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WHEN THE EMPEROR HAS NO CLOTHES III: PERSONNEL POLICIES AND CONFLICTS OF INTEREST IN AMERICAN PROSECUTORS' OFFICES

Carrie Leonetti

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"The duty of the prosecutor is to seek justice, not merely to convict."[1]

"Any prosecutor who risks his day-to-day professional name for fair dealing to build up statistics of success has a perverted sense of practical values, as well as defects of character."[2]

I. INTRODUCTION

The thesis of this Article is that internal personnel policies in American prosecutors' offices, which define job success primarily by conviction rates and sentence lengths, create incentives for prosecutors to overcharge.

There are doubtless many reasons why prosecutorial overcharging occurs in the United States:

> Plea bargaining is now the mainstay of our criminal law system, and excessive charges give the prosecutor added leverage in the plea bargaining process. Because of the threat of prosecution on such charges, defendants may be induced to plead guilty on more unfavorable terms than might otherwise be fair or reasonable. The risk of going to trial may simply become too great, even in cases in which the defendant may arguably be innocent of some of the charges. Moreover, beyond the plea bargaining stage, overcharging may facilitate a compromise verdict in which the jury channels its doubt as to the defendant's guilt into acquitting him on some charges but not others. Thus, while a defendant who chooses not to proffer a guilty plea may successfully resist prosecutorial overcharging by winning a judgment of acquittal, or, as in this case, having his

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[1] THE AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION 3-1.1(c) [hereinafter "ABA PROSECUTION STANDARDS"].

[2] Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 4-6 (1940).

> conviction overturned on appeal, these possibilities hardly amount to adequate protection against the practice.[3]

American prosecutors have enormous power in determining who is subjected to criminal punishment in comparison to their counterparts abroad because they have broad discretion in deciding criminal charges.[4] Through their charging decisions, choice among case-ending options (including dismissal and plea offers), and sentencing recommendations, they often become adjudicators of guilt and punishment, with courts simply confirming their underlying decisions.[5] Absent a showing of invidious discrimination based on race or religion, for instance, American courts will not question a prosecution's decision of whom and how to charge in a given case.[6] And they are hesitant to interfere with plea negotiations and agreements, except after the fact in reviewing alleged breaches of plea agreements using general contract principles.[7] The only legal checks on prosecutorial discretion in the United States are the burden of proof

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[3] United States v. Robertson, 15 F.3d 862, 879 (9th Cir. 1994).

[4] *See* Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH & LEE L. REV. 1413, 1414-15 (2010); *see, e.g.*, Wayte v. United States, 470 U.S. 598, 607 (1985) ("'[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.'" (quoting Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (holding that it was constitutionally permissible for a prosecutor to threaten to bring significantly enhanced charges as a means of inducing a defendant to plead guilty)); *see also* United States v. Armstrong, 517 U.S. 456, 464 (1996) ("'[A] presumption of regularity supports' their prosecutorial decisions and, 'in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.'" (quoting United States v. Chem. Found., Inc., 272 U.S. 1, 14-15 (1926)).

[5] *See* Luna & Wade, *supra* note xxx, at 1051.

[6] *See, e.g.*, Wade v. United States, 504 U.S. 181, 186 (1992) ("Thus, a defendant would be entitled to relief if a prosecutor refused to file a substantial-assistance motion, say, because of the defendant's race or religion."); United States v. Batchelder, 442 U.S. 114, 123-24 (1979) ("This Court has long recognized that when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants."); *Bordenkircher*, 434 U.S. at 364 (1978) ("'[T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation' so long as 'the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.'" (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962)).

[7] *See, e.g.*, Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations*, 54 AM. J. COMP. L. 199, 199-200, 202-14 (2006) (discussing the lack of judicial participation in plea negotiations in the United States and the problems that it produces). *But cf.* Santobello v. New York, 404 U.S. 257, 262-63 (1971) (remanding a case in which the State of New York failed to abide by Santobello's plea agreement).

and the procedural requirements that prosecutors must meet during the pretrial and trial processes. "In most cases, prosecutors can charge at will and preordain the ultimate resolution."[8]

> [T]he prosecutor, rather than a judge or jury, is the central adjudicator of facts (as well as replacing the judge as arbiter of most legal issues and of the appropriate sentence to be imposed). Potential defenses are presented by the defendant and his counsel not in a court, but to a prosecutor, who assesses their factual accuracy and likely persuasiveness to a hypothetical judge or jury, and then decides the charge of which the defendant should be adjudged guilty. Mitigating information, similarly, is argued not to the judge, but to the prosecutor, who decides what sentence the defendant should be given in exchange for his plea.[9]

This unreviewed prosecutorial discretion makes a nasty cocktail when mixed with invidious forms of prosecutorial conduct. Overly zealous prosecutors have exploited questionable scientific evidence to pressure defendants into guilty pleas.[10] Similarly, some prosecutors have distorted or exaggerated the significance of certain scientific evidence to obtain questionable convictions.[11] Prosecutorial discretion has become a tool

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[8] Luna & Wade, *supra* note xxx, at 1420. *See* Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2135 (1998) (explaining that, under the American system of plea bargaining, "the prosecutor acts as the administrative decision-maker who determines, in the first instance, whether an accused will be subject to social sanction, and if so, how much punishment will be imposed"); *see, e.g.*, Hans P. Sinha, *Prosecutorial Ethics: The Charging Decision*, 41 PROSECUTOR 32, 33 (2007) (discussing the comments of a former deputy district attorney who acknowledged "that if a prosecutor wants to bring charges against someone, the prosecutor will be able to do so," and claimed that "[a] prosecutor can . . . sit down at the onset of a typical case and fairly accurately plan and predict the outcome of the case").

[9] Gerard E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading Off?*, 55 STAN. L. REV. 1399, 1403-04 (2003).

[10] *See* MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 326-28, 330-33 (3d ed. 2004).

[11] *See* MARK FUHRMAN, DEATH AND JUSTICE (2003); Ken Armstrong & Steve Mills, *Convicted by a Hair*, CHI. TRIB., Nov. 18, 1999, 1, at 1 (recounting a number of cases of prosecutorial misuse of junk science to secure convictions in the United States).

for adversarial gamesmanship.[12] The result is that prosecutorial misconduct is one of the leading causes of wrongful convictions in the United States.

Overcriminalization,[13] the breadth of many criminal statutes in the United States, the disappearance of *mens rea* requirements from many criminal offenses, and the ability of American prosecutors to use "short-cut" offenses like perjury,[14] obstruction of justice,[15] or making false statements[16] to proceed with charges with relatively little proof raise concerns when the individuals making the decisions may be biased.[17]

Much of the scholarly literature examining prosecutorial discretion in the United States has focused on the use and abuse of this power, analyzing the appropriateness of prosecutors' exercise of discretion, charging decisions, and plea negotiations or plea bargaining.[18] James Vorenberg has offered a comprehensive formula, including

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[12] *See* Luna & Wade, *supra* note xxx, at 1501.

[13] *See* AMERICAN BAR ASSOCIATION TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIMINAL LAW 2 (1998) ("Of all federal crimes enacted since 1865, over forty percent have been created since 1970."); *see also* Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction,* 46 HASTINGS L.J. 979, 980 (1995) ("There are now more than 3,000 federal crimes.").

[14] *See, e.g.*, 18 U.S.C. § 1621 (criminalizing perjury).

[15] *See, e.g.*, 18 U.S.C. § 1505 (criminalizing the obstruction of proceedings of federal departments, agencies, and committees); 18 U.S.C. § 1512 (criminalizing witness tampering).

[16] *See, e.g.*, 18 U.S.C. § 1001 (criminalizing making false statements to federal officers).

[17] *See* Ellen S. Podgor, *The Tainted Federal Prosecutor in an Overcriminalized Justice System,* 67 WASH & LEE L. REV. 1569, 1573 (2010) [hereinafter "Podgor, *Tainted Federal Prosecutor*"]. Unlike judges, American prosecutors are not generally held to an appearance-of-impropriety standard. *See* Roberta K. Flowers, *What You See Is What You Get: Applying the Appearance of Impropriety Standard to Prosecutors,* 63 MO. L. REV. 699, 722-25 (1998); *see generally* 28 U.S.C. § 455 (a) (1974) (requiring judges to recuse themselves from any case that could give rise to an appearance of partiality); Federal Code of Conduct for United States Judges, available at: http://www.uscourts.gov /rulesandpolicies/codesofconduct/codeconductunitedstatesjudges.aspx (last visited Feb. 9. 2012) (requiring judges "to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."); Erwin Chemerinsky, *A Supreme Court Above Reproach*, DAILY J., Feb. 15, 2011, at 1. ("Codes of judicial ethics require that judges avoid even the appearance of impropriety.").

[18] *See, e.g.*, LLOYD L. WEINREB, DENIAL OF JUSTICE 135 (1977) (calling for the institution of an examining judge in the United States to investigate crime and consider charges); D. Barry & A. Greer, *Sentencing Versus Prosecutorial Discretion: The Application of New Disparity Measure,* 18 J. RESEARCH IN CRIME & DELINQUENCY 254 (1981); L.C. Griffin, *The Prudent Prosecutor,* 14 GEORGETOWN J. L. ETHICS 259 (2001); Maximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure,* 33 AM. J. CRIM. L. 223, 225-26 (2006); John H. Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439, 439-40

guidelines, "screening conferences," the development of a record-keeping system of the discretionary decisions made by prosecutors, legislative oversight, and a strong judicial role.[19] Ellen Podgor has advocated better educating prosecutors in their exercise of discretion[20] and a broader approach to charging decisions that takes into account factors like the charging decisions in related cases, the general need for legal reform, and the broad imperative to do justice.[21] Rory Little has advocated a new ethics rule for American prosecutors to guide their discretion in the investigative stage and "promote proportionality in investigation."[22] Norman Abrams and Laurie Levenson have argued for the use of internal guidelines to constrain prosecutorial discretion.[23] Andrew Taslitz and Anthony Alfieri have suggested incorporating community participation into the prosecutorial process.[24] Tracey Meares has proposed the use of financial rewards "to

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(1974) (arguing that the unbridled discretion of American prosecutors could be curbed through the continental model of compulsory prosecution); Robert L. Misner, *Recasting Prosecutorial Discretion,* 86 J. CRIM. L. & CRIMINOLOGY 717 (1996); M. Mulkey, *The Role of Prosecution and Defense in Plea Bargaining,* 3 POL'Y STUDIES J. 54 (1974); H. Schoenfeld, *Violated Trust: Conceptualizing Prosecutorial Misconduct,* 21 J. CONTEMP. CRIM. JUSTICE 250 (2005); Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargaining,* 55 STAN. L. REV. 1409, 1410 (2003) ("Only by improving transparency can we address the underlying concerns, such as convicting innocent defendants or providing prosecutors with such complete control over outcomes that defendants retain no realistic access to judges, trials, or trial rights."); Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff,* 55 STAN. L. REV. 29 (2002) (suggesting a "screening" alternative to negotiated plea bargaining in the United States, which would include increased initial investigative information, the filing of only appropriate charges, and a restriction of plea bargaining).

[19] James Vorenberg, *Decent Restraint of Prosecutorial Power,* 94 HARV. L. REV. 1521 (1981) (discussing various limits on prosecutorial discretion in the United States).

[20] *See* Ellen S. Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions,* 68 FORDHAM L. REV. 1511, 1514 (2000) [hereinafter "Podgor, *Ethics & Professionalism*"].

[21] *See* Ellen S. Podgor, *Race-ing Prosecutors' Ethics Codes,* 44 HARV. C.R.-C.L. L. REV. 462, 474-75 (2009).

[22] Rory K. Little, *Proportionality as an Ethical Precept for Prosecutors in Their Investigative Role,* 68 FORDHAM L. REV. 723, 752-53, 766-69 (1999).

[23] Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion,* 19 UCLA L. REV. 1, 57 (1971) (discussing the need for DOJ policy statements on the exercise of discretion); Laurie L. Levenson, *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors,* 26 FORDHAM URB. L.J. 553, 569 (1999) ("It has long been believed that maximum fairness will be achieved by neutral rules and standards to guide prosecutors' exercise of discretion.").

[24] *See* Anthony V. Alfieri, *Prosecuting the Jena Six,* 93 CORNELL L. REV. 1285, 1292-93 (2008); Andrew E. Taslitz, *Eyewitness Identification, Democratic Deliberation, and the Politics of Science,* 4 CARDOZO J. PUB.

shape a public prosecutor's behavior in desired ways."[25] Richard Uviller has advocated the disaggregation of prosecutorial decision-making authority.[26] Douglas Colbert has argued that courts should appoint counsel to indigent defendants at bail hearings in part so that counsel can help to identify weaker cases and remove them from the system.[27]

At the other end of the debate are scholars who have critiqued suggestions for controlling prosecutorial discretion in the United States. Amanda Hitchcock has argued that "internal guidelines and policies in general fail to serve the purpose of restraining the prosecutor's discretion to any meaningful degree."[28] Marc Miller and Ronald Wright have argued that judicial oversight cannot address the problem because current American law requires a showing that a prosecutor's actions were unconstitutionally racially motivated.[29] Alafair Burke has argued that fault-based solutions attribute too much rational choice to prosecutors and may not be effective if they are making poor decisions unconsciously.[30] William Pizzi has argued that "attempts to limit prosecutorial discretion on the European model are unlikely to work in this country."[31]

L. POL'Y & ETHICS 271, 314-16 (2006) (arguing that criminal-justice coordinating councils should play a role in eyewitness-identification lineup procedures).

[25] Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 917 (1995). *See* Misner, *supra* note xxx, at 766-67 (proposing tying the discretion of state prosecutors "to the availability of prison resources").

[26] *See* H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit,* 68 FORDHAM L. REV. 1695, 1716 (2000) (arguing that separate prosecutors should make the quasi-adjudicative and advocacy-related decisions in each matter).

[27] *See* Douglas Colbert, *Thirty-Five Years After* Gideon: *The Illusory Right to Counsel at Bail Proceedings,* 1998 U. ILL. L. REV. 1, 43-44 ("Rather than waiting several weeks until a lawyer first appears, these weaker charges can be identified at the outset, allowing judges and prosecuting attorneys to avoid squandering valuable time on them.").

[28] Amanda S. Hitchcock, *Using the Adversarial Process to Limit Arbitrariness in Capital Charging Decisions*, 85 N.C. L. REV. 931, 961 (2007).

[29] *See* Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 128 (2008).

[30] *See* Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1590 (2006) (describing confirmation bias and its possible effects in prosecutors' offices). Instead, he has advocated increased oversight and decision making by supervisory personnel. *See* Burke, *supra* note xxx, at 1621 ("Another possible method to mitigate the influence of cognitive bias on prosecutorial decision making is to involve additional, unbiased decisionmakers in the process."); *see also* Keith A. Findlay & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in*

Although these are important conversations, this Article accepts the existence of prosecutorial discretion and leaves to another day a discussion of the merits,[32] or lack thereof,[33] of the unique placement of this level of power in executive-branch agencies in the United States. This Article also omits discussion of what, if any, limits should be placed upon existing prosecutorial discretion because, despite the suggestions of these other scholars, all of which may be warranted, unbridled prosecutorial discretion remains the reality in the United States. As opposed to seeking another way to limit prosecutorial discretion, this Article examines and evaluates an alternate cause of overcharging, one that has not received much attention from courts or in the scholarly literature: the extent to which internal personnel policies in American prosecutors' offices create incentives to overcharge. Instead of focusing only on the ways in which prosecutorial discretion is exercised in the American criminal-justice system, scholars also need to focus on the

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Criminal Cases, 2006 WIS. L. REV. 291, 388 (urging "[m]ultiple levels of case screening" to minimize tunnel vision by prosecutors).

[31] William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 OHIO ST. L.J. 1325, 1372 (1993) (comparing the prosecutorial discretion allowed American prosecutors to that granted to their "civil law counterparts"). Commentators have also examined the infiltration of politics into the American justice system, particularly at the federal level, in a variety of contexts. *See* Sara Sun Beale, *Rethinking the Identity and Role of United States Attorneys*, 6 OHIO ST. J. CRIM. L. 369 (2009) (advocating regulating contact between DOJ and "political actors"); Bruce A. Green & Fred C. Zacharias, *"The U.S. Attorneys Scandal" and the Allocation of Prosecutorial Power*, 69 OHIO ST. L.J. 187 (2008) (discussing the controversial "firings" of nine U.S. Attorneys in 2008 in examining how prosecutorial power should be distributed in the United States) [hereinafter "Green & Zacharias, *Allocation*"]; John McKay, *Train Wreck at the Justice Department: An Eyewitness Account*, 31 SEATTLE U. L. REV. 265 (2008) (discussing the "firings" of U.S. Attorneys); Podgor, *Tainted Federal Prosecutor*, *supra* note xxx (focusing on the importance of maintaining political neutrality in DOJ); James K. Robinson, *Restoring Public Confidence in the Fairness of the Department of Justice's Criminal Justice Function*, 2 HARV. L. & POL'Y REV. 237 (2008) (discussing the politicization of DOJ and its need to restore credibility).

[32] *See generally* Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. REV. 669, 673-76 (discussing the discretion that the adversary system affords to prosecutors).

[33] *See* Vorenberg, *supra* note xxx, at 1560-72 (1981).

policies governing those who exercise that discretion, particularly when those policies suggest the existence of bias.[34]

The goal of this Article is reformist, by proposing a doctrinal mechanism for reigning in the incentives to overcharge within the existing system of prosecutorial discretion in the United States. In order to curb overcharging and other forms of prosecutorial misconduct, American courts should disqualify[35] prosecutors whose offices explicitly or implicitly determine their job status, compensation, or advancement on the basis of their conviction or sentencing record on the ground that such personnel policies create an actual conflict of interest.

II. *DILBERT* LIVES: PROSECUTORIAL PERSONNEL POLICIES

In the United States, increasingly, the concept of "doing justice" is interpreted narrowly, and the effectiveness of prosecutors is judged on the basis of their conviction and plea-bargain rates.[36] There has been a nationwide movement in the United States to increase prosecutorial accountability by utilizing tangible, numerical "performance-based measures" for evaluating the work of prosecutors, which in turn are used to determine advancement, salary, bonuses, and other benefits for prosecutors. Funding entities, like

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[34] *See* David A. Sklansky, *Starr, Singleton, and the Prosecutor's Role,* 26 FORDHAM URB. L.J. 509, 530-31 (1999) (discussing the failure of scholarship to address the question of how American prosecutors should exercise their existing discretion).

[35] This Article uses "disqualify" and "recuse" interchangeably, since the use of these two terms varies by jurisdiction.

[36] *See* ELAINE NUGENT-BORAKOVE & LISA M. BUDZILOWICZ, DO LOWER CONVICTION RATES MEAN PROSECUTORS' OFFICES ARE PERFORMING POORLY? (Natl. Dist. Attys' Assoc. March 2007), at 1, 5.

legislatures and county commissions/councils, are increasingly looking for performance-based budgets from prosecutors.[37]

The Government Performance and Results Act of 1993 ("GPRA")[38] requires federal agencies, including the United States Department of Justice ("DOJ"), to, among other things, set goals, measure performance, and report on their accomplishments in their annual performance plans and reports in order to move toward a performance-based environment. In keeping with this mandate, DOJ has developed performance measures that apply to United States Attorneys ("USAs") in order to monitor the performance of United States Attorney's Offices ("USAOs").[39] The Executive Office for United States Attorneys ("EOUSA") has redesigned its internal evaluation program and begun implementing a new process for collecting and analyzing information to assess each USAO's progress toward addressing DOJ's priorities and meeting performance expectations.[40] The purpose of this redesign is to move USAOs "toward a more results oriented, performance-based environment."[41]

In the summer of 2001, President Bush announced the President's Management Agenda ("PMA") to improve the management and performance of the federal government.[42] It mandated that federal agencies integrate their budgets with performance information to provide a greater focus on performance and increase the value and use of

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[37] *See* M. ELAINE NUGENT-BORAKOVE, *et al.,* EXPLORING THE FEASIBILITY AND EFFICACY OF PERFORMANCE MEASURES IN PROSECUTION AND THEIR APPLICATION TO COMMUNITY PROSECUTION (Nat'l Dist. Attys' Assoc. July 2009), at 2.
[38] Pub. L. No. 103-62.
[39] *See* UNITED STATES GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, U.S. ATTORNEYS PERFORMANCE-BASED INITIATIVES ARE EVOLVING (No. GAO-04-422)(May 2004) [hereinafter "GAO REPORT"], at 1.
[40] *See id.* at 1.
[41] *Id.* at 7.
[42] *See id.* at 20 n.3.

program performance information in resource and management decisions.[43] One of the goals for requiring agencies to integrate their budgets with performance information was to increase the use of program performance information in management decisions.[44]

In order to implement these two mandates, federal agencies, including USAOs, have been instructed, *inter alia,* to engage in activities with titles worthy of Orwell, such as "strategic human capital planning" that is "more fully and demonstrably integrated with mission and critical program goals" and building "results oriented organizational cultures" that "promote high performance and accountability."[45] In response, EOUSA has begun to make changes to its internal evaluation program,[46] including focusing on "personnel management," that are intended to enhance DOJ's ability to assess the performance and management of USAOs.[47] DOJ has been working on a new employee performance appraisal system for General Schedule and Senior Executive Service Employees to link individual employee-performance management to objectives, measures, and results.[48] EOUSA is working toward restructuring pay and performance systems and linking pay to performance in order to give USAs more flexibility to provide larger pay increases and distinguish more precisely among varying levels of

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[43] *See id.* at 20.
[44] *See id.* at 43.
[45] *Id.* at 24.
[46] The evaluation program, which was initiated in 1969, was designed to evaluate each district's compliance with federal regulations and provide information to DOJ on performance, management, and various priorities and objectives. *See id.* at 49 n.1. Among other things, the evaluations assessed compliance with DOJ priorities, policies, and programs; reviewed staffing and workload; and determined whether USAOs were meeting the internal control requirements of the Federal Managers Financial Integrity Act. *See id.* In 1984, EOUSA established the Evaluation and Review Staff ("EARS") as a component to coordinate the evaluation program. *See id.* The EARS guidance has subsequently been revised to provide greater focus on assessing the steps that each office is taking in regard to results-oriented management. *See id.* at 50.
[47] *Id.* at 49.
[48] *See id.* at 63.

performance.[49]

In 2003, the American Prosecutors Research Institute ("APRI"), the research and development division of the National District Attorneys Association ("NDAA"), began to tackle what it perceived as the need for a menu of measures for prosecutor performance at the state and local level by developing a performance-measurement framework for prosecutors.[50] The resulting framework, intended to provide a guide for performance measurement in prosecution, identified measurable goals and objectives for prosecutors that are linked to a series of possible performance measures.[51] The result was a performance-measurement framework intended for nationwide implementation.[52]

Of course, there is nothing wrong with wanting to establish objective, quantitative measures linked to agency goals for evaluating the performance of prosecutors or even to pay individual prosecutors accordingly; on the contrary, these are laudable goals.[53] The problem is the way that those goals are usually defined and the measures that are usually chosen. Deciding to reward successful prosecutors and punish unsuccessful ones is easy. Defining success and failure is much more difficult. Unfortunately, across the United States, prosecutors' offices maintain and track only the most elementary data on outcome: case disposition, length of sentence, and perhaps the number of offenders

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[49] *See id.* at 66-67.
[50] *See* NUGENT-BORAKOVE, *et al.*, *supra* note xxx, at i.
[51] *See id.*
[52] *See id.* at 2.
[53] By rigorously and systematically assessing the effectiveness of different policies and practices in their offices, American prosecutors can answer important questions about the success of their work, set priorities, track progress in achieving goals, target areas for improvement, and direct resource allocation. *See* NUGENT-BORAKOVE & BUDZILOWICZ, *supra* note xxx, at 3-4. Performance measures specifically linked to prosecution goals and objectives provide a framework for a more empirical and rigorous examination of the prosecution function in the United States. *See* NUGENT-BORAKOVE, *et al.*, *supra* note xxx, at 2. The implementation of comprehensive and regular performance measurement could also increase transparency in prosecution, allowing for a more systematic assessment of prosecutorial operations and innovations. *See* B. Forst, *Prosecution's Coming of Age*, 2 JUSTICE RESEARCH & POL'Y J. 21 (1990).

completing some type of diversion program.[54] Researchers and professional associations tend to focus on simple, practical indicators like conviction and dismissal rates.[55] The DOJ performance-evaluation measures, for example, include an "outcome measure," defined as the percentage of cases "favorably resolved," which is intended to show how USAs "contribute to DOJ's overall mission."[56] Many of these outcome measures are described in terms of "convictions" or the percentage of cases "successfully litigated" or "favorably resolved."[57] For Fiscal Year ("FY") 2004, the "performance measures" that were used to evaluate the performance of federal prosecutors in criminal cases included the number of defendant "received," "filed," "prosecuted," and "convicted" by broad case type (terrorism, violent and trafficking crimes, and white-collar crime).[58] For FY 2005, these measures were modified slightly for terrorism cases to "cases filed," "convictions," and defendants "sentenced to prison," for violent crime, drug trafficking, and white-collar crimes to "total defendants terminated"[59] and defendants found guilty, and for all cases, to an outcome measure of "percentage of cases favorably resolved," using data on defendants.[60] DOJ defines the percentage of cases actually or expected to be favorably resolved as the number of defendants found guilty divided by the number of defendants terminated – *i.e.*, the rate of conviction.[61] Under this definition, a case that results in the

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[54] *See* NUGENT-BORAKOVE, *et al.*, *supra* note xxx, at 2.
[55] *See id.* at 3-4.
[56] GAO REPORT, *supra* note xxx, at 5.
[57] *Id.* at 31.
[58] *Id.* at 35-36. The only other performance measures that were used for both civil and criminal AUSAs were training statistics tracking the number of students that were trained at DOJ and non-DOJ training programs. *See id.* at 38. These data were collected from the monthly reports that USAOs file and the USAOs' central case-management system. *See id.* at 36, 38.
[59] As sinister as it sounds, DOJ uses the term "defendants terminated" to mean the total number of defendants for which some type of closure was reached – they were found guilty, acquitted, or the proceedings were dismissed or otherwise terminated. *See id.* at 44 n.2.
[60] *Id.* at 40, 44.
[61] *See id*. at 45. For example, for FY 2003, the total number of defendants found guilty (68,960) divided by the total number of defendants terminated (75,189) equaled 91.7 percent, the same percentage as that

defendant being found guilty has had a favorable outcome; a case that does not result in the defendant being found guilty has not.[62]

The performance measures developed by APRI similarly include the "ratio of convictions/cases charged," "incarcerations," which are measured by "average sentence length" and the average number of years that felony offenders are "sentenced to incarceration," and "dismissals," which are measured by the "ratio of public intoxication arrests to cases charged," *inter alia,* as good measures of a prosecutor's performance with regard to the objective of holding offenders "accountable" and "pleas to original charge," which is measured by the "ratio of pleas to lesser charge / pleas as charged" as a good performance measure with regard to the objective of a case disposition that is "appropriate for offense & offender."[63] The APRI study concluded that conviction, sentence, and plea rates, *inter alia,* were "valid measures" of prosecutor performance.[64] While prosecutors have always made their reputations by winning trials,[65] the result of these new quantitative standards sweeping through prosecution organizations is that

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reported for cases favorably resolved. For FY 2005, the total number of defendants found guilty (73,075) divided by the total number of defendants terminated (79,733) equaled 91.6 percent, the same number reported as the expected percentage of cases favorably resolved for that FY. *See id.* DOJ used the outcome measure – the percentage of cases favorably resolved – to enable all of its litigating components to use a single outcome measure. *See id.; cf.* Richard T. Boylan, *What do Prosecutors Maximize?: Evidence From the Careers of U.S. Attorneys*, 7 AM. L. & ECON. REV. 379, 379 (2005) (finding that the length of prison sentences was positively related to subsequent favorable career outcomes for USAs but nonetheless concluding that "conviction rates do not appear to affect the careers of U.S. attorneys").

[62] In addition to DOJ's performance goals and measures, individual USAOs may establish performance goals and measures in each office, which could vary considerably from district to district and even within a district. *See* GAO REPORT, *supra* note xxx, at 54. A district that has different branch offices could have goals that vary from branch to branch. *See id.* As of 2003, approximately seventy-seven percent of the district USAOs had established district-level performance goals and measures. *See id*. at 54-55. Individual "performance workplan" goals are also established between supervisors and employees as part of each individual's annual performance assessment. *See id.* at 55 n.3.

[63] NUGENT-BORAKOVE, *et al., supra* note xxx, at ii, iv-v, 27.

[64] *Id.* at xiii-xix.

[65] *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial,* 117 HARV. L. REV. 2463, 2472 (2004).

prosecutorial success for the explicit purposes of job evaluation and remuneration are now measured by the number of convictions and amount of punishment.[66]

While APRI had originally included as a goal in its framework "promoting integrity in the prosecution profession and coordination in the criminal justice system," performance in relation to which would have been measured by an analysis, *inter alia,* of the completion of "professional/legal training," "meritorious ethics violations," "prosecutorial error," and "disciplinary actions," after "lengthy discussions with the prosecutors' offices participating in the study, a decision was made not to include performance measurement data to assess the promotion of integrity in the prosecution profession and coordination in the justice system."[67] One rationale for this decision was that "the prosecutors' offices were most interested in understanding how their offices were performing in terms of 'doing justice,'"[68] the implication being that those offices did not see training and avoiding ethics violations, errors, and disciplinary actions as relevant measures of prosecutors' performance in achieving justice. One consequence of APRI dropping the "the goal of promoting integrity in the prosecution profession" from its study is that there are no data with which to compare how those performance measures (training, ethics violations, errors, disciplinary proceedings) may have correlated with more traditional performance measures, such as conviction rates and the length of sentences. A strong correlation, for example, between the number of ethics violations that a prosecutor had and his/her (high) conviction rate would have been strong evidence

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[66] *See* Luna & Wade, *supra* note xxx, at 1495; Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 134-35 (2004) ("Prosecutors with the highest conviction rates (and, thus, reputations as the best performers) stand the greatest chance for advancement internally.").

[67] NUGENT-BORAKOVE, *et al.*, *supra* note xxx, at ii, vi.

[68] *Id.* at vi.

that personnel policies that reward prosecutors on the basis of their conviction rates encourage unethical behavior.

III. PROSECUTORIAL CONFLICTS OF INTEREST

A number of American jurisdictions have rules, regulations, constitutional provisions, or legislative enactments directly bearing upon prosecutorial disqualification because of a conflict of interest.[69] The general principle prohibiting an attorney from representing adverse or conflicting interests[70] applies to prosecuting attorneys and may provide grounds for disqualification from participation in a criminal case. The American Bar Association Criminal Justice Standards for the Prosecution Function ("ABA Prosecution Standards") declare that prosecutors should avoid conflicts of interest with respect to their official duties. Disqualification of a prosecutor is generally necessary if a trial court determines that a prosecutor has a conflict of interest that might prejudice him or her against the accused.[71]

American courts have held that, if a prosecutor has a private interest in a case, it is the court's duty to disqualify him/her and appoint a special prosecutor instead.[72] The nature and extent of the private interests that may result in disqualification are many and

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[69] *See, e.g.,* Scott N. Schools, *An Overview of the General Counsel's Office of the Executive Office for United States Attorneys,* United States Attorney's Bulletin Vol. 5, No. 3 (May 2007), at 6 (explaining that recusal of a USA from a matter is usually warranted when an employee is a target, subject, witness, or victim or when the USA has had a prior business or personal relationship with a target, subject, or victim).
[70] *See, e.g.,* MISSOURI S. CT. R. 4-1.9 (barring lawyers from using information that they have learned about a former client in any subsequent case against that person).
[71] *See, e.g.,* CAL. PENAL CODE § 1424 (authorizing the disqualification of a district attorney after a showing "that a conflict of interest exists such as would render it unlikely that the defendant would receive a fair trial").
[72] *See, e.g.,* People *ex rel.* Colorado Bar Association v. * * *, 9 P.2d 611 (holding that, if a prosecutor has a private interest in a criminal case under his jurisdiction, it was the court's duty to appoint another for him).

varied.[73] Courts have concluded, for example, that prosecutors had to be disqualified on the basis of ongoing civil litigation between the defendant and prosecutor, the victimization of the prosecutor by the criminal activity being prosecuted, and political confrontations. What unifies this case law is the prosecutor's duty to avoid partisanship and partiality in the performance of his/her duties, which may result in false accusations.[74] Important considerations emphasized by many of the courts in these cases are the dual nature of the prosecutor's duty[75] and an analysis of whether a putative conflict is likely to impede a prosecutor's exercise of discretion in an evenhanded manner.[76]

Typically, cases involving the putative disqualification of prosecutor(s) have arisen because of the existence of a past or present connection, relationship, acquaintance, or affiliation with the accused.[77] What this Article proposes, by contrast, is

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[73] *See* Wheeler v. District Court, 504 P.2d 1094, 1095 (Colo. 1973).
[74] *See id.*
[75] *See infra* Section IV (A) (i).
[76] *See, e.g.*, People v. Conner, 34 Cal.3d 141 (1983).
[77] *See, e.g.*, United States v Goot, 894 F.2d 231 (7th Cir. 1990); United States v Troutman, 814 F.2d 1428 (10th Cir. 1987); United States v Schell, 775 F.2d 559 (4th Cir. 1985); United States v Caggiano, 660 F.2d 184 (6th Cir. 1981); United States v Weiner, 578 F.2d 757 (9th Cir. 1978); Gajewski v United States, 321 F.2d 261 (8th Cir. 1963); United States v Stout, 723 F. Supp. 297 (E. D. Pa. 1989); Satterwhite v State, 359 So. 2d 816 (Ala. App. 1977) (holding that a prosecuting attorney improperly took "an active part" in the Satterwhite's marijuana prosecution when he had previously met with him in his private office while still in private practice and discussed the three marijuana-related cases pending against him "to the extent at least, that he could fix a fee for representing him"); State v Hursey, 861 P.2d 615 (Ariz. 1993) (holding that a prosecutor who had represented Hursey in two earlier criminal cases should have disqualified himself from prosecuting Hursey in another criminal case, especially when the convictions in the two earlier cases were the basis for an enhanced sentence in the instant case); State *ex rel.* Romley v Superior Court, 908 P.2d 37 (Ariz. App. 1995) (holding that a deputy county attorney was prohibited from personally participating in the prosecution of fifteen criminal defendants because he had previously received confidential information while representing them in connection with criminal cases when he worked as a law office associate); People v Lepe, 211 Cal. Rptr. 432 (Cal. App. 4th Dist. 1985) (holding that that the trial court had properly recused a district attorney and his entire office from prosecuting Lepe because the district attorney, before assuming that office, had defended him in two prior criminal cases); Trujillo v. Superior Court, 148 Cal.App.3d 368 (Cal. App. 1983) (holding that a prosecutor who tackled Trujillo when he tried to bolt from the courtroom after a guilty verdict was announced was barred from prosecuting him for the resulting attempted escape charge but that the rest of his office was not); People v. Chavez, 139 P.3d 649, 653 (Colo. 2006) (holding that "where the prosecuting attorney had an attorney-client relationship with the defendant in a case that was substantially related to the case in which the defendant is being prosecuted,

circumstances exist that would render it unlikely that the defendant would receive a fair trial") (internal quotation omitted); Reaves v State, 574 So. 2d 105 (Fla. 1991) (holding that a state's attorney who was prosecuting Reaves for the murder of a police officer had to be disqualified because of his previous representation of Reaves in a case involving grand larceny charges when he was an assistant public defender); Tyree v State 418 S.E.2d 16 (Ga. 1992) (noting that Tyree's prosecutor should be recused on remand because he had twice represented him while in private practice); People v Rhymer, 336 N.E.2d 203 (Ill. App. 5th Dist. 1975) (holding that Rhymer was denied a fair trial by the conflict of interest on the part of the prosecutor who previously had discussed her criminal case with her prior to becoming the prosecutor); Asbell v State, 468 N.E.2d 845 (Ind. 1984) (holding that the trial court did not err in appointing a special prosecutor after Asbell had been charged with being a habitual offender when the county prosecutor and his deputy had defended him against two previous charges that were offered to prove his recidivism); Sears v State, 457 N.E.2d 192 (Ind. 1983) (holding that the appointment of a special prosecutor for the habitual offender phase of Sears's perjury trial was proper when the regular prosecutor had represented him "in one or more cases which were listed in the habitual offender charge"); State v Tippecanoe Co. Ct., 432 N.E.2d 1377 (Ind. 1982) (holding that the prosecutor had to be disqualified and a special prosecutor appointed when a habitual-offender charge was based upon two prior theft cases in which the prosecutor had represented the defendant); People v Dyer, 328 N.E.2d 716 (Ill. 5th Dist. Ct. App. 1975) (holding that a *prima facie* violation of Dyer's constitutional right to due process had been established when the prosecutor in the case had previously represented him on unrelated criminal charges that were pending at the time that Dyer allegedly conversed with the prosecutor about facts surrounding the instant murder charges); Nunn v Commonwealth, 896 S.W.2d 911 (Ky. 1995) (holding that a prosecutor should have recused himself from Nunn's prosecution for first-degree arson on the basis of his prior representation of her in a bankruptcy proceeding that was substantially related to the alleged motive underlying the arson prosecution); State v Gardner, 651 So. 2d 282 (La. 1995) (affirming the trial court's granting of Gardner's motion to recuse the district attorney and the assistant district attorney from prosecuting him as a four-time driving while intoxicated ("DWI") offender when the district attorney's prior representation of him as appointed counsel with regard to the two prior DWI offenses had included the filing of pretrial motions); State v Allen, 539 So. 2d 1232 (La. 1989) (holding that the trial court committed reversible error in denying Allen's motion to recuse an assistant district attorney from his arson prosecution when the assistant district attorney had represented him in a prior bankruptcy proceeding, which was "substantially related to" the prosecution in that the main thrust of Allen's defense was that the bankruptcy precluded the possibility of any insurance recovery going directly to him and therefore negated the existence of monetary gain as a motive to commit arson); State v Woods, 283 So. 2d 753 (La. 1973) (recognizing that the prosecutor should have been recused because he had represented Woods at his arraignment while employed as an assistant public defender prior to being appointed as an assistant district attorney and conducting Woods's prosecution); State v Snyder, 237 So. 2d 392 (La. 1970) (holding that the district attorney should be disqualified from prosecuting Snyder in a state perjury case based on his personal animosity toward Snyder and his having actively campaigned against him during a mayoral election); State v Crandell, 604 So. 2d 123 (La. App. 2d. Cir. 1992) (concluding that the trial court had properly recused a part-time prosecutor from any participation in Crandell's murder prosecution because he had previously represented him as counsel of record for two months at an earlier stage in the case); Lykins v State, 415 A.2d 1113 (Md. 1980 (holding that a prosecutor was disqualified from prosecuting Lykins for assault with the intent to murder when he had previously represented prepared a marital separation agreement for her, during which time he had discussed her personal and domestic history); Sharplin v State, 330 So. 2d 591 (Miss. 1976) (holding that, when a prosecutor in Sharplin's trial for the alleged murder of his estranged wife had been representing him in the divorced action against the victim, the relationship between the civil representation and the criminal prosecution was "so substantial and the facts of each so intertwined" that the prosecutor could not be expected to lay aside confidences entrusted to him during the civil representation and the refusal of the court to disqualify the prosecutor upon Sharplin's motion was reversible error); Vandergriff v. State, 920 So. 2d 486 (Miss. Ct. App. 2006) (holding that a prosecuting attorney was disqualified from acting in a criminal case if he had previously represented or been consulted professionally by the accused with respect to the offense charged); State *ex rel.* Burns v. Richards, 248 S.W.3d 603 (Mo. 2008) (holding that a prosecutor was disqualified from prosecution because, prior to being elected as prosecutor, he had served as the public defender in a prosecution in another county for a substantially related matter); State v. Clark, 126 N.J. 201 (2000) (prohibiting municipal prosecutors from

the disqualification of entire prosecutorial offices from the prosecution of cases because of an inherent, actual conflict of interest arising from the structure of promotion and compensation decisions within them.

IV. THE PROPOSAL: DISQUALIFICATION

A. The Problem

(i) The Ethical Role of the Prosecutor

The prosecutor plays a unique role in the American criminal-justice system.[78] While the American trial process has been referred to as a battle of adversaries in which

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defending clients in the same county in which they prosecute because such dual representation created the appearance of impropriety); People v Tessitor, 577 N.Y.S.2d 680 (N.Y. App. Div. 3d Dept. 1991) (concluding that it was improper to allow an assistant district attorney who had once represented Tessitor's codefendant to appear on the State's behalf at the Tessitor's sentencing for burglary and conspiracy); Com. v. Balenger, 704 A.2d 1385 (Pa. Super. Ct. 1997) (holding that the prosecutor's amorous relationship with Balenger's former girlfriend created an impermissible conflict of interest); Mattress v State, 564 S.W.2d 678 (Tenn. Crim. App. 1977) (affirming the trial court's disqualification of an assistant district attorney from prosecuting Mattress for armed robbery because, previously in his capacity as staff attorney at a university legal aid clinic, the assistant district attorney had been assigned to a criminal case against Mattress involving charges unrelated to the instant armed robbery charges, even though the assistant district attorney did not recall the case in which he represent Mattress and Mattress did not claim to have been interviewed by him or to have divulged to him any confidential information); State v Stenger, 760 P.2d 357 (Wash. 1988) (holding that the prosecuting attorney's prior representation of Stenger in unrelated criminal matters while he was in private practice required his disqualification from prosecuting this death-penalty murder prosecution when Stenger had confided uncharged crimes, drug use, and anti-social behavior during the prior representation); State *ex rel.* Keenan v. Hatcher, 557 S.E.2d 361 (W. Va. 2001) (holding that the prosecutor's office was imputedly disqualified from initiating recidivist proceedings on the ground that the elected prosecutor and his assistant had acted as defense counsel in one of the cases involving a predicate offense, even though neither the prosecutor nor his assistant were directly involved in the sentencing phase of the case); State *ex rel.* McClanahan v Hamilton, 430 S.E.2d 569 (W. Va. 1993) (granting a writ prohibiting the trial court from proceeding further with the trial of the underlying criminal action until the prosecutor was disqualified from prosecuting Hamilton for the malicious assault of her husband when he had previously represented her in a suit for divorce based on the ground of cruel and inhuman treatment, reasoning that her mistreatment at the hands of her husband was a central issue in the divorce proceeding and that these same facts and circumstances were substantially related to her defenses of self-defense and "battered wife syndrome" in the criminal action); *cf. In re* Ockrassa, 799 P.2d 1350 (Ariz. App. 1990) (suspending an attorney for violating the Arizona Rules of Professional Conduct for not disqualifying himself from the prosecution of a defendant for driving under the influence of intoxicating liquors ("DUI") whom he had represented in three prior DUI cases while acting as a contract public defender).

[78] *See* Young v. United States *ex. rel.* Vuitton et Fils S.A., 481 U.S. 787, 826 (1987) (Powell, J., concurring in part and dissenting in part) ("A prosecutor occupies a unique role in our criminal justice system.").

lawyers meet to fight for the rights of their client,[79] within the criminal arena, the prosecutor serves a vastly different function than does the defense attorney.[80] Whereas the defense attorney's primary obligation is to protect a client's interest,[81] the prosecutor faces a dual role: that of advocate for the prosecution and administrator of justice.[82] The prosecutor serves a role in between that of the private attorney and the judge – on the one hand, zealously representing the client (the prosecution) in a role closely akin to that of the defense attorney [83] and, on the other, "put[ting] ahead of partisan success the

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[79] *See* James J. Tomkovicz, *An Adversary System Defense of the Rights to Counsel Against Informants: Truth, Fair Play, and the* Massiah *Doctrine,* 22 U.C. DAVIS L. REV. 1, 65 (1988).

[80] *See* Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference,* 44 A.B.A. J. 1159, 1218 (1958) ("The public prosecutor cannot take as a guide for the conduct of his office the standards of an attorney appearing on behalf of an individual client."); Vorenberg, *supra* note xxx, at 1557 (observing that certain accepted practices of American defense counsel are impermissible for prosecutors); *cf.* Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues,* 5 HUM. RTS. 1, 12 (1975) (asserting that the behavior of American criminal-defense attorneys is "amoral" and distinguishable from the role of other lawyers).

[81] *See* Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation,* 85 YALE L.J. 1060, 1060 N.1 (1976); Geoffrey C. Hazard, Jr., *The Future of Legal Ethics,* 100 YALE L.J. 1239, 1244 (1991) ("The legal profession's basic narrative . . . pictures the lawyer as a partisan agent acting with the sanction of the Constitution to defend a private party against the government."). Lord Brougham, in his defense of Queen Caroline before the House of Lords in 1820, eloquently articulated the defense attorney's role in an adversarial system:

> An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.

2 Trial of Queen Caroline 8 (J. Nightingale ed., 1821). *But see In re* Hawaiian Flour Mills, Inc., 868 P.2d 419, 437 (Haw. 1994) (Levinson J., concurring) (urging all attorneys to be more "positively concerned . . . with the pursuit of truth").

[82] See AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 cmt. 1 (1997) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."); ABA PROSECUTION STANDARDS § 3-l .l (b) & (c) (2d ed. 1980) (stating that the duty of the prosecutor is "to seek justice, not merely to convict"); John S. Edwards, *Professional Responsibilities of the Federal Prosecutor,* 17 U. RICH. L. REV. 511, 511 (1983) (describing the prosecutor's dual role as a zealous advocate who "must temper his zeal with a recognition that his broader responsibilities are to seek justice"); George T. Frampton, Jr., *Some Practical and Ethical Problems of Prosecuting Public Officials,* 36 MD. L. REV. 5, 7 (1976) (noting that the prosecutor "is both an advocate in the criminal justice system and also an administrator of that system"); Fuller & Randall, *supra* note xxx, at 1218; Vorenberg, *supra* note xxx, at 1557 (observing that prosecutors within the adversary system are "expected to be more (or is it less?) than an adversary").

[83] *Young,* 481 U.S. at 805 (recognizing the need for a prosecutor to be a zealous advocate).

observance of the law."[84] To that end, the prosecutor is supposed to prosecute and convict the guilty while ensuring that no innocent person is wrongly convicted.[85] The NDAA expressed this view in its National Prosecution Standards:

> [T]he prosecutor has a client not shared with other members of the bar, i.e., society as a whole. . . . The prosecutor must seek justice. In doing so, there is a need to balance the interests of *all* members of society, but when the balance cannot be struck in an individual case, the interest of society is *paramount* for the prosecutor.[86]

In other words, the American prosecutor is supposed to act not only as an advocate, but also as a minister of justice.[87] In *Berger v. United States,*[88] the United States Supreme Court characterized prosecutors not as ordinary parties to a controversy, but as representatives of a sovereign.[89] In keeping with this special role, the prosecutor owes allegiance to a broad set of societal values,[90] avoiding the role of a "partisan eager to convict, and must deal fairly with the accused and other participants in the trial."[91] This also entails the recognition that no single individual or constituency is "the client."[92]

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[84] Blair v. Armontrout, 916 F.2d 1310, 1352 (8th Cir. 1990). But see Stephen A. Saltzburg, *Lawyers, Clients, and the Adversary System,* 37 MERCER L. REV. 647, 656 (1986) (arguing that prosecutors should present the "strongest argument" for conviction at trial); H. Richard Uviller, *The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the ABA,* 71 MICH. L. REV. 1145, 1159 (1973) (urging that prosecutors act primarily as zealous advocates).

[85] *See* CHARLES E. WOLFRAM, MODERN LEGAL ETHICS 759 (1986); Fuller & Randall, *supra* note xxx, at 1218 ("The freedom elsewhere wisely granted to partisan advocacy must be severely curtailed if the prosecutor's duties are to be properly discharged.").

[86] NATIONAL DISTRICT ATTORNEYS' ASSOCIATION STANDARDS 11 (2d ed. 1991), stds1.1 & 1.3.

[87] *See* Flowers, *supra* note xxx, at 703.

[88] 295 U.S. 78 (1935). For a discussion of *Berger, see* Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges,* 50 TEX. L. REV. 629, 635-36 (1972).

[89] *See Berger,* 295 U.S. at 88.

[90] *See* Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework,* 15 AM. J. CRIM. L. 197, 218-20 (1988).

[91] State v. Moss, 376 S.E. 2d 569, 574 (W. Va. 1988) (observing that the prosecutor's duty to avoid overzealousness is especially important in cases involving serious offenses where the jury is apt to be predisposed against the defendant). *See* State v. Chambers, 524 P.2d 999, 1001 (N.M. Ct. App. 1974) (recognizing the prosecutor's duty to see that the defendant is afforded a fair trial).

[92] *See, e.g.,* Town of Newton v. Rumery, 480 U.S. 386, 395 (1987) (holding that the prosecutor represents the public and not the police); *see also* Burns v. Reed, 500 U.S. 478, 485-87 (1991) (denying a prosecutor absolute immunity for advice given to police); *see generally* James Harvey III, *Loyalty in Government*

American prosecutors are supposed to avoid punishing innocent individuals, apply a sense of proportionality (*i.e.*, advocate a punishment that fits the crime), and treat all defendants with rough equality.[93] This role places the prosecutor in the position of both advocating and considering procedural fairness.[94] At times, this means that the prosecutor must protect not only the prosecution, but the defense case as well.[95] The American prosecutor's duty to refrain from improper methods calculated to bring about a wrongful conviction is equal to the duty to use every legitimate means to obtain a just conviction.[96] The *Brady* rule, established by the United States Supreme Court in 1963, requiring prosecutors to disclose to the defendant favorable, material information,[97] arises out of the recognition of this special role.

(ii) Prosecutorial Discretion

American prosecutors have tremendous power over the life and liberty of defendants. Once a criminal matter has been referred for prosecution, the prosecutor decides the appropriateness of bringing criminal charges and, if deemed appropriate,

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Litigation: Department of Justice Representation of Agency Clients, 37 WM. & MARY L. REV. 1569, 1569 (1996) (recognizing the potential clients of DOJ as being the public interest, the United States Government as a whole, United States Governmenet agencies, agency officials, the American President, and the United States Attorney General); Robert P. Lawry, *Confidences and the Government Lawyer,* 57 N.C. L. REV. 625 (1979) (discussing the identity of possible prosecutorial "clients"); E. Michael McCann, *Opposing Capital Punishment: A Prosecutor's Prospective,* 79 MARQ. L. REV. 649, 663 (1996) (describing the relationship between American prosecutors and the police).

[93] *See generally* Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 634-36 (1999) [hereinafter "Green, *Seek Justice*"].

[94] *See* Flowers, *supra* note xxx, at 703.

[95] *See* Roberta K. Flowers, *A Code of Their Own: Updating the Ethics Codes to Include the Non-Adversarial Roles of Federal Prosecutors,* 37 B.C. L. REV. 923, 931 (1996); *see also* Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice,* 44 VAND. L. REV. 45, 66-74 (1991) (discussing the American prosecutor's responsibility to "do justice" when opposing counsel is ineffective). As the United States Court of Appeals for the Eighth Circuit observed in *Blair v. Armontrout,* 916 F.2d 1310 (8th Cir. 1990): "[I]n criminal cases, the government must wear two hats. The prosecutor must act as an advocate, although he or she is repeatedly cautioned to put ahead of partisan success the observance of the law." *Id.* at 1352.

[96] *See Berger,* 295 U.S. 78.

[97] *See* Brady v. Maryland, 373 U.S. 83, 86 (1963).

initiates prosecutions.[98] Prosecutorial screening, the first decision point in the system where the American prosecutor exercises his/her discretion, determines which cases enter the system, which are diverted, and which are refused for prosecution.[99] The American prosecutor brandishes tremendous authority and discretion in directing investigations,[100] ordering arrest, defining the crimes to be charged,[101] deciding whether to seek pretrial detention or agree to release, granting immunity, plea bargaining, affecting punishment, making sentencing recommendations, and deciding whether to prosecute at all.[102] Decisions about which charges to file and whether to negotiate a plea agreement are often a matter of prosecutorial policy that can affect case outcomes.[103] In addition to the ever-increasing number of applicable statutes, [104] the breadth of many criminal statutes in the United States, which allow a wide array of conduct to be subject to prosecution, and the

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[98] *See* GAO REPORT, *supra* note xxx, at 15.
[99] *See* NUGENT-BORAKOVE, *et al.*, *supra* note xxx, at 9.
[100] *See generally* United Stated v. Martinez, 785 F.2d 663, 670 (9th Cir. 1986) (reversing the district court's dismissal of the indictment), *rev'd*, 855 F.2d 621 (9th Cir. 1988); Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393 (1992) (discussing the trend of increasing prosecutorial involvement in criminal investigations).
[101] *See* Ball v. United States, 470 U.S. 856, 859 (1985) (recognizing the long-standing rule that American prosecutors have broad discretion in making charging decisions); United States v. Cox, 342 F.2d 167, 171 (5th Cir.) (explaining that a court cannot interfere with a prosecutor's decision to bring charges); *see also* Gershman, *supra* note xxx, at 409 (arguing that the most extreme example of the prosecutorial discretion is in the area of charging decisions in capital cases); *see generally* Charles J. Yeager & Lee Hargrave, *The Power of the Attorney General to Supercede a District Attorney: Substance, Procedure & Ethics*, 51 LA. L. REV. 733, 742 (1991).
[102] *See* Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 718 (1996). Misner has identified three trends that have augmented the traditional discretion and authority of the American prosecutor: (1) criminal codes with overlapping crimes; (2) the systemic reliance on plea bargaining; and (3) sentencing reforms, like charge-based guidelines and mandatory-minimum sentences, that have shifted much of the judge's historical sentencing discretion into the hands of the prosecutor. *See id.* at 741-63.
[103] *See* NUGENT-BORAKOVE, *et al.*, *supra* note xxx, at 9; *but see* ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 85-86 (2001) ("[P]rosecutors receive little formal training in sentencing theory; often they decide the fates of defendants rapidly and intuitively, without obligatory coordinating guidelines and without any institutionalized requirement to explain and compare their decisions in a reviewable manner."); David T. Johnson, *The Organization of Prosecution and the Possibility of Order*, 32 LAW & SOC'Y REV. 247, 268 (1998) ("In other large American prosecution offices, one usually finds an office manual or handbook of some sort, but 'in most instances it is difficult to say that these materials set forth prosecutorial policy.'").
[104] *See* Podgor, *Tainted Federal Prosecutor*, *supra* note xxx, at 1578-79 (discussing the number of federal criminal statutes in the United States).

reduction of *mens rea* requirements over time afford American prosecutors significant power.[105] One commentator has described the American prosecutor as "the single most powerful figure in the administration of criminal justice."[106] Another has noted that the centralization of power in prosecutors' offices has made the American prosecutor the "preeminent actor in the system."[107] In other words, determining what it means to be a "minister of justice" is largely left "to the wisdom of the prosecuting attorney."[108]

(iii) Counting Convictions

The aspirational language describing prosecutors as impartial "ministers of justice" notwithstanding,[109] in reality, American prosecutors see themselves as advocates in a sometimes brutally adversarial process.[110] They are partisans, with strong incentives to maximize convictions and aggregate sentences.[111] Their role is not necessarily to find the truth, which they are more likely to view as the job of the court, but rather to marshal evidence and arguments that support a conviction and tough sentence.[112] This, in turn, inspires a mentality in which the ends always justify the means and victory is all that matters. This is a serious concern to the proper administration of justice.

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[105] *See id.* at 1580-81 (discussing the reduced *mens rea* requirements of certain federal statutes in the United States).
[106] Charles P. Bubany & Frank F. Skillern, *Taming the Dragon: An Administrative Law for Prosecutorial Decision Making,* 12 AM. CRIM. L. REV. 473, 477 (1976). *See* Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System,* 1992 BYU L. REV. 669, 672.
[107] Misner, *supra* note xxx, at 718.
[108] H. RICHARD UVILLER, THE TILTED PLAYING FIELD 70 (1999). The ABA standards provide that American prosecutors' offices should establish "a statement of (i) general policies to guide the exercise of prosecutorial discretion and (ii) procedures of the office." ABA PROSECUTION STANDARDS, Standard 3-2.5. They note that "the objectives of these policies as to discretion and procedures should be to achieve a fair, efficient, and effective enforcement of the criminal law." *Id.*
[109] *See supra* Section IV (A) (i).
[110] *See, e.g.*, KAGAN, *supra* note xxx, at 61-96 (analyzing adversarialism in the American criminal-justice system).
[111] *See* Luna & Wade, *supra* note xxx, at 1508.
[112] *See* Johnson, *supra* note xxx, at 263-64.

Prosecutorial adversarialism leads to two related but different problems. The first is prosecutorial misconduct and the risk that prosecutorial personnel policies that encourage counting convictions lead prosecutors to run afoul of their constitutional obligations and commit prosecutorial misconduct.

Prosecutorial misconduct is not a rarity in the American criminal-justice system,[113] and, in recent decades, legal scholars have devoted enormous attention to it.[114] Although plenty of standards for the conduct of prosecutors exist in the United States,[115] they have failed to diminish prosecutorial misconduct.[116] Academic commentators have been particularly critical of *Brady* violations.[117] The routine failure of American prosecutors to comply with *Brady* is rarely discovered, and, even then, prosecutors are almost never punished.[118] American prosecutors' offices and bar associations hardly ever

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[113] *See* Flowers, *supra* note xxx, at 734.

[114] *See, e.g.*, BENNETT L. GERSHMAN, TRIAL ERROR AND MISCONDUCT (1997); LAWLESS, *supra* note xxx; Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393 (2001); Alexandra White Dunahoe, *Revisiting the Cost-Benefit Calculus of the Misbehaving Prosecutor: Deterrence Economics and Transitory Prosecutors*, 61 N.Y.U. ANN. SURV. AM. L. 45 (2005); Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713 (1999); Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693 (1987).

[115] *See* ABA MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 cmt. (1997); ABA PROSECUTION STANDARDS; NDAA STANDARDS.

[116] *See, e.g.*, Ellen S. Podgor, *Department of Justice Guidelines: Balancing "Discretionary Justice*," 13 CORNELL J.L. & PUB. POL'Y 167, 177-85 (2004) (discussing federal prosecution guidelines and the failure to enforce them).

[117] Under the rule established in *Brady* and its progeny, American prosecutors are required, as a matter of due process, to disclose favorable material information that tends either to exculpate the defendant or to impeach witnesses against him/her. *See Brady*, 373 U.S. at 87; *see also* Kyles v. Whitely, 514 U.S. 419, 437 (1995) ("The individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."); United States v. Bagley, 473 U.S. 667 (1985) (holding that evidence was material under *Brady* if there was a reasonable probability that, had it been disclosed to the defense, the result of the proceeding would have been different); Giglio v. United States, 405 U.S. 150 (1972). For an excellent assessment of *Brady* issues and criticisms of particular violations, *see* Bennett L. Gershman, *Litigating* Brady v. Maryland: *Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531 (2007).

[118] *See* Daniel Medwed, Brady's *Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533 (2010) (discussing the widespread failure of prosecutors to disclose exculpatory evidence to defendants).

punish this behavior;[119] American judges seldom discipline prosecutors for such violations; and criminal sanctions are rarely imposed against prosecutors in the United States.[120] Richard Rosen has found that disciplinary charges have been "brought infrequently under the applicable rules and that meaningful sanctions have been applied only rarely."[121] Bennett L. Gershman has reported that he reviewed "literally hundreds of truly egregious instances of prosecutorial misconduct" in the United States and that none of these instances resulted in punishment of the prosecutor by either his superiors or the bar.[122]

Commentators have debated the cause of prevalent prosecutorial misconduct in the United States. One theory is that "institutional and political pressures combine to create tremendous incentives for the prosecutor to overlook her quasi-judicial

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[119] *See, e.g.*, Michael S. Ross, *Thinking Outside the Box: How the Enforcement of Ethical Rules Can Minimize the Dangers of Prosecutorial Leniency and Immunity Deals*, 23 CARDOZO L. REV. 875, 890 (2002) (claiming that DOJ's Office of Professional Responsibility ("OPR") has been known to overlook acts of misconduct by prosecutors, even when such misconduct has been publicly noted by judges).

[120] *See, e.g.*, ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 123-41 (2007) (discussing one study of more than 11,000 cases involving potential prosecutorial misconduct in the United States that found that, in only approximately 2,000 of those cases, courts reversed convictions, dismissed charges, or reduced sentences and that most of the prosecutors suffered no consequences as a result). Commentators have also documented that, on the rare occasions when American prosecutors are disciplined, the sanctions imposed amount to little more than a "slap on the wrist." Rosen, *supra* note xxx, at 693. *See* Misner, *supra* note xxx, at 736 (noting the courts' "hands off" policy in sanctioning prosecutors); *see generally* Walter Steele, Jr., *Unethical Prosecutors and Inadequate Discipline*, 38 SW. L.J. 965 (1981).

[121] Rosen, *supra* note xxx, at 693.

[122] BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT 13-2 n.4 (6th ed. 1991) [hereinafter "GERSHMAN, PROSECUTORIAL MISCONDUCT"] (concluding that attorney disciplinary sanctions are so rarely imposed as to make their "use virtually a nullity"). *See* LAWLESS, *supra* note xxx, § 13.15, at 599 (noting that disciplinary sanctions against prosecuting attorneys are the exception rather than the rule); Alschuler, *supra* note xxx, at 673 ("Courts have sometimes exhibited a strange hesitancy to subject prosecutors to the rules that are applicable to other lawyers."); *see also* Ronald F. Wright & Marc L. Miller, *The Worldwide Accountablilty Deficit for Prosecutors*, 67 WASH. & LEE L. REV. 1587 (2010) (describing the "accountability deficit" of American prosecutors across a range of decisions).

obligation."[123] The fear of having performance gauged by a poor conviction record is foremost among these pressures.[124]

The career-advancement structures in American prosecutors' offices increase the danger of prosecutorial misconduct. A prosecutor protective of a "win-loss" record has an incentive to commit misconduct, to cut constitutional and ethical corners in order to secure a guilty verdict in a weak case, to make an incorrect decision about the law, to win at all costs.[125] Prosecutors intent on wracking up convictions and lengthy sentences fail to disclose *Brady* material and run afoul of other constitutional and statutory obligations. For example, a prosecutor with a career stake in the outcome of a case has an incentive not to ensure that law-enforcement agencies, forensic laboratories, and other experts understand their obligations to inform prosecutors about exculpatory or mitigating evidence. Otherwise unthinkable tactics, like bringing questionable or excessive charges, shaping beneficial testimony and mercilessly attacking opposing witnesses, ignoring or even hiding exculpatory evidence, and appealing to base emotions and prejudices all

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[123] Elizabeth L. Earle, *Banishing the Thirteenth Juror: An Approach to the Identification of Prosecutorial Racism*, 92 COLUM. L. REV. 1212, 1219 (1992) (noting that political pressures can cause justice to "take a backseat"). *See* Dick v. Scroggy, 882 F.2d 192, 196 (6th Cir. 1989) (observing that "politically ambitious prosecutors" were not "uncommon").

[124] *See* Welsh S. White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439, 445 (1971) (quoting one prosecutor's assessment that a prosecutor's willingness to take a weak case to trial depended "on his position in the office at the time of trial"); *see generally* Kenneth Bresler, *"I Never Lost a Trial": When Prosecutors Keep Score of Criminal Convictions*, 9 GEO J. LEGAL ETHICS 537 (1996) (discussing problems with the use of conviction records in performance evaluations); Earle, *supra* note xxx; Gifford, *supra* note xxx, at 43 n.39.

[125] *See* Bresler, *supra* note xxx, at 543; Ronald Wright, *Trial Distortion and the End of Innocence*, 154 U. PA. L. REV. 79, 101 (2005) ("Low acquittal rates in some jurisdictions might reflect a tragic indifference to the truth and the prosecutors' determination above all to secure convictions."); *see, e.g.*, United States v. Mullins, 22 F.3d 1365, 1375 (6th Cir. 1994) (Jones, J., concurring) ("a 'win-at-all costs' attitude is inconsistent with 'a prosecutor's] oath of office"); Bruno v. Rushen, 721 F.2d 1193, 1195 (9th Cir. 1983) (explaining that prosecutors have "no obligation to win at all costs"); State v. Ray, 467 N.E.2d 1078, 1984 (Ill. App. 1984) ("The State's interest in a criminal prosecution is not that it must win at all costs, but to assure that justice is done, and it is a prosecutor's duty as much to refrain from improper methods calculated to produce a conviction as it is to employ legitimate techniques to secure a just conviction, striking hard blows, but not foul ones.").

become conceivable when winning means everything.[126] Sometimes, this career interest in earning convictions leads otherwise reasonable people to threaten excessive charges and disproportionate punishment in order to induce guilty pleas.[127] At other times, prosecutors employ dubious evidence and strategies, all to sway juries toward conviction.[128]

The second problem that these American prosecutorial incentive structures engender is not misconduct *per se,* but rather the poor exercise of prosecutorial discretion.[129] In these instances, American prosecutors do not necessarily commit misconduct, but they are nonetheless unable to achieve the good results that they likely would accomplish in the absence of a biasing conflict of interest.

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[126] *See* KAGAN, *supra* note xxx.
[127] *See* Luna & Wade, *supra* note xxx, at 1508.
[128] *See id.*
[129] This distinction, between prosecutorial misconduct and abuse of prosecutorial discretion, has practical as well as theoretical implications. For example, OPR, the internal monitor of ethical violations committed by federal prosecutors in the United States, focuses on professional misconduct. *See* U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL (1999) § 1-2.114 ("The Department's Office of Professional Responsibility, which reports directly to the Attorney General, is responsible for overseeing investigations of allegations of criminal and ethical misconduct by the Department's attorneys and criminal investigators."). Although OPR examines alleged abuses of prosecutorial authority, the conduct scrutinized usually relates to misconduct as opposed to the considerations that might be prevalent in the discretionary decision-making process. *See* Podgor, *Ethics & Professionalism, supra* note xxx, at 1527.

Instances of OPR's examining discretionary decisions by prosecutors occur only in the context of investigations into whether misconduct has occurred. *See id.* at 1528. For example, the 1997 OPR Report references an investigation instigated when a "U.S. District Court found that a DOJ attorney acted in bad faith by refusing to file a substantial assistance motion [for a downward departure at sentencing] on behalf of a defendant who had entered into a plea agreement with the government." *Id.* OPR found that the prosecutor had not engaged in misconduct because there were "valid reasons for not filing a substantial assistance motion." *Id.* at 1528-29. Although a discretionary decision by a prosecutor was being examined in the case, the OPR investigation focused on whether misconduct had occurred and whether the prosecutor had breached a plea agreement. *See id.* at 1529.

Furthermore, central DOJ generally is not in a good position to evaluate the motivations of the individual AUSAs who choose which cases to pursue. *See* Green & Zacharias, *Allocation, supra* note xxx, at 240. The ordinary criteria for supervisory controls rest on the assumption that prosecutors at each level of DOJ will at least try to perform their functions in accordance with their obligations to seek justice. *See id.* at 243. Routine review of fact-sensitive decision making ordinarily is conducted at a relatively low level, by experienced supervisors who are in a position to familiarize themselves with individualized considerations relevant to the specific cases. *See id.* When ordinary supervisory oversight is insufficient, the favored method of preventing abuses of discretion centrally is to develop regulations that guide line decision making. *See id.* at 240.

The already adversarial conception that some American prosecutors have of their role in the system can be exacerbated by prosecutorial performance-measure structures, pursuant to which prosecutors with the highest conviction and sentencing statistics are in the best position for career advancement, not to exercise their discretion to achieve the most just and beneficial outcomes.[130] A simple "screening" decision based on traditional concerns like the strength of the evidence and the individual's relative culpability is inevitably influenced by the background consideration of the prosecutor's career advancement; instinctively, the American prosecutor becomes trigger happy, leaning toward conviction on the top count of the charging document and the maximum sentence.

American prosecutors whose career success depends upon their charging, conviction, and/or sentencing "records" have an actual personal interest in the outcome of in individual case-outcomes and/or net results over time.[131] Counting convictions acts as an incentive to seek them because a prosecutor operating under one of these advancement-and-compensation regimes in the United States accrues a personal benefit from convictions and sentences.[132] The overzealousness that this engenders offends the

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[130] *See* Luna & Wade, *supra* note xxx, at 1466; *see, e.g.*, Edward L. Glaeser et al., *What Do Prosecutors Maximize?: An Analysis of the Federalization of Drug Crimes*, 2 AM. L. & ECON. REV. 259, 263-65 (2000) (describing various motivating factors for prosecutors to gain convictions and finding, among other things, that federal prosecutors in the United States were more likely to accept cases with "higher career returns").

[131] *See* Luna & Wade, *supra* note xxx, at 1495; *cf.* People v Zimmer, 414 N.E.2d 705 (N.Y. 1980) (reversing Zimmer's conviction for grand larceny, forgery, and the issuance of a false financial statement because the district attorney, at the time that he presented the case to the Grand Jury, was also counsel to and a stockholder of the corporation in the course of whose management Zimmer was alleged to have committed the crimes with which he was charged).

[132] *See* Bresler, *supra* note xxx, at 545; *cf.* People v. Superior Court, 51 Cal. Rptr. 3d 356 (Cal. App. 2d. Dist. 2006) (affirming the trial court's recusal of two deputy district attorneys because their demonstrated a one-sided perspective on the role of the prosecution and an apparent attempt to represent the alleged victim's interest in protecting her privacy that exceeded the exercise of balanced discretion necessary to ensure a just and fair trial); People v. Vasquez, 18 Cal. Rptr. 3d 848 (Cal. App. 2d. Dist. 2004) (finding that the trial court erred in failing to recuse the district attorney's office from prosecuting Vasquez for murder in part because the prosecutor made Vasquez no offer to plead to a lesser crime and only offered him to let him plead guilty to second-degree murder); *cf. Chavez,* 139 P.3d at 676-77 (exploring what sorts of prosecutorial "interests" could serve as the basis for disqualification, in the context of political pressure

ethic of objective prosecutorial decision making, which is supposed to consider fairness to defendants, as well as to the public.[133]

In rare cases, this means that American prosecutors will not separate the innocent from the guilty because they have a strong incentive not to discover who is innocent.[134] A prosecutor with a career stake in the outcome of a case has an incentive not to conduct an adequate examination of the quality of the evidence, especially of eyewitness testimony, confessions, or testimony from witnesses who receive a benefit in exchange. Cases make their way to trial without adequate critical examination of the quality of the evidence, especially of eyewitness testimony, confessions, or testimony from witnesses that receive a benefit. These personnel schemes in American prosecutors' offices remove any incentive for a prosecutor to track down a witness whose version of events might support a defendant's claim to an alibi, self-defense, an illegal search or seizure, or a mistaken eyewitness identification or to discover evidence undercutting the credibility of prosecution witnesses.[135] The prospect of advancement and the resulting office cultures

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from a victim's parents, and holding that a prosecutor had to stand to receive some personal benefit from prosecution to be validly disqualified).

[133] *See* Green & Zacharias, *Allocation, supra* note xxx, at 240.

[134] Perhaps understandably, prosecutors are skeptical of most defendants' claims of innocence. *See* Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1946 (1992) ("In the absence of reliable signals that they can afford to take seriously, prosecutors have no viable option other than to ignore claims of innocence."). The strategic incentive that American prosecutors who are promoted and rewarded on the basis of conviction rates and sentence lengths have, though, is to spend all of their time trying to convict defendants (whom they presumably firmly believe to be guilty) rather than exploring undocumented theories that could exculpate defendants who are innocent. If American prosecutors' offices had less of an incentive to look the other way when a case presents the possibility of favorable defense evidence that is only obtainable after additional prosecutorial investigation, they might have a more realistic chance of finding witnesses to support the claims of innocent defendants. Thus, the hopefully rare defendants who deserve to be acquitted, either because they are factually innocent or because there are legitimate questions about the evidence against them, may be convicted anyway.

[135] This problem is compounded by the frequency with which key prosecution witnesses in American criminal trials are involved in criminal activity. *See generally* Michael M. O'Hear, *Plea Bargaining and Victims: From Consultation to Guidelines*, 91 MARQ. L. REV. 323, 327 (2007) ("Many victims are themselves involved in criminal activity, live in neighborhoods with high crime rates, or are otherwise at high risk for involvement in or exposure to additional offenses."). Such impeachment evidence is not

hinder American prosecutors from promptly dismissing weak cases, leaving innocent defendants imprisoned for far longer than necessary or with no choice but to accept too-good-to-refuse guilty-plea offers to crimes that they did not commit. The result is that the burden of investigating potential claims of innocence falls entirely on the shoulders of defense counsel,[136] who have fewer investigatory resources at their disposal, and innocent defendants are regularly convicted of crimes in the United States, both after trial[137] and as a result of guilty pleas.[138]

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necessarily exculpatory, and it may not turn out to be favorable to the defense at all after it is investigated, so it is likely to be overlooked by a prosecutor whose career depends on a body count.

[136] If the defense attorney is competent and not overburdened, there is nothing inherently wrong with this approach. On the contrary, it is what the American adversarial system of criminal justice envisions. The problem, of course, is that many defense attorneys in the United States are overburdened. In some American jurisdictions, compensation for appointed counsel representing indigent defendants is capped for each case, thereby encouraging defense attorneys to take more cases and creating a different but parallel financial incentive for them to avoid spending much time working to prove their clients' innocence. *See* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice,* 107 YALE L.J. 1, 10-11 (1997) ("[A] typical appointed defense lawyer faces something like the following pay scale: $ 30 or $ 40 an hour for the first twenty to thirty hours, and zero thereafter.") (footnotes omitted). Defense attorneys who are paid what amounts to a capitated rate for criminal defense are unlikely to fare much better than prosecutors who are rewarded for obtaining convictions and sentences in uncovering compelling evidence that a defendant is factually innocent.

[137] *See* D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate,* 97 J. CRIM. L. & CRIMINOLOGY 761, 780 (2007) (finding a minimum rate of 3.3% for wrongful convictions in capital rape-murder trials in the United States during the 1980s).

[138] Most innocent defendants who are wrongfully convicted in the United States are not the victims of prosecutorial misconduct or inept defense lawyering *per se,* but rather are convicted because they knowingly and voluntarily pleaded guilty to offenses they did not commit. *See* Josh Bowers, *Punishing the Innocent,* 156 U. PA. L. REV. 1117, 1174 (2008) "[A] great many defense attorneys currently counsel their innocent clients to plead guilty even when no judicially sanctioned devices (like equivocal or no-contest pleas) are available."). Innocent defendants plead guilty in the United States because of long trial backlogs and short-sentence plea offers, which permit them to leave pretrial detention earlier by pleading guilty (through an offered sentence of time served) than they would if they were acquitted at trial. *See* MALCOLM M. FEELEY, THE PROCESS IS PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1979); Bowers, *supra* note xxx, at 1136 ("The trial course is long; even if convicted, the defendant often has already served any postconviction sentence, and then some. In this way, conviction may counterintuitively inaugurate freedom.") (footnote omitted); Colbert, supra note xxx, at 6; Adam M. Gershowitz & Laura R. Killinger, *The State Never Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants,* 105 NW. U.L. REV. 261, 290 (2011); Daniel Givelber, *Lost Innocence: Speculation and Data About the Acquitted,* 42 AM. CRIM. L. REV. 1167, 1199 (2004) (noting that time-served plea offers may "be too good to ignore"); Ellen S. Podgor, *White Collar Innocence: Irrelevant in the High Stakes Risk Game,* 85 CHI.-KENT L. REV. 77, 84-87 (2010) (explaining how the cost of trial and the risk of conviction are so great in the United States that innocent defendants might have an incentive to plead guilty or agree to deferred prosecution); Rodney Uphoff, *Convicting the Innocent: Aberration or Systemic Problem?,* 2006 WIS. L. REV. 739, 798 ("Even innocent defendants choose to plead guilty simply to get out of jail."). For example, after languishing for almost six months in jail without seeing a lawyer, Ramiro Games pleaded guilty to

In far more frequent cases, it means that American prosecutors will not exercise their discretion to distinguish the most culpable defendants from those who are guilty but not deserving of as harsh a punishment (*e.g.*, because they played a minor role in the offense, had a diminished mental capacity, or had no prior criminal record)[139] or to divert appropriate defendants to specialized programs, like drug courts, which are designed to treat and rehabilitate nonviolent offenders rather than incarcerate them.[140] Punishment is not a matter of justice but an adversarial tool to be used to increase conviction rates, particularly through the coercive practices of plea bargaining in the American criminal-justice system.[141] Threats of harsh sentences are not only allowed, they are expected.[142] Guilty defendants with mitigating circumstances do not receive sentencing discounts that they would receive in the absence of an American prosecutor's career incentives to throw the book at them.

B. The Solution

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simple possession of cocaine, a misdemeanor, despite having no attorney and no understanding that he was even pleading guilty. *See* Ruben Castaneda, *Without English, Inmate was Trapped*, WASH. POST, Apr. 10, 2006, at A1. The circuit-court judge who accepted Games's plea acknowledged: "My object in this case was not criminal justice. My object was to get him the hell out of jail." *Id.* Perversely, this incentive to plead guilty for a sentence of time served is likely heightened for innocent defendants in comparison to guilty ones because, presumably, at least in the aggregate, innocent defendants have weaker cases against them, which prosecutors seeking convictions are more likely to dispose of with a "generous" plea offer. The result is that innocent defendants in the United States have good reasons (and few obstacles) to plead guilty to crimes that they did not commit. *See* Gershowitz & Killinger, *supra* note xxx, at 291.

[139] This is particularly important when, as too often is the case in the United States, a defendant is represented by an overburdened or underqualified defense attorney who fails to conduct any investigation or to bring the relevant information to the sentencing court's attention.

[140] *See* Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479, 1540 (2004) *(*"The prosecutor exercises the sole power to recommend that a defendant be diverted to drug court . . . . If the prosecutor decides that the criteria do not apply, the defendant has no further recourse and must proceed through the criminal justice system in the normal manner.") (footnote omitted); *see also* Mae C. Quinn, *Whose Team Am I on Anyway? Musings of a Public Defender About Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37, 57 (2001) ("Like other diversionary programs, most drug treatment courts operate at the whim of the prosecution. In New York, drug courts cannot make promises to defendants without the approval of the Office of the District Attorney.") (footnote omitted).

[141] *See* Luna & Wade, *supra* note xxx, at 1496.

[142] *See id.*

This definition of career success is not universal. European criminal-justice systems typically charge prosecutors with a duty to be completely objective in their pursuit of the truth, based on a belief in the existence of a "substantive" or "material" truth that can be determined by a dispassionate factfinder.[143] In the Netherlands, for example, a prosecutor's being "thought heavily oriented to crime control [as opposed to due process] is a threat to one's self-image and career prospects."[144] This ideal deeply affects the way in which European prosecutors view their role and work.[145] Success is not measured by convictions, and acquittals are not seen as failures.[146] Instead, continental prosecutors are supposed to find the truth and achieve evenhanded outcomes.[147] Senior prosecutors are expected to make sure that those under their supervision apply the law even-handedly and in line with policy.[148] This expectation and the concomitant job culture affect discretionary decision making and encourage case-ending solutions that comport with the interests of justice, whatever those interests may be.[149] These norms,

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[143] *See* Francisca Van Dunem, *The Role of the Public Prosecution Office in the Penal Field, in* THE ROLE OF THE PUBLIC PROSECUTION OFFICE IN A DEMOCRATIC SOCIETY 109-10 (1997) (describing prosecutorial adherence in Europe to "principles that seek the closest possible correspondence between procedural veracity and the underlying facts in order to secure substantive justice"); *see, e.g.*, Marianne Loschnig-Gspandl, *Austria, in* THE ROLE OF THE PUBLIC PROSECUTOR IN THE EUROPEAN CRIMINAL JUSTICE SYSTEMS 12 (Tom Vander Beken & Michael Kilchling eds., 2000) (describing Austrian public prosecutors as "obligated by law to be objective and to explore substantive truth"); Nicholas Kulish, *German Chief Could Lose His Immunity,* N.Y. TIMES, February 17, 2012, at A11 (quoting a statement by a German prosecutor's office that its job included "to investigate relevant circumstances that exonerate as well as incriminate").

[144] Nico Jorg, *et al., Prosecutors, Examining Judges, and Control of Police Investigations*, in CRIMINAL JUSTICE IN EUROPE 237 (Phil Fennell, *et al.,* eds., 1995) (discussing the different rules governing police treatment of suspects as a function of the different assumptions underlying adversarial and inquisitorial criminal-justice systems).

[145] *See* Luna & Wade, *supra* note xxx, at 1469.

[146] *See id.*

[147] *See id.*

[148] *See id.* at 1475.

[149] *See id.* at 1469 (finding no evidence that prosecutors in the European countries that they studied were "led by anything other than a judicially informed vision of truth and fairness"). For an international comparison of prosecutorial decision making and case outcomes based on a hypothetical case, see Jenia Iontcheva Turner, *Prosecutors and Bargaining in Weak Cases: A Comparative View, in* THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE (Erik Luna & Marianne Wade eds., 2011).

rather than a drive for courtroom victories, exert the greatest influence on prosecutorial decision making.[150]

The personnel incentives in American prosecutors' offices, by contrast, pose a severe conflict of interest that should be considered an actual conflict of interest worthy of disqualification because there is a high likelihood that it would negatively influence an American prosecutor's substantial discretionary judgment and interfere with a defendant's right to a fair trial.[151] This solution involves American courts asserting a greater role at the front-end of the criminal process that is premised in part on the separation-of-powers doctrine.[152]

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[150] *See* Luna & Wade, *supra* note xxx, at 1474.

[151] There is an additional implication of this thesis that is not explored in this Article because of time and space considerations: the extent to which a prosecutor's office's compensation and promotion policies in the United States should be discoverable by the defense in a criminal case. For now, this question remains a topic for another day.

[152] *See, e.g.*, William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 594-95 (2001) (suggesting a constitutional basis for checking abuses). Several scholars have examined other variations on this theme, for example, by offering theoretical arguments in favor of increased American judicial oversight of the substantive definition of criminal offenses based on the harm principle or notions of human dignity and autonomy. *See, e.g.*, Markus Dubber, *Toward a Constitutional Law of Crime and Punishment*, 55 HASTINGS L.J. 509, 530-70 (2004) (arguing that notions of dignity and personal autonomy should limit substantive criminal law); Claire Finkelstein, *Positivism and the Notion of an Offense*, 88 CAL. L. REV. 335, 358-93 (2000) ("The definition of an offense must be constructed in a way that makes the infringement of liberty justified in light of the harm the prohibited conduct inflicts").

Others have argued that a violation of the guarantee of due process contained in the United States Constitution and most state constitutions may occur when a court is prevented from sentencing a defendant as an individual based on its assessment of the offense and offender and instead is required by prosecutorial charging decisions and determinate-sentencing laws to impose an excessive punishment. *See, e.g.* ,Luna & Wade, *supra* note xxx, at 1511 n.436. Although a few lower courts in the United States have also suggested as much, so far, they remain outliers and have had little, if any, impact on legal doctrine. *See, e.g.*, United States v. Green, 346 F. Supp. 2d 259, 289 (D. Mass. 2004) (questioning the constitutionality of prosecutorial decision-making); United States v. Dyck, 287 F. Supp. 2d 1016, 1021 (D.N.D. 2003) (finding that a "due process right arises at sentencing because sentencing involves the most extreme deprivation of personal liberty and therefore calls for a highly individualized process where a person must be assessed and sentenced as an individual."); United States v. Sidhom, 144 F. Supp. 2d 41, 41 (D. Mass. 2001) (questioning the constitutionality of prosecutorial charging discretion).

> [T]he power to impose a sentence has been virtually transferred from the court to the government, which, as the prosecuting authority, is an interested party to the case. This transfer continues an erosion of judicial power and a breach in the wall of the doctrine of the separation of powers.
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> Thus, the government, not only has the authority to prosecute crime and to decide the nature of the criminal charge to be preferred, but now

A central purpose of courts in the American system is to provide an institution to check the other branches of government. While the majority of American states do not have disqualification statutes,[153] trial courts nonetheless have the authority to disqualify prosecuting attorneys from participating in particular criminal prosecutions based on a determination that they have a conflict of interest which might prejudice them against the accused or otherwise cause them to seek results that are unjust or adverse to the public interest.

Article III of the United States Constitution vests "judicial power" in the federal courts.[154] The United States Supreme Court has recognized that the federal courts have certain inherent rulemaking powers, arising from the nature of the judicial process, to control their internal process and the conduct of litigation.[155] This includes the inherent authority of federal courts to exercise certain nonadjudicatory powers.[156] Federal courts have recognized a variety of powers as inherent, including a court's power to "control admission to its bar and to discipline attorneys who appear before it" and promulgate

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> has the power to determine the severity of the punishment. As a result, courts are required to react passively as automatons and to impose a sentence which the judge may personally deem unjust.

Sidhom, 144 F. Supp. 2d at 41.

[153] *See* Eli Wald, *Disqualifying A District Attorney When A Government Witness Was Once The District Attorney's Client: The Law Between The Courts And The State*, 85 DENV. U.L. REV. 369, 383 (2007).

[154] Section 1 of Article III of the United States Constitution provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

U.S. CONST. art. III, § 1.

[155] *See Chambers*, 501 U.S. at 43; *see generally* Carrie Leonetti, *Watching the Hen House: Judicial Review of Judicial Rulemaking*, 91 Neb. L. Rev. (forthcoming August 2012).

[156] *See, e.g.*, Chambers v. NASCO, Inc., 501 U.S. 32, 46-49 (1991) (discussing the inherent power of American courts to sanction litigants for bad faith conduct); Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 793 (1987) (discussing the inherent power of American courts to initiate contempt proceedings and to appoint counsel to prosecute them); *In re* Snyder, 472 U.S. 634, 643 (1985) (discussing the inherent power of American courts to suspend or disbar attorneys); *see generally* Leonetti, *supra* note xxx.

internal procedural rules for the conduct of litigation.[157] This includes the power to preserve the integrity of the American justice system, which is at issue when prosecutors with personal career stakes in the outcomes of cases prosecute them. It is pursuant to this power that state supreme courts in the United States regulate attorneys in all fifty states.[158] This inherent-powers doctrine generally encompasses the power to disqualify attorneys.[159] American courts have routinely justified this power on the ground that attorneys are officers of the court,[160] and, as such, their conduct directly affects the integrity, efficiency, and public perception of the judiciary.[161]

Nonetheless, American courts' exercise of their inherent powers to disqualify is an arena in which the executive, legislative, and judicial branches of government sometimes battle over the regulation and control of prosecutors.[162] When the American judiciary invokes its inherent powers to disqualify prosecutors, they often respond by asserting their exclusive authority to exercise executive powers free from the interference of courts, reasoning that the function of prosecuting criminal cases has historically been within the province of the legislative and executive branches and that judicial interference

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[157] *See* Mullenix, *Unconstitutional Rulemaking*, *supra* note xxx, at 1297.
[158] *See* Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation -- Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1171 (2003).
[159] *See* Hempstead Video, Inc. v. Valley Stream, 409 F.3d 127, 132 (2d Cir. 2005) ("The authority of federal courts to disqualify attorneys derives from their inherent power to "'preserve the integrity of the adversary process'" (quoting Bd. of Educ. v. Nyquist, 590 F.2d 1241, 1246 (2d Cir.1979)); Talecris Biotherapeutics, Inc. v. Baxter Int'l, Inc., 491 F. Supp. 2d 510, 513 (D. Del. 2007) (noting that the court had the power to govern the conduct of any attorney appearing before it, including through disqualification); Conley v. Chaffinch, 431 F. Supp. 2d 494, 496 (D. Del. 2006) (holding that the court's inherent power to govern attorneys "appearing before it" included disqualification as a regulatory measure).
[160] See Theard v. United States, 354 U.S. 278, 281 (1957) (noting that, upon acceptance as a member of the bar, an attorney becomes "an officer of the court" (quoting People *ex rel.* Karlin v. Culkin, 248 N.Y. 465, 470-71 (N.Y. 1928))); *see generally* Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39 (1989) (examining the meaning of "officer of the court" with regard to the attorney's roles and responsibilities in contemporary practice realities in the United States).
[161] *See* Henry M. Dowling, *The Inherent Power of the Judiciary*, 21 A.B.A. J. 635, 639 (1935) (explaining that, if an attorney in the United States disregards the principles of justice, the court "has the right to discipline the unworthy member, and exclude those who, in contempt of the tribunal, seek to practice law before it without proper admission, or otherwise disparage the court's dignity").
[162] *See* Wald, *supra* note xxx, at 404.

therewith violates the separation-of-powers doctrine.[163] The assertion of exclusive executive power in this context is mistaken. American courts' inherent powers include, specifically, the power to disqualify prosecuting attorneys,[164] and there are strong practical, ethical, and symbolic reasons for disqualifying a prosecutor with an actual conflict of interest. It is the assertion of exclusive executive authority that threatens the separation of powers by infringing upon the inherent power of courts to protect the integrity of the judicial process. The inherent powers of the American judiciary are the powers of that logically flow from its existence as a third coequal branch of government. American courts' inherent authority to protect the integrity of the judicial process, therefore, is an embodiment of the separation-of-powers doctrine, not an encroachment upon it.

Recognizing the state's immense power and inherent advantage over defendants, the American criminal-justice system incorporates safeguards, often by means of broad judicial interpretation, to protect the right of the accused to a fair trial.[165] The dual role that American prosecutors occupy as officers of the court and executive officers of the

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[163] *See, e.g.*, Brief for Colorado District Attorney's Council as Amicus Curiae Supporting Appellant at 18, 21, People v. Lincoln, 161 P.3d 1274 (Colo. 2007) (Nos. 07SA82 and 07SA83).

[164] *See* Rhodes v. Miller, 437 N.E.2d 978, 979-80 (Ind. 1982) ("A trial judge does have the authority, and, in fact, the responsibility, to find that a prosecuting attorney, and/or members of his staff, should be disqualified if he finds facts to be true with reference to such disqualification and to then appoint a special prosecuting attorney to try the cause"); Lux v. Commonwealth of Virginia, 484 S.E.2d 145, 149 (Va. Ct. App. 1997) ("In order to protect prosecutorial impartiality, a trial court has the power to disqualify a Commonwealth's attorney from proceeding with a particular criminal prosecution if the trial court determines that the Commonwealth's attorney has an interest pertinent to a defendant's case that may conflict with the Commonwealth's attorney's official duties"); *see also* State v. Copeland, 928 S.W.2d 828, 840 (Mo. 1996); Cole v. State, 2 S.W.3d 833, 835 (Mo. App. 1999); State v. Culbreath, 30 S.W.3d 309, 313 (Tenn. 2000); Brown v. Commonwealth, 504 S.E.2d 399, 402 (Va. App. 1998).

[165] *See* People v. Palomo, 31 P.3d 879, 882 (Colo. 2001) (holding that courts had the inherent power, in the absence of a specific statutory grant of authority, to disqualify the District Attorney's Office on the basis of an appearance of impropriety); Wald, *supra* note xxx, at 370. The role of the judiciary in the United States in safeguarding the rights of the criminal defendant against abrogation by the power of the Government has been well documented. *See* Wald, *supra* note xxx, at 370 n.6.

state[166] is what gives rise to the courts' concurrent interest in regulating their ethical conduct. The United States Constitution permits, and in some cases mandates that, a court disqualify a prosecutor when his/her participation would taint the proceeding because permitting a personally interested prosecutor to prosecute a defendant, particularly in light of the unbridled nature of prosecutorial discretion, would violate the due-process rights of that defendant.[167]

No American court has ever disqualified a prosecutor (or prosecutor's office) on the ground that the office promotion and retention policies created an actual conflict of interest, but American courts have disqualified prosecutors on other, closely analogous grounds. For example, in *Haraguchi v. Superior Court,*[168] the California Court of Appeal held that the trial prosecutor prosecuting Haraguchi for rape had an actual conflict of interest stemming from a book that she had written about a fictional rape case with facts similar to those alleged in *Haraguchi,* warranting the disqualification of the entire county district attorney's office. Under the circumstances, the court found that there was a

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[166] *See supra* section IV (A) (i).

[167] *See* Lane v State, 233 S.E.2d 375 (Ga. 1977) (holding that the participation of an attorney who had represented Lane's alleged coconspirator as special prosecutor in Lane's trial for murder and armed robbery denied him fundamental due process); *see also* People v. County Court, 854 P.2d 1341 (Colo. Ct. App. 1992) (holding that the appearance of impropriety was not only a proper ground for disqualification of a district attorney, but also a compelling basis for such action). Most jurisdictions in the United States authorize the appointment of a special prosecutor when the prosecuting attorney is disqualified from conducting a criminal prosecution. *See, e.g.,* GA. CODE ANN. § 15-18-65 (a) (authorizing appointment of a special prosecutor when "a solicitor-general's office is disqualified from interest or relationship to engage in the prosecution"); 55 ILL. COMP. STAT. ANN. 5/3-9008 (authorizing appointment of a special prosecutor "whenever the State's attorney is . . . interested in any cause or proceeding"); IOWA CODE § 331.754.2 (authorizing the appointment of a special prosecutor if the district attorney is "disqualified because of a conflict of interest from performing duties"); MICH COMP. LAWS SERV. § 49.160 (1) (authorizing the appointment of a special prosecutor when "the prosecuting attorney . . . is disqualified by reason of conflict of interest"); MO. ANN. STAT. § 56.110; NEV. REV. STAT. ANN. § 252.100.1 (West 2007) ("[I]f the district attorney . . . for any reason is disqualified . . . the court may appoint some other person to perform the duties of the district attorney."); OKLA. STAT. ANN. tit. 22, § 859 (West 2007) ("If the district attorney . . . is disqualified, the court must appoint some attorney-at-law to perform the duties of the district attorney on such trial."). In some jurisdictions, if the prosecuting attorney is disqualified, it is the state's attorney general who has authority to employ special counsel to conduct the prosecution.

[168] 49 Cal. Rptr. 3d 590 (Cal. App. 6th Dist. 2006).

reasonable possibility that the prosecutor's desire to see her book succeed was so strong that it would trump her duty as a prosecutor to see that justice was done and to accord Haraguchi his constitutional rights. The court noted that obtaining a conviction in a case similar to the one described in her book could generate favorable media publicity for her book and concluded that she might not exercise her discretionary functions in an evenhanded manner as a result.

In *People v. Eubanks,*[169] the California Supreme Court upheld a trial court's order recusing the entire Santa Cruz County District Attorney's Office from prosecuting Eubanks for the alleged theft of trade secrets from a computer-software company on the ground that the company's contribution of approximately $13,000 toward the cost of the district attorney's investigation created a conflict of interest for the prosecutor because it evidenced a reasonable possibility that the prosecutor might not have exercised his discretionary functions in an evenhanded manner.[170]

The Colorado Supreme Court, on the other hand, rejected a disqualification attempt on a different ground than that which is the subject of this Article (internal promotion and remuneration policies) but which belongs under the same broader heading of career incentives to prosecute. In *People* ex rel. *N.R.,*[171] the Colorado Supreme Court explored the contention that the district attorney should have been disqualified due to his potential political gain from the prosecution of N.R. (a juvenile). The court found that "even if [the district attorney] owes his election to the Office of District Attorney in part to the efforts of the [victim's] family, this fact [was not] likely to cause him to 'over

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[169] 927 P.2d 310 (Cal. 1996).
[170] *Cf.* People v. Choi, 94 Cal. Rptr. 2d 922 (Cal. App. 1st Dist. 2000) (disqualifying a prosecutor whose loss of a close friend had adversely affected his independent judgment in such a way that Choi's right to a fair trial had been endangered).
[171] 139 P.3d 671 (Colo. 2006).

extend' in performing his prosecutorial function."[172] The court's conclusion, however, hinged on the factual record in the case. N.L.'s disqualification claim was based on an unsupported allegation of the prosecutor's political indebtedness to the family of the alleged victim, in the absence of any evidence that the prosecutor had "overextended" himself on its behalf.[173] In other words, the court did not rule out a "political payoff" as a relevant consideration in assessing "special circumstances" (the test under the Colorado disqualification statute)[174] but instead found that, in the particular case, N.L. had not proven that political indebtedness in fact had caused the district attorney to overextend himself.[175]

V. CONCLUSION

This Article is not meant to suggest that promotion and compensation structures are the sole driving force behind prosecutorial overcharging and overreaching in the United States. Instead, this Article highlights some of the reasons why internal prosecutorial personnel policies in the United States should be disconcerting to scholars, policymakers, and the general public. Prosecutorial discretion is supposed to help ensure that charges and sentences fit the offenders and their offenses,[176] rather than to maximize

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[172] *Id.* at 678.
[173] *Id.* at 677-78.
[174] The Colorado statute establishes three grounds for disqualification: a request by the district attorney, a personal or financial conflict of interest, and "special circumstances." COLO. REV. STAT. ANN. § 20-1-107 (2) (West 2007). N.L. alleged that the district attorney's potential political gain from his prosecution required disqualification under the third ground ("special circumstances") and did not argue that such potential gain created a personal or financial conflict of interest under the second.
[175] *See id.*
[176] This Article should not be read as advocating the elimination of prosecutorial discretion in the United States, which, when exercised fairly, can serve an important role in achieving the goals of criminal punishment. Some of the reasons often cited for the prosecutor's extensive discretion in charging decisions in the United States are: (1) the separation-of-powers doctrine, (2) limited resources, (3) the impossibility of enforcing all of the laws, (4) prosecutorial expertise, and (5) the need for individualized case analysis and consideration of particular needs of leniency. See JOSEPH F. LAWLESS JR., PROSECUTORIAL

conviction rates and aggregate sentences. If a criminal trial is about finding the truth after an impartial review of all aspects of a case, there is good reason to doubt that American prosecutors whose careers depend primarily on the number of convictions and length of sentences that they obtain are the appropriate actors to fulfill this function.

Although there has been significant academic, legislative,[177] and judicial[178] attention to disqualification of prosecutors in general,[179] and to disqualification of prosecutors who previously represented the defendant in particular, the idea that disqualification is warranted on the basis that internal personnel policies create actual conflicts of interest has received no academic attention, has not been addressed by

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MISCONDUCT 139-40 (1985). Perhaps more to the point, prosecutorial discretion is inherent in the American system. *See* Frank O. Bowman, III, *The Quality of Mercy Must be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines,* 1996 WIS. L. REV. 679, 726-27 (1996) (noting that *"*it is difficult to imagine a system which could eliminate prosecutorial charging discretion"). The focus of this Article, instead, is on the *whom* doing exercising rather than the *what* being exercised.

[177] *See, e.g.,* ALA. CODE § 12-17-186 (a) (authorizing disqualification when a prosecutor is "connected with the party against whom it is his duty to appear"); CAL. PENAL CODE § 1424 (a) (1) (Deering 2007) (authorizing disqualification if "the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial"); COLO. REV. STAT. ANN. § 20-1-107 (2) (West 2007) ("A district attorney may only be disqualified in a particular case at the request of the district attorney or upon a showing that the district attorney has a personal or financial interest or [if the court] finds special circumstances that would render it unlikely that the defendant would receive a fair trial . . . ."); IDAHO CODE ANN. § 31-2603 (a) (authorizing disqualification when a prosecutor "acted as counsel or attorney for a party accused in relation to the matter of which the accused stands charged, and for which he is to be tried on a criminal charge"); IND. CODE § 33-39-1-6 (b) (2) (B) (authorizing the court to disqualify a prosecutor if it finds "by clear and convincing evidence that the appointment [of a special prosecutor] is necessary to avoid an actual conflict of interest"); KY. REV. STAT. ANN. § 15.733 (2) (e) (requiring the disqualification of a prosecuting attorney if s/he "has served in private practice or government service, other than as a prosecuting attorney, as a lawyer or rendered a legal opinion in the matter in controversy"); LA. CODE CRIM. PROC. ANN. art. 680 (3) ("A district attorney shall be recused when he . . . has been employed or consulted in the case as attorney for the defendant before his election or appointment as district attorney."); OR. REV. STAT. ANN. § 8.710 (enumerating grounds for disqualification, including "if a district attorney . . . represented the accused in the matter to be investigated . . . or the crime charged" and "because of any other conflict [that would prevent] ethically serve as a district attorney in a particular case"); VA. CODE ANN. § 19.2-155 (authorizing disqualification when a prosecutor "is so situated with respect to such accused as to render it improper . . . for him to act"); W. VA. CODE ANN. § 7-7-8.

[178] *See* Section IV (B) *supra; see e.g., Eubanks*, 927 P.2d at 318 (specifying a two-part test for determining whether prosecutorial disqualification due to a conflict of interest was necessary: (1) whether there was a conflict of interest, and (2) if so, whether the conflict was so grave or severe as to disqualify the prosecutor from acting); People v. Conner, 666 P.2d 5, 9 (Cal. 1983) (defining a disqualifying conflict as existing "whenever the circumstances of a case evidence a reasonable possibility that the DA's office may not exercise its discretionary function in an evenhanded manner").

[179] *See, e.g.* Wald, *supra* note xxx.

statutes or prosecutors' offices' guidelines[180] and has not been decided by American courts. American courts have been relatively reluctant to exercise their power to disqualify prosecutors for any reason.[181] Even the current American Bar Association Criminal Justice Standards for Prosecution and Defense Functions contain no discussion of improper biases for prosecutors or of the concept of prosecutors acting within an organizational structure.[182]

American courts employing a more searching judicial review of prosecutorial conflicts of interest is not the only means to stem overcharging in the United States. American legislatures, following the example of much of the rest of the world, could empower judges to review charging decisions and strike those that are excessive, mandate that prosecution offices promulgate enforceable comprehensive charging guidelines, or enact "safety valve" provisions that allow sentencing judges to go below otherwise mandatory minimum sentences when certain criteria are met.[183]

For now, however, it is unlikely that the prosecutorial discretion that American prosecutors exercise is going anywhere. The United States Supreme Court has consistently blessed it.[184] Although the United States Congress, in 1998, extended the

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[180] For example, in addition to OPR, DOJ also maintains a Departmental Ethics Office ("DEO"), which "is responsible for administering the Department-wide ethics program and for implementing Department-wide policies on ethics issues." Podgor, *Ethics & Professionalism, supra* note xxx, at 1529. While DEO is tasked with considering issues like conflicts and "impartiality in performing official duties," its ethics outline and handbook do not cover the discretionary decisions made by federal prosecutors or the impact that internal personnel policies have on them. *Id.* at 1529-30.

[181] *See* Wald, *supra* note xxx, at 374; *see generally* GERSHMAN, PROSECUTORIAL MISCONDUCT, *supra* note xxx, at vi (lamenting the passivity of the American judiciary in overseeing prosecutorial power).

[182] *But see* MODEL RULES OF PROF'L CONDUCT, R. 1.10, 5.1, 5.2 (2010).

[183] See Luna & Wade, supra note xxx, at 1512; *see, e.g.*, Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 21 (2010).

[184] The United States Supreme Court has repeatedly reaffirmed the doctrine underlying the American prosecutor's discretionary powers. *See* Garrett v. United States, 471 U.S. 773, 791 (1985) (holding that the United States Government, rather than the court, was responsible for initiating a criminal prosecution, unless the charging decision was based on race, religion, or another arbitrary classification); Weatherford v. Bursey, 429 U.S. 545, 561 (1977) (noting that defendants had no constitutional right to plea bargain in the

application of ethical rules to federal prosecutors, these rules do not directly regulate prosecutors' discretionary decisions.[185] Attorney disciplinary agencies in the United States cannot initiate proceedings against prosecutors who may have violated obligations implicit in their general "duty to seek justice" but not codified explicitly in the disciplinary rules governing American attorneys.[186] In the absence of legislative or Supreme Court action restricting discretion, lower courts could use their existing powers to ensure that, if excessive charges are brought, they are at least brought by a prosecutor who is exercising independent and unbiased judgment about their necessity.

The stakes are much higher than an academic dispute over the separation of powers and the comparative amounts of discretion that different countries allot to their prosecutors. At issue is the welfare of real individuals, whose lives may be irreparably and unjustifiably harmed by a take-no-prisoners approach to prosecution. The *Morton* case in Texas is only the latest in a string of high-profile prosecutorial-misconduct cases in the United States involving decision making entirely inconsistent with the sacred ideal

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United States); Olyer v. Boles, 368 U.S. 448, 456 (1962) (finding no violation of the Equal-Protection Clause of the Fourteenth Amendment to the United States Constitution based on selective prosecution); *see also* Donald Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion,* 1983 U. ILL. L. REV. 37, 53 (distinguishing plea bargaining from other negotiations because of the prosecution's total discretion); *see generally* Sarah J. Cox, *Prosecutorial Discretion: An Overview*, 13 AM. CRIM. L. REV. 383 (1976); Uviller, *supra* note xxx; *see, e.g., Wayte*, 470 U.S. at 607 (explaining that American prosecutors retain broad discretion in deciding whom to prosecute, subject only to constitutional restraints); *Bordenkircher*, 434 U.S. at 364 ("So long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.").

[185] *See* Citizens Protection Act of 1998, Pub. L. No. 105-277, 101 (b), 112 Stat. 2681, 2681-118 to -119 (codified at 28 U.S.C. § 530B). American prosecutors may also be subject to "ad hoc judicial rules." Green, *Policing*, *supra* note xxx, at 75-77. The only significant limits on prosecutorial discretion in the federal system in the United States are those contained in DOJ guidelines. *See* U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL (1999); *see generally* Abrams, *supra* note xxx. These guidelines, however, are internal regulations and are legally unenforceable by defendants. *See, e.g.,* United States v. Blackley, 167 F.3d 543, 548-49 (D.C. Cir. 1999) (holding that the DOJ guidelines for prosecutors created no enforceable rights for Blackley); United States v. Piervinanzi, 23 F.3d 670, 682 (2d Cir. 1994) (holding that the DOJ guidelines did not create substantive rights for Piervinanzi); United States v. Busher, 817 F.2d 1409, 1411 (9th Cir. 1987) (holding that the DOJ guidelines did not create substantive or procedural rights for Busher).

[186] *See generally* Green, *Seek Justice*, *supra* note xxx (analyzing rationales for the American prosecutor's duty to "seek justice").

of the prosecutor as a minister of justice. In December 2011, DNA evidence exonerated Michael Morton after his wrongful conviction for murdering his wife for which he served nearly twenty-five years in a Texas prison.[187] Morton's postconviction attorneys found evidence in recently unsealed court records that the prosecutor in Morton's original trial suppressed critical exculpatory evidence that may have helped him prove his innocence, in violation of "a direct order from the trial court to produce the exculpatory police reports from the lead investigator" in the case.[188] Morton alleges specifically that the prosecutor willfully failed to disclose police notes indicating that another man committed the murder, concealed from the trial judge that he did not provide the full police report to the defense as ordered, and advised his successor prosecutor "to oppose all of Mr. Morton's postconviction motions for DNA testing."[189]

This Article does not even address the most awesome prosecutorial power of all in the United States, the power to seek and obtain the death penalty. As is true in noncapital cases, self-interest can play a significant role in decisions about capital punishment, with some American prosecutors explicitly seeking election based on the defendants that they have put on death row.[190] Putting aside whether this political reality is troubling in and of itself, the incentive structure inherent in current "performance-based" evaluations in the United States may well encourage prosecutors to pursue unsavory strategies in capital cases, such as presenting inconsistent theories in pursuit of multiple death verdicts (*e.g.*, arguing in one case that a particular person killed the victim,

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[187] *See Editorial: Justice and Prosecutorial Misconduct*, NEW YORK TIMES (December 28, 2011).
[188] *Id.*
[189] *Id.*
[190] *See, e.g.*, Kenneth Bresler, *Seeking Justice, Seeking Election, and Seeking the Death Penalty: The Ethics of Prosecutorial Candidates' Campaigning on Capital Convictions*, 7 GEO. J. LEGAL ETHICS 941, 943 (1994) (detailing the "particularly gruesome campaign practice . . . of prosecutors and former prosecutors politicking on the defendants they have sent to death row").

then claiming in another case that someone else was the actual killer).[191] Moreover, the infusion of politics and self-interest into a decentralized, unguided approach to prosecution virtually ensures inconsistent decision-making in death cases in the United States.[192] In other instances, the mere threat of the death penalty allows the American prosecutor to force a guilty plea in the case, with defendants entering into plea bargains to avoid execution regardless of any factual or legal claims that they might have.[193]

[191] *See* Luna & Wade, *supra* note xxx, at 1508; *see, e.g.*, Stumpf v. Mitchell, 367 F.3d 594, 613 (6th Cir. 2004) ("In this case, the state clearly used inconsistent, irreconcilable theories at Stumpf's hearing and Wesley's trial."), *rev'd sub nom.*, Bradshaw v. Stumpf, 545 U.S. 175 (2005); Thompson v. Calderon, 120 F.3d 1045, 1057 (9th Cir. 1997), *rev'd*, 523 U.S. 538 (1998) ("The prosecutor manipulated evidence and witnesses, argued inconsistent motives, and at Leitch's trial essentially ridiculed the theory he had used to obtain a conviction and death sentence at Thompson's trial.").
[192] *See* Luna & Wade, *supra* note xxx, at 1508.
[193] *See id.* at 1508-09.