Starr, Singleton, and the Prosecutor’s Role

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Abstract

This article discusses the lessons contained in States v. Singleton and the system that has been adopted for investigating and prosecuting high executive officers. After describing Singleton and the tumult it triggered in Part I of this Article, Part II returns to the Starr Referral and poses a question that may at first seem idle: what distinguishes Starr’s promises to Lewinsky in exchange for her testimony from the efforts he charges the President made to help find her a job? Part III of the Article broadens the focus. It argues there has been a general failure to think rigorously about the questions prosecutors face every day regarding the proper exercise of their discretion. How should prosecutors decide what charges to file? When, for example, does perjury, or obstruction of justice, warrant criminal prosecution? What role should the likely sanctions play in a prosecutor’s choice of charges?

KEYWORDS: Morrison v. Olsen, Scalia, Kenneth Starr, States v. Singleton, Singleton, Monica Lewinsky, Napoleon Douglas, prosecutor discretion

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Introduction

It has been more than a decade since Justice Scalia, dissenting alone in *Morrison v. Olson*, warned of “[t]he mini-Executive that is the independent counsel . . . operating in an area where so little is law and so much is discretion, [and] intentionally cut off from the unifying influence of the Justice Department.” Even in the best of cases, Scalia worried, “[w]hat would normally be regarded as a technical violation . . . may in his or her small world assume the proportions of an indictable offense,” and “[w]hat would normally be regarded as an investigation that has reached the level of pursuing such picayune matters that it should be concluded, may to him or her be an investigation that ought to go on for another year.”

Scalia also argued that things could easily get worse: what if the judges appointing the independent counsel “are politically partisan, as judges have been known to be, and select a prosecutor antagonistic to the administration, or even to the particular individual who has been selected for this special treatment?” The whole scheme, Scalia concluded, “invite[s] what Justice Jackson described as ‘picking the man and then searching the law books, or putting investigators to work, to pin some offense on him.’” And not just any man, but one elected by the nation as its chief executive. “[A]crid with the smell of threatened impeachment,” the independent counsel law made it too easy in Scalia’s view for “the

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2. Id.
3. Id. at 730.
4. Id. (quoting Address at the Second Annual Conference of United States Attorneys (April 1, 1940)). Jackson’s remarks, made when he was Attorney General of the United States, are reprinted as Robert H. Jackson, *The Federal Prosecutor*, 24 J. Amer. Judicature Soc’y 18 (1940).
5. Id. at 702.
President's political foes . . . to trigger a debilitating criminal investigation."  

Paging through the Referral submitted to Congress last September by Independent Counsel Kenneth Starr, Justice Scalia could be excused for feeling a little smug. So could Joe Klein, for different reasons. Understandably and quite properly, the Starr investigation has prompted reconsideration both of the independent counsel law and of President Clinton. The Referral casts neither in a flattering light, and there is room for disagreement regarding whether the law or the President emerged looking worse.

The starkest lessons contained in Starr's Referral are doubtless those about the man we twice elected president and the system we have adopted for investigating and prosecuting high executive officers. But for federal prosecutors, and for those who care about the work of federal prosecutors, the Referral and the investigation that produced it also offer less obvious lessons. I argue in this Article that among them is the need to take seriously the recent, controversial decision by a panel of the Tenth Circuit in *United States v. Singleton*, holding that federal prosecutors cannot reward witnesses with leniency — or even with recommendations for leniency — for testifying truthfully. The panel opinion was quickly vacated and the case set for rehearing *en banc*. For reasons that the Starr Referral helps to make clear, however, the initial decision deserves careful attention regardless of its ultimate fate.

After describing Singleton and the tumult it triggered in Part I of this Article, I return in Part II to the Starr Referral and pose a question that may at first seem idle: what distinguishes Starr's promises to Lewinsky in exchange for her testimony from the efforts he charges the President made to help find her a job? At bottom, I suggest, the difference cannot be simply that Starr sought

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6. *Id.* at 713.
7. OFFICE OF THE INDEPENDENT COUNSEL, Referral to the United States House of Representatives Pursuant to Title 28, United States Code, § 595(c) (1998) [hereinafter Referral].
10. This Article focuses on federal prosecutors, in part because they are the subject of this symposium, but much of what is said will obviously apply to state prosecutors as well.
11. 144 F.3d 1343 (10th Cir. 1998) (en banc).
12. See *id.* at 1361. Following the symposium at which this Article was presented, the *en banc* court reversed the panel decision. *United States v. Singleton*, 1999 WL 6469 (10th Cir. Jan. 8, 1999).
the truth, or that Starr promised only what he might have provided anyway in the normal exercise of his discretion. The difference has to be that Starr is a prosecutor, and prosecutors have a special role to play. For this answer to be fully convincing, however, the special nature of the prosecutor’s role, and the special obligations it entails, need to be taken more seriously than is now common.

In Part III of the Article I broaden my focus. I argue there has been a general failure to think rigorously about the questions prosecutors face every day regarding the proper exercise of their discretion. How should prosecutors decide what charges to file? When, for example, does perjury, or obstruction of justice, warrant criminal prosecution? What role should the likely sanctions play in a prosecutor’s choice of charges? These questions receive little academic attention. Perhaps the most important lesson of both the Starr investigation and the Singleton decision is that they deserve much more.

I. Singleton

In April 1992 — back when Bill Clinton was a Governor, Kenneth Starr was Solicitor General, and Monica Lewinsky was a college freshman — the Wichita Police Department uncovered a ring of Wichita cocaine dealers with suppliers in California. Eventually one of the dealers, Napoleon Douglas, already convicted of cocaine trafficking in Mississippi, struck a deal with the authorities in Kansas and agreed to testify against other members of the Wichita operation. Among those he helped convict was Sonya Singleton. Singleton’s handwriting was found on the paperwork for eight wire transfers of money from Kansas to California; the government alleged the funds were the proceeds of cocaine sales and were used to purchase more cocaine. Douglas bolstered the government’s case by describing how the ring operated, by tying Singleton to another alleged conspirator, Eric Johnson, and by testifying that on occasion he might have seen Singleton help move cocaine to Johnson’s car. In January 1997, a federal jury found Singleton guilty of conspiracy and money laundering, and five months later the trial judge sentenced her to just under four years in prison. If ever there was a routine money laundering case, this was it.\footnote{See 144 F.3d at 1343-44; Appellant's Brief, at 2-5; Brief of Appellee, at 2-6; Appellant's Reply Brief, at 1.}

But not on appeal. On July 1, 1998, a unanimous panel of the Tenth Circuit threw out Singleton’s conviction and ordered a new
trial.\textsuperscript{14} The decision drew little immediate attention, partly because it came the same day that a federal district judge—in a ruling later reversed on appeal—threw out Starr's tax evasion case against former Associate Attorney General Webster Hubbell, labeling the subpoena that gave rise to the charges a "quintessential fishing expedition."\textsuperscript{15} But within days the Hubbell case was old news, and the Singleton decision had jaws dropping in prosecutors' offices across the country. The Court of Appeals had concluded that the government's agreement with Douglas violated the so-called gratuity provisions of the federal bribery statute, 18 U.S.C. § 201.\textsuperscript{16} The author of the opinion was Judge Paul Kelly Jr., a graduate of the law school hosting this symposium, and a Bush appointee with impeccable Republican credentials.\textsuperscript{17}

The core provisions of the bribery statute make it a felony, punishable by up to fifteen years of imprisonment, to "corruptly" give, offer, or promise "anything of value" to a public official or a witness, with the intent "to influence" either an "official act" or the witness's testimony.\textsuperscript{18} Similar penalties are prescribed for an official or witness who solicits or accepts such payment.\textsuperscript{19} These are the offenses that judges and lawyers typically call "bribery."\textsuperscript{20} The "gratuity" provisions at issue in Singleton prescribe shorter sentences, up to two years, for giving, offering, or promising "anything of value" to an official "for or because of an official act," or to a witness "for or because of" his or her testimony.\textsuperscript{21} Again, identical penalties are prescribed for officials or witnesses who solicit or accept such payments.\textsuperscript{22} Judge Kelly reasoned for the panel

\begin{itemize}
\item \textsuperscript{14} See Singleton, 144 F.3d at 1361.
\item \textsuperscript{16} See Singleton, 144 F.3d at 1352.
\item \textsuperscript{17} See 2 ALMANAC OF THE FEDERAL JUDICIARY, 10th Circuit, 10-11 (1998). The other two members of the panel were Chief Judge Stephanie K. Seymour, appointed by President Carter, and Judge David M. Ebel, appointed by President Reagan. See id. at 3, 8.
\item \textsuperscript{18} 18 U.S.C. § 201(b)(1), (3) (1998).
\item \textsuperscript{19} See id. § 201(b)(2), (4).
\item \textsuperscript{20} E.g., United States v. Gatling, 96 F.3d 1511, 1522 (D.C. Cir. 1996) (holding that "accepting money with the specific intent of performing an official act in return" is bribery).
\item \textsuperscript{21} 18 U.S.C. § 201(c)(1)(A), (2). "An aphorism sometimes used to sum up the distinction between a bribe and a gratuity is that a bribe says 'please' and a gratuity says 'thank you.' . . . Another way of looking at it is that a bribe purchases a service (or at least is intended to do so) and is therefore bargained-for; a gratuity is more in the nature of a tip (hence the name) because it is not bargained for." UNITED STATES DEP'T OF JUSTICE, CRIMINAL RESOURCE MANUAL § 2044 (1998).
\item \textsuperscript{22} See id. § 201(c)(1)(B), (3).
\end{itemize}
that the government's promises were "things of value" to Douglas, and that they had been made explicitly "for" his testimony. The promises therefore violated not only the plain terms of the statute, but also the underlying policy against "buying" testimony.\textsuperscript{23}

The promises Douglas received were hardly unusual. In exchange for his guilty plea and his agreement to testify truthfully, the government pledged not to prosecute Douglas on other related charges, and to tell the sentencing court and the Mississippi parole board about "the nature and extent" of his cooperation.\textsuperscript{24} One former United States Attorney accurately described these terms as "plain vanilla."\textsuperscript{25} If the agreement with Douglas was illegal, so were the agreements with almost every other cooperating defendant in a federal criminal case, including, as we will see, Monica Lewinsky. Not only that, but since violations of the bribery law are felonies, \textit{Singleton}, as the Justice Department was quick to point out, made "a criminal out of nearly every federal prosecutor."\textsuperscript{26}

Although in some quarters this last consequence occasioned undisguised glee, the chief reactions to the decision were indignation, ridicule, and disbelief.\textsuperscript{27} And, indeed, the breathtaking disruption promised by \textit{Singleton} is the most convincing sign that the panel misread the statute. Prosecutors have long traded leniency for testimony,\textsuperscript{28} courts generally have smiled on the practice,\textsuperscript{29} and most everyone — Congress included — appears to have assumed its legality.\textsuperscript{30} Against this background, the government is on its strong-
est footing in arguing that Congress should not be deemed "without a clear and explicit statement" to have declared the practice criminal.31

The Singleton panel, moreover, is on its weakest footing in suggesting that Congress has in fact provided such a clear and explicit statement. The statute prescribes criminal punishment for "[w]hoever . . . directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness . . . ."32 This language, Judge Kelly declared, "could not be more clear,"33 but of course it could. The statute could provide explicitly that it applies to prosecutors acting in their official capacities as well as to private parties, and to promises of leniency as well as to other forms of consideration. It says neither of these things.

Nor, however, does it say the opposite, and what the statute does say is sufficiently broad to reach cooperation agreements. Judge Kelly's best argument for taking Congress at its word was not the clarity of the gratuity prohibition, but the Supreme Court's recent penchant for interpreting statutes by reference to their "plain language."34 The most articulate champion of that approach on the

lines allow credit for "substantial assistance"). The Singleton panel reasoned that under the immunity statute prosecutors do not "give immunity directly for the witness's testimony"; instead, a unilateral grant of immunity "removes the witness's testimonial privilege so the ordinary compulsion may be brought to bear to require the witness to testify." 144 F.3d at 1348. There may be something to this distinction: a witness with irrevocable "statutory immunity" may not have the same motive to please prosecutors as a witness who has entered into a cooperation agreement, with benefits conditioned on "truthful" testimony. See Hughes, supra note 28, at 23-40. The panel further reasoned that "substantial assistance" should be interpreted to exclude testimony. Singleton, 144 F.3d at 1355. Here the panel's reading seemed strained. As the government later pointed out, "most cooperators can substantially assist a 'prosecution' — as opposed to an 'investigation' — only by testifying." Supplemental Brief of the United States at 5. United States v. Singleton, 144 F.3d 1343 (10th Cir. 1998) (No. 97-3178). The "substantial assistance" provisions obviously fall far short of an explicit congressional endorsement of rewarding testimony with leniency, but — like the immunity statute — they do seem to reflect a general view of the practice as unproblematic. The Singleton panel did not contest this point, but reasoned that the wording of the bribery statute was sufficiently clear to make any such background understandings irrelevant.

31. Supplemental Brief of the United States at 2, United States v. Singleton, 144 F.3d 1343 (10th Cir. 1998) (No. 97-3178); see also United States v. Guillaume, 13 F. Supp. 2d 1331, 1335 (S.D. Fla. 1998) (refusing to follow Singleton, because "if Congress had intended to eliminate a procedure so well-established, it would have done so in clear, unambiguous terms").
33. Singleton, 144 F.3d at 1345.
34. Id. at 1344 (quoting Ardestani v. Immigration and Naturalization Service, 502 U.S. 129, 135 (1991)).
Court has been Justice Scalia, and the *Singleton* panel drew some of its strongest support from his majority opinion earlier the same year in *Brogan v. United States*. In *Brogan*, the Supreme Court refused to exempt simple denials of wrongdoing from the federal prohibition on false statements to government officials. In so doing, the Court rejected the notion "that criminal statutes do not have to be read as broadly as they are written." Justice Scalia explained for the Court that "it is not, and cannot be, our practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy."

Judge Kelly quoted all of this, as well he might. A small but considerable part of the glee following the panel's decision arose from speculation among observers unfriendly to Justice Scalia about the quandary in which the case might place him. The independent counsel law was not the only chicken coming home to roost this past year. A colleague of mine, more sympathetic to Scalia, confessed to me that *Singleton* was the kind of decision that "makes me sorry I'm a textualist." Strikingly, the government's supplemental brief in *Singleton*, seeking to overturn the panel decision, did not even try to distinguish *Brogan*, or any of the other "plain language" decisions cited by Judge Kelly. Instead, it just ignored them.

Notwithstanding the difficulty these cases create for the government, almost no one expected the panel decision in *Singleton* to survive long — if the Tenth Circuit failed to reverse it, the Supreme Court would; and if not the Supreme Court, then Congress. The panel's broad, literal reading of the ban on witness gratuities simply created too many oddities, and not only for prosecutors. The panel's reasoning made criminals not just of any prosecutor who ever traded leniency for cooperation, but also of any judge who ever lightened a defendant's sentence "because of" the defendant's

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38. *Id.* at 809.
39. *See* Singleton, 144 F.3d at 1345.
40. *See*, e.g., United States v. Eisenhardt, 10 F. Supp. 2d 521, 521-22 (D. Md. 1998) (calling *Singleton* "amazingly unsound, not to mention nonsensical," and finding the odds that the Supreme Court would reach a similar result "about the same as discovering that the entire roster of the Baltimore Orioles consists of cleverly disguised leprechauns"). In fact, the panel decision in *Singleton* was reversed in January 1999 by the Tenth Circuit sitting *en banc*. Only the three members of the original panel dissented. *See* United States v. Singleton, 1999 WL 6469, at *12 (10th Cir. Jan. 8, 1999).
truthful testimony. As the panel pointed out, the gratuity prohibition can be violated without a *quid pro quo*; the statute "prohibits even the rewarding of testimony after it is given." These considerations probably will disconcert even judges unfazed by the government’s suggestion that, without cooperation agreements of the kind invalidated in *Singleton*, it "could not enforce the drug laws, could not prosecute organized crime figures under RICO," and might have lost the Oklahoma City bombing cases.

The weak points of *Singleton*, and its poor prognosis as precedent, might tempt us to dismiss the case as a passing curiosity. That, however, would be unfortunate, because Judge Kelly’s opinion raises questions that deserve greater attention. One of these, to which I have already alluded, is how seriously to take the Supreme Court’s recent endorsements of “plain language” as the be-all and end-all of statutory interpretation. Another, to which I wish now to turn, is how prosecutors can defend the propriety, and not just the legality, of trading leniency for testimony.

This question arises because a good portion of the statutory analysis in the *Singleton* panel opinion was informed by underlying concerns of policy. Judge Kelly reasoned that the gratuity ban reflects a congressional judgment “that justice is undermined by giving, offering, or promising anything of value for testimony.” Moreover, he explained:

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42. *Singleton*, 144 F.3d at 1355.

43. Supplemental Brief of the United States at 15-16, *Singleton*, 144 F.3d 1343 (No. 97-3178). In addition, even if prosecutors are deemed to violate the gratuity ban when they reward testimony with leniency, one may question whether evidentiary suppression is the appropriate remedy. See id. at 19-20. That question could easily be the subject of a separate article, and I will not pursue it at length here. But it is worth noting, as Eugene Volokh has pointed out to me, that Congress may have couched the gratuity ban so broadly in part because the sole anticipated remedy was criminal prosecution, which Congress counted on prosecutors to invoke only in deserving cases. Of course, this kind of reliance on prosecutors has its own problems. See John Shepard Wiley, Jr., *The New Federal Defense: Not Guilty By Reason of Blamelessness*, 35-39 (July 31, 1998) (forthcoming in Virginia Law Review). These problems become particularly acute when prosecutors themselves are allegedly violating a criminal statute *en masse*. Ultimately, therefore, the remedy question in *Singleton* may be closely connected with the questions animating the Independent Counsel law, Justice Scalia’s dissent in *Morrison v. Olson*, 487 U.S. 654, 732 (1988), and this Article: how should prosecutors be held accountable, and to what?

44. 144 F.3d at 1346.
[i]f justice is perverted when a criminal defendant seeks to buy testimony from a witness, it is no less perverted when the government does so. . . . The judicial process is tainted and justice cheapened when factual testimony is purchased, whether with leniency or money.45

Indeed, Judge Kelly suggested, “[b]ecause prosecutors bear a weighty responsibility to do justice and observe the law in the course of a prosecution, it is particularly appropriate to apply the strictures of [the gratuity prohibition] to their activities.”46 He buttressed this last point with language from Justice Sutherland’s majority opinion in Berger v. United States47 and the dissent by Justice Brandeis in Olmstead v. United States.48 Olmstead, of course, is where Brandeis warned famously that “[i]f the Government becomes a lawbreaker, it breeds contempt for law.”49 The remarks Judge Kelley borrowed from the majority opinion in Berger are almost as familiar, particularly to federal prosecutors. Nonetheless I reprint them in full here, because we will return to them later:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape nor innocence suffer.50

I will argue below that the prosecutor’s “twofold aim,” if taken seriously, hurts Judge Kelly’s argument more than it helps. The “peculiar and very definite sense” in which prosecutors are “servant[s] of the law” is in fact the best reason for allowing them to reward witnesses in ways that ordinary lawyers may not. To see why, it will help to return to the Starr Referral.

II. Napoleon Douglas and Monica Lewinsky

Among the acts by President Clinton that the Referral suggested “may constitute grounds for impeachment” were his efforts to help Monica Lewinsky find a job while discovery was underway in the

45. Id. at 1346-47.
46. Id. at 1347.
47. 295 U.S. 78 (1935).
48. 277 U.S. 438 (1928).
49. Id. at 485.
Paula Jones case. 51 Starr suggested that these efforts may have constituted “witness tampering,” depending on the President’s intent: “The question . . . is whether the President’s efforts in obtaining a job for Ms. Lewinsky were to influence her testimony or simply to help an ex-intimate without concern for her testimony.” 52 And Starr concluded that the President’s intent appeared to have been criminal: “There is substantial and credible information that the President assisted Ms. Lewinsky in her job search motivated at least in part by his desire to keep her ‘on the team’ in the Jones litigation.” 53

Of course Starr’s office made its own considerable efforts to get and to keep Lewinsky “on the team.” In return for her written agreement “to cooperate fully,” by among other things “testify[ing] truthfully,” the Independent Counsel gave her use immunity (a promise not to use her statements, or evidence derived from her statements, against her in any criminal case), transactional immunity (a promise not to prosecute her for any previous offenses within Starr’s jurisdiction), and transactional immunity for her parents (conditioned on their own cooperation). 54 These concessions went beyond the “plain vanilla” inducements offered to Napoleon Douglas in the Singleton case. Why were they permissible, if the President’s help was, in Starr’s view, not only felonious, but possible grounds for impeachment?

A. Truth and Consequences

The simplest response would be that Starr wanted the truth, and the President allegedly wanted perjury. Under the criminal statutes on which Starr relied, that answer may suffice. The “Legal Reference” Starr submitted along with his Referral 55 makes no mention of the bribery statute, 18 U.S.C. § 201, and suggests instead that Clinton’s “witness tampering” violated two other federal statutes: 18 U.S.C. §§ 1503 and 1512. 56 The pertinent part of section 1512 prohibits efforts to “corruptly persuade[ ] another person . . . with intent to . . . influence, delay, or prevent the testimony of

51. Referral, supra note 7, at 104-05.
52. Id. at 113-14.
53. Id. at 114.
55. Id. app., at 263-375.
56. Id. at 329-47.
any person in an official proceeding."\textsuperscript{57} The statute explicitly provides an affirmative defense to any defendant who can show by a preponderance of the evidence that his or her conduct "consisted solely of lawful conduct," and that his or her "sole intention was to encourage, induce or cause the other person to testify truthfully."\textsuperscript{58} Section 1503 bars, among other things, "corruptly . . . endeavor[ing] to influence, obstruct, or impede, the due administration of justice."\textsuperscript{59} This statute contains no affirmative defense like the one set out in section 1512. However, the term "corruptly" — generally defined as "having an evil or improper purpose or intent"\textsuperscript{60} — may limit the statute to efforts to suppress the truth. This evidently is Starr's reading, and it finds some support in the cases.\textsuperscript{61}

This reading, though, is neither obvious nor uncontested,\textsuperscript{62} and it creates some oddities. To begin with, it appears to make the affirmative defense superfluous in section 1512, which also applies only to defendants who act "corruptly." It also sits in some tension with the use of the same term, "corruptly," in the core, bribery provisions of section 201. No one suggests that a defendant charged with bribing a judge must be shown to have sought an erroneous or unjust ruling: buying a judge's ruling is criminal regardless of whether the ruling is good or bad. Why should it be otherwise with testimony?\textsuperscript{63}

Moreover, unlike the bribery provisions of section 201, the gratuity provisions of that same statute — the provisions invoked by Sonya Singleton — do not require proof that the defendant acted

\begin{thebibliography}{99}
\bibitem{58} Id. § 1512(d).
\bibitem{59} Id. § 1503.
\bibitem{60} United States v. Haldeman, 559 F.2d 31, 115 n.229 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977), cited in Referral, supra note 7, app., at 322.
\bibitem{61} See Referral, supra note 7, app., at 329-35; see also, e.g., United States v. Tranakos, 911 F.2d 1422, 1432 (10th Cir. 1990); United States v. Davis, 752 F.2d 963, 973 n.11 (5th Cir. 1985).
\bibitem{62} See, e.g., United States v. Donathan, 65 F.3d 537, 540 (6th Cir. 1995) (suggesting that a payment to a witness is made "corruptly" if it is intended to influence the witness's testimony).
\bibitem{63} Starr himself argues that even a defendant "acting from a seemingly benign motive," like the desire to protect a relative, can violate section 1503. Referral, supra note 7, app., at 322-24 (citing United States v. Faudman, 640 F.2d 20, 21 (6th Cir. 1981)). He also observes that "[e]ven evasive testimony which is literally true may form the basis for an obstruction charge, though this is an unusual occurrence." Referral, supra note 7, at 325, app. (citing United States v. Spalliero, 602 F. Supp. 417 (C.D. Cal. 1984)). Neither of these propositions, of course, necessarily implies that eliciting forthright testimony can constitute obstruction of justice. But they make it less obvious why such activity cannot constitute obstruction.
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“corruptly.”64 As the Singleton panel stressed, those provisions are violated whenever “anything of value” is offered or provided to a witness “for or because of” testimony.65 One federal appellate court has interpreted this language to ban only payments for false testimony,66 but Judge Kelly seems right to have rejected that reading as ill considered.67 If it is awkward to read a falsity requirement into the term “corruptly,” it is even more difficult to read it into the stripped-down terms of the gratuity prohibition. Perhaps with an eye to other prosecutions, even the government did not argue in Singleton that the law generally permits fact witnesses to be paid for truthful testimony.68

In any event, even if the law does permit it, the ethical rules governing attorneys clearly do not.69 The reason is obvious: even payments nominally made for honest testimony can encourage a witness to lie or to shade the truth. If a defense attorney pays for testimony from the officer who arrested his client, he cannot escape professional sanctions by claiming that he asked only for the truth. Here, for example, is what the Illinois Supreme Court has had to say on the subject:

[A] policeman would be encouraged to change the “truth” if the lawyer is permitted to pay him for what the lawyer believes is the truth. It is realistic to assume that defense lawyers will not

64. See 18 U.S.C. § 201(c) (1994).
65. See Singleton, 144 F.3d at 1348-50.
66. Rejecting a vagueness challenge to the witness gratuity provisions of 18 U.S.C. § 201, the Eleventh Circuit declared that “[g]iving something of value ‘for or because of’ a person’s testimony obviously proscribes a bribe for false testimony; persons of ordinary intelligence would come to no other conclusion.” United States v. Moody, 977 F.2d 1420, 1425 (11th Cir. 1992). Later the court cited this language when refusing to grant relief to a civil litigant whose opponent allegedly had paid a fact witness. See Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Ass’n, 117 F.3d 1328, 1335 n.2 (11th Cir. 1997).
67. See Singleton, 144 F.3d at 1358. But cf. United States v. Reid, 19 F. Supp. 2d 534, 537 (E.D. Va. 1998) (refusing to follow Singleton, in part because “most defendants who make plea agreements with the Government are made to understand that the agreements are not based on the conviction of anyone, rather they are based on truthful testimony”).
68. The prohibitions in the federal bribery statute specifically exempt “the payment or receipt of witness fees provided by law, or the payment, by the party upon whose behalf a witness is called and receipt by a witness, of the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such trial, hearing, or proceeding, or in the case of expert witnesses, a reasonable fee for time spent in the preparation of such opinion, and in appearing and testifying.” 18 U.S.C. § 201(d) (1994).
69. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(b) & cmt. (1998); RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA Rule 5-310(B); FLA. STAT. ANN. BAR Rule 4-3.4(b).
pay policemen for "truth" which does not favor their clients. Those policemen who are less resistant to corrupting influences will soon discover how to change the truth to their economic benefit. . . . [W]e will not tolerate payment of any sum of money by an attorney to witnesses for the opposition to secure or influence testimony, whether it be for the purpose of securing truthful testimony or otherwise.\footnote{\protect{70. In re Kien, 372 N.E.2d 376, 379 (Ill. 1977). Kien was suspended from practice for 18 months after paying $50 for a police officer's testimony. He claimed the officer requested the payment in exchange for testifying truthfully, and the court appeared to view the claim as credible. \textit{See also} In re Howard, 372 N.E.2d 371, 375 (Ill. 1977) ("The damage that would immediately accrue to our system of justice, should it be acceptable to pay for truthful testimony, is manifest.").}}

If bartering with police officers for truthful testimony risks perjury, surely the risks are greater when bartering with criminal suspects. The problem is familiar, and Graham Hughes has described it well.\footnote{\protect{71. \textit{See} Hughes, \textit{supra} note 28.}} A witness cooperating with the prosecution, he points out, "will know that he has no chance to gain immunity or leniency unless the information that he initially furnishes appears weighty enough to aid in convicting a target."\footnote{\protect{72. \textit{See id.} at 39. Testifying to the grand jury about her written proffer to the Independent Counsel, Lewinsky explained, \"I had written this proffer obviously being truthful, but I think that when I wrote this, it was my understanding that this was to bring me to the step of getting an immunity agreement, and so I think that sometimes to — that I didn't know this was going to become sort of this staple document, I think, for everything, and so there are things that can be misinterpreted from in here, even from me re-reading it, the conditions — some of the conditions maybe under which I wrote it.\" Testimony of Monica S. Lewinsky at 85, In re: Grand Jury Proceedings (D.D.C.), Aug. 20, 1998, \textit{reprinted in Referral, supra} note 7, Document Supplement, Part B, at 1057, 1141.}} Conditioning immunity or other benefits on truthfulness then gives him a powerful reason to stick to his initial story:

At an early stage he almost certainly will testify before a grand jury. If this testimony differs in any significant way from the information he gave the police and the prosecutor, he may lose immediately any expectation of leniency or immunity, since it logically follows that either the information tendered to the police or the grand jury testimony was false. Similarly, if his testimony at trial differs either from the information tendered or from his grand jury testimony, he risks losing the benefits of the bargain and also risks prosecution for perjury.\footnote{\protect{73. Hughes, \textit{supra} note 28, at 39.}}

The "healthy sounding promise to tell the truth,"\footnote{\protect{74. \textit{Id.}}} coupled with the initial need to offer valuable information, thus can easily pres-
sure a cooperating witness to give slanted testimony. The pressure obviously is increased if the benefits from the agreement depend on how much help the witness winds up providing. This is typically the case with witnesses like Napoleon Douglas, who plead guilty to reduced charges; it is less of a problem with immunized witnesses, like Monica Lewinsky. Lewinsky, on the other hand, nicely illustrates three other factors that can boost the risks associated with trading leniency for “truthful” testimony. First, the dangers of perjury plainly are heightened when dealing with a witness suspected of previous perjury. Second, the pressure is stronger on a cooperating witness to stick to her initial story if the deal she strikes with prosecutors — like Lewinsky’s agreement with Starr — makes clear that she is expected to do so. Finally, like any source of bias, inducements offered by prosecutors are more likely to warp a witness’s testimony when the facts at issue are not black-and-white, like whether Napoleon Douglas saw Sonya Singleton handle cocaine, but necessarily involve interpretation, like whether Monica Lewinsky had an implicit “understanding” with President Clinton “to jointly conceal the truth of their relationship from the judicial process.”

If Starr’s promises to Lewinsky share none of the evil of the President’s alleged efforts to find her a job, it thus cannot be simply because Starr bargained for the truth. Paying for honest testimony is not as bad as paying for perjured testimony, but as a general matter it is bad enough. We do not allow defense attorneys to pay police officers to testify truthfully about the circumstances surrounding arrests. Why are prosecutor’s promises to cooperating defendants different?

75. See Agreement, supra note 54, ¶ 1(D) (“Ms. Lewinsky ... represents that the statements she made during [her] proffer session were truthful and accurate to the best of her knowledge. She agrees that during her cooperation, she will truthfully elaborate with respect to these and other subjects.”); Lawrie Mifflin, Free to Speak, Sort Of, Lewinsky Gives a Long-Sought Interview, N.Y. TIMES, Feb. 23, 1999 (reporting that Starr permitted Lewinsky to talk to Barbara Walters only on the condition that Lewinsky not contradict any of her grand jury testimony).

On the other hand, unlike cooperation deals which purport to make prosecutors the sole judges of truthfulness, see Hughes, supra note 28, at 38 nn.143-44, Starr’s agreement with Lewinsky permits him to prosecute her if he first obtains a finding from the District Court that she “has intentionally given false, incomplete, or misleading information or testimony ... .” Agreement, supra note 54, ¶ 3. But the agreement is ambiguous as to whether Starr may revoke his promises only in this manner. More importantly, if Lewinsky strays from her proffer a showing of dishonesty will be straightforward: either the proffer or the later testimony must be false. And in such circumstances it will be Starr’s decision whether to seek to abrogate the agreement.

76. Referral, supra note 7, at 105.
B. The Difference that Money Makes

One possible answer is that prosecutors tend to offer different kinds of benefits. Neither Douglas nor Lewinsky was paid anything; instead they were simply promised particular exercises of prosecutorial discretion. Douglas was promised he would not be charged with particular offenses, and that prosecutors would take the initiative to inform the sentencing court and the Mississippi parole board about the assistance he provided. Lewinsky was promised that neither she nor her parents would be prosecuted by the Independent Counsel, and that the information and testimony she provided could not be used against her in any criminal prosecution. In both cases, we might say, prosecutors made promises only about how they would carry out their ordinary responsibilities. Perhaps that should make all the difference.

My colleague Daniel Lowenstein has suggested that bribery laws should not be read to prohibit the kinds of political deals “that are inevitable by-products of valued features of the system.”77 Those deals include, he argues, most exchanges of one political act for another political act: for example, a union’s endorsement in return for a legislator’s vote, or a legislator’s vote on one bill traded for another legislator’s vote on a separate bill. Lowenstein contends that bartering of this variety — unlike cash payments for votes — is either part and parcel of, or too hard to tell apart from, the normal give-and-take of politics, the kinds of pressures to which we want politicians to respond.78 We might be tempted to distinguish similarly between testimony sold for money (or help getting a job), and testimony traded for actions within the framework of the legal system, (actions that we think should take testimony into account).79 No just and sensible prosecutor, we might reason, could ignore Lewinsky’s candor before the grand jury in deciding whether to charge her, or refuse to report Douglas’s cooperation to his parole board. Perhaps there is not much wrong with formalizing these rewards. Of course, making the exchange explicit could exacerbate the risk that a witness will lie or shade the truth to please prosecutors. But the marginal risk might be thought more acceptable than the costs of trying to suppress agreements that arise naturally from our system of prosecutorial discretion.

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78. Id. at 845-50.
79. Lowenstein himself suggested this analogy to me.
The Justice Department never advanced this argument in Singleton, and it is easy to see why. To begin with, it is hard to square with the relevant statutory language, which broadly prohibits compensating testimony with "anything of value."\(^{80}\) Lowenstein argues that offers arising out of everyday politics are not made "corruptly,"\(^{81}\) but, as we have seen, the term "corruptly" is not found in the federal ban on witness gratuities.\(^{82}\)

This difficulty could be overcome by legislation, or perhaps by a creative construction of "anything of value." A deeper problem is that the exception we are considering — allowing prosecutors to promise what we would want them to consider giving anyway — would not reach many of the inducements provided to cooperating witnesses. It probably would not reach Starr’s promise not to prosecute Lewinsky’s parents: it is hard to argue that any decent prosecutor weighing an indictment must take into account the candor shown by the target’s child. It certainly would not reach the monetary incentives the government sometimes finds necessary to provide to witnesses, particularly in high-profile cases.\(^{83}\) Nor would it reach the more humdrum efforts prosecutors make daily to keep witnesses “on the team”: transferring prisoners to nicer institutions, obtaining work permits for undocumented aliens, etc. Anyone who wants these sorts of inducements to continue will not be satisfied with a rule that permits the government to bargain for testimony only by committing to normal exercises of prosecutorial discretion.

Nor, in truth, will the rule likely satisfy those happy to limit cooperation agreements to the “plain vanilla” terms offered Napoleon Douglas. For extending Lowenstein’s approach from political bribery to witness gratuities is not as simple as it looks. In the first place, there is the problem of equity. Prosecutorial discretion is exercised by prosecutors; defense attorneys have no equivalent way of rewarding testimony through the legal system itself. Occasionally two defendants may be able to swap favorable testimony, but this will be rare. Unless there is some basic difference between prosecutors and defense attorneys — a matter to which I will return momentarily — it seems dangerously unfair to allow testi-

\(^{80}\) 18 U.S.C. § 201(c).

\(^{81}\) Lowenstein, supra note 77, at 845-50.

\(^{82}\) Nor, as Lowenstein notes, is it found in the ban on gratuities to public officials “for or because of any official act.” 18 U.S.C. § 201(c)(1); see Lowenstein, supra note 77, at 797.

mony to be rewarded, and potentially biased, only with favors in the hands of prosecutors. It is bad enough to run the risk of perjury; it is even worse to run the risk only in favor of one side.

More fundamentally, give-and-take indeed may be the heart of politics, but it is far from obvious that it must form part of criminal adjudication. So there is an element of question begging in the proposition that prosecutors should be able to secure testimony by promising "normal" exercises of their discretion. Not everyone agrees that fair-minded prosecutors ordinarily should take into account how helpful or honest a suspect's testimony has been when deciding whether to file charges. Judge Kelly plainly does not agree, and he is not alone. If it is permissible for prosecutors to reward truthful testimony with leniency, it cannot be simply because the practice, minus the quid-pro-quo, is "normal." The question is whether it should be normal.

C. The "peculiar... servant of the law"84

If the prosecutors' promises to Douglas and Lewinsky differ critically from a defense attorney's payment to a police officer, or from the President's alleged efforts to find Lewinsky a job, it cannot be simply because the prosecutors seek the truth. Defense attorneys are not allowed to pay for truthful testimony. Nor can the difference be that prosecutors offer immunity instead of money. That distinction is too arbitrary — and underinclusive to boot. The difference is neither what is bargained for, nor what is bargained with. It is who does the bargaining.

Why should prosecutors have a freedom denied to defense attorneys, particularly a freedom that threatens to bias testimony in one direction? I think the answer is that prosecutors serve a different role and shoulder different responsibilities: they represent not "an ordinary party to a controversy," but "a sovereignty... whose interest... is not that it shall win a case, but that justice shall be done."85 And I think this answer, as hoary as it sounds, has implications that are not always recognized. But before I discuss these, I need to dispose of two red herrings.

The first is that prosecutors should be allowed to barter for testimony because they are required to reveal what they have promised. The government raised this claim in Singleton: "Unlike defense lawyers or other members of the public, prosecutors have

85. Id.
an affirmative obligation to disclose benefits they confer on a witness, and defendants are entitled to cross-examine witnesses concerning any benefits they received from the government. This is true, and perhaps it should inform interpretation of the statutory ban on witness gratuities. But as a matter of policy the government's discovery burdens offer little reason to continue to allow prosecutors but not defense attorneys to reward witnesses. If defense attorneys could pay for testimony, most would gladly assume the obligation to disclose the payments.

The other red herring is simple necessity. This claim, too, was raised in Singleton. The government noted that it "relies on witnesses who testify in return for leniency in literally thousands of cases each year, including major cases such as the Oklahoma City bombing prosecutions." Without this testimony, the government argued, it "could not enforce the drug laws, could not prosecute organized crime figures under RICO, and could not prosecute many other cases 'of such a character that the only persons capable of giving useful testimony are those implicated in the crime.'"

Although unproven, this claim also may be true. It certainly has been conventional wisdom for generations. The problem, again, is that by itself it cannot justify different rules for prosecutors and defense attorneys. Defense attorneys, too, might be able to obtain more candid and more complete testimony, from law enforcement officers as well as other witnesses, if they were allowed to pay for it. Defense attorneys cannot claim that the missing testimony cripples law enforcement, but they can argue credibly that it would assist justice. And we ordinarily do not take the position that, in the interest of law enforcement, evidence too unreliable to be used by criminal defendants may nonetheless be used by prosecutors.

The government's claim of necessity becomes persuasive only when it is coupled with recognition of the distinctive responsibili-

86. Supplemental Brief of the United States at 15, United States v. Singleton, 144 F.3d 1343 (10th Cir. 1998) (No. 97-3178) (citing Giglio v. United States, 405 U.S. 150 (1972); Davis v. Alaska, 415 U.S. 308 (1974)). See also United States v. Reid, 19 F. Supp. 2d 534, 537 (E.D. Va. 1998) (refusing to follow Singleton, in part because “disclosure of plea agreements to defense before trial, cross-examination of cooperating witnesses, and jury instructions all provide opportunity to ferret out false testimony that an interested witness might give because of a government promise”).
88. Id. (quoting Kastigar v. United States, 406 U.S. 441, 446 (1972)).
89. That contention will be plausible even when their clients are guilty, because we rely on suppression of evidence in criminal cases to deter violations of the Fourth and Fifth Amendments.
ties of prosecutors. Unlike defense attorneys, prosecutors are not simply advocates, nor should they be. They are and should be adjudicators as well as litigants, and their "twofold aim . . . is that guilt shall not escape nor innocence suffer." The notion that prosecutors serve a different role than ordinary advocates can sound like an embarrassing homily. When invoked to justify special powers for prosecutors, it can also sound self-serving. This may be why the Justice Department did not stress the point in Singleton. But it is manifestly true that prosecutors have different obligations than defense attorneys, and the differences have important implications. Inattention to those implications is what has made a bromide of the prosecutor's "twofold aim."

Judge Kelly, it may be recalled, reasoned that the special role of prosecutors was all the more reason they should not give rewards for testimony: "[b]ecause prosecutors bear a weighty responsibility to do justice and observe the law in the course of a prosecution, it is particularly appropriate to apply the strictures of [the gratuity prohibition] to their activities." This works as a rhetorical flourish, but not as a serious argument. No one contends that prosecutors should break the law. Instead, the question is what the law is with respect to prosecutors. After all, judges have, if anything, an even weightier responsibility than prosecutors "to do justice and observe the law." But not even the Singleton panel suggested that federal law bars sentencing judges from taking into account a defendant's candor on the witness stand, despite the fact that, as we have seen, the plain language of 18 U.S.C. § 201 - "whoever . . . gives . . . anything of value" - applies to judges no less than to prosecutors. Of course judges typically do not promise particular sentences in exchange for testimony, but, as the Singleton panel stressed, the statute "prohibits even the rewarding of testimony after it is given." "One obvious purpose," Judge Kelly explained, "is to keep testimony free of all influence so that its truthfulness is protected." But even he seemed to recognize that rewards from judges are different, notwithstanding their preeminent duty "to do justice and observe the law." Rewards from judges are less objec-

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92. Singleton, 144 F.3d at 1347.
93. Id. at 1355.
94. Id. at 1350 (emphasis added).
tionable precisely because judges are assumed to be impartial. We trust them to reward true candor, not partisanship.

Prosecutors of course are not as impartial as judges, nor are they asked to be. But they are asked to be more impartial than defense attorneys. If that request is taken seriously — if prosecutors value justice above convictions, and truthful testimony above helpful testimony — then they may sensibly be granted some tools denied to defense attorneys. The point is not that prosecutors are more ethical than defense attorneys, but that their ethical obligations are different.

Many people scoff at the notion that prosecutors have a “twofold aim.” Prosecutorial impartiality, they suggest, is an oxymoron, an institutional impossibility. If these skeptics are right, allowing prosecutors but not defense attorneys to pay for testimony cannot be justified. But like most prosecutors and former prosecutors, I think the skeptics are wrong.

This is not to say, though, that prosecutors are always or even generally as impartial as they should be. In the heat of litigation, facing zealous defense counsel, it can be hard not to think simply as an advocate. And when a witness seeks leniency in exchange for damning evidence against the defendant, it can be tempting to leave credibility assessments to the jury. Nor is this simply a matter of getting caught up in the competitive nature of trial work. Even in moments of detachment, many prosecutors may feel that it is not their job to judge the truth of testimony, only how it will play in the courtroom.

Indeed, Justice Department policies appear to encourage this approach. The Department’s Principles of Federal Prosecution list a range of “relevant considerations” for determining whether to enter a plea agreement with a defendant. These include “[t]he defendant’s willingness to cooperate in the investigation or prosecution of others,” and “the nature and value of the cooperation

95. Some, but of course not all. Notwithstanding the special responsibilities of prosecutors, it may still be unwise to permit them to reward testimony with, for example, large sums of money. The risks may be too great, and the necessity too small. See, e.g., United States v. Cuellar, 96 F.3d 1179, 1183-89 (1996) (Wiggins, J., concurring), cert. denied, 520 U.S. 1109 (1997).


98. Id. § 9-27.420(A)(1).
offered" — but not the prosecutor's degree of confidence that the witness will testify honestly. The Principles also set forth "considerations to be weighed" in deciding whether to agree to forego prosecution in return for a person's cooperation. Again, these factors include "the value of the person's cooperation to the investigation or prosecution," but not — except tangentially — the person's candor. In assessing the value of such cooperation, the prosecutor is to consider such questions as whether the cooperation will in fact be forthcoming, whether the testimony or other information provided will be credible, whether it can be corroborated by other evidence, whether it will materially assist the investigation or prosecution, and whether substantially the same benefit can be obtained from someone else without an agreement not to prosecute. After assessing all of these factors, together with any others that may be relevant, the prosecutor can judge the strength of his/her case with and without the person's cooperation, and determine whether it may be in the public interest to agree to forego prosecution under the circumstances.

The clear message is that credibility is important solely for determining how helpful the cooperation will be; the concern is less with truth than with forensic efficacy.

This is the wrong message to send. If federal prosecutors, unlike defense attorneys, are allowed to bargain for testimony, they should bargain only with witnesses they are satisfied will be honest. They should keep in mind their "twofold aim," and should weigh the reliability, not just the credibility, of cooperating witnesses. Otherwise there can be no justification for exempting prosecutors from the rule we apply to defense attorneys.

Instructing prosecutors to take care to reward only truthful testimony will not guarantee that they will do it, nor that they will be

99. Id. § 9-27.420(B)(1).
100. Id. § 9-27.620.
101. Id. § 9-27.620(A)(2).
102. Id. § 9-27.620(B)(2).
103. Perhaps the drafters of the manual thought the importance of testimonial candor too obvious to mention. But they did not think it too obvious to mention that prosecutors should take into account whether the cooperation a witness offers will actually be of assistance. And, as I have noted, it may not be obvious to a prosecutor in the heat of litigation that she should take pains to trade only for honest testimony, instead of just relying on the jury to sort out the truth.
104. Cf. Office of Director of Public Prosecutions, New South Wales, Prosecution Policy and Guidelines 22 (1998) (directing that decisions whether to enter into cooperation agreements should be based on, among other things, "[t]he general character of the proposed witness," and his or her "reliability").
able to. Not all federal prosecutors bother to read Department policies. Even for those who do, there will always be the competitive pressures of the courtroom. And even prosecutors who are able to withstand courtroom pressures and who try to guard against perjurious "cooperation" will not invariably succeed. But aspirations matter. Most federal prosecutors take their ethical responsibilities seriously, and when they set their mind to it, there is a fair amount they can do to test the veracity of cooperating witnesses. But they will not set their minds to it if they believe it is not part of their job. The Justice Department should make clear that it is — that federal prosecutors have an obligation to dispense favors to witnesses in the cause of truth, not just of victory.

III. Prosecutors and Professors

I have discussed Singleton and the Independent Counsel's Referral at some length not only to extract a particular lesson about how prosecutors should exercise one part of their discretion, but also to illustrate a kind of inquiry of which I think we have too little. Prosecutorial discretion has attracted a good deal of academic attention, and much of the resulting scholarship is excellent. We have keen descriptions of the power prosecutors wield and of how they wield it. We have a rich debate over how much and what kind of discretion prosecutors ideally should be granted. But we


106. As Daniel Richman has pointed out, the greatest risk may be "that a cooper- tor will independently try to be 'helpful' to a prosecutor, in hopes of greater leniency, and that the prosecutor will not be able to separate the truth from the 'icing.'" Daniel C. Richman, Cooperating Defendants: The Costs and Benefits of Purchasing Information from Scoundrels, 8 Fed. Sentencing R. 292, 298 (1996); see also Trott, supra note 83, at 1382-85.

107. See, e.g., Trott, supra note 83, at 1405-09.


largely lack scholarship about a more mundane, but no less impor-
tant, question: how prosecutors should exercise the discretion they 
actually have.\footnote{110}

The legal academy has tended to talk about prosecutors as natu-
ralists talk about bears: describing them, trying to explain them, 
and assessing how to deal with them. Naturalists do not ask how a 
responsible bear \textit{should} act, and academics rarely ask the same 
question about prosecutors. But prosecutors are not bears. Every 
day, prosecutors face moral and managerial questions that could 
and should be the stuff of sustained scholarly inquiry. This is true 
of United States Attorneys and Assistant United States Attorneys 
no less than Independent Counsels and Associate Independent 
Counsels. When does a criminal falsehood — a lie in a civil deposi-
tion, say, or a false denial of guilt to a federal investigator\footnote{111} — 
warrant prosecution? Under what circumstances should a govern-
ment officeholder — the President, the Mayor of the District of 
Columbia,\footnote{112} or an Assistant Attorney General\footnote{113} — be charged 
with criminal conduct that prosecutors might overlook in someone


There have been occasional academic comments on a prosecutor's duty to refrain from constitutional violations even when courts look the other way. See, e.g., Sanford Levinson, \textit{Identifying the Compelling State Interest: On "Due Process of Lawmaking" and the Professional Responsibility of the Public Lawyer}, 45 HASTINGS L.J. 1035 (1994); Sheri Lynn Johnson, \textit{Batson Ethics for Prosecutors and Trial Court Judges}, 73 CHI.-KENT L. REV. 475 (1998). This subject, too, may warrant more attention, but it is different — and less central to the everyday work of criminal justice — than how prosecutors should exercise the wide discretion the Constitution leaves them.

111. This latter question is particularly pressing in the wake of \textit{Brogan v. United States}, 118 S. Ct. 805 (1998), which rejected the "exculpatory no" defense to the crime of making a false statement to a government official. The reader may recall that Justice Scalia's majority opinion in \textit{Brogan} featured prominently in the \textit{Singleton} panel's argument for reading criminal statutes literally. See supra notes 35-39 and accompanying text. Justice Department policy still bars false-statement prosecutions "in situations in which a suspect, during an investigation, merely denies guilt in response to questioning by the government." \textit{Dep't of Justice Manual}, supra note 97, § 9-42.160. Whether \textit{Brogan} should prompt reexamination of this policy is unclear, in part because the Manual does not articulate the grounds for the policy.


else? And what are a prosecutor’s responsibilities before promising benefits to a witness in exchange for testimony?

Scholars may think these questions are not worth pursuing because they are impossible to decide by reason. Prosecutors, after all, work “in an area where so little is law and so much is discretion.” But discretionary decisions can nonetheless be reasoned. Law professors understand that: they routinely make reasoned arguments for legal outcomes — judicial rulings or legislative enactments — that they recognize are matters of judgment. Prosecutors understand it, too. They do not and could not decide whom to charge, for example, in the same way they choose what to order for dinner. They think about it, they argue about it, and sometimes — although not often enough — they write policies about it. I will return later to the question of written policies. The point I now wish to stress is that even when prosecutors operate without formal guidelines, their charging decisions almost always involve, in part, the application of general principles to particular situations.

Often the principles alone will not determine the outcome, just as doctrine by itself frequently fails to tell a court how to rule. And prosecutors, like judges, often reason from the specific to the general, deriving their working principles from particular circumstances, instead of simply applying preexisting principles to the situations they encounter. But none of this makes prosecutorial decision-making, any more than judicial decision-making, of solely descriptive interest.

Prosecutors themselves are unlikely to doubt that their discretionary decisions present normative questions that are difficult, important, and interesting. But they may wonder whether law professors can have anything useful to say about those questions. My larger aim in this Article has been to suggest that they can. I have tried to show that a scholar’s distance from the day-to-day world of criminal litigation, while making it easier to miss important details, can also lend helpful perspective. But I would not want readers unimpressed with my argument about cooperating witnesses to conclude that academics have been wise to stay away from the problems faced by prosecutors. So let me briefly provide one other example.

115. Cf. Lynch, supra note 90, at 2131 (suggesting that “a kind of common law of plea bargaining may arise, sometimes shaped by formal office ‘policy,’ and sometimes by individual negotiation”).
No one can claim that the legal academy has neglected the recent revolution in federal sentencing. More articles than anyone would ever want to read have been written about the system of Sentencing Guidelines and mandatory minimum sentences Congress constructed during the 1980s. Probably most of these articles have at least touched on the way in which the new sentencing laws have changed the role of the prosecutor; many have focussed on these changes. We have descriptions of the new powers granted to prosecutors, analyses of how they have used those powers, and assessments of whether the powers were wisely bestowed. But how should prosecutors operate under a system of fixed sentences? Should sentencing considerations influence charging decisions and plea offers, and if so, how? The academy has ignored these questions.

Prosecutors, of course, have lacked this luxury. As originally promulgated in 1980, the Principles of Federal Prosecution instructed prosecutors “ordinarily” to charge the provable offense carrying the heaviest maximum penalty, but warned against charging “those rare federal offenses that carry a mandatory term of imprisonment” in situations where the prescribed punishment would seem grossly excessive. The latter warning was ostensibly grounded in considerations of strategy, but had the effect of requiring prosecutors to consider whether the required sentence was “appropriate.” Later in the decade, when mandatory sentences became much more common and guideline sentencing became universal, federal prosecutors faced a dilemma. On the one hand,


117. Again, notable exceptions are Clymer, supra note 110, at 708-17, and Fisher, supra note 110, at 251-53.


119. As originally promulgated in 1980 and as codified in 1984, the Principles explained that in some instances “unusually mitigating circumstances may make the specified penalty appear so out of proportion to the seriousness of defendant’s conduct that the jury or judge in assessing guilt, or the judge in ruling on the admissibility of evidence, may be influenced by the inevitable consequence of conviction. In such cases, the attorney for the government should consider whether charging a different offense that reaches the same conduct, but that does not carry a mandatory penalty, might not be more appropriate under the circumstances.” 1984 Principles, supra note 118, § 9-27.310(B); 1980 Principles, supra note 118, at 17.
provable offenses in more and more cases carried mandatory sentences that, under the circumstances, seemed inappropriately severe — making the warning in the original Principles appear all the more important. On the other hand, undercharging could frustrate the purposes of the sentencing laws passed during the 1980s — and prosecutors, after all, are executive branch officers with a constitutional duty to ensure that the laws are faithfully executed. Should prosecutors continue to use their discretion to avoid excessively severe sentences?

The Justice Department thought not. In the late 1980s and early 1990s the Department eliminated the warning about mandatory penalties in the Principles of Federal Prosecution, and repeatedly directed that prosecutors in virtually every case should charge the provable offenses that would result in the heaviest possible sentence.120 The Department also modified a provision in the Principles directing that plea agreements bear “a reasonable relationship to the nature and extent” of a defendant’s conduct;121 new language required a plea to “the most serious readily provable charge consistent with the nature and extent of [the defendant’s] criminal conduct” — i.e., the charge carrying the heaviest penalty.122 The restriction on plea agreements came with a potentially broad exception: charges could be dropped with the approval of the United States Attorney or a “designated supervisory level official,” as long

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120. As amended in January 1993, the Principles provide that “a Federal prosecutor should initially charge the most serious, readily provable offense or offenses consistent with the defendant’s conduct,” and that “[t]he ‘most serious’ offense is generally that which yields the highest range under the sentencing guidelines.” Dep’t of Justice Manual, supra note 97, § 9-27.300. The Department earlier had directed prosecutors to file any “readily provable” charge under 18 U.S.C. § 924(c), which prescribes stiff mandatory minimum sentences for using or carrying a gun “during and in relation to any crime of violence or drug trafficking crime.” Memorandum from Dick Thornburgh to Federal Prosecutors, at 1 (June 16, 1989); see also U.S. Dep’t of Justice, Prosecutor’s Handbook on Sentencing Guidelines 50 (1987). Since 1992, federal prosecutors have also been instructed to file any “readily provable” sentence enhancement under 21 U.S.C. § 851 for prior criminal convictions. Dep’t of Justice Manual, supra note 97, § 9-27.300(B); Memorandum from George J. Terwilliger III to Holders of United States Attorney’s Manual Title 9, at 3 (Feb. 7, 1992).

121. 1980 Principles, supra note 118, at 17.

122. Dep’t of Justice Manual, supra note 97, § 9-27.430(A) (1997). Incorporating an earlier directive from Attorney General Thornburgh, the principles explain that “[t]he basic policy is that charges are not to be bargained away or dropped, unless the prosecutor has a good faith doubt as to the government’s ability readily to prove a charge for legal or evidentiary reasons.” Id. § 9-27.400(B); Memorandum from Dick Thornburgh to Federal Prosecutors, at 3 (Mar. 13, 1989) [hereinafter March 1989 Memorandum].
as the reasons were set forth in writing. But the exception appeared to be aimed at preserving prosecutorial resources, not avoiding excessive sentences. My impression as a federal prosecutor at the time was that many, if not most, of my colleagues felt obliged to implement the spirit as well as the letter of the new policies. In 1993, following the change in administrations, the Principles were "clarified" by language suggesting that charging decisions and plea offers could properly take into account whether the likely sentence was "proportional to the seriousness of the defendant’s conduct." But none of the older language was removed, and the Department since has reiterated the "basic policy" that "prosecutors must charge 'the most serious offense that is consistent with the nature of the defendant's conduct,'" and "should seek a plea to 'the most serious readily provable offense charged.'"

It is easy to view this "basic policy" as simply reflecting prosecutors' desire to get the highest sentences they can in every case. But anyone who has worked for the Justice Department during the past decade knows there is more to the story. Many thoughtful prosecutors believe that it would be wrong to reduce the charges in a case to avoid what appears to them to be an excessive sentence, particularly since the Sentencing Guidelines are intended to make penalties more uniform. Other prosecutors may privately approve of this kind of discretionary charging, but keep their view quiet for fear of reproach. The Department's recent reaffirmation of the

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123. Dep't of Justice Manual, supra note 97, § 9-27.400(B) (1997); March 1989 Memorandum, supra note 122, at 4.

124. "This exception recognizes that the aims of the Sentencing Reform Act must be sought without ignoring other, critical aspects of the Federal criminal justice system. For example, approvals to drop charges in a particular case might be given because the United States Attorney's office is particularly over-burdened, the case would be time-consuming to try, and proceeding to trial would significantly reduce the total number of cases disposed by the office." Dep't of Justice Manual, supra note 97, § 9-27.400(B); March 1989 Memorandum, supra, note 122, at 4.

125. Cf. Thomas E. Zeno, A Prosecutor's View of the Sentencing Guidelines, 55 Fed. Probation, Dec. 1991, at 31 (predicting that "[t]his exception is likely to be invoked so rarely that it need not be discussed further in this article").


127. Memorandum from John C. Keeney and Donald K. Stern to United States Attorneys and All Federal Prosecutors, at 2.

128. Cf. Kessler & Piehl, supra note 108 (concluding that prosecutors act to maximize punishment); Kahan, supra note 96, at 486 (attributing the "pathology" of "prosecutorial overreaching" to the fact that "U.S. Attorneys are extraordinarily ambitious and frequently enter electoral politics after leaving office").
"basic policy" for charging and plea agreements appears in fact to have been prompted by outside criticism — specifically, concerns expressed by the United States Sentencing Commission that prosecutors were undermining the Sentencing Reform Act of 1984 by "exercising prosecutorial discretion to avoid mandatory statutory and guideline sentences." The "basic policy" is the product of reasoning and discussion about the duties of federal prosecutors, albeit a discussion from which scholars have been largely absent.

Their absence is unfortunate. The issue has wide practical consequences, and the Department's handling of it has left much to be desired. The current policy is so diplomatic it approaches the disingenuous. The pre-1992 policy was more plainspoken, but it relied on — without ever articulating or defending — a debatable view of a prosecutor's proper function. Federal courts have long endorsed the "broad discretion" of prosecutors "to select the charges to be brought in a particular case." Perhaps the sentencing statutes passed in the 1980s limited that discretion, so that federal prosecutors now may manipulate charges only to maximize a defendant's sentence. And perhaps this limitation is compatible with the constitutional delegation of law enforcement authority to the executive branch. But neither proposition is self-evident, and as far as I know neither has ever received careful examination. Prosecutors might be excused for not running these issues to the ground; they have other things to keep them busy. But the neglect shown by scholars is harder to defend.

Like the proper considerations when bargaining with a witness, the relevance of fixed sentences in the proper exercise of charging discretion is a particularly ripe subject for academic discussion, because the Justice Department has already started the discussion though the promulgation of formal policies. With respect to other ethical questions faced by prosecutors — e.g., when prosecution is warranted for perjury in a civil deposition — scholars essentially will have to start from scratch. Not the least important service provided by the Starr investigation is to remind us how important these questions can be, and how completely unanswered they remain. The role that formal policies can play in facilitating dialog with scholars is one more reason for prosecutors to write such policies, over and above the more basic reasons that Norman Abrams identified almost thirty years ago.

129. Memorandum from John C. Keeney and Donald K. Stern, supra note 127, at 1.
131. See Abrams, supra note 110.
Of course prosecutors might not see it that way. Indeed, scholarly criticism of Justice Department policies could deter the Department from issuing policies, or could encourage policies even vaguer than the current ones.

This would be a mistake, and not simply because a dialog with scholars could help the Department gradually improve its policies. There is a less lofty reason for federal prosecutors to welcome academic discussion of their policies: they may find it preferable to wholesale regulation by bar committees dominated by private practitioners. Robert Jackson could get away with comparing an ethical prosecutor to a gentleman, and declaring that “those who need to be told would not understand it anyway.”132 But courts today are less inclined than they were in Jackson’s day to place their trust in a prosecutor’s sense of “fair play and sportsmanship.”133 And because the special responsibilities of prosecutors are rarely spelled out — because academics, along with everyone else, tend to hear talk of a prosecutor’s “twofold aim” as mere rhetoric — courts have reacted with incredulity when asked to exempt prosecutors from ethical rules governing other lawyers. The incredulity has been no less marked when the rule in question is one no sane person could want to apply to prosecutors in its entirety.134 Nor have judges been alone in their skepticism: buried in the budget bill passed by Congress and signed by the President last October was the “Citizens Protection Act of 1998,” which subjects federal prosecutors to local disciplinary rules “in the same manner as other attorneys.”135

Decisions applying disciplinary rules to prosecutors provided a small part of the basis for the panel decision in Singleton.136 “If federal prosecutors are bound by an ethical rule governing ex parte

132. Jackson, supra note 4, at 20.
133. Id.
134. The best example is the ethical rule preventing an attorney and his or her agents from overtly or covertly contacting a person represented by another attorney without the other attorney’s permission. Applied literally to prosecutors and the law enforcement officers who act as their agents, this rule would bar, among other things, any undercover contact with a criminal who had the foresight and wherewithal to keep counsel on retainer. Nonetheless courts have been markedly hostile to the suggestion that the rule should not apply to prosecutors. See Rory K. Little, Who Should Regulate the Ethics of Federal Prosecutors?, 65 FORDHAM L. REV. 355, 361-62, 367-68 (1996).
136. See Singleton, 144 F.3d at 1354.
contact in the course of a prosecution,” Judge Kelly thought it “even more clear they are bound by a federal statute regulating the evidence presented in court.”\textsuperscript{137} The disciplinary rule cases, along with the Citizens Protection Act, reflect the same unease at the heart of the panel decision in \textit{Singleton}, and much of the unease prompted by the Starr Referral: if prosecutors are not bound by the same rules that govern other attorneys, by what are they bound?\textsuperscript{138}

One response, for the Justice Department, if not for Starr, is the point Justice Scalia stressed in \textit{Morrison v. Olson}: federal prosecutors ultimately answer to the President, and the President answers to the electorate.\textsuperscript{139} “Under our system of government,” Scalia reasoned, “the primary check against prosecutorial abuse is a political one.”\textsuperscript{140} But that cannot be the only check, and not just because the political accountability of federal prosecutors is often quite attenuated. We want prosecutors to be bound by something other than politics. And if that something else is not the normal ethical rules of the legal profession, what is it?

Until prosecutors can answer that question, they will have difficulty claiming exemption from rules that apply to other advocates — even rules that, if applied to prosecutors, threaten great disruption to the Department’s mission. The answer they should provide is that prosecutors are bound by a different set of rules, more lenient in some ways because stricter in others. But for that answer to be fully persuasive, the rules binding prosecutors need to be treated more seriously than they have been, both by the Department and by the academy.

\textsuperscript{137} \textit{Id.}.

\textsuperscript{138} Cf. \textit{Singleton}, Brief Amicus Curiae of National Association of Criminal Defense Lawyers, at 14-15 (“Requiring prosecutors to abide by the same standards of conduct that all other lawyers are required to meet would help restore public confidence in the criminal justice system and would constitute a small step toward restoring some equilibrium in the adversarial process.”).

\textsuperscript{139} See 487 U.S. at 728-29 (Scalia, J., dissenting).

\textsuperscript{140} \textit{Id.} at 728.