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WORKING OUTSIDE THE RULES: THE UNDEFINED RESPONSIBILITIES OF FEDERAL PROSECUTORS

*Laurie L. Levenson**

> The qualities of a good prosecutor are as elusive and as impossible to define as those that mark a gentleman. And those who need to be told would not understand it anyway. A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal and human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.[1]

Introduction

It is said that a good prosecutor is one who follows the rules. Experience, however, suggests otherwise. To be a good prosecutor, it is not enough to operate within the terms of the law. Prosecutors seeking justice often must go beyond the boundaries of the law in an effort to create informal procedures for justice that will apply where the law is silent.

This need for prosecutors to expand the pursuit of justice is evident in many aspects of the criminal justice system. For example, consider a federal prosecutor's responsibilities in providing discovery. Discovery in federal criminal cases is governed by Federal Rules of Criminal Procedure 16 and 26, 18 U.S.C. § 3500[2] and constitutional doctrine.[3] Pursuant to these rules, a prosecutor is obligated to turn over only limited categories of evidence, such as a

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

2. 18 U.S.C. § 3500 (1998), also known as "The Jencks Act," provides for release of witness statements.

3. The two most significant constitutional duties of discovery are the prosecutor's obligation to disclose exculpatory information, *see* Brady v. Maryland, 373 U.S. 83

defendant's statements, physical evidence and exculpatory materials. In practice, however, prosecutors and courts recognize that strict compliance with the rules can easily result in trial by ambush. As such, the practice of many U.S. Attorney's Offices is to offer earlier and broader discovery to the defense. That is not to say that there is an "open file" attitude,[4] but there is a recognition that mere compliance with the rules, unless there is a compelling reason to refuse to go further, may not be sufficient to fulfill the prosecutor's duty.[5]

This Article discusses the undefined responsibilities of federal prosecutors. For purposes of example, the essay focuses primarily on five situations in which federal prosecutors are often expected to operate "outside" of the rules, including: charging and investigative decisions, discovery, plea bargaining, dealing with the press, and sentencing decisions. While there are "rules" in each of these areas, they take a back seat to the discretionary powers prosecutors are expected to exercise wisely when performing their duties. In judging whether there has been an appropriate exercise of those powers, it is not the rules that will govern society's judgment. Rather, the collective experience of dedicated and fair-minded prosecutors sets the standards. It is only appropriate, therefore, that this Article, as the others in this Symposium, be dedicated to the memory of William M. Tendy, Sr.[6]

As the number of rules governing federal criminal actions increases, so will the burden on federal prosecutors to judge how they will operate outside the rules.[7] Part I of this Article discusses

(1963), and information impeaching the government's witnesses, *see* Giglio v. United States, 405 U.S. 150 (1972).

4. The courts have repeatedly recognized that neither the Constitution nor a prosecutor's statutory duties requires open file discovery. *See* Kyles v. Whitley, 514 U.S. 419, 422 (1995).

5. For example, it is standard practice in some jurisdictions to disclose witness statements before trial begins, even though the law only requires disclosure after the witness testifies. 18 U.S.C. § 3500(b).

6. For many years, William M. Tendy, Sr. was a highly regarded prosecutor in the United States Attorney's Office for the Southern District of New York. Born in Ireland, Tendy spent his youth in an orphanage. When he came to the United States, he led the fight for justice. To this day, "[l]egions of former Assistants and law enforcement agents revere his name." Daniel Wise, *Summation's Impact Cited in Capital Case*, N.Y. L.J., July 30, 1998, at 1.

7. For an example of the proliferation of articles that accompanied the implementation of the Federal Sentencing Guidelines, see Cynthia K.Y. Lee, *From Gatekeeper to Concierge: Reigning in the Federal Prosecutor's Expanding Power Over Substantial Assistance Departures*, 50 RUTGERS L. REV. 199 (1997) (discussing reins on prosecutor's discretion to move for leniency when defendant offers government "substantial assistance"); Daniel J. Freed, *Federal Sentencing in the Wake of the*

the role of the federal prosecutor in terms of what rules dictate, and where they fall short. Part II provides an analysis of where the law is silent, thereby making prosecutorial discretion imperative by focusing on five scenarios in particular. This Article concludes with a proposal of the factors a prosecutor should use in making such decisions. Not surprisingly, they all relate to the goals of the criminal justice system: a fair and efficient judgment in each individual case.

I. The Role of Federal Prosecutors: Can it Be Defined by Rules?

Much has been written regarding the role of the federal prosecutor.[8] It has been said that the prosecutor wears several hats, representing everyone from the government agency investigating a case, to the victim of a particular crime, to society in general. The latter view is reinforced daily when the prosecutor stands in court and states her appearance, "Jane Q. Doe on behalf of the United States of America." This daily mantra reminds the prosecutor that she represents more than just the investigative agency or individual victims of a crime. The prosecutor represents the people and society's interests in justice in the case.[9]

Guidelines: Unacceptable Limits on the Discretion of Sentencers, 101 YALE L. J. 1681, 1723 (1992) ("A prosecutor's options for including or excluding information can drastically influence the sentence range and different prosecutors make different decisions in different cases."); David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283 (1995) (examining using equal protection to eliminate discrepancy between sentencing guidelines for crack and powder cocaine).

8. *See, e.g.*, George T. Felkenes, *The Prosecutor: A Look at Reality*, 7 Sw. U. L. REV. 98 (1975) (exploring use of prosecutorial agency internal policy to balance the need for consistency with the need for flexibility); Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1 (1971) (examining research on prosecutors' psychology); Whitney North Seymour, Jr., *Why Prosecutors Act Like Prosecutors*, 11 REC. 302 (1956) (a prosecutors' description of how he prepares for trial).

9. *See* Roberta K. Flowers, *A Code of Their Own: Upating the Ethics Codes to Include the Non-Adversarial Roles of Federal Prosecutors*, 37 B.C. L. REV. 923, 928 (1996) ("In the United States federal courts, the people are represented by an Assistant United States Attorney."). Justice Sutherland summarized the prosecutor's role:

> 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.*

Berger v. United States, 295 U.S. 78, 88 (1935) (emphasis added).

In some U.S. Attorney's offices, prosecutors may convey a slightly different message to themselves and others with their introductions. Appearances are made "on behalf of the Government." Although just a change in words, the introduction

Prosecutors have a general sense that they should seek "justice," but there has been no specific effort to define this role for prosecutors. The primary guide for prosecutors — the U.S. Attorneys' Manual — does not have a preamble inspiring and directing prosecutors as to how to seek justice, nor does it define the exact role of the prosecutor. Rather, the U.S. Attorney's function is defined by those rules that govern the prosecutor's behavior.[10]

This role of prosecutors — as technicians who must follow the rules — is regularly reflected in both the writings and speeches of Department of Justice employees. Consider, for example, Deputy Attorney General William Barr's letter in opposition to the American Bar Association's consideration of revisions of the ABA Prosecution Function Standards:

> Prosecutors are first and foremost bound by their oaths of office faithfully to execute the laws which the legislature has promulgated, in accordance with applicable statutory and constitutional standards. They must also adhere to codes of conduct imposed by their own executive agencies. Federal prosecutors must comply with this Department's Standards of Conduct, and with its policies and practices governing other aspects of the prosecution function, such as the Principles of Federal Prosecution . . . . Finally, this Department has historically required its prosecutors, insofar as is consistent with carrying out their federal law enforcement responsibilities, to conduct themselves in accordance with the ethical requirements of those state and local jurisdictions in which they are licensed to practice.[11]

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conveys that the primary role of the prosecutor is to represent the Government as an institution which, in turn, is entrusted with safeguarding the interests of the people.

10. *See* UNITED STATES DEP'T OF JUSTICE, UNITED STATES DEP'T OF JUSTICE MANUAL § 9-27.001 (Aspen Law 1987) [hereinafter DEP'T OF JUSTICE MANUAL]. A copy of the *Manual* is also available online at the Department's website, and is updated with greater regularity. *See* U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL (updated Jan. 8, 1999), <http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/>. This is not to suggest that all of the rules have precise answers to the questions that prosecutors may face. The more frequent approach is to set forth the factors a prosecutor should consider in making a decision. The overall focus, however, is to keep prosecutors operating within the terms of the rules, without regard to whether these rules alone are sufficient to lead to justice.

11. Letter from William Barr, Deputy Attorney General, to Sheldon Krantz, Chairperson of the Criminal Justice Section of the ABA 2 (Aug. 2, 1990), *quoted in* John M. Burkoff, *Prosecutorial Ethics: The Duty Not "To Strike Foul Blows"*, 53 U. PITT. L. REV. 271, 272 n.2 (1992).

As of late, the fight has been over whose rules prosecutors must follow, with a presumption that any such rules would suffice to define a prosecutor's role or guide her functions.[12]

While following the rules is certainly an enviable goal, it is insufficient to describe for prosecutors what their function is in the criminal justice system. This description of prosecutors as "rule followers" presupposes that there are enough rules to guide all the behavior of prosecutors and that those rules are specific enough to ensure that prosecutors perform their role in achieving justice. The description further assumes that novice prosecutors, often fairly new to the practice of law, will have the judgment and wisdom to evaluate cases and prosecute them fairly. Experience tells us neither is likely to be true.

As comforting as it may be for prosecutors to think that all they have to do is follow the rules in order to achieve justice, the reality is quite different. Federal prosecutors must often operate without the safety net of specific rules.[13] They must seek justice by making the right decisions when gaps in the rules leave them with little guidance.

II. Gaps in the Rules

In almost every task a prosecutor performs, there will be gaps in the rules guiding the prosecutor's behavior. From selecting investigative targets, to making charging decisions, to interacting with the press, to making sentencing recommendations, prosecutors must recognize that the rules will not guide them in all of their decisions. Accordingly, a prosecutor's individual and independent interest in reaching fair and just decisions is often the only compass pointing to the right procedure.

12. *See, e.g.,* Ethical Standards for Federal Prosecutors Act of 1997, H.R. 232, 105th Cong., 2d Sess. (1997). The bill provides that federal prosecutors are subject to state ethical rules and specifically addresses the issue of whether prosecutors, contrary to state rules, can have direct discussions with a party represented by counsel. The bill was strongly supported by the National Association of Criminal Defense Lawyers, bringing true Attorney General Thornburgh's prophecy that prosecutors could find themselves following rules written by their opponents. This was evident in Attorney General Thornburgh's press release criticizing the ABA's attempt to redraft professional standards governing prosecutors in which he stated, "[a]s a practical matter, the rules are an undisguised effort by the defense bar to undo what both Congress and the Supreme Court have declared to be the law." Joint Press Release from the U.S. Department of Justice, the National Association of Attorneys General, and the National District Attorneys Association 1 (Aug. 6, 1991), *cited in* Burkhoff, *supra* note 11, at 275.

13. *See* Morrison v. Olson, 487 U.S. 654, 732 (1988) (Scalia, J., dissenting) (Prosecutors work "in an area where so little is law and so much is discretion.").

A. Charging Decisions

It takes a certain amount of proficiency with the rules before prosecutors realize that their most important work occurs in the area where the rules are silent — "in the gap." Charging decisions are a perfect example. "The prosecutor's decision to institute criminal charges is the broadest and least regulated power in American criminal law."[14] The guidelines for charging decisions are so expansive that they vary from office to office.[15] Moreover, the guidelines often depend on such factors as how one case compares to another, or what the Department of Justice's current views are on the priorities for criminal law enforcement. In fact, they depend on so many factors that there is no one rule governing all charging decisions. Thus, charging decisions take place in a gap in the rules — a gap intentionally left so that prosecutors can tailor justice.[16]

In order to fill the gap, prosecutors must apply both a practical sense of what is right and a moral standard. Practically, prosecutors must consider the likelihood of success if the case is prosecuted and the availability of resources to achieve success. Morally, prosecutors must consider whether conviction is "consistent with the public interest,"[17] in conjunction with their personal sense of the defendant's culpability for the crime, including the prosecutor's individual assessment of the credibility of witness' testimony, the accuracy of evidence and the need to punish the defendant for his actions.[18] The prosecutor is indeed the gatekeeper and there are

14. Bennett L. Gershman, *A Moral Standard for the Prosecutor's Exercise of the Charging Decision,* 20 FORDHAM URB. L.J. 513 (1993). *See* Charles W. Thomas & W. Anthony Fitch, *Prosecutorial Decision Making*, 13 AM. CRIM. L. REV. 507 (1976), for an overview of the prosecutor's role in charging decisions.

15. The Department of Justice Guidelines instruct prosecutors to commence prosecutions when they believe a federal offense has been committed and the evidence is sufficient to convict, unless: (1) there is no substantial federal interest in the prosecution; (2) the suspect is subject to effective prosecution in another jurisdiction; or (3) *adequate alternatives to prosecution exist.* DEP'T OF JUSTICE MANUAL, *supra* note 10, § 9-27.220(A) (1998) (emphasis added).

16. *See* Wayte v. United States, 470 U.S. 598, 607 (1985) (prosecutor entitled to threshold presumption that prosecutor acted in good faith for sound policy reasons); *see also* Town of Newton v. Rumery, 480 U.S. 386, 396 (1987) (broad discretion afforded prosecutor because of the need for prosecutor to evaluate strength of case, allocation of resources, and enforcement priorities).

17. Gershman, *supra* note 14, at 514.

18. For a more thorough and detailed list of factors prosecutors commonly use in making charging decisions, see Thomas & Fitch, *supra* note 14, at 514-15 (1976). These factors include:

1. The nature of the offense itself;
2. Prior treatment of similar situations;
3. The status of the victim;

no rules defining whose name must be placed on the list of entrants.

When the prosecutor's role in charging decisions is viewed from this perspective, it is perfectly understandable why many U.S. Attorney's offices, especially those in larger districts, do not entrust the job of making initial charging decisions to new prosecutors. Rather, more experienced prosecutors or specialized units supervise grand jury investigations and evaluate the merits of cases. If deciding how to charge a case were as simple as reading a statute and deciding whether its elements might apply to the defendant's behavior, then new prosecutors who have demonstrated their academic acuity should be equipped to handle the task. Experienced prosecutors know, however, that the charging decision is much more complicated. The difficulty comes in evaluating those factors that are not defined by statute, including the severity of the crime, the defendant's role in the crime, the defendant's past and possible future cooperation, injury to the victim, complexity in trying the case and the likelihood of success.[19] Prosecutors must be able to fill in these gaps in order to perform their charging functions.

The recent report issued by Independent Counsel Kenneth Starr regarding alleged impeachable offenses by President William Jefferson Clinton provides an example of a prosecutorial approach that mechanically applies the facts of a case to possible charges, rather than screening those charges through the use of prosecutorial discretion.[20] Starr's report is only accurate if every

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4. Caseload demands;
5. Anticipated public reactions;
6. Personal characteristics of the defendant;
7. Recommendations of other criminal justice agencies;
8. The prosecutor's concern for his conviction rate;
9. The effect on law enforcement;
10. The prosecutor's opinion of the guilt or innocence of the defendant; and,
11. The likelihood of conviction.

Id.

19. *See* Gerard E. Lynch, *Our Administrative System of Criminal Justice,* 66 FORDHAM L. REV. 2117, 2127 (1998) (describing the broader policy goals that guide prosecutorial discretion).

20. *See* Referral to the United States House of Representatives Pursuant to 28 U.S.C. § 595(c), Submitted by The Office of the Independent Counsel, H.R. DOC. NO. 105-310, 1998 WL 614815 (2d. Sess. 1998) [hereinafter Starr Report]. In his report, Starr itemizes every possible charge that could conceivably form the basis for the impeachment of the President. Unlike the practice of most prosecutors, there is no effort in the report to balance the severity of the target's alleged acts with the charges being contemplated, nor to assess the likelihood of success on those charges. Rather, much in the style of a law school criminal law examination answer, the Starr Report itemizes and details all possible charges that could be sought against the President.

inference is drawn against the President and in favor of Starr's key witnesses.[21]

The reality of criminal prosecutions is that jurors will rarely be so one-sided. In making a charging decision, prosecutors are expected to anticipate the arguments by the defense and the questions of the jurors.[22] The only saving grace of the Starr report is that it is not formally a charging document. Rather, it is a report that may lead to formal impeachment charges, which in themselves have both a political and legal component. From the public's perspective, however, it may be both misleading and disturbing to witness a prosecutor blindly applying possible charges to a defendant's behavior without analyzing the likelihood of success and the fairness of those charges.[23]

Additionally, the problems with the Starr investigation and report highlight another significant gap left open by the law to prosecutorial discretion. Although most criminal cases are initially developed by investigative agencies and then brought under the supervision of a prosecutor, prosecutors also have the power to institute investigations.[24] The law does not pretend to dictate when a prosecutor may open an investigation. It is assumed that the prosecutor will concentrate his or her time on those targets and offenses posing the most serious risk to society.

It is therefore extremely troubling when a prosecutor, like the Independent Counsel, is assigned a target and given the responsibility to develop evidence of any criminal violations by that indi-

21. For a detailed defense to the charges, see *Submission by Counsel for President Clinton to the Committee on the Judiciary of the United States House of Representatives*, 1998 WL 856898.

22. As Chicago lawyer David J. Stetler, former chief of the criminal division of the United States Attorney's Office for the Northern District of Illinois noted, "If I had received a prosecution memorandum like this, with details about the guy's marriage and all, I probably would have sent it back to the assistant who wrote it and said, 'What are you doing?'" *See* John Gibeaut, *In Whitewater's Wake: Lurid Details Aside, Is it a Crime?*, 848 A.B.A. J. 41 (Nov. 1998).

23. There is the additional concern that the Starr Report will be translated into a criminal charging memorandum after the President is either removed from office or completes his term and is thereby subject to criminal prosecution.

24. *See* United States v. Luttrell, 923 F.2d 764 (9th Cir. 1991) (law enforcement does not need reasonable suspicion or probable cause to target a particular individual for investigation). The Department of Justice guidelines also do not provide specific criteria for opening an investigation. Broad discretion is granted to both the prosecutor and law enforcement agent in making this determination. DEP'T OF JUSTICE MANUAL, *supra* note 10, §9-2.010.

vidual.[25] The fear is that the investigation will become personal and that the prosecutor will fill in the gap with his own personal goals in mind, instead of those of the overall criminal justice system. The rules allow the prosecutor to do so as long as they are not the sole motivating force.[26] However, the unwritten law that exists in that gap called investigative discretion, counsels to the contrary.[27]

Given the trend in the law of search and seizure to rely on the "good faith" of prosecutors and investigators, even in the absence of strict compliance with the law,[28] it is imperative that prosecutors have an understanding of their role to serve justice. Assistant Attorney General Stephen Trott counseled prosecutors when the decision in *United States v. Leon* was issued:[29]

> This landmark Supreme Court ruling should be heralded by those of us in law enforcement not just as a victory for truth in

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25. *See* Joseph E. DiGenova, *The Independent Counsel Act: A Good Time to End a Bad Idea,* 86 GEO. L.J. 299, 304 (1998) (quoting Morrison v. Olson, 487 U.S. 654, 732 (1988) (Scalia, J., dissenting)):

> How frightening it must be to have your own independent counsel and staff appointed, with nothing else to do but to investigate you until investigation is no longer worthwhile . . . [a]nd to have that counsel and staff decide, with no basis for comparison, whether what you have done is bad enough, willful enough, and provable enough, to warrant indictment.

Id. See generally Cass R. Sunstein, *Bad Incentives and Bad Institutions,* 86 GEO. L.J. 2267 (1998) (stating the Independent Counsel Act imposes harmful incentives on an independent counsel thereby decreasing the public trust in government); James P. Fleissner, *The Future of the Independent Counsel Statute: Confronting the Dilemma of Allocating the Power of Prosecutorial Discretion,* 49 MERCER L. REV. 427 (1998) (evaluating the future of the Independent Counsel statute in light of concerns about prosecutorial power); *A Roundtable Discussion on the Independent Counsel Statute,* 49 MERCER L. REV. 453 (1998).

26. *Wayte*, 470 U.S. at 607.

27. See Remarks by Attorney General Jackson, reprinted in 24 J. AMER. JUD. SOC. 18-19 (1940):

> The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. . . . [A] prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. . . . It is in this realm — in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and the looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal.

28. The Supreme Court's landmark decision in *United States v. Leon*, 468 U.S. 897, 915-17 (1984) is emblematic of this trend. In *Leon*, the Court held that the Fourth Amendment does not bar admission secured by a search warrant obtained in good faith but not in strict compliance with the law.

29. *Id.*

> the courtroom or "for our side" but more importantly as a solemn occasion to reaffirm our faithful dedication to all constitutional principles as well as the historic right of the American people to be free from totalitarian searches . . . . As officials charged with upholding all the laws of the land, the Constitution is our sacred trust. I am confident that we shall avail ourselves of this opportunity to demonstrate without ambiguity to the Supreme Court and to the American people that we are fully capable of discharging this duty.[30]

As Judge Trott understood, the vacuum created in the law by *Leon* must be filled by prosecutors exercising their judgment to safeguard the constitutional rights of defendants. Rather than viewing gaps in the law as an opportunity to obtain an advantage over the defense, the role of the prosecutor is to fill the gaps with decisions and principles that are consistent with the fair administration of justice.

B. Discovery Responsibilities

Perhaps an even clearer example of a prosecutor's responsibility to fill in the gaps in the rules is a prosecutor's duty to provide discovery to the defense. Certainly, there are rules articulating a prosecutor's discovery duties. The Federal Rules of Criminal Procedure direct the production of the defendant's statements, physical evidence, criminal records and reports of examinations and tests.[31] Constitutional doctrine directs the production of exculpatory evidence,[32] as well as information that could be used to impeach government witnesses.[33] Finally, the Jencks Act[34] provides for the disclosure of pretrial statements after a witness has testified on direct examination.[35]

Irrespective of all these rules, gaps exist with respect to the prosecutor's duty to provide discovery. Although a prosecutor cannot be compelled to disclose statements by prospective witnesses prior to the time prescribed by the Jencks Act,[36] many federal prosecu-

30. Stephen S. Trott, Assistant Attorney General, The Challenge to Law Enforcement of the Reasonable Good-Faith Exception to the Exclusionary Rule, Address delivered before the Career Prosecutor Course of the National College of District Attorneys (July 5, 1984) (transcript on file with the author).

31. FED. R. CRIM. P. 16(a).

32. *See* Brady v. Maryland, 373 U.S. 83 (1963).

33. *See* Giglio v. United States, 405 U.S. 150, 154-55 (1972).

34. 18 U.S.C. § 3500 (1998) (incorporated into FED. R. CRIM. P. 26.2(a)).

35. 18 U.S.C. § 3500(b) (1998); FED. R. CRIM. P. 26.2(a).

36. *See* United States v. Algie, 667 F.2d 569, 571-72 (6th Cir. 1982) (holding that at trial, a court cannot require earlier production of witness statements by the govern-

tors choose to do so.[37] An experienced prosecutor generally understands that the trial will run more smoothly, and the trial judge will be happier, if she ordinarily provides early disclosure of witness statements. Only in the most extreme cases, where a prosecutor legitimately fears coercion of a witness or concoction of a incontrovertible lie by the defense, will the prosecutor deny early disclosure.

Perhaps with the exception of individual office policies,[38] there is no federal rule that requires the early disclosure. Rather, prosecutors fill in the gap by considering broader concerns for a fair and expeditious process. "[P]retrial disclosure [redounds] to the benefit of all parties, counsel, and the court"[39] by expediting the trial, reconfirming the prosecutor's commitment to a fair and open trial, and avoiding a trial that is less a search for truth than a game or sporting contest.[40] To achieve these goals, the prosecutor must move beyond the rules to a procedure that makes the trial even fairer and even more efficient than the rules may have allowed for in that case.[41]

C. Media Relations

As a prosecutor moves away from his or her role in a trial to other prosecutorial functions, there is an even greater need for the prosecutor to fill in the gaps left by the laws governing prosecutors. Consider, for example, the rules governing a prosecutor's behavior during a pending grand jury investigation. While Federal Rule of Criminal Procedure 6(e) prohibits the disclosure without court or-

ment in order to avoid lengthy trial delays); United States v. Percevault, 490 F.2d 126, 131-32 (2d Cir. 1974) (stating that it is not within trial judge's discretion to order pretrial disclosure of statements earlier than the prescribed time). *But see* United States v. Blackburn, 9 F.3d 353, 357-58 (5th Cir. 1993), *cert. denied*, 513 U.S. 830 (1994) (holding that it is within the district court's discretion to order production of witness statements before the witness testifies).

37. *See* United States v. Murphy, 569 F.2d 771, 773 n.5 (3d Cir. 1978) (stating the prevailing practice by prosecutors of delivering "Jencks material" to the defense before the conclusion of direct examination to allow the defense time to study the disclosures).

38. *See, e.g., Algie*, 667 F.2d at 571-72 (noting the policy of the United States Attorney for the Eastern District of Kentucky to advance disclosure of Jencks Act materials to defendants).

39. *Percevault*, 490 F.2d at 132.

40. *See* United States v. Hinton, 631 F.2d 769, 779-80 (D.C. Cir. 1980).

41. Of course, there are often added practical benefits for prosecutors providing early discovery. Early reaction by defense counsel to that discovery may reveal weaknesses in the prosecution's case. Additionally, the prosecution will gain a reputation with both the defense and trial judge as an advocate more interested in winning the case on its merits than in using procedural rules to best the opposing counsel.

der of matters occurring before a grand jury,[42] the disclosure of information regarding other investigative matters is left to the discretion of the supervising federal prosecutor.[43]

This year, the issue arose in the Starr investigation as to whether it was appropriate for Independent Counsel Starr to reveal to reporters the content of pre-grand jury interviews with grand jury witnesses. In defense of his decision to review such interviews, Independent Counsel Starr took the position that the rules technically did not cover matters occurring before the witness entered the grand jury and that his revelations were designed to ensure that the public had a fair image of his investigation and his investigators.[44]

The uproar from Starr's revelation was due, in large part, to a recognition that a prosecutor has an obligation to fill in the gaps in the rules in a manner consistent with a prosecutor's overall commitment to seeking justice and providing a fair process to the target of an investigation. Thus, if revelation of a pre-grand jury interview would prejudice the defendant in the same manner as revelation of the actual grand jury transcripts, it is the prosecutor's duty to fill in the gap left by Rule 6(e).[45]

D. Forfeitures

While there has been a general cry for more rules to guide or limit prosecutorial discretion,[46] the continual development of criminal law and procedure often creates the need for prosecutors to exercise increased discretion in realms where the laws have remained silent. A prime example is the Supreme Court's recent decision in *United States v. Bajakajian.*[47] In *Bajakajian,* the Court faced a challenge to a seizure under the current forfeiture laws.

42. FED. R. CRIM. P. 6(e)(2).

43. In order to fill in the gap, the Department of Justice has adopted its own guidelines regarding disclosure of matters relating to ongoing investigations. *See* DEP'T OF JUSTICE MANUAL, *supra* note 10, § 1-7.530. The guidelines caution that, in general, federal prosecutors shall not reveal information regarding an ongoing investigation. *See id.* § 1-7.530(a). However, the rules eventually leave it to the individual prosecutor, with the approval of supervisors, to decide whether there should be disclosure. *See id.* § 1-7.530(b).

44. *See* Karen Gullo, *Starr Says Some Leaks Not Violation,* AP REP., Jan. 6, 1999.

45. *See* Lombardo v. Comm'r of Internal Revenue Service, 99 T.C. 342 (1992) (recorded interview of potential grand jury witness should be treated like grand jury material). *See also* Submission by Counsel for President Clinton to the Committee on the Judiciary of the United States House of Representatives, 1998 WL 856898.

46. *See generally* James Vorenberg, *Decent Restraint of Prosecutorial Power,* 94 HARV. L. REV. 1521 (1981).

47. 524 U.S. 321 (1998).

Prosecutors argued that the "rules" governed and that because full forfeiture was authorized by the statute, the forfeiture should be upheld.[48]

The Court, in an opinion by Justice Thomas, held the seizure to be unconstitutional under the Eighth Amendment prohibition against "Excessive Fines."[49] In order to be constitutional, prosecutors would have to limit their seizure to some lesser amount — not prescribed by the rules — that would not be grossly disproportionate to the crime committed.[50] In essence, prosecutors must use their discretion to fill in the gap between what is statutorily authorized and what is constitutionally permitted. As in *Bajakajian,* where there was insufficient evidence that the money was linked to an illegal source, prosecutors have a responsibility of moderating the forfeiture they seek.[51] In other words, the prosecutors and the courts have a constitutional duty to tailor the forfeiture to the actual violation that occurred, despite the failure of the forfeiture laws to expressly state such a limit.

E. Sentencing Guidelines

Finally, there are laws that are drafted to intentionally give the prosecutor — and the prosecutor alone — the responsibility to decide what would be the just exercise of the law. While the formal act of sentencing rests with the court, a prosecutor's charging decisions very much will dictate what the judge's options are at the time of sentencing.[52]

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48. The Government sought forfeiture pursuant to 18 U.S.C. § 982(a)(1), which provides that a person convicted of willfully transporting more than $10,000 in currency without complying with the Customs reporting requirements, 31 U.S.C. § 5316(a)(1)(A), shall forfeit "any property . . . involved in such an offense." Defendant Bajakajian was found to have transported $357,144. "The district court found [that Bajakajian's] violation was unrelated to any other illegal activities [and] the money was . . . to be used to repay a lawful debt." *See Bajakajian*, 524 U.S. at 328.

49. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

50. *Bajakajian*, 524 U.S. at 326-28.

51. As pointed out by the dissent, prosecutors suspected that the money was linked to illegal activities, but had insufficient evidence to convince the district court of that fact. *Bajakajian*, 524 U.S. at 336 (Kennedy, J., dissenting).

52. Sentencing determinations in federal court are made through the use of the United States Sentencing Commission's Sentencing Guidelines. In calculating sentences under the guidelines, the courts are guided primarily by the defendant's offense level and criminal history. By selecting which charges the defendant will face, the prosecutor has considerable influence over the guideline range the defendant will face if convicted.

Additionally, embedded in the Federal Sentencing Guidelines is Rule 5K1.1 which explicitly provides that it is the federal prosecutor who must decide if a downward departure from the guidelines is warranted for substantial assistance to the authorities.[53] The prosecutor's decision is subject to review by the courts, but only if refusal to file a substantial assistance motion was based on an unconstitutional motive or not rationally related to any legitimate government end.[54] Otherwise, it is up to the prosecutor to determine what serves a "legitimate government end."[55] A prosecutor's decision as to whether to recommend a downward departure for substantial assistance is guided, in large part, by the prosecutor's personal evaluation of the defendant's assistance and its value to the prosecutor's case. This decision making process requires judgment — judgment gleaned from a prosecutor's experience and good faith willingness to evaluate a defendant's attempt to provide cooperation.

Finally, prosecutors, in making an initial charging decision, are entrusted with whether the defendant will be charged with an offense that carries a mandatory sentence. Certainly, there are Department of Justice guidelines that encourage prosecutors to seek severe sentences, but only those that are "consistent with the nature of the defendant's conduct."[56] Thus, it is up to the prosecutor to fill the gap left by these guidelines — the determination of what punishment, if there is a conviction, would fit the defendant's crime.

F. Summary

As demonstrated by these brief examples, the laws intentionally and unintentionally create gaps that are designed to be filled by prosecutorial discretion. Although efforts are continuously made,

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53. Federal Sentencing Guidelines § 5K1.1 provides, in pertinent part: "Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines." *See* UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL, § 5K1.1 (1998).

54. *See* Wade v. United States, 504 U.S. 181, 184-85 (1992) (the Government has the power, but not the duty, to file a motion when a defendant has substantially assisted).

55. *See, e.g.,* United States v. Brechner, 99 F.3d 96, 99 (2d Cir. 1996) (holding that the government's decision that the defendant was not entitled to motion because he had not been candid in his cooperation was not subject to review); United States v. Higgins, 967 F.2d 841, 845 (3d Cir. 1992) (finding that the government need not make motion when it determines for cost-benefit reasons that motion is unwarranted).

56. DEP'T OF JUSTICE MANUAL, *supra* note 10, § 9-27.310(A) (1997).

it is likely futile, and most likely foolish, to try to fill the gaps with hard and fast rules.[57] The reason that it would be futile is that in any given case it is often the prosecutor who possesses the information that can lead to the fairest and most expeditious decision.[58] Moreover, the mere fact that there is a rule governing the prosecutor's behavior does not mean that the rule alone will guarantee compliance with it. Often, rules are recognized that carry so little remedy that a prosecutor can violate the rule with relatively little consequence.[59] Finally, there are so many prosecutorial functions that, unless one has a crystal ball, we may still end up making rules ad hoc in response to individual situations.[60]

The reason that it is harmful to try to legislatively or judicially fill the gaps is that prosecutors might actually start to see themselves as mere administrators and forget the commitment that they too must have toward achieving a just result. The daily exercise of discretion reminds prosecutors of what is at stake: not just their win record, but the credibility of the justice system and justice for the defendant, the victim, and the public. As Justice Oliver Wendell Holmes, Jr. so wisely warned, "[the law] cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."[61] Anyone who thinks they are going to find the "right" answer to all prosecutorial questions just by reading the rules will be sorely disappointed and dangerously off track.

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57. *See* KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 43 (1969) ("To fix as the goal the elimination of all discretion on all subjects would be utter insanity.").

58. "Discretion is a tool, indispensable for individualization of justice . . . . Rules alone, untempered by discretion, cannot cope with the complexities of modern government and of modern justice. Discretion is our principal source of creativeness in government and in law." *Id.* at 25.

59. A commonly complained about example of this is the prosecutor's duty to disclose exculpatory evidence. Unless the defendant can demonstrate the prejudicial effect of the prosecutor's actions, the defendant has no remedy. Therefore, the rules do little to ensure prosecutorial compliance with the rules. *See* Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693 (1987) (indicating only nine cases exist where discipline even considered for *Brady* misconduct).

60. *See, e.g.*, Rita M. Glavin, *Prosecutors Who Disclose Prosecutorial Information for Literary or Media Purposes: What About the Duty of Confidentiality?*, 63 FORDHAM L. REV. 1809 (1995) (proposing a rule for prosecutors wishing to write books about high-profile cases).

61. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (Little, Brown & Co. 1923) (1881).

Conclusion and Proposal

Ironically, engraved in stone on the Department of Justice Building in Washington, D.C., on the Pennsylvania Avenue side, are the words, "Where law ends tyranny begins." As Kenneth Culp Davis noted almost thirty years ago, "Where law ends tyranny need not begin. Where law ends, discretion begins, and the exercise of discretion may mean either beneficence or tyranny, either justice or injustice, either reasonableness or arbitrariness."[62]

The goal of our justice system is to provide enough guidance, structure and checks and balances to ensure that when prosecutors fill in the gaps in the law, they do so in the way most likely to achieve justice. Professor Davis named the principal ingredients for proper exercise of prosecutorial discretion as facts, values and influences.[63] Yet, as he recognized, such decisions are generally intuitive. How, then, can we instill in prosecutors the values and influences necessary to ensure that they will properly analyze the facts and achieve a result as good or better than that which would result if there had been a specific rule on point?

The following are some suggestions:[64]

(1) *Hire the right people.* Typically, United States Attorney's Offices have been able to be selective in their hiring of new attorneys. Yet, one wonders whether the hunt for smart, aggressive young prosecutors has overlooked an evaluation of their commitment to justice, including zealous protection of the defendant's right to a fair trial. Far too often, young prosecutors join an office with a "conviction psychology" which is best captured in the statement, "I am engaged in a crusade to stop this great avalanche of crime before it takes over all of us without our even knowing what happened."[65]

The challenge is in finding would-be prosecutors who want to serve in a role different from that of a traditional advocate. Potential prosecutors must be evaluated not only for their skill in winning cases, but also for their ability and judgment in filling in the gaps left in the law with decisions that will serve both sides' search for justice.[66]

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62. DAVIS, *supra* note 57, at 3.

63. *Id.* at 5.

64. Of course, I do not stand alone in making these suggestions. Those familiar with the operations of United States Attorney's Office have suggested the same. *See* Lynch, *supra* note 19.

65. Felkenes, *supra* note 8, at 107.

66. In this regard, a great deal of the responsibility of "filling the gaps" in the laws lies with the senior prosecutors who select new prosecutors and train them. ABA

(2) *Train the People Right.* "Trial by fire" is the training for most federal prosecutors. Assigned a case and someone to supervise her, the prosecutor learns by making those decisions that are part and parcel of handling a case. There is ordinarily very little time for the prosecutor to evaluate those decisions that were made during the handling of a case. Both the volume of cases and the quick pace at which they develop often force prosecutors to make quick decisions that must be based in some part on correct instincts regarding the application of the laws.

It is crucial for young prosecutors to have the time to rethink their decisions and evaluate how they would make the decision in the next case. There must be an opportunity to seek guidance from prosecutors who are experienced in making such decisions. Finally, there must be a constant review of the decisions young prosecutors make and the propriety of such decisions. Without such procedures, some prosecutors are likely to be guided by the experience of what they were able to get away with, rather than what would have been the right decision under the same or similar circumstances.

(3) *Establish tolerable inconsistency.* It has long been believed that maximum fairness will be achieved by neutral rules and standards to guide prosecutors' exercise of discretion.[67] Yet, there is a danger to formalizing the decision making process with guidelines and internal policies. The danger is that these policies will not be regularly reviewed by those serving on the front lines and regularly implementing these guidelines.

Experience teaches that both prosecutors and defense counsel can become dangerously resigned to following rules in which they do not believe, simply because the rules are so entrenched and the lawyers are so busy that it does not seem worth the effort to seek to

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Standards Relating to the Administration of Criminal Justice, The Prosecution Function Standard 3-1.2 (1992) ("Prosecution Function" generally) provide helpful guidance as to the qualities to look for in potential prosecutors. They include a prosecutor who understands that it is part of a prosecutor's responsibilities to: administer justice, exercise sound discretion, seek justice (not merely to convict), seek to reform and improve the administration of justice, remedy inadequacies and injustices in the system, and "be guided by the standards of professional conduct as defined by applicable professional traditions, ethical codes, and the law in the prosecutor's jurisdiction." *Id.*

67. The focus of many commentators has been on establishing consistency in the operation of prosecutors. *See* Abrams, *supra* note 8, at 7. While consistency provides a certain amount of fairness, a tolerable range of inconsistency permits prosecutors to constantly adjust their decision making to achieve justice and neutrality in an individual case.

overturn the prior practices. It is imperative that internal policies be constantly reviewed to ensure that they do not suffocate a prosecutor's ability to achieve justice, but instead give the prosecutor guidance as to what path in the past has best filled the gaps left in the statutory and court rules.[68]

(4) *Remember the Goals of Federal Law Enforcement.* One of the problems for prosecutors trying to fill the gaps in the rules that govern their behavior is that they rarely have a clear vision of the goals of federal law enforcement. Sometimes the vision is blurred because it is myopic. Prosecutors become trapped in focusing only on the "crime du jour." For example, prosecutors have been directed through the 1980s and 1990s to pursue diligently the "War on Drugs," the "War on White-Collar Crime" and the "War on Terrorism."[69] While stopping each of these crimes is a laudable goal, creating war-like environment for prosecutors institutes its own dangers.

As a soldier engaged in war, the prosecutor gives very little thought to the pain and suffering of the enemy. Unlike in war, there is room in the prosecutorial role for a prosecutor to turn to his or her own conscience in making decisions. In joining campaigns against certain types of crimes, there is also a danger that the prosecutor will ignore other very real prosecutorial needs that are less likely to grab the attention of policy makers or the media. Certainly, priorities need to be set as to which kinds of crimes should be prosecuted, but priorities should be subject to constant reexamination. There is a danger in becoming too invested in a particular type of prosecution strategy, even though it is not providing effective results. Finally, a battle scenario should be avoided in prosecution work because it makes it psychologically more difficult for the prosecutor to make the concessions necessary to make a trial more expeditious and fair. More so than in war, a prosecutor can lose several battles (for example, over motions and other evidentiary matters) and still succeed at her goal.

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68. Many prosecutors may not be aware that the *U.S. Attorneys' Manual* specifically provides that individual prosecutors may deviate from Department of Justice policy when appropriate to do so. It is important and required, however, for the prosecutor to report on the action taken so that the policy may be evaluated. *See* DEP'T OF JUSTICE MANUAL, *supra* note 10, § 9-2.120.

69. For the corrupting impact of declaring "war" on an individual crime problem, *see* John A. Powell & Eileen B. Hershenov, *Hostage to the Drug War: The National Purse, The Constitution, and the Black Community*, 24 U.C. DAVIS L. REV. 557 (1991).

Sometimes prosecutors have a blurry vision of their mission because they either fail to see or choose not to pay attention to the efforts of other institutions, including local law enforcement, mental health officials and community organizational programs, to address a problem. Prosecutors are trained to prosecute, not to provide social remedies. However, remedies outside the criminal justice system may be the best approach to solving difficult problems.

Finally, a prosecutor's vision may be out of focus because that prosecutor is looking in too many directions and her judgment is driven by logistical concerns rather than the fair outcome of a case. A prosecutor's vision can be unclear because she is wearing blinders — the urge to "win" blinds the prosecutor to the need to provide a fair process. A prosecutor must be taught to focus on what really matters in a case — a fair investigation and trial of a person who deserves, based on the evidence known (not just suspected) to be punished for his actions.

Good prosecutors follow the rules, but they also do much more. The tools for this job should be readily at hand and finely honed through everyday experience. Common sense, an understanding of the impact of their decisions on others, perspective and a commitment to a fair trial for both sides of the case are of the utmost importance. For federal prosecutors, these basic tools may be more valuable than all the guidelines in the world.