or a belief that they are not permitted to do so.129 Others refuse to seek convictions in such cases, requiring, in addition to a convictable case, that they be personally satisfied of the defendant's guilt.130 Indeed, some prosecutors require that they be convinced to the same extent that the law requires for the jury to return a guilty verdict, i.e., beyond a reasonable doubt.131

The ultimate issue addressed in this article—whether prosecutors should incorporate their personal judgments as to defendants' guilt into their charging decisions—is a question which will be further examined in Parts IV and V of this article. Before doing so, however, it will be useful to examine certain factors which affect prosecutors' charging decisions and consequently impact the resolution of that ultimate issue.

III. FACTORS AFFECTING PROSECUTORIAL DISCRETION

American lawyers are predisposed to be zealous advocates.132 Trial lawyers in particular tend to target

128. Id.; Kaplan, supra note 5, at 180.
130. MILLER, supra note 11, at 36 n.15, 42; Corrigan, supra note 78, at 539; Kaplan, supra note 5, at 178. See also Bubany & Skillern, supra note 18, at 479. For a recommendation that ethical codes be revised to require prosecutors to have a good faith belief in the factual guilt of the defendant, see Zacharias, supra note 79, at 49-50.
131. MILLER, supra note 11, at 22; Utz, supra note 116, at 110. Cf. NISSMAN & HAGEN, supra note 7, at 13.
132. 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT 327-28
"victory" as their goal. Law schools generally emphasize litigation, creating a focus on victory as a professional goal. Law school training in professional responsibility tends, quite understandably, to focus upon the private practitioner, whose obligation, in significant part, is to zealous advocacy on behalf of the particular client. As a general proposition, the adversary model is not the subject of a great deal of formal scrutiny. Law students who are suspicious of the adversary system often shed their reservations either before or shortly after entering practice. The transition from law school to practice often parallels the adoption of the perspective of an advocate unconcerned about the discovery of truth. Litigators in particular may become "amoral technician[s] committed to winning the adversary battle."

It is with this indoctrination that many individuals enter into service as prosecutors. Many of these individuals are young, inexperienced, and little-prepared for the responsibility of exercising charging discretion. When they arrive, they are provided with some degree of training in adversarial skills and general office policies, but they are given little if any education in prosecutorial ethics and the exercise of case-specific charging discretion. Indeed, some prosecutors lack the training necessary to appreciate even the existence of their case-specific charging discretion.
PROSECUTORIAL DISCRETION

Although variations in prosecutors' offices and in individual prosecutors make generalizations somewhat risky,144 many offices seek to accomplish some form of central control over charging discretion by restricting that discretion—particularly the initial screening function—to experienced, supervisory prosecutors.145 Nevertheless, the initial charging decision will frequently be made in a matter of minutes, given the necessity of processing many arrested individuals through the initial judicial appearance in a very short time.146 This brief case evaluation will typically be made solely on the basis of information from a police officer and, if applicable (and then typically only indirectly), from the victim of the crime.147 The information provided in this limited context is not always accurate and complete.148 Under these circumstances, it is hardly remarkable that the screening prosecutor is routinely persuaded to file criminal charges.149 Even in cases that present some doubts, the cursory screening process rarely allows for immediate investigation.150 Assuming there is a legal basis for criminal charges, the "safest" course of action is to file charges and leave the necessary investigation to the individual line assistant to whom the case is assigned.

Despite the likelihood that the screening process does not produce a considered and informed charging decision, a line assistant may find it easier simply to prosecute the case to conclusion than to seek reconsideration by a supervisor.151 Moreover, some line assistants place unwarranted faith in the screening process and are consequently unlikely to perceive any necessity for reevaluation.152

This fragmented decision-making is not necessarily limited

144.  See Fisher, supra note 11, at 204. See also Kaplan, supra note 5, at 178.
145.  See Alschuler, supra note 129, at 64 n.42. See also MILLER, supra note 11, at 17; Abrams, supra note 34, at 54.
146.  For example, in the United States Attorney's Office in the District of Columbia, the daily screening process typically involved making charging decisions, preparing the necessary paperwork, and appearing in court at the initial judicial appearance for over 100 cases per day.
147.  See GROSMAN, supra note 52, at 46-47.
149.  See Fisher, supra note 11, at 208.
150.  Cf. MILLER, supra note 11, at 4.
151.  Alschuler, supra note 129, at 64 n.42.
152.  See Felkenes, supra note 6, at 112-13.
to the screening function. Many prosecutors' offices, for reasons of efficiency, employ what can be termed a horizontal case assignment system. For example, certain line assistants may be assigned, for a period of time, exclusively to the presentation of cases to the grand jury for indictment, while other line assistants may be assigned exclusively to the trials of those same cases. With such an arrangement, it is easy for each line assistant to rationalize that any decision to dismiss charges should have been, or should be, made by another line assistant at another stage of the criminal justice process. In fact, at least in prosecutors' offices burdened with large caseloads, detailed investigation and preparation of cases may not take place until trial is imminent. As noted, however, by that time the earlier screening stages may be accorded an unjustified deference interfering with objective evaluation.

The possibility that prosecutors will fail to dismiss appropriate cases is sometimes exacerbated by the motivations of prosecutors themselves. Some prosecutors have political or other ambitions, and consequently, they are concerned about their status and advancement within the prosecutors' office. That advancement may often depend upon one's image of being fearless about prosecuting difficult cases. Correspondingly, line assistants who seek dismissals because of doubts concerning the defendants' guilt run the risk of being perceived as soft, fearful, and lacking the skills to win the tough case. Particularly where cases generate public attention, the prosecutors' office may be reluctant to appear ameliorative. In such cases, there is likely enhanced pressure upon the assigned line assistant to obtain a conviction.

Even the most conscientious of prosecutors cannot avoid the effects of very selective influences inherent in the criminal

153. See Abrams, supra note 34, at 2-6.
154. Id. at 2.
155. Bubany & Skillern, supra note 18, at 489.
156. See supra text accompanying notes 149-150.
157. DOUGLASS, supra note 5, at 5; FRANK & FRANK, supra note 142, at 236-37.
158. See Kaplan, supra note 5, at 180.
159. See Felkenes, supra note 6, at 112.
160. See Alschuler, supra note 129, at 64 n.42.
161. Fisher, supra note 11, at 231; Utz, supra note 116, at 102.
162. Kaplan, supra note 5, at 181.
justice process. Prosecutors rarely speak to defendants. Prosecutors come to know defendants from police reports and rap sheets, and thus think of defendants only in the context of the criminal accusations. By contrast, prosecutors may come to know victims as real people, possibly likeable people, and very often persons deserving of consideration and sympathy. Quite naturally, prosecutors may develop loyalty to victims, and that loyalty may influence the prosecutors' decisions.  

Prosecutors also come into prolonged and recurrent contact with police officers. As a result, prosecutors may tend to regard police officers as their clients. Thus, some prosecutors may be reluctant to derail prosecutions, particularly where the police officers feel strongly about the case. This may be true despite the fact that many police officers are satisfied as to the defendant's guilt at the time of the arrest, and view all subsequent procedures as potential occasions for the frustration of effective law enforcement.

In short, the prosecutor's institutional posture and orientation make him or her less likely to perceive doubts concerning the guilt of defendants. Once an investigation focuses upon a particular individual, the prosecutor naturally examines evidence with a predisposition to confirm his or her original theory of culpability. Once the case proceeds to trial, it will probably require some truly extraordinary and unanticipated development to cause the prosecutor to reevaluate the propriety of seeking a conviction. And if the trial prosecutor is in an office which employs a horizontal case-assignment system, he or she may not even be privy to information which should have created some doubt at an earlier stage of the process.  

The result is that even a conscientious prosecutor can come to believe, or at least to presume, that all, or virtually all,
defendants are in fact guilty.\textsuperscript{171} This conclusion receives constant reinforcement from the high percentage of dispositions by guilty pleas\textsuperscript{172} and the high conviction rate at trial.\textsuperscript{173} The occasional acquittal can easily be accounted for by the irrationality of the jury, the bizarre rulings of the trial judge, or the objectionable tactics of defense counsel. Gradually, the prosecutor can come to view his or her primary obligation as obtaining convictions.\textsuperscript{174} The admonitional obligation to "seek justice" is forgotten, not because it is ignored, but because prosecutors equate it with obtaining convictions.

This phenomenon of emphasizing convictions has been labeled "conviction psychology,"\textsuperscript{175} and it is not merely a theoretical model. Many prosecutors do, in fact, believe their primary function is to secure convictions.\textsuperscript{176} Because the adoption of a conviction psychology frequently results from the institutional influences brought to bear upon prosecutors, veteran prosecutors are more likely than their less experienced colleagues to manifest conviction psychology.\textsuperscript{177} Nevertheless, these conviction-oriented values affect the entire office, both because the values are conveyed to newcomers,\textsuperscript{178} and because more experienced prosecutors dominate supervisory positions where much charging discretion is located.

Needless to say, the assimilation of a conviction psychology by the prosecutor makes it difficult, if not impossible, for the prosecutor to protect the innocently accused.\textsuperscript{179} Over-emphasizing convictions can lead to an ends-justifies-the-means mentality, resulting in various forms of prosecutorial misconduct.\textsuperscript{180} Because the prosecutor focuses exclusively on securing the conviction, there is a danger that the prosecutor will, for example, be improperly reluctant to disclose exculpatory material to the defense\textsuperscript{181} or subtly influence witnesses' testimony to secure a guilty verdict.\textsuperscript{182}

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\begin{itemize}
\item \textsuperscript{171} Id. at 553-54; Felkenes, \textit{supra} note 6, at 110.
\item \textsuperscript{172} Jonakait, \textit{supra} note 168, at 553-54.
\item \textsuperscript{173} Id. at 554. \textit{See also} FRANK & FRANK, \textit{supra} note 142, at 239.
\item \textsuperscript{174} Felkenes, \textit{supra} note 6, at 110.
\item \textsuperscript{175} Id.
\item \textsuperscript{176} Id. at 109.
\item \textsuperscript{177} Id. at 111.
\item \textsuperscript{178} Fisher, \textit{supra} note 11, at 206.
\item \textsuperscript{179} See id. at 206; Felkenes, \textit{supra} note 6, at 110.
\item \textsuperscript{180} See Fisher, \textit{supra} note 11, at 199, 208; Jonakait, \textit{supra} note 168, at 550.
\item \textsuperscript{181} \textit{See}, \textit{e.g.}, United States v. Bagley, 473 U.S. 667, 696-97 (1985) (Marshall, J., dissenting).
\item \textsuperscript{182} Cf. Stephan Landsman, \textit{Reforming Adversary Procedure: A Proposal}
Of course, for all litigators, the temptation to engage in intentional misconduct, as well as the danger of unintended improprieties, arises from the adversary system's emphasis upon victory. In the case of the prosecutor, the emphasis upon victory inherent in an adversary ethic not only motivates potential misconduct, but also steers the prosecutor inexorably toward a conviction psychology. As a result, the adversary process makes it difficult for the prosecutor to protect the innocent.

The reaction of prosecutors to the behavior of defense counsel also impacts upon the prosecutor's adoption of an adversary ethic. The obligation of defense counsel is primarily, if not exclusively, to the defendant. Consequently, defense counsel will seek to advance the causes of truth and substantive justice only coincidentally, i.e., when those goals are consistent with the personal interests of the defendant. With the adoption of an adversary ethic, some prosecutors advocate extreme positions in an attempt to counterbalance the position of defense counsel. Some prosecutors also respond in kind to defense tactics, feeling that adversary combat cannot be fought with unequal weaponry.

Given all of these influences, it should be clear that a prosecutor's decision regarding the existence and nature of self-imposed charging standards depends fundamentally upon the prosecutor's position on the appropriateness of an adversary model of prosecutorial behavior. A brief examination of the adversary system, and its relevance to a prosecutor's ethic, is thus in order.

IV. THE ADVERSARY MODEL

During my tenure in the United States Attorney's Office in

183. See Marshall, supra note 133, at 921.
184. See Cox, supra note 18, at 414; Fisher, supra note 11, at 208; Utz, supra note 116, at 103, 108; Vorenberg I, supra note 8, at 1557-58.
185. Cox, supra note 18, at 415. This is particularly true at trial, which is an inherently competitive process. See Zacharias, supra note 79, at 107-08.
186. See, e.g., Fisher, supra note 11, at 208 n.53.
187. See, e.g., Nissman & Hagen, supra note 7, at 2; Frankel II, supra note 137, at 1037-38; Uviller, supra note 78, at 1072-73.
188. See Fisher, supra note 11, at 252.
189. See Frank & Frank, supra note 142, at 233-34; Fisher, supra note 11, at 210-11.
Washington, D.C., it was the practice for trial assistants to circulate post-trial memoranda to other trial assistants. These memoranda would detail the charges, the verdict and the jury members, as well as comments from the assistant who tried the case. I recall receiving such a memorandum from a friend and colleague reporting on an acquittal, in which he commented that he believed that the jury's verdict was correct. Of course, no one would enjoy confessing to losing a case that should have been won, but I knew the author of the memorandum well enough to doubt that his comment was made merely to insulate his ego and prestige. I remember wondering, given his view of the case, how he would have felt if he had obtained a conviction, and I asked him that very question. He responded that he would have felt just fine, thank you, because it was the jury's province to decide guilt or innocence. In fact, he added, it would have been improper for him to interfere with the jury's prerogative by dismissing the case.

Had we been representing private clients, there could be no quarrel with my colleague's position. It summarized the essence of the adversary system: it is not for litigants' counsel to duplicate the function of the trier of fact. Indeed, such duplication is not only not required; it is not permitted. It is somehow seen as intrusive upon the exclusive province of the trier of fact. Like presumptively selecting from the menu for one's date without leave to do so, it is simply not done.

In the context of a prosecutor, who does not represent a private client, the same ethic prevails in some circles. Some prosecutors insist that the prosecutor's obligation is to leave the question of guilt or innocence to the jury. Even when the prosecutor has doubts about the defendant's guilt or concerning the truth of the government's evidence, the jury must make the factual decision.

190. Because jurors would serve for several weeks, it was useful to know, during jury selection, whether potential jurors had returned a guilty or not guilty verdict, and the circumstances in which they did so, earlier in their term.
191. See, e.g., Uviller, supra note 85, at 1155-59.
192. See Harvey A. Schneider & Stephen D. Marks, The Contrasting Ethical Duties of the Prosecutor and Defense Attorney in Criminal Cases, 7 U. WEST L.A. L. REV. 120, 126 (1975). Some advocates of the adversary model of prosecutorial behavior assert, however, that a prosecutor should not prosecute where "there is a substantial likelihood that the defendant is innocent." Uviller, supra note 85, at 1159.
This position stems from an unfounded faith in the adversary system. Many who defend the adversary system tout it as a superior process for discovering the truth.193 For some the adversary system has become not merely a means to that end, but rather a glorified end in and of itself.194 On this view, lawyers are servants to the system, and it is essential that they fulfill their function as advocates and not seek to perform roles the system assigns to other functionaries.

Those who apply this ethic to prosecutors believe prosecutors should identify themselves as advocates for the community “other than the defendant.”195 Thus, because the prosecutor functions in an adversary system against an advocate for the defendant, he or she has an advocate’s duty to present the doubtful case in the strongest possible way against the defendant.196 The prosecutor’s function is not to determine truth, as he or she has no special abilities to perform that function.197 In short, prosecutors are not merely permitted to rely on the process, they are required to defer to it.198

But why such faith in the adversary system? It is true that the adversary system is an integral component of a dispute resolution process designed to ascertain the truth.199 At best, however, we just assume that the adversary system is a valuable contributor to this goal,200 and at worst we engage

194. See, e.g., THE AMERICAN LAWYER’S CODE OF CONDUCT, Preamble (Roscoe Pound-Am. Trial Lawyers Found. Revised Draft 1982) (referring to the adversary system as a system which “helps to preserve and enhance our dignity as individuals” and as an “expression[d] [of] fundamental American values,” and extolling “all American lawyers” to commit “to strengthening that system as the embodiment of the constitutional values inherent in the administration of justice in the United States”). See also LUBAN, supra note 138, at 58 (“[T]here is a tendency among many people to treat reservations about the adversary system as assaults on the American Way.”).
196. See Fisher, supra note 11, at 231.
197. See id.; Uviller, supra note 78, at 1079.
198. Cf. Uviller, supra note 78, at 1078; Uviller, supra note 85, at 1158-59.
in self-deception or even hypocrisy in proclaiming the truth-revealing virtues of our adversarial process.  

The fact is that, because we do not know "the truth" in any absolute sense, we cannot measure the truth-revealing capabilities of the adversary system except on the basis of anecdotal accounts and intuition. But the idea that trial by combat, whatever the weapons, will reliably produce truth is both counter-intuitive and contradicted by experience. Certainly the parties and their advocates are not pursuing the truth; they are pursuing victory. As trial lawyers and judges are likely to acknowledge, "the fairness of the procedures is not a guarantee of the truth-finding capacity of trials." False testimony is sometimes believed, and accurate testimony is sometimes rejected. Thus, in the view of critics of the adversary system, truth can only result as a coincidental byproduct of the process, and consequently, truth is an insufficiently valued and not necessarily attained objective of the process.

The impact of lawyers upon the process cannot be overstated. Verdicts, especially those of juries, are sometimes influenced by the divergent skills, and sometimes even personalities, of the advocates. A skillful lawyer can frequently create the appearance that a perfectly honest and accurate witness is confused or even lying. Consistent with legal and ethical requirements, skillful lawyers can block the presentation of truthful and accurate evidence. Indeed,
such amoral skills are admired by members of the bench and bar\textsuperscript{213} and highly sought after by inexperienced lawyers and students.

Additionally, while the adversary system assumes equal competence of the opposing advocates,\textsuperscript{214} this is frequently not the case.\textsuperscript{215} Particularly in criminal cases, the ability of the adversarial system to produce a just result is dubious where defense counsel lacks comparable skill and dedication to that of the prosecutor.\textsuperscript{216} I have had the simultaneous pleasure and difficulty of encountering some extremely talented and dedicated criminal defense lawyers as adversaries, but that was certainly not always the case. Assigned counsel, in particular, include some of the best and worst of the defense bar.\textsuperscript{217} Unfortunately, the extent of inadequate criminal defense representation is not insignificant.\textsuperscript{218}

The corollary of this phenomenon is the proposition that a superior performance by a prosecutor can enhance the prospect of conviction, quite independent of the merits of the case.\textsuperscript{219} In fact, prosecutors sometimes take advantage of inferior adversaries to accomplish results not otherwise attainable.\textsuperscript{220} And, under an adversary model, there is no incentive for prosecutors to rescue defendants from the inadequacies of defense counsel.\textsuperscript{221}

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  \item \textsuperscript{213} See Frankel II, supra note 137, at 1034.
  \item \textsuperscript{215} Schwartz, supra note 214, at 547.
  \item \textsuperscript{216} Goodpaster, supra note 193, at 65; Zacharias, supra note 79, at 66.
  \item \textsuperscript{217} Kaplan, supra note 5, at 187.
  \item \textsuperscript{218} See Bazelon, supra note 214, at 2; Warren E. Burger, The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?, 42 FORDHAM L. REVIEW 227, 227 (1973); Goodpaster, supra note 193, at 72-73. Judge Bazelon characterizes some assigned counsel as "courthouse regulars" who lack the motivation to make more than perfunctory efforts for limited fees, "uptown lawyers" who specialize in other areas of the law and accept appointments only out of a sense of duty, and "neophytes" who have no experience in any area of the law. Bazelon, supra note 214, at 8-13. By contrast, although many prosecutors are inexperienced, they do quickly gather specialized experience in the criminal area, and a lack of motivation is an infrequent problem.
  \item \textsuperscript{219} See Zacharias, supra note 79, at 52 & n.27.
  \item \textsuperscript{220} See FREEDMAN I, supra note 12, at 88-89; Bazelon, supra note 214, at 15. See also Kaplan, supra note 5, at 186 (suggesting that, in certain circumstances, prosecutors are more likely to bring criminal charges if they know the defendant is represented by unskilled counsel).
  \item \textsuperscript{221} See Bazelon, supra note 214, at 15. From an adversarial perspective, the only concern a prosecutor should have is that the defendant's conviction will be
Insofar as the justification for a system of dispute resolution is the discovery of truth, perhaps the best defense of the adversary system is that there appear to be no superior alternatives.\(^{222}\) Indeed, whatever one thinks of the adversary system, it is here to stay.\(^{223}\) But even assuming that the adversary system is a superior system for guiding the private practitioner, it does not necessarily follow that it is a valuable standard for prosecutorial behavior. The adversary system that prosecutors must accept as governing the world in which they function is not necessarily what they should embrace as their professional ethic.

In fact, some rationales for the adversary system have little or no application to the prosecutor. For example, one view of the adversary system is that it permits the clients to participate in the dispute resolution process.\(^{224}\) Prosecutors do not have private clients, and thus this rationale is not applicable to the government in criminal prosecutions.\(^{225}\) Another rationale frequently offered for the adversary system—particularly in the context of criminal defense—is that it functions in conjunction with the attorney-client privilege to foster unrestrained communication between defendants and their lawyers.\(^{226}\) Again, because prosecutors do not represent private clients, this rationale is not applicable to them.\(^{227}\)

overturned because of ineffective assistance of counsel. In Strickland v. Washington, 466 U.S. 668 (1984), the Court imposed upon defendants advancing such claims the dual burden of establishing, first, that counsel's performance was so defective as to overcome a strong presumption of competence, \textit{id.} at 688, 696, and second, that the defendant was prejudiced to the extent that there was a reasonable probability that the outcome would have been different but for counsel's errors, \textit{id.} at 691-92, 694. This standard makes it very difficult for defendants to advance successful claims of ineffective assistance of counsel. \textit{See, e.g.}, Goodpaster, \textit{supra} note 193, at 73. Correspondingly, this standard creates a very high threshold before adversarial prosecutors will become concerned that the ineffectiveness of defense counsel will jeopardize convictions.

\(^{222}\) \textit{See}\textsc{ LUBAN, supra} note 138, at 68, 92.
\(^{223}\) \textit{See}\textsc{ Uviller, supra} note 78, at 1074.
\(^{224}\) \textit{See}\textsc{ Stark, supra} note 73, at 972.
\(^{225}\) \textit{But see} Fisher, \textit{supra} note 11, at 231. Professor Fisher suggests that one justification for prosecutors to adopt an adversarial ethic is that it permits witnesses to "get their day in court." \textit{Id.} However, witnesses, even if they are victims of crimes, are not parties to criminal prosecutions. Moreover, in my experience, only a small percentage of witnesses for the government actually desire to testify; most are at best dutifully compliant. Finally, the disposition of the majority of criminal prosecutions by plea agreements limits Professor Fisher's rationale to a small percentage of cases.
\(^{226}\) \textit{See}\textsc{ FREEDMAN I, supra} note 12, at 79.
\(^{227}\) \textit{Id.}
So what is a prosecutor to do? In the absence of any significant external constraints upon the exercise of charging discretion, in the face of a variety of self-imposed standards available from which to choose, with the realization that certain institutional and psychological factors will inevitably push him or her to a conviction orientation, and with the comprehension that all lawyers function in a system with an overarching adversarial ethic, what should a prosecutor adopt as his or her own charging standard? Some recommendations follow in the next part of this article.

V. RECOMMENDATIONS

It is often said that the prosecutor serves a dual role, functioning both as an advocate for the government and as an administrator of justice. The prosecutor is assigned both the quasi-judicial role of protecting the innocent and the advocate's role of pursuing convictions. This presents the prosecutor with difficult questions in attempting to assign and balance these apparently conflicting roles.

Some have suggested that each of these roles assumes prominence at different stages of the criminal process, with the prosecutor exercising a judicial role in determining whether or not to prosecute, and thereafter functioning as a zealous advocate in a quest for convictions. Such a theory may have some descriptive value regarding the behavior of some prosecutors, but there is surely no reason why the prosecutor's obligation to "seek justice" should disappear once the defendant has been charged. Additional information may come to the prosecutor's attention in the serious preparation that occurs.

228. See discussion supra part I.
229. See discussion supra part II.
230. See discussion supra part III.
231. See discussion supra part IV.
232. See, e.g., Model Rules, supra note 4, Rule 3.8 cmt.; ABA Prosecution Standards, supra note 76, Standard 3-1.1(b); Edwards, supra note 5, at 511; Frampton, supra note 60, at 7; Puller & Randall, supra note 3, at 1218; Vorenberg I, supra note 8, at 1557; Donahue, supra note 163, at 407.
233. Frank & Frank, supra note 142, at 233-34; Nissman & Hagen, supra note 7, at 2; Edwards, supra note 5, at 511; Fisher, supra note 11, at 216; Frampton, supra note 60, at 7; Zacharias, supra note 107.
234. Fisher, supra note 11, at 217; Vorenberg I, supra note 8, at 1557.
immediately before trial, or even during the trial itself. Indeed, the Model Code describes the ethical prosecutor’s nonadversarial function as extending to the trial itself.237

In the absence of such a simplistic solution, the prosecutor is left with an ongoing schizophrenia, acting simultaneously as an advocate and a minister of justice. As a result, the prosecutor is faced with a dilemma. He or she must determine which role will take priority. While this dilemma is often confronted in an issue-specific fashion, it manifests itself more fundamentally in the prosecutor’s perception of his or her primary role as either a judicial officer or as a law enforcement advocate.238 The overarching ethical prescription of zealous advocacy tends to create the latter self-image,239 an image which is constantly reinforced by the forces of the adversary criminal process.240

But even if one assumes that the prosecutor is primarily a zealous advocate, there is still a question as to the identity of the prosecutor’s client. Prosecutors do not have individual, identifiable clients.241 They are lawyers for the state. As such, prosecutors represent the public interest.242 Prosecutors represent the interests of society as a whole, including the interests of defendants as members of that society.243 But without direction from a specific client, the prosecutor must make the client’s decisions; the prosecutor must define the public interest in specific cases.244

If prosecutors truly accept their obligation to define the public interest they represent, the apparent conflict between zealous advocacy on behalf of the state and “seeking justice” disappears. Neither the state nor the public interest is served if

237. Model Code, supra note 4, EC 7-13 (For the text of this section, see supra note 75.).
238. See Jay A. Sigler, The Prosecutor: A Comparative Functional Analysis, in The Prosecutor 53, 55 (William F. McDonald ed., 11 Sage Criminal Justice System Annuals, 1979) (reporting that of 36 prosecutors responding to questionnaires, 15 regarded themselves as judicial officers, 14 regarded themselves as law enforcement officers, and 7 regarded themselves as independent of both the judiciary and the executive).
239. See Zacharias, supra note 79, at 52.
240. See supra text accompanying notes 141-189.
241. Prosecutors do not represent particular individuals, including crime victims or police officers. Corrigan, supra note 78, at 537; Kress, supra note 25, at 107.
242. See Douglass, supra note 5, at 31; Edwards, supra note 5, at 511.
243. Nissman & Hagen, supra note 7, at 7; Corrigan, supra note 78, at 538-39.
the innocent are convicted.245 Thus, prosecutors who indiscriminately seek convictions violate not only the "seek justice" prong of their ethical obligation; they violate the "zealous advocacy" prong as well. Zealous advocacy must be on behalf of the client's interest, and the only legitimate interest of the prosecutor's client is assuring that justice is done.

Characterizing the prosecutor's obligation as a dual one—representing the state and "seeking justice"—suggests that the state has some interest other than justice. But this is only true if the prosecutor defines society's interests more broadly than the accomplishment of justice. However, if the prosecutor properly focuses upon the interests of society as nothing more nor less than "seeking justice," then the obligation of the prosecutor is singular and clear: it is to accomplish justice by prosecuting only the guilty.246

The admonition to "seek justice" is meaninglessly redundant if it means only that the prosecutor is prohibited from violating other, specific ethical rules.247 The task for the prosecutor is to give content to the "seek justice" admonition. Unfortunately, the dual-obligation formula for prosecutorial behavior minimizes the content of the "seek justice" prong by juxtaposing it with the "zealous advocacy" prong.

In truth, the prosecutor is instructed to "seek justice," not as a check upon his or her advocacy, but rather as a direction for its exercise. The prosecutor is commanded, by virtue of the interests he or she represents, to discriminate among those who may suffer the consequences of formal criminal accusation and possible conviction. The prosecutor, like it or not, determines the fate of many individuals accused of crimes,248 and thus, the conscientious prosecutor is the best protection against unjust accusations and convictions.249

The potential, dire consequences—even short of conviction—to the wrongfully accused have already been touched upon.250 But the most unthinkable injustice—the conviction of an innocent individual—must surely be unacceptable to the conscientious prosecutor.251 Yet cases exist where this has

245. Jonakait, supra note 168, at 551; Saltzburg, supra note 195, at 665.
246. See Zacharias, supra note 79, at 50.
248. Vorenberg I, supra note 8, at 1522.
249. Corrigan, supra note 78, at 537.
250. See supra text accompanying notes 10-16.
occurred. Such occurrences may be rare, but it is naive to believe that such cases do not go undetected and uncorrected. The fallibility of the human actors in the process—from witnesses to jurors—makes such possibilities real. Indeed, the burden placed upon the government to prove guilt beyond a reasonable doubt is a tacit acknowledgement of both the gravity and plausibility of erroneous convictions.

If the “beyond a reasonable doubt” standard is a necessary cushion against erroneous convictions by the trier of fact, then how can prosecutors, in pursuit of their obligation to “seek justice,” impose any lower standard upon themselves? Prosecutors do not serve the interests of society by pursuing cases where the prosecutors themselves have reasonable doubts as to the factual guilt of the defendants. There is surely no reason to believe the jury is better able to determine guilt or innocence than the prosecutor. The jury system may be the best available alternative for determining guilt or innocence at trial, but it does not follow that we must suffer delusions about the jury’s unassailable reliability. Prosecutors routinely report, at least privately, on jury error following acquittals. There is nothing to justify the extraordinary trust prosecutors place in those same juries when prosecutors pursue cases as to which the prosecutors themselves have reasonable doubts.

The unacceptability of deferring to the jury is further manifested by the fact that only a small percentage of cases actually proceed to trial. Most cases are disposed of by guilty pleas. Indeed, a dominant factor in prosecutorial discretion is the need to dispose of cases, and the primary vehicle to accomplish that end is plea bargaining. The same prosecutors who would defer to the jury the scrutiny of determining guilt beyond a reasonable doubt are simultaneously frustrating the jury’s prerogative by disposing of cases prior to trial. And

252. See FRANK & FRANK, supra note 142, at 31.
253. Goldstein, supra note 56, at 1153; Saltzburg, supra note 195, at 655.
254. Corrigan, supra note 78, at 540.
255. Gross, supra note 120, at 446.
256. See Kamm, supra note 148, at 303.
257. This is especially troubling given the fact that jurors sometimes trust and defer to prosecutors, and assume that prosecutors have determined—perhaps on the basis of additional information not available to the jury—that the defendant is guilty. See Gross, supra note 120, at 448. Thus, it is entirely possible that both the prosecutor and the jury will have deferred, at least in part, to the presumed independent determination of guilt made by the other.
258. Cox, supra note 18, at 391.
259. See FREEDMAN I, supra note 12, at 86-88; Alschuler, supra note 129, at 63-
because the "generosity" of plea offers is normally greatest in the cases with the least likelihood of producing convictions at trial, the greatest pressures to plead guilty will fall on those defendants who may be innocent. Prosecutors who, in their zeal to dispose of weak cases, offer seductive incentives to plead guilty while failing to satisfy themselves beyond a reasonable doubt of defendants' guilt are ignoring the danger of producing erroneous convictions in violation of their prime ethical directive.

For all of these reasons, the conscientious prosecutor, in zealous pursuit of society's interest in justice, does not and should not pursue cases unless personally satisfied beyond a reasonable doubt of the defendants' guilt. But a prosecutor need not come to this conclusion exclusively within the adversary model. In other words, while this conclusion can be derived from an identification of the legitimate interests of society as the prosecutor's client, many prosecutors more faithfully attain the goal of "seeking justice" by rejecting the adversary model entirely.

It is true that the prosecutor functions in an adversary system and is opposed by lawyers zealously advocating the private interests of their clients. It is also true that prosecution is not for the diffident. But simply because one must have adversarial skills to function effectively does not mean that one must adopt an adversary ethic. We rarely think of trial judges as adversaries, but they surely exercise adversarial skills, persuading lawyers and parties to perform certain tasks in certain ways, and defending their decisions from appellate reversal by the adversarial skills exercised in crafting their

64; Vorenberg I, supra note 8, at 1556.
260. See Utz, supra note 116, at 108.
261. Freedman I, supra note 12, at 87; Alschuler, supra note 129, at 60.
262. See Alschuler, supra note 129, at 62.
263. Freedman I, supra note 12, at 85; Freedman II, supra note 12, at 219. Professor Freedman has also advocated an ethical proscription, to be enforced with disciplinary sanctions, against prosecutors who "proceed[] with a prosecution if a fair-minded person could not reasonably conclude, on the facts known to the prosecutor, that the accused is guilty beyond a reasonable doubt." Freedman II, supra note 12, at 221. The wisdom of imposing the "beyond a reasonable doubt" standard upon prosecutors in the form of a disciplinary rule is at least questionable, as Professor Freedman has acknowledged. Id. at 221-22. Such a rule would likely expose prosecutors to disciplinary sanctions in every case which resulted in an acquittal, possibly discouraging prosecutors from pursuing difficult but meritorious cases, and also possibly influencing judges to be more reluctant to grant motions for judgments of acquittal. Id.
opinions. All of this is perfectly acceptable provided the judges are objective and fair in their decision-making.

The prosecutor, too, must exercise considerable adversarial skills, but this cannot justify assuming less than an objective posture in exercising charging discretion. The law defines guilt as that which is proved beyond a reasonable doubt. If prosecutors pursue cases without satisfying themselves beyond a reasonable doubt of the defendants' guilt, they are asking the jury to do what the prosecutors would not do themselves. This is the essence of the adversary function. But this is surely unacceptable if the prosecutor's mission is fairly and objectively to expose only the guilty to criminal sanctions.

Ultimately, the question prosecutors must ask themselves is whether they wish to function as ministers of justice, or merely as ministers of process. For many prosecutors, functioning merely as a cog in the criminal justice system is quite simply an inadequate return on their commitment. Trusting solely in the criminal justice system to protect the innocent—in the face of convincing evidence of that system's inability to do so in all cases—is too great a concession to the adversary model of behavior, a model that takes its origin and justification from the very different circumstances of the lawyer representing a private client.

Rather than mischaracterizing the public prosecutor as an adversary with additional, conflicting obligations, it would be more accurate and beneficial for prosecutors to view themselves as skilled adversaries exercising quasi-judicial functions. The accomplishment of justice should not be the fortuitous residue of the process in which the prosecutor participates; it should be the guiding principle for every aspect of the prosecutorial function. The prosecutor must accept personal responsibility for the accomplishment of justice, and the fundamental aspect of this imperative is that the prosecutor must refuse to accept the risk of conviction of individuals when the prosecutor has reasonable doubts as to their guilt.

264. See supra notes 191-198 and accompanying text.
265. See Corrigan, supra note 78, at 541.
266. In my tenure as a prosecutor, the issue materialized on several occasions, but the following situation stands clearly in my recollection. The victim, a short, handicapped gentleman in his late fifties, was working in his backyard under his car. Two men approached him, exhibited handguns, and took the victim into his otherwise unoccupied house. Once inside, the two men robbed and gratuitously beat the victim, shot him and left, apparently believing the victim to be dead. A
As discussed earlier, many prosecutors are drawn to the quasi-judicial role of the prosecutor precisely because of qualms about the adversary function of lawyers for private clients. But many do not share those qualms. And all prosecutors are subjected to influences which naturally steer them to a conviction psychology and an advocate's role. Thus, if prosecutors' offices are serious about the quasi-judicial ethic of the prosecutor, it is necessary that prosecutors be oriented to that view. Only when prosecutors are encouraged and trained to assume fully their obligation to seek justice will the best protection against unjust charges and convictions be fully

neighbor found the victim alive, an ambulance was called, and the victim ultimately survived following surgery and a two-week hospitalization. Prior to his emergency surgery, the victim described the two men, in relevant part, as being about 5'5" to 5'8" tall and in their late twenties. He also claimed to have seen one of the men playing basketball in the neighborhood prior to the crime.

About one month after the crime, with the investigation having thus far produced nothing tangible, the victim telephoned the police and reported that one of the two assailants was at that moment playing basketball at an outdoor basketball court in the victim's neighborhood. The police rushed to the neighborhood, the victim pointed out the defendant as one of his assailants, and the police arrested the defendant, a 17 year old male standing about six feet tall. The case was screened and approved by a senior prosecutor. Another prosecutor presented the case to the grand jury and obtained an indictment. The case was then assigned to me for trial.

I spoke to the victim on three separate occasions. In his own mind, his identification was unshakable. He dismissed his earlier descriptions as erroneous, claiming, quite credibly, that he could not remember his prior descriptions because of his medical distress at the time. He insisted that the prior descriptions were inaccurate for the same reason. He claimed a vivid memory of the crime and his two assailants, and described the event and the assailants in impressive detail. He would have made an excellent witness.

After a couple of nearly sleepless nights and a great deal of uncertainty, I persuaded my supervisor that we should dismiss the case. Two facts which I have not yet mentioned influenced my decision. First, the defendant had no criminal or juvenile convictions or arrests. This crime was heinous. It seemed most unlikely that an individual who could commit such a crime would not have a track record of escalating criminality. Second, the defendant was assigned a lawyer whom I regarded as minimally effective.

The case was not a strong one for the government, but it could have been won. But it was winning that frightened me. Ironically, the weakness of defense counsel made me even more reluctant about pursuing a conviction. Ultimately, my own reasonable doubts about the defendant's guilt, doubts which my supervisor shared, or at least endorsed, resulted in the dismissal.

The victim, as you might imagine, was extremely displeased. The defendant may well have been factually guilty. The adversary process was circumvented. And, in my view, justice was done.

267. See supra notes 3-6 and accompanying text.
268. See discussion supra part III.
269. Fisher, supra note 11, at 257.
effective. The prosecutor must appreciate that his or her obligation is to investigate as fully and objectively as possible. The prosecutor, especially in a horizontal case-assignment system, must accept the duty continually to reevaluate cases and reconsider charging decisions where appropriate. And the prosecutor must be on constant watch that his or her advocate's instincts do not interfere with the singular goal of accomplishing justice.

VI. CONCLUSION

Prosecutorial discretion has recently been targeted as an abuse which needs to be restrained. But any such abuses are not inherent in the exercise of prosecutorial discretion. Indeed, one of the greatest dangers to the accomplishment of justice is the failure of prosecutors to accept the extent and significance of their discretion. Charging discretion, at least in the context of case-specific evaluations, is both unavoidable and desirable.

In the exercise of their charging discretion, prosecutors must make a fundamental choice about how they view themselves and their roles. In order to fulfill their obligation to seek justice, prosecutors must shed the adversary ethic reserved for the private interest lawyer and impose upon themselves the simultaneous duty and freedom to prosecute only those who are, to the prosecutors' satisfaction, guilty beyond a reasonable doubt.

270. See Frank & Frank, supra note 142, at 32.
271. Edwards, supra note 5, at 519.
272. Corrigan, supra note 78, at 541.
273. See Fisher, supra note 11, at 201.
274. See supra notes 25-32 and accompanying text.
275. See, e.g., Utz, supra note 116, at 119.