INTRODUCTION

The prosecutor is perhaps the most fascinating actor in the criminal justice system. The prosecutor is the government’s representative in the criminal court process, yet this description does not begin to convey the complexity of the position and its level of importance in the functioning of the criminal courts and the criminal justice system as a whole.

This immense level of importance stems largely from the central position the prosecutor occupies in the criminal justice system. Law enforcement officers, judges, defense attorneys, and corrections officials are involved in limited, focused aspects of the criminal justice process. Each depends largely on the actions of others to begin or end their activity in a matter. The prosecutor, on the other hand, plays an active role in the investigation of crimes, the arrest of a suspect, the prosecution of the suspect, the sentence received following a conviction, and, in many jurisdictions, the termination of probation and parole.

Beyond the prosecutor’s central position in the criminal justice system, it is the inherent contradictions involved in the job that make the position so fascinating. Consider the following contradictions:

- Prosecutors have nearly limitless discretion in the most critical matters they must consider, yet they are held to very high ethical standards.
- The prosecutor is a publicly elected official, yet most of the work performed by the office is done outside the public eye.
- Prosecutors have a duty to seek justice but operate in an adversarial rather than truth-seeking system.

This chapter examines how the prosecutor balances these contradictory demands. After examining the evolution of prosecution in the United States, we look at how prosecutors are selected and the way in which their offices are organized. We then examine the role prosecutors play in the system, the duties they perform on a daily basis, and their relationships with other members of the courtroom workgroup. In the last part of the chapter, we consider the ethical responsibilities placed on prosecutors and explore the evolving concept of community prosecution.

HISTORICAL EVOLUTION OF THE AMERICAN PROSECUTOR

The prosecutor’s place in the U.S. criminal justice system is uniquely American. Like many aspects of American society, the prosecutor is a hybrid of British and European ancestry that evolved over time. To fully understand the role the prosecutor plays in the criminal justice system, one must briefly consider the historic origin and evolution of the position.

During the 17th century, the American colonies followed the English system of private prosecution of criminal cases. Each colony had an appointed attorney general, who served as counsel to the government and left the prosecution of crimes primarily to the victim. This system was ill suited for the vast colonies as victims had difficulty
traveling to state capitals to pursue their claim. In addition, as sanctions imposed on conviction were severe, prosecutions were frequently initiated by individuals as a means of extorting financial compensation from an offender who would pay off the victim to avoid the punishment. To help alleviate these problems and as means to generate revenue, in the early 1700s, the colonies themselves began to routinely prosecute offenders.

As the population of the colonies grew, it became apparent that a centrally located public prosecutor was ill equipped to prosecute offenders across the colony. To ameliorate the workload, colonies appointed deputy attorneys general to handle prosecutions for a given county. This practice expanded throughout the 18th century. By the time of the American Revolution, each of the colonies conducted public prosecutions at the local level.

At the time the U.S. Constitution was ratified in 1789, the prosecutor was appointed by the government and straddled a line between the judicial and executive branches of government. In the federal government, the practice of executive appointment was put into law by the Judiciary Act of 1789. At the state and local levels, the appointment of prosecuting attorneys continued as a matter of local custom or pursuant to state constitutions.

In the 1820s, the populist movement (Jacksonian democracy) gained prominence. The rise of Jacksonian democracy brought with it an increase in the power of citizens to directly elect a number of government officials. As part of this wave, state after state amended their constitutions to provide for the election of local prosecutors. By the end of the 18th century, a majority of states had direct elections of prosecuting attorneys.

THE FEDERAL PROSECUTOR

As we have already seen, the United States has a dual system of criminal justice. Acts that violate federal statutes are prosecuted in the federal court system. Violations of state laws are prosecuted in the state where the act occurred. It should not be surprising, therefore, that prosecutors in the federal system and state-level prosecutors operate in different spheres.

In the federal court system, the government is represented by the United States attorney. The Judiciary Act of 1789 provided that within each judicial district, an attorney shall be appointed by the president as the United States attorney and represent the government in federal prosecutions. Today, there are 93 U.S. attorneys stationed throughout the United States, the U.S. Virgin Islands, Puerto Rico, Guam, and the Northern Mariana Islands. Each of the 93 federal judicial districts is assigned a U.S. attorney (except for Guam and the Northern Mariana Islands, which share a single U.S. attorney). U.S. attorneys are appointed by the president and are confirmed by the Senate. Generally, U.S. attorneys serve 4-year terms, but they may be removed from office at the will of the president. As the position is politically appointed, when a new president is elected into office, most if not all U.S. attorneys are replaced by appointees of the new president’s choosing.

The day-to-day operations of each U.S. attorney’s office are carried out by assistant U.S. attorneys. These are lawyers who often work as federal prosecutors for their entire career. Each U.S. attorney’s office has anywhere from a dozen to several hundred assistants, who make charging decisions, conduct plea negotiations, appear in court, and
perform tasks similar to those of local and state prosecutors. Assistant U.S. attorneys enjoy civil service protection and are expected to carry out their duties as prosecutors absent political considerations. Whereas U.S. attorneys are likely to be replaced when a new president takes office, assistant U.S. attorneys generally keep their positions and continue to represent the federal government in court.

STATE PROSECUTORS

Selection of the Local Prosecuting Attorney

State systems of prosecution are extremely decentralized. Normally, violations of state laws are prosecuted by a prosecutor’s office located in the county or judicial district where the offense took place. The person in charge of the prosecutor’s office is generally referred to as the district attorney, prosecuting attorney, state’s attorney, commonwealth’s attorney, or county attorney. In 45 of the 50 states, the chief local prosecuting attorney reaches office by way of popular election, generally for a 4-year term.

Not surprisingly, the specific tasks performed by the elected prosecuting attorney vary largely depend on the size of the jurisdiction. In 2001, there were 394 jurisdictions across the nation (average population 7,778), in which the elected prosecuting attorney was the only full-time attorney responsible for criminal prosecutions. Prosecutors in these counties regularly appear in court, represent the government at trial, and perform myriad other duties required of a prosecutor’s office. Such an arrangement is only possible for areas with small populations and little criminal activity.

At the other extreme, large urban areas may have several hundred assistant prosecutors and budgets in the tens of millions of dollars. Facts about the 20 largest local prosecuting attorney offices in the nation are presented in Table 5.1.

The heads of these offices are more akin to a corporate CEO than a trial attorney. The typical prosecutor’s office falls between these two extremes. The average office has a dozen assistant prosecutors and serves a jurisdiction of 100,000 people. In most offices, the elected prosecutor rarely works on specific cases or makes court appearances. Rather, his or her duty is to delegate day-to-day responsibility for the prosecution of cases to supervisors and assistant prosecuting attorneys, to manage the organization and long-term planning for the office, and to set overarching policies and priorities. As the chief prosecutor is an elected official in most locales, it should not be surprising that the policies and priorities instituted in the office are politically advantageous for the prosecutor and generally relate to crime control and fiscal efficiency.

These policies may involve having the office focus resources on particular types of crimes, implementing policies to increase efficiency, or promoting consistency in the treatment of defendants by restricting the discretion of assistant prosecutors to reduce charges or punishments as part of plea bargains (Green & Zacharias, 2004). Specific examples of policies set by some prosecutors’ offices include mandatory prosecution of domestic violence arrests (Peterson & Dixon, 2005), a policy prohibiting assistant prosecutors from dropping sentence enhancements for crimes involving a firearm (Heumann & Loftin, 1979), bans on plea bargaining within 30 days of trial, and complete bans on plea bargaining in felony cases (Holmes, Daudistel, & Taggart, 1992). Specific policies in specific offices vary.
The chief prosecutor sets office policy, but the daily work of the office is usually handled by a number of assistant or deputy prosecuting attorneys. This work ranges from assisting law enforcement officers in their investigations to appearing on behalf of the government in court for hearings and trials.

**Assistant prosecuting attorneys** work in the trenches of the criminal court system. Whereas the chief prosecuting attorney and select supervisors set policy, it is the assistant prosecutors who appear in court, interview witnesses, oversee investigations, and negotiate with defense attorneys on a daily basis. Because of the hands-on nature of the job, many assistant

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**TABLE 5.1**  
**Twenty Largest Prosecutor's Offices in the United States, 2005**

<table>
<thead>
<tr>
<th>Location</th>
<th>Population Served</th>
<th>Full-Time Attorneys</th>
<th>Full-Time Staff</th>
<th>Annual Budget</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cook County, IL</td>
<td>5,327,777</td>
<td>897</td>
<td>1,893</td>
<td>$126,000,000</td>
</tr>
<tr>
<td>Los Angeles County, CA</td>
<td>9,937,739</td>
<td>887</td>
<td>1,959</td>
<td>$285,000,000</td>
</tr>
<tr>
<td>New York County, NY</td>
<td>1,562,723</td>
<td>442</td>
<td>1,139</td>
<td>$63,300,000</td>
</tr>
<tr>
<td>Kings County, NY</td>
<td>2,475,290</td>
<td>385</td>
<td>957</td>
<td>$63,000,000</td>
</tr>
<tr>
<td>Maricopa County, AZ</td>
<td>3,501,001</td>
<td>363</td>
<td>1,009</td>
<td>$72,220,855</td>
</tr>
<tr>
<td>Bronx County, NY</td>
<td>1,365,536</td>
<td>307</td>
<td>797</td>
<td>$42,106,635</td>
</tr>
<tr>
<td>Philadelphia County, PA</td>
<td>1,470,151</td>
<td>291</td>
<td>676</td>
<td>$48,113,158</td>
</tr>
<tr>
<td>Miami-Dade County, FL</td>
<td>2,363,600</td>
<td>289</td>
<td>1,154</td>
<td>$51,200,000</td>
</tr>
<tr>
<td>Queens County, NY</td>
<td>2,237,216</td>
<td>286</td>
<td>576</td>
<td>$39,200,000</td>
</tr>
<tr>
<td>King County, WA</td>
<td>1,777,143</td>
<td>246</td>
<td>485</td>
<td>$47,621,663</td>
</tr>
<tr>
<td>Harris County, TX</td>
<td>3,644,285</td>
<td>235</td>
<td>447</td>
<td>$44,063,572</td>
</tr>
<tr>
<td>Orange County, CA</td>
<td>2,987,591</td>
<td>228</td>
<td>694</td>
<td>$80,718,573</td>
</tr>
<tr>
<td>Riverside County, CA</td>
<td>1,871,950</td>
<td>225</td>
<td>633</td>
<td>$69,000,000</td>
</tr>
<tr>
<td>City of Baltimore, MD</td>
<td>636,251</td>
<td>215</td>
<td>400</td>
<td>$27,834,540</td>
</tr>
<tr>
<td>Broward County, FL</td>
<td>1,754,893</td>
<td>214</td>
<td>507</td>
<td>$33,231,705</td>
</tr>
<tr>
<td>San Bernardino County, CA</td>
<td>1,921,131</td>
<td>207</td>
<td>452</td>
<td>$47,827,736</td>
</tr>
<tr>
<td>Wayne County, MI</td>
<td>2,016,202</td>
<td>181</td>
<td>297</td>
<td>$33,884,100</td>
</tr>
<tr>
<td>Sacramento County, CA</td>
<td>1,352,445</td>
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<td>447</td>
<td>$59,552,007</td>
</tr>
<tr>
<td>Dallas County, TX</td>
<td>2,294,706</td>
<td>170</td>
<td>376</td>
<td>$27,936,347</td>
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<tr>
<td>Suffolk County, NY</td>
<td>1,475,488</td>
<td>167</td>
<td>416</td>
<td>$30,059,066</td>
</tr>
</tbody>
</table>

*Most recent data available.
prosecutors are young attorneys from local law schools looking to gain extensive courtroom experience. Although prosecutors' offices do not pay salaries on par with most private law firms, they do provide an attorney with an opportunity to obtain a great deal of trial experience in a relatively short time. In addition, given the public nature of the job, many attorneys looking to enter state and local politics in the future start their careers as prosecutors. For these individuals, forgoing a higher salary in exchange for a government position that seeks to pursue justice and preserve the community is a tradeoff that is willingly made. The specific activities and duties of prosecutors are examined later in this chapter.

**Organization and Operation of the Prosecutor’s Office**

Large prosecutors’ offices maintain a bureaucratic organizational structure. Consider, for example, the organizational chart for the Philadelphia District Attorney’s Office in Figure 5.1. The elected district attorney sits atop the organization, while everyday operations of the office are overseen by a first assistant and several deputies who oversee the five nonadministrative divisions maintained by the office. Each of these divisions represents a general area for which the office is responsible. Within each division are a number of units or teams that were established to help focus the regular operations of the office. Finally, within each unit, team, or task force, up to several dozen assistant district attorneys carry out specific duties for the office.

In many prosecutors’ offices, units or teams are established to deal with the prosecution of specific classes of crimes. In Philadelphia, for example, the district attorney’s office has units that deal only with prosecuting homicides, sexual assaults and acts of family violence, economic crimes, and repeat offenders. By having groups of prosecutors focus on specific types of crime, a district attorney’s office builds up high levels of expertise in areas that are of significant seriousness and public importance.

Depending on how a particular office is organized, different methods of prosecuting cases can be implemented. Three general models are used by prosecutors’ offices for prosecuting cases. Under a **horizontal model of prosecution**, assistant prosecutors are assigned to units that handle specific steps or functions in the judicial process that are routine in nature and involve limited discretion (see Figure 5.1). For example, regardless of the type of case (there are exceptions), one attorney or a group of attorneys may be responsible for all initial appearances, another for preliminary hearings, and others for arraignments, and so on. Horizontal prosecution is generally used in larger offices as it handles a large number of cases with great efficiency.

Under a **vertical model of prosecution**, a case is assigned to a single prosecutor who is responsible for the case at each step in the judicial process from initial appearance through a final disposition. This method is often used in smaller jurisdictions that lack the personnel to operate under a horizontal model. Although not as efficient as horizontal prosecution models, vertical prosecution has the advantage of allowing victims and witnesses to deal with only one attorney, adding to their level of comfort and trust in the prosecution as it goes forward.

In an effort to include the positive aspects of the two modes of prosecution, many jurisdictions have adopted a **mixed model of prosecution**. Under mixed models, most cases are handled in a horizontal manner. Specific crimes, however, such as homicide and sexual assaults, are handled at all steps along the process by a specialized unit. This approach meets the need of efficiency in handling “routine” crimes but permits the use of expertise and case ownership for more serious offenses.
THE PROSECUTOR'S DUTIES

The overarching role of prosecutors in the criminal justice system is to represent the government in the prosecution of criminal offenses. That being said, prosecutors represent the government and governmental interests as well as specific needs of citizens beyond criminal prosecutions. Before examining the prosecutor's duties in the criminal justice system, we briefly describe the nonprosecutorial duties and responsibilities of local prosecutors.

Nonprosecutorial Duties

The locally elected prosecuting attorney is the government's attorney. This position requires the office to perform a number of duties on behalf of the local government, typically a county. The fundamental aspect of this duty is to provide legal assistance and advice to the various elected officials, boards, agencies, and employees of the county regarding official matters. This includes advising on personnel matters, annexations, commercial development and other land use issues, and procurement and other county contracts.

In addition, the county attorney's office is also tasked with defending all lawsuits brought against the county and all city officers and employees named in lawsuits.

In addition to serving as the county's attorney in civil matters, most prosecutors' offices have a number of specific, nonprosecutorial duties for which they are responsible.

Juvenile and Dependency Matters

In addition to prosecuting delinquency matters involving juveniles accused of committing crimes, prosecuting attorneys' offices are also responsible for a number of duties relating to child welfare and dependency issues. These duties may include filing petitions to protect abused or neglected children, as well as vulnerable adults, including the elderly and developmentally disabled. In many states, local prosecutors are also frequently called on to file involuntary commitment actions to provide necessary treatment for individuals who are mentally ill, chemically dependent, or mentally handicapped.

Child Support Enforcement

Prosecutors' offices are normally responsible for enforcing child support orders. This involves taking legal steps to collect delinquent child support payments.

Victim Assistance

Most prosecutors' offices have programs or units to provide assistance to crime victims. The overarching mission of these services is to make the criminal justice system more responsive to the victims of crime. Services provided typically include victim notification of court proceedings, an orientation about the prosecutorial process, crisis intervention assistance, passing along information about counseling and advocacy resources, and assistance in obtaining restitution for financial losses and the return of seized property.
Civil Asset Forfeitures

State and federal laws provide for the seizure and civil forfeiture of items used to commit a crime or that represent the proceeds of a crime. Items that are routinely subject to civil forfeiture include guns, money, vehicles, and houses. As civil forfeiture proceedings are instituted separately from any criminal prosecution, they are usually conducted by the civil side of a prosecuting attorney’s office.

Prosecutorial Duties

The primary role of the prosecutor’s office is to oversee the adjudication of criminal matters. The duties associated with this role involve activities prior to the arrest of a suspect up through the time a convicted defendant is released from prison. The actual power the prosecutor has in fulfilling this role was eloquently articulated in 1940 by Supreme Court Justice Robert Jackson.

Prior to being appointed to the U.S. Supreme Court in 1941, Robert Jackson served as U.S. Attorney General. In a speech given to the U.S. attorneys from across the nation, Justice Jackson laid out his perspective on the role and duties of the prosecutor in the American criminal justice system:

It would probably be within the range of that exaggeration permitted in Washington to say that assembled in this room is one of the most powerful peacetime forces known to our country. The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. Or the prosecutor may choose a subtler course and simply have a citizen’s friends interviewed. The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial. He may dismiss the case before trial, in which case the defense never has a chance to be heard. Or he may go on with a public trial. If he obtains a conviction, the prosecutor can still make recommendations as to sentence, as to whether the prisoner should get probation or a suspended sentence, and after he is put away, as to whether he is a fit subject for parole. While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst. (Jackson, 1940, p. 3)

The following sections discuss in some detail the nature and importance of several of these functions and how they relate to the ideals expressed by Justice Jackson.

Assisting Law Enforcement Officers

Prosecutors frequently work closely with law enforcement officers during criminal investigations. As prosecutors are the government’s attorneys, it is their responsibility to advise police on the legality of investigatory matters. This advice most often involves assessments regarding whether probable cause is present for an arrest or search warrant. Moreover, the prosecutor routinely prepares warrants and presents them to a judge for approval.
The prosecutor also plays an important role in deciding how investigations proceed. As the representative of the government in criminal matters, the prosecutor is in the best position to know what kind of evidence, as well as the amount of such evidence, is likely to be necessary to obtain a conviction. Accordingly, prosecutors routinely inform police investigators what is needed before prosecutors will go forward with filing charges. As prosecutors are the gatekeeper to the system and they alone have the ability to commence a prosecution, law enforcement officers generally take this information to heart and do what they can to obtain the evidence deemed necessary (Table 5.2).

### Screening Cases and Making Charging Decisions

In the criminal justice system, it is the responsibility of the police to arrest individuals suspected of committing crimes. Whereas in a perfect world, only individuals worthy of prosecution would be arrested, and every arrest would lead to a prosecution, this is not the way in which the system operates. In fact, in the United States, between one third and one half of all arrests are not formally prosecuted.

There are several reasons for this. Prosecutors’ offices do not have the capacity to prosecute every suspect arrested by police. Moreover, not every arrest is appropriate for prosecution. Following an arrest, the prosecutor has the duty of determining which of the arrestees should have formal charges brought against them and what those charges
should be. This decision is made necessary because the prosecutor’s office does not have the capacity to prosecute every individual arrested by police.

As prosecutors out of necessity must screen cases to determine which ones should be prosecuted, it is not surprising that how these decisions are made can be the source of controversy. What makes a **charging decision** more intriguing and controversial is the fact that in making this decision, the prosecutor has nearly limitless discretion. The Supreme Court has repeatedly held that courts should not review how and why charging decisions are made. So long as the decision is not based on the personal characteristics possessed by an individual (e.g., race, gender, religion) or for vindictive reasons (e.g., the exercising of a constitutional right or a prior acquittal), the prosecutor’s charging decisions are beyond judicial review.

Whereas there are limited constitutional constraints on charging decisions, there are several ethical boundaries prosecutors are required to stay within. The appropriate limits of a prosecutor’s discretion in making charging decisions are set out in Standard 3-3.9 of the American Bar Association Standards for Criminal Justice Prosecution Function (Exhibit 5.1). Under these standards, prosecutors may not file charges in cases where they do not have a belief that there is sufficient evidence to support a conviction. On the other hand, the standard explicitly states that prosecutors need not file charges if they determine it is not in the public interest to do so. As is evident from the numerous factors listed in the standard, the possibilities for this determination are virtually limitless.

How, then, does a prosecutor’s office determine which cases to prosecute? Three key factors drive these decisions. The first is the seriousness and nature of the offense. Even though this would seem to be a straightforward consideration, it can be quite complex and controversial. Trying to measure the comparative seriousness of different crimes is not an easy task. Homicides are clearly at the top of the list, but how does one differentiate between armed robbery, residential burglary, attempted rape, child abuse, and the distribution of heroin? All are serious, yet people will differ in weighing their comparative seriousness. Though offenses that cause real harm to a person are often given priority, some nonviolent crimes, such as child pornography or large-scale narcotics distribution, may be considered to cause more harm to society than an isolated act of violence. In such cases, the nonviolent offenses may be prosecuted more readily than the crime of violence.

Relatedly, the nature of the offense given the specific community in which it occurs has an effect on whether it will be prosecuted. Recall that local prosecutors have autonomy on whether to file charges. Recall also that the prosecutor is an elected official, answerable to the voters in his or her community. These facts have a significant influence on what types of crimes, particularly minor offenses, are formally prosecuted. In a large city with the serious social and crime problems typically faced by cities, it is unlikely that charges will be filed against a college student drinking alcohol in public in violation of the law. However, in a small college town, where citizens want the police and prosecutor to assert control over local college students, a criminal prosecution of a minor in possession of alcohol is much more likely to occur. Such political realities inevitably enter into charging decisions.

A second factor that is considered in charging decisions is an offender’s culpability. Crimes in which the offender acted intentionally or maliciously are more likely to be prosecuted than crimes resulting from a negligent or reckless act. This is because criminal
prosecution is likely to have a greater impact on the future behavior of a person who intentionally broke the law as opposed to a person who simply made a mistake or error in judgment. In addition, a criminal who purposefully broke the law is more of a danger to society than a negligent offender. Prosecution of a deliberate offender, accordingly, serves to protect society.

Another aspect of culpability involves whether the offender has a prior criminal history. Repeat offenders are regarded as posing a greater danger to the community than a first-time offender. But that being said, should the prosecution of a habitual drug dealer take precedence over a first-time armed robbery suspect? It is largely the responsibility of the elected prosecuting attorney to set office policies in these determinations. Given the difficulty in making these distinctions and the potential for political repercussions, prosecutors’ offices normally focus more on a third factor in deciding which cases to prosecute.

This third factor, the likelihood of being able to obtain a conviction at trial, has been repeatedly shown by research to be a critical factor in charging decisions (Albonetti, 1987; Frohmann, 1997). As discussed in the introduction to this section, members of the courtroom workgroup—the prosecutor, defense attorney, and judge—have the common goal of avoiding uncertainty. The most frequent and efficient way to decrease uncertainty from a prosecutor’s perspective is to refrain from filing charges in cases where a conviction may be difficult to obtain. In making these assessments, prosecutors consider the amount and quality of evidence against the offender. Specific factors vary by type of crime, but key factors frequently include whether the offender confessed or made other incriminating statements, the believability of the victim, the presence of eyewitnesses, and the existence of physical evidence. In examining these items, prosecutors are less concerned about whether there is evidence to believe the offender probably committed the crime for which he or she was arrested than about whether the evidence is such that it is very likely to lead to a conviction.

Whereas this standard is logical from the prosecutor’s perspective, it can be controversial in the eyes of outsiders. The cases in which the refusal to prosecute gives rise to the most controversy frequently involve sexual assault. The crime of sexual assault often occurs with no witnesses, little physical evidence showing compulsion, and conflicting accounts of what occurred between the victim and the accused. Absent evidence corroborating the victim’s assertion, proving beyond a reasonable doubt that the offender committed the crime is unlikely. In such instances, prosecution is similarly doubtful. The decision to prosecute becomes even more controversial when one takes into account the perceived believability of the victim and offender. Remember, the prosecutor is deciding whether or not to file charges based largely on the level of certainty he or she has that a jury will find the defendant guilty at trial. If the victim is from a different racial, ethnic, or social background than most of the jurors are likely to be, whereas the offender is from a similar background as typical jurors, and if the prosecutor has had experience in such circumstances where the jury did not accept the victim’s testimony as credible, prosecution is less likely than if the opposite background characteristics are present (Frohmann, 1997). While this may or may not be considered racism or classism, it is based on convictability, not prejudice. Nonetheless, it is a troubling component to charging decisions.
EXHIBIT 5.1  ■ Standard 3-3.9 Discretion in the Charging Decision

a. A prosecutor should not institute, or cause to be instituted, or permit the continued pendency of criminal charges when the prosecutor knows that the charges are not supported by probable cause. A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction.

b. The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his or her discretion are:
   i. the prosecutor’s reasonable doubt that the accused is in fact guilty;
   ii. the extent of the harm caused by the offense;
   iii. the disproportion of the authorized punishment in relation to the particular offense or the offender;
   iv. possible improper motives of a complainant;
   v. reluctance of the victim to testify;
   vi. cooperation of the accused in the apprehension or conviction of others; and
   vii. availability and likelihood of prosecution by another jurisdiction.

c. A prosecutor should not be compelled by his or her supervisor to prosecute a case in which he or she has a reasonable doubt about the guilt of the accused.

d. In making the decision to prosecute, the prosecutor should give no weight to the personal or political advantages or disadvantages which might be involved or to a desire to enhance his or her record of convictions.

e. In cases which involve a serious threat to the community, the prosecutor should not be deterred from prosecution by the fact that in the jurisdiction juries have tended to acquit persons accused of the particular kind of criminal act in question.

f. The prosecutor should not bring or seek charges greater in number of degree than can reasonably be supported with evidence at trial or than are necessary to fairly reflect the gravity of the offense.

g. The prosecutor should not condition a dismissal of charges, nolle prosequi, or similar action on the accused’s relinquishment of the right to seek civil redress unless the accused has agreed to the action knowingly and intelligently, freely and voluntarily, and where such waiver is approved by the court.


In addition to deciding which arrestees to have charges filed against, the prosecutor must also decide what specific charges will be filed. In most instances, a prosecutor will charge a defendant with the most serious level of crime for which there is probable cause to believe the defendant committed. There are several reasons behind this practice. First, a defendant cannot be convicted of a more serious offense than what he or she has been charged with. Whereas a matter that is overcharged can be corrected by the prosecutor or at trial to a lesser offense if need be, a crime that is undercharged cannot be ratcheted up later without significant effort, if at all. The second purpose behind charging the highest level offense is that it places the prosecutor in an advantageous position for the next critical decision point: plea bargaining.
As seen in this chapter, there are logical, resource-driven reasons behind decisions not to prosecute individual offenders despite strong evidence that a crime was committed. Case-by-case decision making of this sort is necessary for a prosecutor’s office to function. A different question is raised when a prosecutor refuses to pursue charges against law violators because he or she strongly opposes the law in question. Over the past several years, a number of prosecutors have refused to prosecute individuals arrested for laws related to gun and weapon ownership and possession. In 2010, the District Attorney of Jackson County, Wisconsin, Gerald R. Fox, announced that he will no longer prosecute the state’s laws prohibiting carrying concealed weapons, transporting uncased or loaded guns in vehicles, carrying guns in public buildings and taverns, and carrying switchblades and butterfly knives. In his statement, Mr. Fox wrote, “These so-called ‘public safety’ laws only put decent law-abiding citizens at a dangerous disadvantage when it comes to their personal safety, and I for one am glad that this decades-long era of defective thinking on gun issues is over” (Fox, 2010).

1. Should prosecutors be permitted to refuse to prosecute whole classes of crimes they disagree with?
2. What might be the impact of such a position?
3. Does the public have any recourse if a prosecutor takes such a position?
4. Is there any class of crime you would refuse to prosecute if you were an elected district attorney?

CURRENT CONTROVERSY

Plea Bargaining

In the United States, a vast majority of criminal prosecutions are settled through a plea bargain. The term plea bargain implies that the prosecution and the defense each give up something to reach a mutually acceptable disposition. Although this is generally true, it is the prosecutor that sets the ground rules for the bargain that is struck.

The prosecutor’s control of the plea bargaining process is largely a result of the discretion possessed by the prosecutor in deciding what charges to file against a defendant. By charging a defendant with the highest level of crime possible, the prosecutor can agree to let the defendant plead guilty to a lesser offense. This usually results in a conviction and sentence at an acceptable level in the mind of the prosecutor, and charging defendants with the most serious offense possible places added pressure on defendants to avoid the sentence that would be imposed on conviction of the more serious crime.

The prosecutor has complete discretion in deciding whether to enter into a plea bargain. That being said, the prosecutor has strong internal incentives to avoid trials and the inherent uncertainty they present. Generally, the prosecutor and defense attorney will have a defendant enter into a plea agreement that sentences the defendant to the going rate—that is, the typical sentence for the crime charged. If the prosecution believes it has a case with weak evidence, it is likely to push for a plea agreement in which the defendant receives a better bargain than the going rate, yet the prosecution still obtains a conviction. On the other hand, if the prosecution has an airtight case, or a “slam dunk” against a defendant, it may be unwilling to offer any concessions in exchange for a guilty plea.

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In 2014 Ronald Wright and Kay Levine published an article in the Arizona Law Review that examined how the attitudes and practices of prosecutors change as they gain experience. Wright and Levine conducted semistructured interviews of 217 prosecutors with varied levels of experience from eight distinct prosecuting attorney offices.

The article reports a number of very interesting differences between experienced and inexperienced attorneys. Based on their findings, the authors state that many inexperienced prosecutors suffer from “young prosecutors’ syndrome.” Young prosecutors were found to view themselves as “superheroes,” eager to try any case fully at the drop of a hat with minimal interest in negotiating. Experienced prosecutors, on the other hand, viewed themselves as “arbiters, negotiators, ‘BS meters,’ and advocates.” The experience they obtained over years working with defense attorneys, judges, witnesses, and law enforcement gave them increased confidence to make more independent proportionate decisions depending on the circumstances of individual cases. While young prosecutors were eager to try and win cases, more seasoned prosecutors were more interested in fairness and efficiency.

The authors conclude that it is important to instill in young prosecutors the importance of negotiation, pragmatism, and the ability to evaluate cases realistically. Although most experienced prosecutors’ attitudes varied significantly from those of neophyte colleagues, such evolution is not a given, and care must be taken to provide effective mentorship and guidance.

1. Should prosecutor offices screen applicants for “young prosecutor’s syndrome” when they hire new attorneys? What characteristics or attributes might be warning signs exhibited by new attorney applicants that they might be prone to this syndrome?

2. What steps, policies, or actions do you think a prosecuting attorney’s office could take to cure new attorneys of “young prosecutor’s syndrome”?


Disclosure of Evidence

During a criminal investigation, law enforcement officers and investigators from the prosecutors’ office obtain significant amounts of evidence concerning suspects and a criminal event. When formally charging a person, prosecutors have an ethical, statutory, and constitutional duty to disclose much of this evidence to the defendant. The prosecution, however, is not required to provide all of the evidence it possesses to the defendant.

Generally, there are three classes of evidence prosecutors are required to disclose to a defendant prior to trial. The first involves testimony and physical evidence the prosecutor intends to use at trial. This includes police reports, witness interviews, lab reports, and reports prepared by expert witnesses. The disclosure of these items is generally required by court rule, and failure to provide proper disclosure is likely to lead to their exclusion.
from use during a trial. The other two types of evidence that prosecutors are required to disclose to a defendant, exculpatory material evidence and impeachment evidence, are far less simple to identify.

Exculpatory evidence is evidence that is favorable to the defendant. Pursuant to the Supreme Court decision in *Brady v. Maryland* (1963), a prosecutor must disclose exculpatory evidence to the defendant if such evidence is considered to be material evidence. Two decades later, the Supreme Court stated that exculpatory evidence is material if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed. A reasonable probability of a different outcome is shown where suppression undermines confidence in the outcome (*United States v. Bagley*, 1985). The Supreme Court opinion in *Kyles v. Whitley* (1995) provides a vivid illustration of these standards.

In 1984, a woman was killed in a grocery store parking lot as she was putting her groceries in the trunk of her car. After the assailant shot the victim in the head, he took her keys and fled in her vehicle. Six eyewitnesses provided police investigators with statements, but these reports were inconsistent with one another with respect to the gunman's hair, height, and body type. Police also traced license plate numbers of the cars in the parking lot when the crime happened, but none of the plates were registered to the man later implicated, Curtis Kyles.

Police saw no real developments in the case until 2 days after the murder when they were contacted by a man known as “Beanie.” Over the next few days, Beanie gave the police several statements suggesting the involvement of Curtis Kyles. While each statement implicated Kyles, each one also contradicted Beanie’s other accounts on a number of factual details. Also questionable was that after Beanie’s first statements to the police but before Kyles was arrested, Beanie visited Kyles’s apartment several times. Two days following Beanie’s first statement to investigators, Kyles was arrested in his apartment. While searching the apartment, police found the murder weapon and items taken from the victim. None of these materials bore Kyles’s fingerprints. After Kyles’s arrest, three of the eyewitnesses identified him as the assailant. Kyles was then indicted and tried for capital murder.

Before trial, Kyles’s attorney filed a discovery motion requesting all exculpatory and impeachment evidence as required under *Brady*. The prosecution answered that there was no exculpatory evidence—despite the inconsistent reports of the eyewitnesses, the contradictory nature of Beanie’s many written and recorded statements to the police, and evidence that Beanie was a suspect in other robberies.

Kyles argued at trial that he was framed by Beanie. The prosecution relied on the eyewitnesses and the evidence found in Kyles’s apartment and chose not to call Beanie to testify. The trial resulted in a deadlocked jury. After the trial, Beanie met again with prosecutors and provided additional and contradictory statements against Kyles. Prosecutors used this new information at a second trial. As before, Kyles said that he was framed, and Beanie did not testify. This time Kyles was found guilty and sentenced to death.

Several years later, attorneys for Kyles found out about exculpatory evidence in the government’s possession that had never been disclosed to the defense. This evidence included a computer printout of the license plate numbers of cars near the murder scene in which Kyles’s car was not listed, the eyewitness accounts taken by police, and Beanie’s
recorded and written statements. Kyles argued that the prosecution’s failure to disclose these items denied him due process. The district court and circuit court of appeals rejected Kyles’s argument.

In a 5–4 decision, the Supreme Court reversed Kyles’s conviction and ordered a new trial. The central issue was whether the undisclosed exculpatory evidence was material. Writing for the majority, Justice Souter held that the undisclosed evidence was material and that nondisclosure was unconstitutional. Kyles was arrested largely due to the statements made by Beanie. As Kyles’s defense was based on his claim that Beanie framed him, evidence that supports that possibility, considered together with the discrepancies in the eyewitnesses’ descriptions of the shooter, was found by the Court to be sufficient to create distrust in the verdict. Significantly, the Court also held that it is the prosecutor’s duty to disclose material, exculpatory evidence that is in the hands of the police, even if the prosecutor does not know of its existence. The prosecutor is responsible for being aware of such evidence. Any other ruling would encourage police to obscure evidence from the prosecution and therefore a defendant.

Note that the identification of material evidence is left largely to the prosecutor. As prosecutors are the only ones who know what evidence is in their possession, it is their responsibility to determine what might be material and exculpatory. This is complicated by the facts that (a) this includes evidence in the possession of the police, (b) the prosecutor is presumed to know what is in the possession of the police, and (c) this decision must be made prior to trial.

It is important to remember that the same rules of disclosure for substantive evidence of criminal activity apply to impeachment evidence. Impeachment evidence is evidence that calls into question the credibility of a witness. For example, evidence that a witness who identified the defendant as the offender was previously sued in court by the offender and owed the offender a large civil judgment. This evidence of potential bias against the defendant would be usable to impeach the witness’s testimony at trial. As such, if the prosecution had knowledge of the prior relationship between the witness and the defendant, it would be required to disclose it to the defendant’s counsel.

The sanctions against a prosecutor for failing to disclose evidence to the defense can be severe. If a court finds that the failure to disclose was deliberate, it can dismiss the charges against a defendant. If it was an oversight or an error in judgment, the failure to disclose material evidence is likely to lead an appellate court to reverse a conviction and order a new trial. For these reasons, the need to disclose exculpatory evidence is taken very seriously by prosecutors. The Los Angeles County District Attorney’s Office has gone so far as to establish a Brady Compliance Division to deal with exculpatory and impeachment evidence disclosure issues. In addition to providing counsel to local law enforcement and deputy prosecutors on specific cases, the Brady Compliance Division also maintains a database of prior acts by police officers that could be considered exculpatory evidence. In addition, a standardized form (see Exhibit 5.2), designed to identify potentially exculpatory evidence, has been put to use by the office in an effort to prevent nondisclosure issues from arising at trial.
CURRENT RESEARCH

The Los Angeles District Attorney’s Office developed a specialized prosecution unit called Operation Hardcore to handle the prosecution of violent, gang-related offenses. Specialized units in prosecutor offices are developed in the hopes that the assigned prosecutors will gain specific knowledge and skills that will make them more effective in handling specific types of cases, the smaller caseloads will increase efficiency, and that the number of cases prosecuted and convictions secured will increase as a result. In 2011, a study was conducted that examined whether characteristics of the victim, suspect, and situational characteristics in the case influenced the charging decisions made by prosecutors in the specialized gang unit and whether the presence of the unit impacted the number of cases rejected.

The data used in the study was taken from the specialized prosecution unit in the Los Angeles District Attorney’s Office over a 5-year period. The study examined prosecutor’s charging decisions in 346 gang-related homicide cases. The victim and suspect characteristics (gender, race and ethnicity, gang affiliation, and number of victims and suspects) and situational characteristics (use of a firearm, whether the incident occurred after the unit was established and whether the unit prosecuted the case) were examined to determine their impact on whether the case was rejected or not.

The findings show that victim, suspect, and situational characteristics do impact the likelihood of case rejection. First, the results show that as the number of victims increased in the incident, the likelihood of the case being rejected significantly decreased. Second, the results show that cases involving female suspects and gang-affiliated suspects were more likely to be rejected by prosecutors. Last, the results show that gang-related homicides assigned to the specialized unit were more likely to be prosecuted compared to those gang-related homicides not assigned to the unit. Therefore, it appears that the existence of the specialized unit had one of the intended effects, in that it increased the likelihood that cases were fully prosecuted. Future research can build on the study by examining how decision making occurs in other specialized prosecution units for gang-related offenses and other types of crime. Furthermore, Los Angeles serves as an example to other cities considering implementing a specialized prosecution unit as a way to deal with their gang-related crime.

1. In your opinion, is it appropriate for the victim, suspect, and situational characteristics to have an impact on whether a case is prosecuted? How so?

2. Would you recommend that all cities establish a specialized gang-related prosecution unit?

ASSISTANT PROSECUTORS AT WORK

Regardless of why young attorneys become assistant prosecutors, the transition from a law student, law clerk, or private attorney to being a prosecutor is frequently jarring. Prosecutors learn quickly that practicing law in the criminal justice system is much different than anything they learned in law school. Eloquent legal arguments are few and far between. What is observed is the rapid disposition of cases. Exactly how these decisions are made is not contained in a training manual but rather learned through informal courtroom observation and mentoring. The following section examines how assistant prosecutors do their jobs.

Working in the Courtroom Workgroup

One of the first things learned by a new prosecutor is that courts conduct business as a workgroup (Heumann, 1977). The court operates not unlike an assembly line, with each component anticipating what other components will do next. The new prosecutor learns that a member of the workgroup who disrupts the anticipated processes—that is, the efficient disposition of cases—is ripe for unofficial sanctioning by the judge.

Prosecutors have a great deal of control over a court’s workload by their charging power and decisions regarding plea bargaining. The prosecutor’s decisions regarding how cases are handled affect the workload placed on the members of the workgroup. Failure by a prosecutor to follow the informal workgroup guidelines makes every member suffer. In response to such actions, the judge is likely to take steps to teach the renegade prosecutor a lesson.

Consider the following example. Bob was arrested for driving while intoxicated. At the time of the arrest, his blood alcohol level was 0.24, three times the legal limit. To make matters worse, he had his 3-year-old twin sons in the car with him at the time. Peter Prosecutor has been on the job for 6 weeks. From observing and prosecuting 40 driving while intoxicated (also referred to as driving under the influence [DUI]) cases during this time period, he knows that first-time DUI offenders almost always receive no jail time in exchange for a guilty plea. The fact that Bob was so intoxicated and driving with his children disturbs Peter so much that he will only let Bob plead guilty if he receives a sentence of 10 days in jail. Bob’s attorney explains that the going rate is no jail time and that even if he loses at trial, Bob will probably be sentenced to only 1 day in jail. Peter refuses to budge, and Bob rejects the plea offer.

Bob is later found guilty at trial and sentenced by Judge Julie to 1 day in jail. Afterward, Judge Julie asked the lawyers why they wasted her time by having a trial in a simple case. Bob’s lawyer and Peter explain about the 10-day plea offer. The judge scolds Peter for wasting taxpayer money and says that he better learn not to do such a thing in the future. Although Peter understood the judge, his understanding grew even further over the next several months when every motion for a continuance (postponement) or time extension he requested, which previously had been granted as a matter of course, was
EXHIBIT 5.2 ■ Los Angeles District Attorney

Request Law Enforcement Conduct a Review of Its Files for Possible Brady Documents

The Office of the Los Angeles County District Attorney has determined that the following employees of your department may be material witnesses in:

People v. __________________________ Case # __________________________

Therefore, it is requested that __________________________ review any files in your agency in order to locate any possible Brady documents for:

[Names of Employees]

Brady is information or evidence that (1) impeaches a prosecution witness, or (2) tends to exonerate a defendant. Evidence of conduct involving dishonesty or improper use of force or tending to show bias, which occurs in the course of exercising peace officer powers and while interacting with the public or when engaging in investigatory functions, may be deemed Brady documents.

If no Brady documents are found for the above-listed employees please indicate below and return form.

If Brady documents do exist for any of the above-listed employees, please identify the name, ID number and employment status of any such employee on this form and return it.

The obligation to provide Brady documents is ongoing. If your department receives any new Brady document regarding your above-listed employees, notify Deputy-in-Charge immediately.

____________________________ No document foreseen as being Brady documents exists for the above-named employees.

____________________________ Possible Brady documents exist for the following employees:

[Names of Employees]

Guidelines

Examples of possible impeachment evidence of a material witness include but are not limited to the following:

1. False reports by a prosecution witness.
2. Pending criminal charges against a prosecution witness. Parole or probation status of the witness.
3. Evidence contradicting a prosecution witness’ statements or reports.
4. Evidence undermining a prosecution witness’ expertise.
5. A finding of misconduct by a Board of Rights or Civil Service Commission that reflects on the witness’ truthfulness, bias or moral turpitude.
6. Evidence that a witness has a reputation for untruthfulness.
7. Evidence that a witness has a racial, religious or personal bias against the defendant individually or as a member of a group.
8. Promises, offers or inducements to the witnesses, including a grant of immunity. An employee presently under suspension.
denied. With each denial, he was told that because he had so much time to try clear-cut DUIs, he shouldn’t need any continuances. Peter has never bucked the workgroup’s going rate in DUI plea offers again.

In his classic book *Plea Bargaining*, Milton Heumann (1977) explains that instances such as the one just described help lead all members of the workgroup to adapt to the workgroup’s expectations. The other aspect that leads to prosecutors becoming melded with their workgroup is that it makes their lives easier. The workgroup operates to decrease uncertainty and increase efficiency. Given the large volume of cases handled by the criminal courts, without routine cooperation between prosecutors and defense attorneys, plea agreements would dissipate, and the number of trials, with their high levels of uncertainty and consumption of time, would increase. To avoid this unpleasantness, prosecutors generally play by the workgroup’s informal rules.

### THE EXPANSION OF THE PROSECUTOR’S DISCRETIONARY POWER

As you read throughout this chapter, discretion is an omnipresent force in the work of the prosecuting attorney. The vastness of the discretion possessed by prosecutors is based largely on the lack of effective checks on many of the decisions that are made by prosecutors, the fact that most of the decisions are made behind closed doors, and that the system relies on the prosecutor to exercise discretion to keep the system running. Over the past 25 years, every state and the federal government has adopted some form of sentencing guidelines or mandatory sentencing provision.

Mandatory sentencing laws, whether based on the type of crime, the number of prior convictions, or as part of a general determinate sentencing structure, have bolstered the discretionary power of prosecutors immensely. This increase in prosecutorial discretion comes at the expense of judicial discretion at sentencing (Woolridge & Griffin, 2005). By definition, mandatory sentencing laws require a judge to sentence an offender for a specified period of incarceration. Any prior sentencing discretion held by a judge is inapplicable in such cases. At the same time, the prosecutor maintains the discretion regarding what offenses with which to charge an offender. If a prosecutor thinks a mandatory life sentence is too extreme given the offender’s conduct, he or she can choose not to allege prior convictions when charging the defendant and avert a mandatory sentence for repeat offenders. At the same time, the prosecutor can charge the defendant as a repeat offender with mandatory sentence on conviction and use the potential punishment as leverage during plea negotiations. Either approach is with the prosecutor’s discretionary power.

### PROSECUTORIAL ETHICS AND MISCONDUCT

As we have already seen, the prosecutor represents the government in criminal prosecutions. While the criminal court process operates under an *adversarial system*, with attorneys advocating for one side or the other, the roles of the prosecution and defense are
Prosecutors have a tremendous amount of discretion in deciding when to bring criminal charges against an individual and what those charges should be. This discretion is not without limitation. In the case of *Yates v. United States* (2015), the Supreme Court considered whether federal prosecutors overreached in prosecuting a commercial fisherman with violating a provision of financial crimes statute.

While conducting an offshore inspection of a commercial fishing vessel in the Gulf of Mexico, a federal agent found that the ship’s catch contained 72 undersized red grouper, in violation of federal conservation regulations. The officer instructed the ship’s captain, John Yates, to keep the undersized fish segregated from the rest of the catch until the ship returned to port. After the officer left the ship, Yates had a crew member throw the undersized fish overboard. Yates was subsequently charged with violating 18 USC 1519, known as the Sarbanes–Oxley Act, which reads, “Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States” is subject to imprisonment for up to 20 years. Yates argued to the trial court that 1519 was enacted to criminalize the destruction of incriminating documents and computer hard drives and not fish. The trial court rejected this argument and Yates was found guilty by a jury. The U.S. Court of Appeals for the Eleventh Circuit affirmed.

A divided Supreme Court (5–4) reversed the conviction, holding that prosecutors overreached in considering fish to be a tangible object under the Sarbanes–Oxley Act. Writing for a five-member majority, Justice Ginsburg found that the act had nothing to do with maritime regulations. It also noted that the caption of the relevant section is, “Destruction, alteration, or falsification of records in Federal investigations and bankruptcy.” Additionally, the title of the section in which 1519 was originally placed, “Criminal penalties for altering documents,” clearly indicated that Congress was referring only to financial records. Moreover, the text immediately surrounding “tangible object”—“falsifies or makes a false entry in any record [or] document”—indicates that Congress intended to restrict the term to documents and related items. The Court concluded that the prosecution overreached in charging a fisherman under this provision.

Justice Kagan wrote a dissenting opinion. She argued that the term “any tangible object” should be given its ordinary meaning and not arbitrarily limited by the Court. Given that the term means all items that possess a physical form, the dissent argued that fish should be covered under the statute.

1. Do you agree with the logic laid out by the majority or dissent? Why?

2. If a fish is a tangible object, and the statute prohibits destruction of “tangible objects,” how can throwing the undersized fish off the boat not violate the statute?

The oral argument in *Yates v. United States* is available for you to listen to at https://www.oyez.org/cases/2014/13-7451.

Quite different. Defense attorneys are duty-bound to do all they can do within the ethical rules to obtain a favorable outcome for their clients. This is the case even for clients they know are guilty.
The prosecutor, on the other hand, has a much different duty. The prosecutor represents the government and all of the citizens within the jurisdiction. Standard 3-1.2(c) of the American Bar Association’s (1993) *Standards for Criminal Justice: Prosecution Function and Defense Function* simply states, “The duty of the prosecutor is to seek justice, not merely to convict.” This plain statement provides a quick summary of the prosecutor’s role in the criminal adjudication process. A more complete explanation of the extent of this duty was set forth by the Supreme Court in *Berger v. United States* (1935):

The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape nor innocence suffer. He may prosecute with earnestness and vigor; indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. (p. 88)

The basis for this duty is twofold. First, as stated in *Berger*, it is simply wrong to convict an innocent person of a crime. Along with the presumption of innocence, which is the cornerstone of the American justice system, a prosecutor must operate with ethical safeguards to limit the chance of a wrongful conviction. The second basis revolves around the fact that the prosecutor represents the government rather than an individual. Private attorneys have an ethical duty to do all they can to achieve a favorable outcome for their clients. The prosecutor may have such a duty on behalf of the government, but that does not necessarily mean that prevailing in court is a favorable outcome. Society benefits from a fair outcome where justice is done. This includes having innocent defendants acquitted and rights of all parties—including the defendant—protected and upheld.

Relatedly, in representing the state, the prosecutor has a large effect on how citizens view their government. If prosecutors are perceived as operating outside the rule of law, respect for the government and court system’s authority and legitimacy will be diminished.

Recognizing a [prosecutor’s] role as a shepherd of justice, we must not forget that the authority of the Government lawyer does not arise from any right of the Government, but from power entrusted to the Government. When a Government lawyer, with enormous resources at his or her disposal, abuses this power and ignores ethical standards, he or she not only undermines the public trust, but inflicts damage beyond calculation to our system of justice. (*In re Doe*, 1992, p. 480)

Ethical conduct, then, must be seen to be at the core of the prosecutor’s role in the criminal justice system. While no one disputes that prosecutors must seek to do justice, at times they lose sight of this duty. It is extremely rare for a prosecutor to deliberately try to have people
convicted of a crime they did not commit. That being said, it is possible for a prosecutor, based on circumstantial evidence, to be convinced that a person is guilty of a crime when in fact the person did not commit the crime. It is such situations that give rise to breeches of a prosecutor’s ethical duties and acts of **prosecutorial misconduct**.

Although it is atypical for prosecutors to deliberately act unethically, research has shown that such acts are committed from time to time across the country. The Center for Public Integrity is a nonprofit, nonpartisan organization that conducts research on public policy issues. In 2003, the center published the results from a multiyear study that examined appellate decisions in 11,452 cases in which prosecutorial misconduct was alleged. The study found that the appellate courts vacated the trial court outcome due to acts of prosecutorial misconduct in 2,012 cases (Weinberg, 2003). The center found that cases of misconduct occurred in a variety of areas, including the following:

- Courtroom misconduct (making inappropriate or inflammatory comments in the presence of the jury; introducing or attempting to introduce inadmissible, inappropriate, or inflammatory evidence; mischaracterizing the evidence or the facts of the case to the court or jury; committing violations pertaining to the selection of the jury; or making improper closing arguments)
- Mishandling of physical evidence (hiding, destroying, or tampering with evidence, case files, or court records)
- Failing to disclose exculpatory evidence
- Threatening, badgering, or tampering with witnesses
- Using false or misleading evidence
- Harassing, displaying bias toward, or having a vendetta against the defendant or defendant’s counsel (including selective or vindictive prosecution, which includes instances of denial of a speedy trial)
- Improper behavior during grand jury proceedings

When misconduct is found to have occurred, a variety of sanctions can be ordered. If it is found that the misconduct was unintentional and did not affect the outcome of the case, there may be no sanction. On the other hand, if the act is intentional, it will likely lead to the reversal of a conviction, disciplinary action by a state bar association against the prosecutor, or both. For example, in the late 1990s, two first-degree murder convictions and death sentences were vacated by the Arizona Supreme Court when it was shown that during trial, the prosecutor intentionally presented false testimony, suborned perjury from a police detective, and argued facts to the jury that he knew were not true (*State v. McCrimmon*, 1996). The court ruled that due to egregious and intentional acts of misconduct by the prosecutor, retrial was barred by double jeopardy (*State v. Minnitt*, 2002). Finally, in 2004, the Court held that given the intentional and repeated nature of
the misconduct, the serious harm (a death sentence) it gave rise to, and the fact that the prosecutor involved was very experienced, he should be disbarred and precluded from the practice of law (In re Peasley, 2004).

COMMUNITY PROSECUTION

Over the past two decades, the criminal justice system has seen consistent movement toward a community-based, proactive model of justice and crime control. Starting with community policing in the 1980s, various components of the criminal justice system shifted their focus away from arresting and prosecuting offenders and more toward dealing with underlying issues within the community in an effort to prevent crimes from occurring in the first place.

Since the 1990s, an increasing number of prosecutors’ offices have engaged in what has been termed community prosecution. Community prosecution involves a partnership among the prosecutor’s office, law enforcement, and the community, in which the authority and power possessed by the prosecutor’s office are used to identify and solve problems, enhance public safety, and improve the quality of life in the community. Under a community prosecution model, the role of the prosecutor is redefined from a law enforcer in an adversary system to a member of a community partnership with the ability to facilitate mediation, galvanize community action, and impose civil sanctions and other nontraditional remedies in an effort to eradicate a problem faced by a community.

The American Prosecutors Research Institute (1995) identified five core elements to community prosecution:

- A proactive approach to crime
- A defined target area
- An emphasis on problem solving, public safety, and quality-of-life issues
- Partnerships between the prosecutor, the community, law enforcement, and others to address crime and disorder
- Use of varied enforcement methods

Community prosecution activities and programs are present in over half of the prosecutors’ offices across the United States. These programs range from assigning prosecutors to geographic areas and having prosecutors responsible for attending community meetings to assigning prosecutors to work on specific community problems as identified by broad-based partnerships. What follows are two examples that show how community prosecution has been put into practice.

Albany, New York: Prisoner Reentry Program

Prisoners released from prison have a high recidivism rate. The faster former inmates take positive steps toward reintegrating into the community, the less likely they are
to reoffend and be returned to prison. To foster this reintegration, the Community Prosecution Office of the Albany County District Attorney’s Office established a prisoner reintegration program. Under the program, community prosecutors worked with nonprofit organizations to help 18- to 24-year-old former inmates living in high-crime neighborhoods obtain appropriate housing, employment, and health care. The partnership also helped former inmates obtain other necessities, such as driver’s licenses, bank accounts, and clothing appropriate to wear on employment interviews. For several months following release, inmates met with a counselor to assess needs and obstacles.

In addition, the program established Reintegration Accountability Boards (RABs). RABs are panels of residents who meet with parolees and let them talk about past problems and future goals. The RAB also tells parolees what the community expectations are for their behavior and that the board is there to help with their reintegration. Parolees are given the chance to tell the board about community conditions that may have been a cause of prior criminal behavior and any current conditions that may lead to future problems. The RAB considers these items and takes steps to address them when possible.

**Wayne County, Michigan: Drug Property Seizure and Abandoned Properties Program**

The Wayne County, Michigan, Prosecutor’s Office has an active community prosecution program. The office’s focus has been to address quality-of-life issues in Detroit. In an effort to rid the community of drug dealers, community prosecutors, in partnership with community members, local police, and government agencies, initiated the Drug Property Seizure and Abandoned Properties Program to force slumlords to clean up or raze their buildings. The seizure policy forces landlords to fix up and police their properties. Failure to do so can lead to a court finding that the property is a danger or nuisance and ordering it razed and sold at auction. The program, which is used in a number of other cities, has been very successful in eliminating drug houses and reducing urban blight.

Programs such as these are being used by dozens of prosecutors’ offices across the nation. It is fair to say that the use of community prosecution has increased to such a degree over the past decade that it is likely to be a permanent fixture in the criminal justice system.

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**SUMMARY**

The prosecuting attorney is a critical cog in the criminal justice system. Decisions made by prosecutors at various stages of the criminal justice process have profound effects on the other actors in the system, individual members of society, and society as a whole. In the same speech quoted from previously in this chapter, Justice Robert Jackson (1940), in noting the power of the prosecutor in the American system of justice, concluded that it is individual
prosecutors, as well as the way they view their position and make use of their authority, that determine how well the system will serve a community:

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

The need for prosecutors with such qualities is compounded by the fact that prosecutors have almost limitless discretion in the decisions they make and the actions they take. That being said, they do not operate in a vacuum. Despite the power they wield, prosecutors do work in a system. As we will see in the coming chapters, for the court system to function effectively, prosecutors must work together with defense attorneys and judges to find a common ground and perform the joint duties called upon them by society. (p. 20)

Don’t overlook the Student Study Site with its useful study aids, such as self-quizzes, eFlashcards, and other assists, to help you get more from the course and improve your grade.

**DISCUSSION QUESTIONS**

1. What role should politics play in the selection of U.S. attorneys?
2. Do you think local prosecuting attorneys should be elected or appointed? What are the pros and cons of each selection method?
3. What factors should voters consider in deciding if a prosecutor should be reelected?
4. In your opinion, should prosecutors’ offices have to explain to the public why they declined to file charges in cases? What would be some ramifications of such a requirement?
5. Of the three models of prosecuting cases—horizontal model, vertical model, and mixed model—which do you think would be most appropriate for the prosecutor’s office where you attend school?
6. What effect does being a member of the courtroom workgroup have on the way assistant prosecutors perform their jobs?
7. Is it fair to allow prosecutors to determine what evidence is exculpatory? What alternative methods (if any) would be better?
8. In *Griffin v. California* (1965), a case involving the rape and murder of a woman in a dark alley, the Supreme Court considered whether the following arguments by the prosecutor constituted prosecutorial misconduct and violated the defendant’s rights:

   “The defendant certainly knows whether Essie Mae had this beat-up appearance at the time he left her apartment and went down the alley with her...”
“He would know that. He would know how she got down the alley. He would know how the blood got on the bottom of the concrete steps. He would know how long he was with her in that box. He would know how her wig got off. He would know whether he beat her or mistreated her. He would know whether he walked away from that place cool as a cucumber when he saw Mr. Villasenor because he was conscious of his own guilt and wanted to get away from that damaged or injured woman.”

“These things he has not seen fit to take the stand and deny or explain.”

“And in the whole world, if anybody would know, this defendant would know.”

“Essie Mae is dead, she can’t tell you her side of the story. The defendant won’t.”

Do you think the prosecutor committed misconduct in making this argument?

9. Do you think community prosecution is an effective use of resources?

10. Think about the community where you live for a moment. Identify a quality-of-life problem in your community related to criminal behavior that may be a fitting target for a community prosecution effort. What is the problem? What might your community prosecution program include? What would be the desired outcome?

KEY TERMS

<table>
<thead>
<tr>
<th>Term</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Adversarial system</td>
<td>122</td>
</tr>
<tr>
<td>Assistant prosecuting attorneys</td>
<td>106</td>
</tr>
<tr>
<td>Charging decision</td>
<td>112</td>
</tr>
<tr>
<td>Community prosecution</td>
<td>126</td>
</tr>
<tr>
<td>Going rate</td>
<td>115</td>
</tr>
<tr>
<td>Horizontal model of prosecution</td>
<td>107</td>
</tr>
<tr>
<td>Impeachment evidence</td>
<td>118</td>
</tr>
<tr>
<td>Mediation</td>
<td>126</td>
</tr>
<tr>
<td>Mixed model of prosecution</td>
<td>107</td>
</tr>
<tr>
<td>Plea bargaining</td>
<td>115</td>
</tr>
<tr>
<td>Prosecutorial misconduct</td>
<td>125</td>
</tr>
<tr>
<td>United States attorney</td>
<td>104</td>
</tr>
<tr>
<td>Vertical model of prosecution</td>
<td>107</td>
</tr>
</tbody>
</table>

INTERNET SITES

American Bar Association Prosecution Function Committee: www.abanet.org/dch/committee.cfm?com =CR204000
Association of Prosecuting Attorneys: www.apa-inc.org
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