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The Prosecutor in American Criminal Procedure: Observations of a Foreign Student

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I. INTRODUCTION

The fact that the prosecutor has a central role and dominant position in the American criminal justice system is not a new idea for American lawyers, law students, or laymen. Almost fifty years ago, the Wickersham Commission noted that the prosecutor's office "is the pivot on which the administration of criminal justice in the States turns."\(^1\)

Within his jurisdiction, the prosecutor is usually referred to as the "chief law enforcement officer." This is the title given to him by both the American Bar Association\(^2\) and the National District Attorneys Association\(^3\) in their standards relating to criminal justice. It is not uncommon for the courts also to use this title for the prosecuting attorney.\(^4\)

The core of the prosecutor's powers is his control over the evidence presented to him by the police and presented by him to the court. The prosecutor screens the evidence and decides whether to file charges or drop them. In doing so, he consults with both the police and the courts and can exert much influence over both. He, in a word, is the focal point of the criminal justice system. His formal powers are coupled

\(^{†}\) A précis of this article was delivered in Salzburg, Austria at the Salzburg Seminar in American Studies, Session 192, "American Law and Legal Institutions," July 1979.


1. NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON PROSECUTION 11 (1931).

2. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION, Standard 3.1 (1970) [hereinafter cited as ABA PROJECT].

3. NATIONAL DISTRICT ATTORNEYS ASSOCIATION, NATIONAL PROSECUTION STANDARDS, Standard 2.1(A) (1977) [hereinafter cited as NDAA STANDARDS].

4. The Supreme Court of Michigan has stated that to ensure orderly warrant procedures, "all law enforcement" should be funneled "through the prosecuting attorney, the chief law enforcement officer of a county." People v. Holbrook, 373 Mich. 94, 97, 128 N.W.2d 484, 486 (1964) (emphasis added).
with a variety of informal ties and influences, which further strengthen his position in the system.\(^5\) The crucial decisions shaping the flow of the process and its outcome are made either by the prosecutor alone or with his active participation. That an American prosecutor can use such power in his discretion and in the absence of outer controls also seems to be a familiar fact for Americans. As Professor Kenneth Culp Davis suggests, "the American legal system seems to be shot through with many excessive and uncontrolled discretionary powers but the one that stands out above all others is the power to prosecute or not to prosecute.\(^6\)"

The aim of this article is to analyze the position of the prosecutor in the criminal process as it appeared to a foreign student of criminal justice in the United States. There are three basic features that are characteristic of the position of the prosecutor: his broad powers (formal and informal), his discretion to use them, and the lack of sufficient control over him. The observations here may not necessarily appear strikingly new to the American audience, for they are based on the studies of well-known and oft-quoted American sources. They should be considered as the observations of a concerned foreign student who, upon entering this particular field of study, discovered certain procedures, practices, and traditions that seemed to contradict commonly recognized objectives and ideals of criminal justice, as well as principles and values embodied or implied in the United States Constitution. This author is one of those European students of criminal procedure, who, in the words of Dr. Jan Stepan of Harvard Law School, are simply not able to understand how the broad powers of the American prosecutor and his "far-reaching prosecutorial discretion can be practiced without constant violation of both the law and the principle of equal justice.\(^7\)"

II. POWERS OF THE PROSECUTOR

\textit{A. The Charging Decision}

The power to commence the criminal process by a charging decision

\(^5\) Professor Frank Miller, in his comprehensive research on the prosecution function speaks of "informal arrangements" worked out between the judge and the prosecutor. "It is only when they cannot reach an informal agreement . . . that the formal law must be consulted to determine whether the judge can enforce his wishes against those of the prosecutor." \textsc{F. Miller, Prosecution: The Decision to Charge a Suspect with a Crime 308 (1970)} [hereinafter cited as \textsc{Miller}].

\(^6\) \textsc{K. Davis, Discretionary Justice: A Preliminary Inquiry 188 (1969)} [hereinafter cited as \textsc{Davis}].

\(^7\) Stepan, \textit{Possible Lessons from Continental Criminal Procedure}, in \textsc{The Economics of Crime and Punishment 181, 196 (1973)} [hereinafter cited as Stepan].
is in reality a monopoly of the public prosecutor in the United States. However, the initiation of the criminal process in the United States, unlike some other countries, does not appear to be a single procedure carried out and formally recorded by a given official. As Professor Frank Miller states, the charging decision "is not a unitary decision made at a readily identifiable time by a specified individual. It is, instead, a process consisting of a series of interrelated decisions. . . ."

In principle, the basic design of the initial charging stage as provided by law usually appears as follows. When there is probable cause to believe that a person has committed a crime, a law enforcement officer files a complaint seeking either an arrest or a search warrant. The complaint is an official document but is not the formal act by which the prosecution starts. The complaint is presented, under oath, to a magistrate, who is required by law to determine whether there is probable cause to believe that the crime was committed and that the suspect might have committed the crime. The issuance of a warrant by the magistrate is the procedural act that formally marks the initiation of prosecution. The warrant itself is the initial, and, in the prosecution of lesser offenses, the only charging act, and the only document manifesting that formal proceedings have started.

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8. Some states still have procedures by which a private citizen, through his attorney, can initiate and carry out prosecution. See, e.g., Note, Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction, 65 YALE L.J. 209 (1955). But this procedure, rooted in ancient common law, is seldom put in motion and does not greatly affect law enforcement. The necessity of having it on the books is questioned by experts. The ABA has proposed making the right to initiate the charging process the exclusive prerogative of the public prosecutor. See ABA PROJECT, supra note 2, Standards 2.1, 3.4.

9. MILLER, supra note 5, at 11.

10. The fourth amendment of the United States Constitution provides that "no Warrants shall issue, but upon probable cause, supported by Oath." See also CAL. PENAL CODE § 740 (West 1970), which provides that "all public offenses triable in the inferior courts must be prosecuted by written complaint under oath."

11. A magistrate is a judicial officer having power to issue a warrant for the arrest of a person charged with a public offense. CAL. PENAL CODE § 807 (West 1970).

12. It is interesting to note that the prosecutor's decision to charge and prosecute is not recorded or otherwise documented before a magistrate issues a warrant. The NDAA has recommended adopting practices whereby "[a] record of the charging decision . . . [is] made
B. The Warrant

Presumably, the issuance of a warrant by a “neutral and detached” magistrate ensures the thorough check of the judiciary over the law enforcement and prosecutorial agencies’ compliance with the constitutional standard of “probable cause” in the initiation of the criminal process. The legitimacy and validity of their actions at that stage of the process thus would be assured. It is also assumed that the judicial officer makes his judgment as to the legitimacy and validity of the institution of criminal proceedings in a disinterested, neutral, and detached manner. Neither the police nor the prosecutor can so base their judgments because of their accusatorial purposes.  

The courts have made it clear where the power to issue warrants belongs. The Supreme Court’s decisions during past decades have reaffirmed this power as the prerogative of the magistrate. In those states where statutes empowered prosecutors to issue warrants without judicial control, such practices were held unconstitutional.

Despite these legal assumptions and imperatives, the actual initiation of the criminal process by the issuance of a warrant is different. It is not the determination of the judicial officer that is of controlling importance for the police and the prosecutor; rather, the charging decision of the latter determines the initiation of criminal proceedings. The warrant is issued by the prosecutor in each case.” NDAA STANDARDS, supra note 3, at 132. At the same time, the NDAA has suggested that “[t]his record should be for office use only, and should not be made available for outside use.” Id. at 133. It is not clear whether the latter suggestion implies that an accused could see the document.

In Soviet criminal procedure, all procedural acts must be recorded. See Code of Criminal Procedure of the RSFSR, Art. 102 at 233 in H. Berman, SOVIET CRIMINAL LAW AND PROCEDURE: THE RSFSR CODES (2d ed. H. Berman & J. Spindler trans. 1972) [hereinafter cited as Code]. Decisions to initiate criminal proceedings and charge a suspect with a crime are recorded in the form of postanovlenie (resolution, decree). Id. Art. 112 at 236, Art. 144 at 249. The contents of the postanovlenie have to be set forth, and the nature of the charge has to be explained to a suspect. Id. Art. 148 at 250.

13. The Supreme Court has stated that “protection consists in requiring that . . . inferences [from the facts which lead to the complaint] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.” Johnson v. United States, 333 U.S. 10, 14 (1948). It is assumed that the initiation of proceedings by the issuance of a warrant by a judicial officer is “better” than by a law enforcement officer. The neutrality and objectivity of the judicial officer are taken for granted. However, in practice, this assumption is often not justified. See notes 16-18 infra and accompanying text.


15. See State ex rel. Simpson, 28 Wis. 2d 590, 137 N.W.2d 391 (1965) (invalidation of the statutory provision authorizing issuance of an arrest warrant by either the magistrate or the prosecutor; confinement of the power to the magistrate alone).
rant issued by a magistrate is often just a documented and automatic confirmation of the prosecutor’s decision to charge a person with a crime. It is the undocumented charging decision that is the heart of the initiation of the criminal process.

The charging decision is made by the prosecutor upon his examination of available evidence presented to him by police officers seeking a warrant. The police officers present their complaint or affidavit to the prosecutor for his informal approval before they formally file a complaint with a magistrate.16 The magistrate usually follows the prosecutor’s recommendations as to the initiation of criminal proceedings by issuance of a warrant. There are several practical reasons for this. First, magistrates do not have investigative facilities and cannot check whether there is actual “probable cause.” Second, many magistrates do not have adequate training, and they rely upon the judgments of prosecutors, the professional lawmen. Third, the magistrate may not be willing to confront the prosecutor at this initial stage, but prefer to put off potential conflict to further pre-trial stages of prosecution. Detailed surveys conducted by Professor Miller in Michigan, Kansas, and Wisconsin showed that the magistrate played virtually no role in the warrant decision.17 It is useless for the police to ignore the District Attorney’s office and file a complaint directly with the magistrate, because the prosecutor can refuse to prosecute. Thus, a warrant issued in spite of the prosecutor’s wishes can be worthless.18

16. It is a well established federal rule that, before going to court, federal law enforcement officers must obtain approval for their complaints from the United States Attorney or the appropriate division of the Justice Department. In some states, prior approval of the warrant by the prosecuting attorney is required by statute. In Michigan, for instance, the magistrate cannot issue warrants without the prior written approval of the prosecutor. Mich. Stat. Ann. § 28.1195 (1978). The ABA and the NDAA have recommended adoption of such procedures. ABA PROJECT, supra note 2, Standard 3.4(c), Comment; NDAA STANDARDS, supra note 3, Standard 7.3.

17. [T]here is virtually no judicial inquiry into the existence of probable cause for the issuance of an arrest warrant. And this is true despite the variety of formal schemes for the allocation of this function. In each of the three states the determination whether a warrant should be issued is made by the office of the prosecuting attorney. MILLER, supra note 5, at 54 (emphasis added).

18. The right to enter nolle prosequi or to drop charges by an order of dismissal is one of the prosecutor’s procedural tools. Nolle prosequi (“I am unwilling to prosecute”) is deeply rooted in common law. In the early nineteenth century, the court observed that “[t]he practice of entering a nolle prosequi to informations is very ancient; but to indictments it began in the latter end of the reign of Charles 2 . . . . Certainly, the court [sic] are not legally competent to give any advice on this subject.” Commonwealth v. Wheeler, 2 Mass. 172, 173 (1806). The right to drop charges, by nolle prosequi or by dismissal, is the absolute prerogative of the prosecutor. There is virtually no recourse to its exercise. In many jurisdictions, the prosecutor cannot discontinue prosecution without court approval. See, e.g., Cal.
Usually, initiation of the proceedings coincides with issuance of the warrant. The standard for the charging decision is "probable cause." Since the main goal for any ambitious prosecutor is the conviction of a defendant, this standard becomes the criterion by which the prosecutor gauges whether he will win the case. Constitutionally, however, the evidence at the prosecutor's disposal should match the standard of "beyond a reasonable doubt," the criterion for conviction. In the prosecutor's mind, this criterion of "beyond a reasonable doubt" is linked not with the question of a defendant's actual guilt, but only with the question of probability of obtaining a conviction.

It should be noted that winning the case—obtaining the conviction—in the American adversary system of criminal justice is not necessarily the result of the search for facts and truth that results from the complete and comprehensive evaluation of all relevant evidence by the court at trial. The prosecutor's "victory" is very often manifested by a conviction as the result of a bargained guilty plea, which precludes a trial. Anticipating the plea of guilty, the prosecutor does not bother with the sufficiency of "probable cause," because the expected plea is treated in American criminal procedure as the best evidence of guilt "beyond a reasonable doubt." That is why prosecutors still initiate criminal proceedings when a suspect "is likely to plead guilty," and why charges are filed "despite serious doubt in the mind of the prosecutor . . . whether the case would result in a conviction by trial."
C. The Evidence

Aiming the case at a win by conviction, the prosecutor exerts corresponding influence upon police and magistrates in accordance with this aim. The prosecutor screens the evidence presented by the police and scrutinizes the legitimacy of the ways in which it was obtained. Thus, he examines its relevance and admissibility for potential presentation at trial. The prosecutor is free to reject evidence seized by obviously unlawful means as well as evidence the admissibility of which he might doubt. In checking the admissibility of evidence, the prosecutor in fact reviews the legality of the police investigation. In doing so, he indirectly controls the police. He does not do this, however, in discharge of a duty of supervising the legality of the work of the police.\(^{23}\)

In rejecting evidence obtained in legally dubious ways, the prosecutor guides himself by purely utilitarian considerations. He is aware that the record of conviction is the criterion for procedural efficiency and political popularity of an elected prosecutor. He therefore needs evidence for “no loss” prosecutions. When, in a given case, he cannot count on a guilty plea and expects trial, he knows that available evidence may be excluded by the court.\(^{24}\) For this reason, he might, at the

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\(^{23}\) John Van de Kamp, District Attorney of Los Angeles, in explaining the relationship between his office and the police, has stated:

"We are not here to watch them—in a ride-along capacity—every day of their operations. We operate as an indirect check when the police go off the deep end; the policeman goes beyond the scope of his authority, commits a criminal act—then we prosecute him. . . . We are a sort of watchdog of police in that respect, but I can't tell you that we control how the police set their policies. That is a separate, almost political, structure and they operate under different kinds of leadership."


In the U.S.S.R., on the other hand, the prosecutorial agencies (the procuracy) are constitutionally vested with the power to supervise closely the work of the investigative agencies. The Soviet Code of Criminal Procedure provides that “[a] procurator shall exercise supervision over the execution of the laws in the conduct of an inquiry or a preliminary investigation.” \textit{Code, supra} note 12, Art. 211 at 269. The Procurator General of the U.S.S.R. and procurators subordinate to him, are obliged to “watch over the undeviating observance by agencies of inquiry and preliminary investigation of the procedure established by law for investigation of crimes.” \textit{Statute on the Procuracy Supervision in the U.S.S.R.}, Art. 17(3), in \textit{Basic Laws on the Structure of the Soviet State} 182, 187 (H. Berman & J. Quigley trans. 1969) [hereinafter cited as \textit{Statute}].

\(^{24}\) In the procedural framework of the American legal system, ombudsman-type prosecutorial supervision over police investigation is unknown. In view of this lack of administrative control over the police, the exclusion of evidence obtained by the police in an unlawful manner is the only effective way to compel respect for constitutional guarantees. See \textit{Mapp v. Ohio}, 367 U.S. 643 (1961).

By applying this “exclusionary rule” to police evidence, prosecutors can effectively shape police practices in accordance with their own policies. But, this may also work to upgrade and polish police skills.
start, reject certain evidence, even at the expense of not prosecuting a person whose guilt is obvious.\textsuperscript{25}

One should not think that all prosecutors at all times screen evidence to select only "sterile" evidence, thereby committing themselves to exposing or preventing unlawful police practices. First, prosecutorial overzeal in this respect can lead to confrontations with the police. That may be risky, for many prosecutors do not have adequate investigative staff and must rely on police detectives. Second, in many cases the necessity to scrutinize evidence as to its admissibility does not arise because of the prosecutor's firm determination to win the case by any means. Aiming the prosecution at the desired conviction, prosecutors may initiate proceedings lacking actual "probable cause." Sometimes this is done for political purposes or under political pressures, direct or indirect.\textsuperscript{26} Striving to win the case by conviction may turn the prosecutor's energy from the exclusion of illegally obtained evidence to the opposite, inclusion of evidence of any legal "quality."\textsuperscript{27}

We have filing standards . . . . The police have to come to us with their evidence, and we have to make an evaluation under our standards as to whether or not there is sufficient evidence to file a case. And for this reason there is always a substantial amount of conflict between our office and the police department. But it is true that with our filing standards, we were able to push the police department toward a greater degree of professionalism. Police departments here when I came in, and particularly the Los Angeles police department, did a very sloppy job in terms of investigating cases. They had had a pretty free time in the past in getting cases filed. We've compelled them now to do almost all of the work that's necessary before they come to us to file the case . . . . In a sense, by our standards and our refusal to file cases until they've done certain things, we do have a fairly significant impact on them.

Van de Kamp Interview, supra note 23.

25. One major difference between the duties of the American prosecutor and those of his European counterpart is that the former is free "not to prosecute in cases where guilt may reasonably be expected to be proved before the court." Stepan, supra note 7, at 195.

26. The prosecution of Angela Davis, Marxist scholar and member of the Communist Party of the U.S.A., provides an example. She was indicted as a co-conspirator for kidnapping and murder. See, e.g., Skolnick & Brick, A Fair Trial for Angela Davis? NATION, July 19, 1971, at 46-50. Assistant Attorney General of California, A. Harris, Jr., was the prosecutor in the case. He contended that "[t]he evidence clearly provides probable cause to believe that Davis conspired with Jonathan Jackson to kidnap Judge Haley." Uproar Over the Angela Davis Case—the Facts, the Issues, U.S. NEWS & WORLD REPORT, Oct. 11, 1971, at 39. But, despite the huge bulk of evidence and the statements of prosecution witnesses, Angela Davis was acquitted. "The prosecution's case was based on purely circumstantial evidence." Angela's Triumphant Acquittal, TIME, June 12, 1972, at 22.

27. In the case of the Wilmington Ten, civil rights activists, it was revealed that the prosecution had bribed or coerced some witnesses into testifying on its behalf. See Who Bombed Mike's Grocery?, TIME, May 23, 1977, at 83.

There is an affirmative duty of the prosecutor to inform the court that his witness has committed perjury, United States v. Basurto, 497 F.2d 781 (9th Cir. 1974), and to withhold evidence known to be false, United States v. Cervantes, 542 F.2d 773 (9th Cir. 1976). However, in striving to "get" a person whose conviction is deemed desirable for political or other
Finally, the prosecutor does not bother to collect evidence sufficient for conviction at trial when he believes he will obtain the conviction as the result of a guilty plea. In such a case, the prosecutor confines his efforts or those of the police to gathering minimal evidence. He sees his task merely as the "procedural bluff"—the tactical art of convincing the defendant that the prosecution rests on solid evidence sufficient to convict at trial.

D. The Preliminary Hearing

After the charging decision is made by the prosecutor and formally confirmed by the magistrate’s warrant, the next important stage in the process is the decision to hold a suspect for trial. The legal assumption is that such a decision is the prerogative of the grand jury in serious cases, or of the magistrate in the majority of cases.

The magistrate’s decision is made at the preliminary hearing. Theoretically, the function of the preliminary hearing is to screen cases to determine whether a crime has been committed, whether there is "probable cause" to believe that the defendant is guilty of that crime, and whether the defendant should be bound over for the formal charge by the prosecutor ("the information"). The statutes provide that the preliminary hearing should be held in the presence of the prosecutor, the defendant, and the defense attorney. The magistrate is to hear both prosecution and defense witnesses, and cross-examination is allowed.

It is assumed that by vesting in the magistrate control over the preliminary hearing, the judiciary provides a balance for government prosecutors in order "to prevent hasty, malicious, improvident, and oppressive prosecutions." In fact, the preliminary hearing is the procedure in which the prosecutor, having made the initial charging decision, freely reigns. In many cases, the "probable cause" examination by the magistrate turns out to be a formality easily surmounted by

reasons, a prosecutor may act contrary to this duty. Naturally, no prosecutor would admit to that.

29. The function of the preliminary hearing is "to determine whether there is sufficient evidence to proceed to trial." ALI Model Code of Pre-Arraignment Procedure § 330.1 (1975) [hereinafter cited as ALI Code].
30. In 1975, the Supreme Court ruled that a hearing on probable cause is required by the Constitution. Gerstein v. Pugh, 420 U.S. 103 (1975).
31. For the law and current administration of the preliminary hearing, see Miller, supra note 5, at 64-82.
the prosecutor. Thus, the preliminary hearing merely provides a rubber stamp approval for the prosecutor's decision to proceed.

At this stage, the magistrate evaluates only the "probability" or "sufficiency" of the defendant's guilt in order to bind him over for further proceedings. Therefore, there is no need for discovery, and the magistrate does not examine all of the evidence obtained by the prosecution. The defendant has no right to see all of the prosecutor's evidence. At the typical preliminary hearing, one or two prosecution witnesses testify, there is little cross-examination and no disclosure to the defendant.

The practice of minimum disclosure by the prosecutor is the reason why his energies are channeled into making that small amount of evidence for presentation in the preliminary hearing appear immaculate. At this stage, the prosecutor's main task is to demonstrate his confidence in conviction. If he expects a guilty plea, he confines himself to the task of convincing the magistrate of the sufficiency of the evidence in order to portray the magistrate's decision to the defendant as the combined punitive resoluteness of the state. In this manner, the way is paved for plea bargaining. The preliminary hearing thus seems to be an evaluation of the prosecutor's tactical arts rather than the justness of holding the defendant for trial. Such practices resemble, in the words of the Soviet scholar Dr. Konstantin Gutsenko, "not one of the stages in the legal process to ascertain the truth but more likely [a] dishonest..."

33. In the American criminal system, pre-trial discovery by the defendant and his counsel is within the prosecutor's discretion. The prosecutor may offer the defendant an opportunity to examine the evidence, but he is under no duty to do so. As one court has suggested, "[t]he mission of the [preliminary] hearing is an investigation into probable cause for further proceedings against the accused. It does not include discovery...[S]ome discovery becomes a by-product of the process of demonstrating probable cause. But in no sense is discovery a legitimate end unto itself." Coleman v. Burnett, 477 F.2d 1187, 1199-1200 (D.C. Cir. 1973). However, "discovery is designed to ascertain the truth...in criminal as well as civil cases...[T]he state has no interest in denying the accused access to all evidence that can throw light on issues in the case." Jones v. Superior Court, 58 Cal. 2d 56, 58-59, 372 P.2d 919, 920, 22 Cal. Rptr. 879, 880 (en banc) (citations omitted).

Although there is a trend in American law to liberalize the concept of discovery, the suspicion remains that the question of letting the defendant examine evidence against him is in the hands of the prosecution. One reason for this is that pre-trial discovery is not protected by due process constitutional requirements. In Soviet criminal procedure, full pre-trial discovery for the defendant is required by law. It is a duty of the prosecution "to present all of the materials of the case to the accused and his defense counsel" upon the completion of the preliminary investigation and before the indictment is filed. Code, supra note 12, Art. 201 at 266.

34. MILLER, supra note 5, at 65.
card game."\textsuperscript{35}

The magistrate, here as in the warrant issuance procedure, relies upon the prosecutor's ability to screen cases. He assumes that as soon as the prosecutor decides to prosecute, he will do his best to push the case through the process. The magistrate is, of course, free to dismiss charges for want of "probable cause," but this is rarely done.\textsuperscript{36}

The law equips prosecutors with procedural tools to overcome a magistrate's decision to dismiss charges. Prosecution of the defendant may be re-initiated for the same offense, or for a different one on lesser charges.\textsuperscript{37} Prosecutors can also "shop around" for a magistrate more sympathetic to their endeavors. As the Kansas Supreme Court suggested:

[D]ischarge by a magistrate is not a bar to another preliminary examination. The state has supplied itself with many magistrates. . . . Out of all of these we rather imagine it would not be too difficult to find some magistrate who would lend a responsive ear in any case where the state seeks to bind over a person . . . .\textsuperscript{38}

The magistrate's decision to discharge the defendant is not, in law or in practice, an absolute obstacle for the prosecutor. In effect, the magistrate is under the indirect control of any prosecutor who is determined to seek conviction.

\section{The Grand Jury}

The prosecutor exercises actual control over holding for trial even when this function has theoretically been assigned to the grand jury.\textsuperscript{39}

The grand jury is one of the oldest American legal institutions. It is rooted in ancient English history, was transplanted to American soil by the Colonists, and affirmed by the Bill of Rights.\textsuperscript{40} Basically, the grand jury performs two functions: it investigates and it brings formal

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\item \textsuperscript{35} K. Gutsenko, UGOLOVNY PROTSESS OSNOVNYKH KAPITALISTITCHESKYKH GOSSUDARSTV (CRIMINAL PROCEDURE IN THE LEADING CAPITALIST STATES) 139 (1969).
\item \textsuperscript{36} By Professor Frank Miller's estimates, the average dismissal rate of all defendants entitled to a preliminary hearing is 2%. Miller, supra note 5, at 84.
\item \textsuperscript{37} "There is no constitutional or statutory inhibition against holding more than one preliminary examination for the same offense . . . ." Kansas v. Curtis, 108 Kan. 537, 539, 196 P. 445, 445 (1921).
\item \textsuperscript{38} Kansas v. McCombs, 164 Kan. 334, 337, 188 P.2d 922, 924 (1948).
\item \textsuperscript{39} The use of the term "holding for trial" is not technically correct with respect to the grand jury. In theory, the function of the grand jury is to initiate criminal prosecution. In practice, the prosecutor makes the initial decision to prosecute. The grand jury is assembled in response to this decision.
\item \textsuperscript{40} "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ." U.S. CONST. amend. V.
\end{itemize}
charges in serious cases. As a constitutional institution, the grand jury in the early history of the United States was contemplated "as a protective bulwark standing between the ordinary citizen and an overzealous prosecutor." The legal assumption behind the short formula in the Bill of Rights is that a panel of peers should serve as a citizen's protection against the abuse of prosecutorial power by the government. It was to be the citizens' check on prosecutors and the citizens' body controlling the charging process in serious cases.

Modern practices clearly demonstrate that the grand jury has become the opposite of contemplated ideals and legal assumptions. From the protector of the rights of an accused and the guarantor of legality in prosecutions, it has been transformed into an obedient tool of prosecutors and, in too many instances, their instrument in oppressive persecutions.

Abuses of the grand jury's powers in the interests of prosecutors became possible by virtue of procedures employed for grand juries' functioning. Conceived as the arm of the court, the grand jury in many states is selected by court officials and instructed by a judge before its session starts. Once assembled, however, jurors are captured by the prosecutor. The hearing is closed and secret, proceedings are not stenographically recorded, the judge is not present, and witnesses' counsel are not allowed into the chamber. All of these factors work to the benefit of the prosecutor: he is the only official at the hearings, he is the only lawyer upon whose advice jurors can rely, and he is free to present them with information of his own choosing since he can be confident in the secrecy of the proceedings. Under such conditions, the prosecutor naturally controls the outcome of the proceedings. Re-

43. The Supreme Court has eulogized the grand jury as an institution:
Historically, [the grand jury] has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice or personal ill will. Wood v. Georgia, 370 U.S. 375, 390 (1962).
44. See, e.g., CAL. PENAL CODE § 903.4 (West 1970).
45. "It is the prosecutor who will explain and construe the myriad of laws that the Grand Jury is charged to enforce. Moreover, this representative of the executive branch of the government will also instruct the jury as to the quantum of proof necessary to justify an indictment . . . ." Campbell, Eliminate the Grand Jury, 64 J. CRIM. L. & CRIMINOLOGY 174, 177 (1973) [hereinafter cited as Campbell].
turning a grand jury indictment is his enterprise, both practically and technically. The document itself is, in effect, drafted by his office, and the "true bill" resolution of the jurors has to be confirmed by the prosecutor.\textsuperscript{46} The grand jury is powerless to override the prosecutor's disapproval.\textsuperscript{47} At the same time, the refusal of the jurors to return the indictment is not an obstacle for the prosecutor; he can refer the case to a new panel, or charge the same person by filing an "information."\textsuperscript{48}

The grand jury has been under heavy criticism in recent years, both as an institution and for its practices.\textsuperscript{49} The operations of federal grand juries during the Nixon administration were attacked for political abuses. Attorney General Mitchell's prosecutors used grand juries to stifle political protest and to prosecute black, youth, and antiwar activists. Many of these activists "have spent time in jail as a direct result of the expanded grand jury powers . . . . Government prosecutors, led by Guy Goodwin of the Justice Department's Internal Security Division, turned federal grand juries into rubber stamps in this new method of radical witch-hunting."\textsuperscript{50} Grand jury hearings arranged by federal prosecutors were aimed at discrediting and harassing political opponents as well as pumping out information for intelligence purposes of federal law enforcement.\textsuperscript{51}

There is a move now to reform or abolish grand juries.\textsuperscript{52} Several bills have been introduced in Congress to reform grand jury procedures. Reformist aspirations have probably been dictated not by concern over the political roles of grand juries in government attacks on

\textsuperscript{46} \textit{Fed. R. Crim. P. 7(c)(1)}.  
\textsuperscript{47} The provision of Rule 7, requiring the signing of the indictment by the attorney for the government, is a recognition of the power of government counsel to permit or not to permit the bringing of an indictment. If the attorney refuses to sign . . . . we conclude that there is no valid indictment. United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965).  
\textsuperscript{49} For a strong criticism of institutional deficiencies, see Campbell, \textit{supra} note 45, at 174-82.  
\textsuperscript{50} Gerth, \textit{The Americanization of 1984}, \textit{Sundance Magazine}, April/May 1972, at 58, 65, \textit{reprinted in Criminal Justice in America} 213, 244 (R. Quinney ed. 1974). In view of the roles of grand juries in "law 'n' order" policies of the Nixon administration, Judge Campbell's remark that "[the grand jury] has outlived its reputation as the bulwark of democracy" is noteworthy. Campbell, \textit{supra} note 45, at 179.  
\textsuperscript{51} For detailed descriptions, see \textit{L. Clark, The Grand Jury} (1975).  
\textsuperscript{52} In many states, grand juries are practically inactive. In Los Angeles County in 1976, only 40 out of 21,000 criminal cases went to a grand jury. Footlick, \textit{Reforming the Grand Jury, Newsweek}, Aug. 22, 1977, at 46.
radical movements, but rather by the fact that in certain investigations federal grand juries stepped on the toes of economically and politically privileged groups. General Motors lawyers complained that in investigations by the Internal Revenue Service, the grand jury was used as "the sword" of the IRS.\textsuperscript{53} Corruption and other white collar crimes have also been targets of grand juries. Nevertheless, the prosecutorial brethren, by and large, oppose reforming the grand jury, trying instead to preserve it as the duteous and pliable instrument of prosecution.

\textbf{F. Plea Bargaining}

Plea bargaining is the next, and, for the most part, inevitable stage after formal charges by indictment or information have been brought against the defendant and filed with the court. At arraignment, the defendant is called before the court and officially informed of the charges to which he is required to plead. He has the right to plead guilty, nolo contendere, or not guilty. As many as approximately ninety percent of all defendants in the United States enter guilty pleas. Most of these pleas result from negotiations or bargaining between the prosecutor and defense counsel or the defendant.\textsuperscript{54}

In the words of the 1967 President's Commission, "few practices in the system of criminal justice create a greater sense of unease and suspicion than the negotiated plea of guilty."\textsuperscript{55} European observers of American criminal justice would readily agree to this. As Dr. Jan Stepan suggests, "[i]t is hardly possible to imagine any system of criminal justice where plea bargaining, at least as it is presently known in this country, would not function as a malignant disease, metastatically attacking the whole organism of administration of justice."\textsuperscript{56}

There is probably no need for a detailed discussion of the nature of a guilty plea resulting from plea bargaining.\textsuperscript{57} In short, it is a procedure by which a defendant, after securing the prosecutor's promise of leni-

\textsuperscript{53} Id.
\textsuperscript{54} President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: The Courts, at 9 [hereinafter cited as Task Force Report]. See, e.g., Cortez v. United States, 337 F.2d 699, 701 (9th Cir. 1964) ("most" guilty pleas result from bargains made with prosecutors); People v. West, 3 Cal. 3d 595, 608, 477 P.2d 409, 417, 91 Cal. Rptr. 385, 393 (1970) (en banc) (probably the "'vast majority' " of criminal cases are disposed of through plea bargaining) (quoting In re Tahl, 1 Cal. 3d 122, 138, 460 P.2d 449, 461, 81 Cal. Rptr. 577, 589 (1969) (Peters, J., dissenting)).
\textsuperscript{55} Task Force Report, supra note 54, at 9.
\textsuperscript{56} Stepan, supra note 7, at 196.
\textsuperscript{57} For a description of the plea bargaining mechanism in a broad variety of cases, see Note, The Legitimation of Plea Bargaining: Remedies for Broken Promises, 11 Am. Crim. L. Rev. 771 (1973).
ency, pleads guilty to a lesser charge, thus removing the case from the criminal process. The confession of guilt is considered to be the best evidence of guilt in American criminal procedure, for it is "as conclusive as a verdict of a jury."

Cases on the subject are legion. The amount of literature is huge, and so are the authors' criticisms. It is beyond the scope of this article to discuss all aspects of plea bargaining, but one point should be made in view of the approach undertaken—namely, the significance of plea bargaining and its potential use by the prosecutor in the criminal process. It is a legal assumption that criminal justice should be administered by the court. In this process, the court is supposed to resolve two central and vital questions: the question of guilt or innocence, and the question of the appropriate sanction for a person found guilty. Establishing facts and determining guilt are functions assigned to the jury. Imposition of criminal sanctions provided by law is often the preroga-

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58. The operation of the guilty plea is rooted in the common law model of criminal process and has developed historically as a "combat," or "adversary" process. Entering a guilty plea meant that the defendant submitted to the claims of the state as to his guilt. He thus waived all his defenses, Kachnic v. United States, 53 F.2d 312, 315 (9th Cir. 1931), and broke "the chain of events which had preceded [the guilty plea] in the criminal process." Tollett v. Henderson, 411 U.S. 258, 267 (1973). As a venerable authority wrote: "If the Prisoner say Guilty, then the Confession is recorded, and no more is done to him till Judgment." M. DALTON, THE COUNTRY JUSTICE 515 (London 1705) (1st ed. London 1618), quoted in Cogan, Guilty Pleas: Weak Links in the "Broken Chain," 10 CRIM. L. BULL. 149, 154 (1974).

In his excellent analysis of the deficiencies in the American criminal process, Professor Lloyd Weinreb suggests:

On any fair account of our actual practices, conviction by guilty plea is normal and a trial the exception. This reversal of the theoretical and actual models of our criminal process is the more striking because we are so fond of proclaiming it a mark of our civilization that the government is required to prove a person's guilt without assistance from him. . . . In fact, we rely on the defendant's formal admission of guilt far more than other countries, whose procedures we criticize because they are not based so fully on our conception of an adversary system.

WEINREB, supra note 22, at 71-72 (emphasis added).

59. BALLANTINE'S LAW DICTIONARY 954 (3d ed. 1969). Other countries' criminal justice systems do not rely so heavily upon defendants' confessions as the only evidence needed to convict a defendant. Individual circumstances can draw a person into self-incrimination. It is therefore a firm rule in Soviet criminal procedure that "an acknowledgement of guilt by the accused may become the basis for an accusation only if the acknowledgement is confirmed by the totality of evidence in the case." Code, supra note 12, Art. 77 at 227.

60. See, e.g., note 54 supra.

tive of the judge. Guilt is determined on the basis of facts proved at a public trial by jury, as guaranteed in the Bill of Rights. A guilty plea means the waiver of this right. For the prosecutor, this waiver is of great importance, for (1) it helps to save time and resources in the face of an overwhelming caseload; (2) it provides for certain conviction, which may not necessarily have followed from a trial; (3) it removes possibilities of judicial scrutiny of the admissibility of evidence, and of potential use of the "exclusionary rule," thus drawing a cloak of secrecy around the preceding actions of the police and the prosecutor; (4) it contributes to the number of convictions in the prosecutor's record; (5) it adds to the impression of prosecutorial effectiveness; and (6) it helps save resources for thorough preparation of those cases designed to go to trial.

Thus, the prosecutor is essentially interested in a continual flow of guilty pleas. Other participants in the criminal process also have a practical interest in these pleas. Motivated by his own incentives and backed by the interests of other participants, the prosecutor induces guilty pleas by offering bargains. It is the prosecutor who is the backbone of plea bargaining, and his efforts to induce guilty pleas play a central role in the administration of justice. The terms of plea charges and sanctions are worked out within the walls of his office and then offered to a defendant. Recommendations of the prosecutor as to the sentence are routinely followed by the judge in his sentencing decision.

The prosecutor, while arranging a guilty plea, in effect usurps the roles of the court: it is he who replaces the jury in its function of determining guilt, for he decides to what offense the defendant may plead.

62. U.S. CONST. amend. VI provides: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." The right of jury trial is protected under the due process clause and is applied to the states through the fourteenth amendment. Duncan v. Louisiana, 391 U.S. 145 (1968).

63. Points (4) and (5) are especially important to an elected D.A. because, in order to secure re-election, he can demonstrate to the community his prosecutorial activism and effectiveness. Describing the once famous Manhattan D.A.'s office headed by Frank Hogan, Mayer wrote: "Defendants plead guilty in New York County because lawyers can demonstrate to them that they have no earthly hope of winning in court." Mayer, "Hogan's Office: A Kind of Ministry of Justice," in CRIME AND CRIMINAL JUSTICE 138, 139 (D. Cressey ed. 1971) [hereinafter cited as Mayer].

64. See, e.g., W. CHAMBLISS & R. SEIDMAN, LAW, ORDER AND POWER 395-414 (1957).


66. The California statute requires that the sentence conform to the terms worked out in plea discussions; the plea is withdrawn if it is otherwise. See CAL. PENAL CODE § 1192.2 (West 1979).
AMERICAN PROSECUTORIAL DISCRETION

It is to whom the judge's function of sentencing is delegated, for he decides the terms of the sentence and submits them to the judge for an automatic approval. When coupled with the fact that ninety percent of all criminal cases in the United States are disposed of by guilty pleas, one cannot help viewing American criminal justice as a system administered by an organ of the executive branch rather than "by public jury trial." Actual operation of the criminal justice system thus appears to be ninety percent contrary to its theoretical model. Administrative justice by the prosecutor seems to be a more accurate definition for the operations of the criminal justice system in the United States.67

Several decades ago, Professor Raymond Moley defined the powers and roles of the prosecutor:

I have attempted to indicate the very great importance of the public prosecutor, a fact which is particularly American. The sheriff and the coroner, the grand jury, and finally the petit jury, products of a long historical evolution, have quite faded into insignificance. Likewise, both the examining magistrate and the trial judge in state courts . . . perform no dominant role. In the midst of the decay and impotence of his official associates, the prosecutor rises to a definite mastery. To a considerable extent he is police, prosecutor, magistrate, grand jury, petit jury, and judge in one.68

Moley's contention that the prosecutor has, "to a considerable extent," the concentrated functions of police, magistrate, grand jury, trial jury, and judge does not appear too exaggerated when applied to certain procedures in the criminal process. It also applies to many aspects of the prosecutor's relationships with other participants in the process.

67. In theory the function of the District Attorney is to prosecute in the courts people charged with committing felonies and misdemeanors. In fact, so far as serious crimes are concerned, Hogan's office determines whether accused people are guilty or not. Once the New York D.A. decides you are guilty of a felony, you are . . . . [I]n New York County—and to only somewhat lesser degree in other jurisdictions—what we really have is an administrative system of criminal justice, where the evidence is weighed and the important decisions are taken in the prosecutor's office.

68. R. MOLEY, POLITICS AND CRIMINAL PROSECUTION vii (1929). The control of the "chief federal prosecutor" over the legal process within the federal courts is most apparent and striking. The functions of the Department of Justice place it in a position to control administratively investigation (FBI, INS, DEA), prosecution (divisions of the Department, U.S. Attorneys in federal districts), selection of judges (recommendations to the President), appeals (Solicitor General), execution and enforcement of courts' decisions (U.S. Marshals), the serving of sentences by federal convicts (Bureau of Prisons), parole (U.S. Parole Commission, formerly U.S. Board of Parole), and commutation of sentence and pardon (Pardon Attorney). For a discussion of the roles of the Justice Department, see Removing Politics from the Administration of Justice: Hearings Before the Subcomm. on Separation of Powers of the Comm. on the Judiciary, 93rd Cong., 2d Sess. (1974) [hereinafter cited as Hearings].
His decisions do substitute for those of other officials, and he is in de facto control of crucial stages of criminal prosecution.

III. PROSECUTORIAL DISCRETION

The indispensable characteristic of the status of an American prosecutor is his wide, unlimited discretion in exercising the powers conferred on him. Absolute prosecutorial discretion is a fundamental component of the American criminal justice system. Probably nowhere else in the world does the situation exist in which a government official, responsible for prosecution, is accountable to no one in the discharge of his function.

It is likely that the free exercise of prosecutorial discretion is a corollary to the fact that, in the American legal system, prosecution is a right which the prosecutor is free to invoke, but not a duty. The very term "attorney" implies that a person was "attorned" to perform certain functions in the name of another. The prosecutor is the attorney of his client, the sovereign. He is legally empowered to act as an agent in those areas of the sovereign's functioning that deal with prosecution. Prosecution as the sovereign's function has, in a sense, been "attorned," turned over wholly to the prosecuting attorney. The point is that the prosecutor has become, in effect, a free agent, handling his function as he deems it best in the interests of his client. Thus, in American


70. For a general discussion of the distinction between "duty" and "right" in the exercise of the prosecution function, see Special Prosecutor, supra note 69, at 588.


72. "Just because a crime has been committed, it does not follow that there must necessarily be a prosecution, for it lies with the District Attorney to determine whether acts . . . should as a matter of public policy not be prosecuted." Hassan v. Magistrates' Court, 20 Misc. 2d 509, 514, 191 N.Y.S.2d 238, 243 (1959) (emphasis in original). On the other hand, Soviet criminal procedure provides that a prosecutor is "obliged . . . to initiate a criminal case in every instance in which indicia of a crime are disclosed and to take all measures provided by law for ascertaining the occurrence of the crime and the persons guilty of committing it." CODE, supra note 12, Art. 3 at 206.

The prosecutor in the Soviet criminal justice system is not left without any discretion, for
criminal justice, prosecuting the accused appears to be the right rather than the duty of the public prosecutor.

One may ask for the definition of "discretion," and what it relates to, in this observation of the prosecutor's roles. It has been said to be an official's functioning in a situation in which he "is authorized and rather encouraged by statute to exercise his best judgment with great freedom and little guidance." 73

Usually, prosecutorial discretion is viewed only with respect to the initiation or commencement of a criminal prosecution. It should be noted, however, that practically all procedural acts after the complaint is filed and up to the trial refract and often substantially deflect in the prisms of the prosecutor's discretion. Within his discretion, the vital issues of a criminal prosecution are resolved: initiating proceedings, discharging, nature and number of charges, and plea bargaining. Being in control of the criminal process during the many stages of prosecution, 74 the prosecutor is free to and inevitably does make decisions of a discretionary nature.

A. To Initiate or To Refuse To Prosecute

The refusal of the prosecutor to initiate criminal proceedings, even upon obvious "probable cause," is never documented. Reasons for it are rarely given to interested parties, and it cannot be appealed. 75 Attempts to secure court backing in appeals from negative charging deci-

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73. Vorenberg, supra note 69, at 654.
74. The rationale in United States v. Brokaw, 60 F. Supp. 100 (S.D. Ill. 1945), suggests that the prosecutor is in full control of the prosecution just because he is in control of the initial charging decision. "The control of criminal litigation during many stages of a prosecution is a prerogative and power closely akin to the power of initiating a prosecution." Id. at 101.
75. Professor Davis asks a simple question: Why should a prosecutor . . . have discretionary power to decide not to prosecute even when the evidence of guilt is clear, . . . without ever having to state to anyone what evidence was brought to light by his investigation and without having to explain to anyone why he interprets a statute as he does or why he chooses a particular position on a difficult question of policy?
sions by prosecutors usually fail, for the courts adhere firmly to the posture of non-interference with the free exercise of prosecutorial discretion.\textsuperscript{76}

This uncontrolled power to refuse to prosecute is combined with the discretionary power to commence further prosecution and to control it after the proceedings have been initiated.\textsuperscript{77} Prior to trial, the power to withdraw prosecution is absolute. After the trial begins, however, it is subject to judicial control, but courts rarely countermand a prosecutor's decision to dismiss charges.\textsuperscript{78} The line of cases since the beginning of the last century suggests that courts have interpreted the prosecutor's power to discontinue prosecution as a discretionary one that is superior to that of the court.\textsuperscript{79}

\textbf{Davis, supra} note 6, at 189.

In Soviet criminal procedure, the prosecutor has to give reasons for his refusal to prosecute:

In the absence of grounds for initiating a criminal case, or if there exist circumstances precluding proceedings in a case, a procurator . . . shall refuse to initiate the criminal case.

A reasoned decree of refusal to initiate a criminal case shall be rendered and . . . [interested parties] shall be notified thereof, and the right to appeal from such decree shall be explained to them.

A refusal to initiate a criminal case may be appealed . . . to the proper procurator or higher court, as appropriate.

\textit{Code, supra} note 12, Art. 113 at 237.

76. Pugach v. Klein, 193 F. Supp. 630 (S.D.N.Y. 1961), is illustrative. Pugach petitioned the district court for a writ of mandamus to compel the U.S. Attorney to prosecute New York police and D.A. officers for alleged violations of wiretap regulations. He claimed that the police and a District Attorney had wiretapped his telephone conversations and divulged their contents to newspapers and to the county grand jury, causing his arrest and indictment. The court ordered the U.S. Attorney to show cause why a writ should not be granted. In dismissing the petition for lack of jurisdiction, the court stated:

\textit{Even if by some stretch of the imagination . . . [power to grant the writ existed], the Court would still be compelled to deny it . . . [I]t is not the business of the courts to tell the United States Attorney to perform what they conceive to be his duties . . . . The federal courts are powerless to interfere with his discretionary power. The Court cannot compel him to prosecute a complaint, or even an indictment, \textit{whatever his reasons for not acting}.}

\textit{Id.} at 634-35 (emphasis added).

77. \textit{See} note 74 \textit{supra}.

78. \textit{See} United States v. Brokaw, 60 F. Supp. 100, 102 (S.D. Ill. 1945). \textit{See also} note 17 \textit{supra}.

79. \textit{See}, e.g., Commonwealth v. Wheeler, 2 Mass. 172 (1806); Commonwealth v. Tuck, 37 Mass. 356 (1838); The Confiscation Cases, 74 U.S. 454 (1868); Gray v. District Court, 42 Colo. 298, 94 P. 287 (1908) (per curiam) (en banc); State v. Smith, 363 Mo. 1235, 258 S.W.2d 590 (1953) (en banc). \textit{See also} United States v. Brokaw, 60 F. Supp. 100 (S.D. Ill. 1945); United States v. Woody, 2 F.2d 262 (D. Mont. 1924).
B. The Charge

It is also within the prosecutor's discretion to shape formal charges—the nature and number of crimes to be prosecuted against a particular suspect. In many cases, the prosecutor's decision is largely a matter of tactics, and the formal charges may appear to be unrelated, or related indirectly, to the alleged criminal acts. Prosecutors in the United States are often involved in what is usually referred to as "overcharging" or "charging up." This means that a prosecutor, either adhering to a contemplated pattern of "effective" law enforcement, or firmly intending to convict a given defendant, squeezes all possible charges out of the evidence at hand. In "overcharging," the prosecutor not only charges those necessarily included offenses, but also those violations of law that are lesser included offenses. A prosecutor in a small city in Ohio, obviously reacting to community concerns about crime, explained to this author that, in order to prevent crime in the area and deal effectively with criminals, his office pursued the policy of charging on as many counts and separate crimes as the evidence could sustain, as well as on the highest type of crime that could be sustained by the evidence.80

As implied in these explanations, and as generally understood, practices such as "overcharging" make conviction through trial more likely. This is because the prosecutor will have something left to back up the prosecution, and the defendant can still be convicted on one or more of the several counts if a portion of the evidence is excluded at trial. "Overcharging" is also an indispensable instrument for the prosecutor's moves to induce a guilty plea and plea negotiations. The more he is charged, the more willing a defendant will be to plead guilty. It is not then surprising that prosecutors deliberately "charge up" in order to gain a bargaining advantage.81

One species of "overcharging" is successive prosecutions, when charges are successively brought, in separate trials, against the same defendant for separate offenses arising out of the same criminal episode. Successive prosecutions can become dramatic. When they occur, they seem to be motivated by vengeful instincts to chastise rather than by an interest to ensure that justice is done.82

80. Interview with Mr. Richard E. Bridwell, Prosecuting Attorney of Muskingum County, Zanesville, Ohio, Apr. 6, 1977. Mr. Bridwell, however, pointed out he did not feel the term "overcharging" was appropriate in light of his office's charging policy.
81. See Weinreb, supra note 22, at 58.
82. See, e.g., Ciucci v. Illinois, 356 U.S. 571 (1958) (per curiam). The defendant's wife and three children were found dead in a burning building with bullet wounds in their heads. First, the defendant was prosecuted and tried for the murder of his wife. The penalty was fixed at twenty years' imprisonment. Afterward, he was tried for the murder of one of the
“Charging down,” as opposed to “overcharging,” is the result of plea bargaining. The natural outcome of “overcharging,” “charging down” is also within the prosecutor’s discretion. As plea bargaining is largely the prosecutor’s enterprise, he is free to exercise his discretion in deciding whether to offer concessions. Examples are striking. In *Newman v. United States*, 83 appellant and co-defendant were indicted for house-breaking and petty larceny. The prosecutor consented to a guilty plea to a misdemeanor for appellant’s co-defendant but refused the same for appellant. Appellant asserted that he and his co-defendant were equally guilty. The court once again reaffirmed the judiciary’s stance of non-interference with the prosecutor’s discretionary control of criminal prosecutions. 84

Despite his general interest in guilty pleas, the prosecutor does not necessarily consent to any plea by any defendant. As it happens, some defendants, willing to plead guilty in exchange for charge and sentence concessions, may confront the wall of the prosecutor’s disinclination. As James Ahern suggests, “[w]hat is not excusable . . . is the discriminatory way in which plea-bargaining operates. Because of public pressures for ‘law and order,’ prosecutors must gain maximum penalties for

children and sentenced to forty-five years’ imprisonment. He was prosecuted for the third time for the murder of the second child, and at this time he was sentenced to death. At each of the trials, the prosecutor introduced into evidence materials relating to a single episode of all the deaths. The Supreme Court ruled that the prosecutor did not deny due process to the defendant by subjecting him to three separate prosecutions for the same episode. *Id* at 573.

In a dissenting opinion, Mr. Justice Douglas commented: “This case presents an instance of the prosecution being allowed to harass the accused with repeated trials and convictions on the same evidence, until it achieves its desired result of a capital verdict.” *Id.* (Douglas, J., dissenting). In fact, the defendant was “duly processed to death.”

It is noteworthy that the Ninth Circuit has held that an attempt by the prosecution to seek a heavier sentence for offenses arising out of the same act upon retrial of a defendant is generally “inherently suspect.” *United States v. Preciado-Gomez*, 529 F.2d 935, 939 (9th Cir.), *cert. denied*, 425 U.S. 953 (1976). However, in *Preciado-Gomez*, the court did not object to the addition of two counts in the re-indictment after mistrial. The court held that the defendant had been charged with new, separate and different offenses occurring on different dates, although the charges all related to his illegal entry into the United States. *Id* at 939-40.

83. 382 F.2d 479 (D.C. Cir. 1967).
84. *Id.* at 481-82. The court noted:

To say that the United States Attorney must literally treat every offense and every offender alike is to delegate him an impossible task; of course, this concept would negate discretion. Myriad factors can enter into the prosecutor’s decision. Two persons may have committed what is precisely the same legal offense but the prosecutor is not compelled by law, duty or tradition to treat them the same as to charges. On the contrary, he is expected to exercise discretion and common sense to the end that if, for example, one is a young first offender and the other older, with a criminal record, or one played a lesser and the other a dominant role, one the instigator and the other a follower, the prosecutor can and should take such factors into account; no court has any jurisdiction to inquire or review his decision.
some serious offenders. These maximum sentences are virtually always given to the poor and to those without influence who cannot afford good lawyers. On the other hand, the prosecution may be very quick to offer bargains when the interests of the prosecution or political interests are at stake. Arranged by the prosecutor and shaped by his discretion, the guilty plea means that, in most of the criminal cases in the United States, two basic questions, that of guilt and that of its punishment, are, in effect, resolved through the prisms of prosecutorial discretion. The question of guilt is directly related to the question of truth in the criminal process. Yet a bargained guilty plea may cause a defendant to confess to a crime that he never committed, or could not possibly have committed in view of the circumstances. Or his guilt may be far greater than his plea. The truth and facts are irrelevant in this system of bargained “justice.” When pleas are arranged by prosecutorial discretion, the truth is sacrificed for administrative efficiency, the need for a quick disposition of the case, a desire for an impressive record of convictions, and other self-serving interests having nothing to do with the interests and goals of justice. Furthermore, the

85. J. AHERN, POLICE IN TROUBLE 103 (1972).
86. At the highest level of politics, two guilty pleas (technically, both were nolo contende) have become causes célèbres in recent years: one by Spiro Agnew, former Vice-President, and another by Richard Helms, ex-CIA chief.

Agnew, reportedly involved in corruption while Governor of Maryland, was charged merely with tax evasion. Mr. Elliot Richardson, then the Attorney General, in recommending the plea, explained the prosecution's approach: “It is unthinkable that this nation should have been required to endure the anguish and uncertainty of a prolonged period in which the man next in line of succession to the Presidency was fighting the charges brought against him by his own Government.” Kress, The Agnew Case: Policy, Prosecution and Plea Bargaining, 10 CRIM. L. BULL. 80, 84 (1974) (quoting Elliot Richardson, N.Y. Times, Oct. 11, 1973). Agnew's plea thus allowed the Government to save face in a twofold manner by demonstrating its commitment to prosecute yet barring the trial of “the man next to the President.” See also Newman, The Agnew Plea Bargain, 10 CRIM. L. BULL. 85 (1974).

Helms could have been prosecuted on two felony counts of perjury. He had lied before the Senate about the CIA's covert activities in Chile. Helms' lawyer made an explicit threat that, if the ex-CIA chief went to trial on felony charges, government secrets would necessarily be divulged. The Justice Department reacted promptly and offered to Helms the plea of nolo contendere on some misdemeanor charges. Senator Church commented: “I thought there was to be an end to the double standard of justice for big shots. Apparently, Helms was just too hot to handle.” Helms Makes a Deal, TIME, Nov. 14, 1971, at 23.

87. Some situations are ridiculous. The following is illustrative. A person is prosecuted on a speeding charge in a jurisdiction in which a conviction of that charge results in a loss of driving license for a period of time. There are doubts that the prosecution can prove the speeding charge, so the prosecutor offers to reduce the charge to the minor offense of crossing a white line, subject to a small fine. The charge is appropriately reduced, and the plea accepted, even though on the street in question there is no white line. Chambliss & Seidman, Prosecution: Law, Order, and Power, in CRIMINAL JUSTICE IN AMERICA 235, 245-46 (R. Quinney ed. 1974).
discretionary choice of a charge through bargained pleas outlines the sentence and dominates the judicial sentencing function.

C. Juveniles

Prosecutorial discretion is present in every procedure within the criminal process. It is found even when it should not be found at all. For instance, the author was amazed to discover that the most vulnerable group of accused, the youth, is exposed to prosecutorial discretion instead of being safely protected against it.88

In American criminal justice, delinquent youths of the same age can be treated as juveniles or as adults. Those treated as juveniles enjoy certain rights and benefits,89 which those treated as adults do not enjoy. Thus, assignment to either group is of vital importance to an accused youth. Yet the law provides that prosecutors may decide administratively to which category a youthful offender belongs. Both the federal90 and the District of Columbia91 statutes allow the prosecution to determine the “procedural age” of such an offender. The prosecutor’s determination depends on the initial charge and precludes a court hearing. In 1973, the Fourth Circuit held that, under federal law, the decision to prosecute an offender as an adult is a matter of prosecutorial discretion

89. See id. at 1184.
90. 18 U.S.C. § 5032 (1976) provides, in pertinent part:
   A juvenile alleged to have committed an act of juvenile delinquency shall not be proceeded against in any court of the United States unless the Attorney General, after investigation, certifies to an appropriate district court of the United States that the juvenile court or other appropriate court of a State (1) does not have jurisdiction or refuses to assume jurisdiction over said juvenile with respect to such alleged act of juvenile delinquency, or (2) does not have available programs and services adequate for the needs of juveniles.
   Id. (emphasis added).
91. The code of the District of Columbia provides:
   (3) The term “child” means an individual who is under 18 years of age, except that the term “child” does not include an individual who is sixteen years of age or older and—
   (A) charged by the United States attorney with (i) murder, forcible rape, burglary in the first degree, robbery while armed, or assault with intent to commit any such offense, or (ii) an offense listed in clause (i) and any other offense properly joinable with such an offense;
   (B) charged with an offense referred to in subparagraph (A)(i) and convicted by plea or verdict of a lesser included offense; or
   (C) charged with a traffic offense.
For purposes of this subchapter the term “child” also includes a person under the age of twenty-one who is charged with an offense referred to in subparagraph (A)(i) or (C) committed before he attained the age of sixteen, or a delinquent act committed before he attained the age of eighteen.
and that the Attorney General's determination regarding the youth's status is uncontrolled. Thus, the discretion of the federal prosecutor in the United States dictates which of the accused youths will be entitled to additional procedural guarantees.

D. Pros and Cons of Discretion

There seem to be three basic reasons why discretionary powers of the prosecutor still exist in this country, are immune to criticism, and can effectively resist attempts at reform. The first reason is of an administrative nature. The traditional organization of prosecution services in the United States is based upon decentralization, the autonomy of separate prosecutors' offices, and the lack of visible cooperation and coordination among them. In most states, local prosecutors are elected officials subject to no administrative control from above. They would never admit or accept being controlled from within except by intangible forms of "community pressures." The attorney general of a state is rarely an administrative head of prosecution services in the state and has no supervisory powers over local prosecutors. Also an elected official, he can assert an independent position within the state's government and follow policies different from those of the Governor.


93. In the Soviet Union, in order to ensure uniform application of the laws, prosecution services are provided on a centralized basis. "Agencies of the procuracy in the USSR shall constitute a single centralized system headed by the Procurator General of the USSR with subordination of inferior procurators to superiors." Statute, supra note 23, Art. 5 at 184. "[A]gencies of the procuracy shall exercise their functions independently of any local agencies whatsoever, being subordinate only to the Procurator General of the USSR." Id. Art. 6 at 184.

Professor Davis asserts that "possibly the most important check of discretionary action is simply the normal supervision of subordinates by superiors." Davis, supra note 6, at 143.

94. Mr. Robert Morgan, Attorney General of North Carolina, has stated:

As a state Attorney General, I have served with a Governor of my own political faith and with a Governor of the other party. In neither case have I viewed my job as part of the Governor's staff. This is my concept of the Attorney General—to serve as the state's chief law officer, giving his allegiance to the law, not to political leaders or power groups.

Statement of Robert Morgan, Attorney General of North Carolina, in Hearings, supra note 68, at 324.

To back their administrative independence, both the Attorney General and local district attorneys employ different concepts—allegiance to the law, public servants, people's representation, parens patriae roles, sovereign's law officer. With all, due to the honest belief of some prosecutors in their civic responsibilities, they serve as attorneys for the government first and foremost.

The naive may believe that because the people pay the salaries, through taxes, of gov-
In the federal government, the structure of prosecution services appears on its face to be centralized and hierarchical: the United States Attorney General is statutorily authorized to supervise and direct the United States Attorneys who act as his representatives in federal judicial districts. Despite this explicit statutory command, representatives of the United States Attorney General run their offices in an independent manner, and, in discharge of their prosecution function, may act irrespective of the wishes of their superiors. The prosecutor's discretionary control over cases is the traditional justification for the substantial independence of United States Attorneys.

The second reason for the immunity of prosecutorial discretion is of a legal nature. Throughout American history, the courts have presumed that prosecutorial discretion is an inherent aspect of the common law status of the prosecutor. In theory, as a party to an adversary contest, an attorney prosecuting on behalf of his client is vested with the power to handle freely the criminal suit brought by him. The English common law doctrine of prosecutorial discretion was brought to the United States and developed here by the courts. As the authorities suggest, however, American courts developed the doctrine of prosecutorial discretion in a different direction, and it has far outreached its English predecessor. Whether prosecutorial discretion is
“the product of unplanned evolution” or “power resulting from default,” it is firmly rooted in the administration of American criminal justice. It is a premise drawn from centuries of common law and institutionalized through lines of court decisions. Prosecutorial discretion has been declared by courts to be an “inherent” feature that “arise[s] out of the very nature of the office” of the prosecutor, subject to no outer controls.

Theoretically, there are several remedies that can be used by courts or by higher officials to curb the discretion of prosecutors. These may be direct or indirect, formal or informal, but they are rarely invoked, except in those “extreme” situations when a prosecutor oversteps those broad lines defining his right of unabridged discretion. Outside this broad area, there are only cases of outright misuse and abuse of power and apparent corruption. Illegitimate motives behind the actions of a prosecutor in those areas between institutionalized “lawful” discretion and discretion that has become arbitrary are difficult to prove. Prosecutors accused of abuses of power in administrative or court proceedings brought against them usually have sufficient arguments to show the validity and necessity of their discretion in handling criminal cases. Courts hearing appeals by prosecutors who have been subjected to administrative or judicial remedies of control follow the reasoning of those appellants. As a rule, the courts declare the judiciary to be incompetent to intrude into the exercise of discretionary powers by prosecutors, because “such intrusion is contrary to the settled judicial tradition.” Existing remedies to control prosecutorial discretion turn out to be ineffective.

Political interest appears to be the third factor why broad prosecutorial discretion is being preserved practically untouched in the American legal system. Flexible use of prosecutorial discretion can be an effective instrument of politics. At the local level, the policy of the

99. Davis, supra note 6, at 189.
100. Vorenberg, supra note 69, at 680.
101. See, e.g., cases cited at note 79 supra.
103. One federal court has stated that “[prosecutorial] discretion . . . is not to be controlled by the courts, or by an interested individual, or by a group of interested individuals.” United States v. Brokaw, 60 F. Supp. 100, 101 (S.D. Ill. 1945).
104. The statutes provide for different forms of remedies—disbarment, prosecution for power abuses, ouster or quo warranto suits, mandamus proceedings, intervention by the Attorney General, and others. For a detailed discussion, see Miller, supra note 5, at 293-345.
prosecutor is often affected, or, perhaps directly controlled, by local political machines and political and business leaders, who give their political and/or financial support to his election campaign. The prosecutor may shape the policy of his office in such a way that it fits the interests of those who backed him in his career. The prosecutor, as a member of a political party, may enforce the policy of his party by choosing a certain course of prosecutions, or by associating his successes with his party's strategies. Discretion becomes an indispensable instrument in implementing those policies, and it is used to promote a certain microclimate in the jurisdiction.106

Discretionary power to enforce certain laws, while refusing to enforce others, may be used at a higher level of government by the United States Attorney General and the subordinate army of federal prosecutors and investigators. Thus, prosecutorial discretion can be used to implement government policies affecting the entire country. The lives of many Americans, as well as the state of the politico-legal regime in the country, depend upon the directions of the use of prosecutorial discretion at the federal level.

Attorney General Robert Kennedy often referred to the "lack of federal power" to intervene in the South where acts of violence by white racists occurred without prosecution. When three civil rights activists were murdered in Mississippi in 1964, he claimed that the incident was a matter for local law enforcement.107 When asked by civil rights organizations to prosecute racists upon an information rather than upon indictments by grand juries, which were packed in the South by segregationists, the Department of Justice declined the requests. In many cases, it claimed a lack of legal authority to carry out the requests. But, a few months later, the Department was able to do precisely what had been sought, namely, prosecuting on an information, thus avoiding Southern segregationist grand juries.108

Prosecutorial discretion can cause shifts in policies with a change of administrations. For example, Democratic Attorney General Ramsey

106. Robert Meyer, appointed in 1970 as the U.S. Attorney for Los Angeles, was known to be a "hard liner," a characteristic which the police deemed favorable to them. But, to the surprise of the police, Mr. Meyer launched a series of investigations into police shootings that had resulted in the killing of persons of minority groups. The police were furious to see a "hard liner" "hard lining" the police. Police Chief Davis explained Meyer's zeal as being part of the "Western strategy" of the Republican party to increase the number of votes for the Republicans among minority groups in the Los Angeles area. NEWSWEEK, March 15, 1971, at 37.
108. Id. at 171.
Clark was opposed to extensive use of electronic surveillance\textsuperscript{109} and threatened to refuse to enforce Title III of the Omnibus Crime Control Act.\textsuperscript{110} His successor in the Republican Administration, John Mitchell, on the contrary, was an ardent advocate of unrestricted wiretapping and made Title III one of the most favored instruments of his “law and order” policy.\textsuperscript{111}

Prosecutorial discretion can also help shape long-term strategic policy of the government in law enforcement, making it flexible whenever so required by the political interests of the ruling elite. Ebbs and flows in the prosecution of political activists and radicals are due to the discretion of government prosecutors. In prosecuting activists, the government, through its prosecutors, may not necessarily insist on the use of the harshest criminal sanctions. What should be viewed as more important is the indication of a willingness to use them. In initiating the prosecution of a political activist for technical violation of some criminal statute, the prosecution may be pursuing not the conviction per se, but the moral condemnation of “an offender.” Prosecutorial discretion allows the bringing of charges, calling of the grand jury, pressuring of witnesses for information, arranging of “leaks” to the mass media, and, finally, dismissal of the case. Procedurally, a person is discharged, but politically, he is not, because the government has demonstrated its negative attitude toward him and branded him “a criminal.”\textsuperscript{112} As Harvey Silverglate states:

[T]he government is not interested only, or perhaps even primarily, in winning cases and in putting dissidents behind bars. . . . The point had been made—the government would follow, investigate, film, photograph, and prosecute selected enemies of the Republic who would serve as warnings and examples to others.

Furthermore, the government has weapons other than political trials, perhaps more potent weapons. The government can take steps to encourage lower echelon “law enforcement” officials and to signal an end to high level condemnation of uncivilized police tactics.\textsuperscript{113}

\textsuperscript{109} This did not prevent the FBI’s wiretaps of Dr. Martin Luther King, Jr., however.


\textsuperscript{111} For a general discussion of Justice Department policies under Democrats and Republicans in the 1960's, see J. Elliff, Crime, Dissent, and the Attorney General (1971).

\textsuperscript{112} Philistine common sense presumes the guilt of a person once pulled into the criminal justice machinery. Prosecutors “leaking” information to the media feed that presumption and accuse a person politically, for he will remain a “suspect” regardless of the subsequent dismissal of the case.

The advocates of broad discretionary powers for prosecutors are those political groups in power. They view this discretion as an effective instrument to be used with flexibility. These groups use all of their authority and influence to retain the status quo with respect to broad prosecutorial discretion. The results of their activities can be seen, for example, in the fact that the attempts to reorganize the Department of Justice and to limit the Attorney General’s powers have failed. They can also be seen in the fact that there are no significant cases in which courts have substantially curbed prosecutorial discretion. This is happening “in an era when the judiciary has otherwise assumed an active role in imposing limitations upon the exercise of discretion by the executive branch.”

Many advocates of prosecutorial discretion view “sound” discretion as an integral and necessary element of the application of criminal law. Justice Breitel’s oft-quoted notion is illustrative: “If every policeman, every prosecutor, every court, and every post-sentence agency performed his or its responsibility in strict accordance with rules of law, precisely and narrowly laid down, the criminal law would be ordered but intolerable.”

Discretion is considered “a tool, indispensable for individualization of justice,” and “[r]ules alone, untempered by discretion, cannot cope with the complexities of modern government and of modern justice.” Discretion is also a practical necessity in those situations in which criminal law is chaotic, such as mutually contravening provisions, vague definitions, and outlived taboos. Enforcement of the criminal law inevitably invites discretion. In view of the constant crime growth and the correspondingly huge case loads, discretion is the only way to keep prosecutors’ offices operating. The prosecution of all crimes would clog the criminal justice mechanism with a flood of cases.

Proponents of prosecutorial discretion point to positive aspects of the prosecutor’s right to enforce or not to enforce laws, such as the non-prosecution of violations of archaic or “unpopular” statutes. Both the

114. In cases of obvious abuse of discretion, however, courts may set aside a prosecution on the basis of discrimination “deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.” Oyler v. Boles, 368 U.S. 448, 456 (1962). The Ninth Circuit has set aside a prosecution brought to intimidate “the vocal offender” for the “expression of ideas.” United States v. Steele, 461 F.2d 1148, 1152 (9th Cir. 1972).
115. Special Prosecutor, supra note 69, at 587.
117. Davis, supra note 6, at 25.
118. “Indeed, one of the major consequences of the state of penal law today is that administration has so largely come to dominate the field . . . .” Wechsler, The Challenge of a Model Penal Code, 65 Harv. L. Rev. 1097, 1102 (1952).
consequence and the indicator of the state of the criminal law, prosecutorial discretion serves to assess and select practically enforceable laws, thus outlining directions for legislative reforms. Consistent refusal to enforce certain statutes or to bring maximum charges can lead to decriminalization of offenses punishable under those statutes. Prosecutorial discretion can also be used to avoid harsh sentences for defendants. In view of the fact that the United States has some of the harshest sentences, using discretion for leniency can contribute to justice. The positive aspects of prosecutorial discretion advanced by its proponents, however, cannot outweigh the potential and actual harm inflicted on justice by its uncontrolled and broad use. "[E]very truth extolling discretion may be matched by a truth about its dangers."119

E. Selective Prosecution

Unlimited discretion inevitably introduces subjectivism and arbitrariness into the prosecutorial process and leads to the selective enforcement of laws. For example, a prosecutor in one jurisdiction may enforce a certain category of law, while his colleague in another jurisdiction enforces that same category vigorously. In a third jurisdiction, such a category is enforced by spontaneous campaigns, and in still another jurisdiction, a prosecutor does not prosecute violators of this law at all. In the United States, then, we can see a situation that seems to contradict a common principle of equal justice, namely, the equality of citizens before the law and an even-handed application of the law. This practice of selective enforcement has a negative impact on the prevention and reduction of crime, because it creates a favorable climate for the growth of crime in jurisdictions in which certain types of crimes are not prosecuted, as well as an opportunity for crime to flow from one area to another. How can there be effective crime control in a particular county when, in a neighboring county, crime is controlled loosely? A community's freedom from crime is thus unsecured. Selective enforcement, then, coupled with the superfluous responsiveness to community sentiments,120 encourages the development and consolidation of localist approaches in the prosecutors' operations and erects obstacles to a uniform application of the law.121

119. Davis, supra note 6, at 25.

120. The 1967 President's Commission observed that "[p]olitical considerations make some prosecutors overly sensitive to what is safe, expedient, and in conformity with law enforcement views that are popular rather than enlightened." Task Force Report, supra note 54, at 73.

121. Uniform application of the law is a great social value and, at the same time, the way to ensure justice. Despite certain positive aspects of localist law enforcement, e.g., respon-
Selective enforcement also means vigorous prosecution of some persons and non-enforcement with respect to others. Selective enforcement usually focuses on “unpopular” individuals. Attorney General Jackson once commented:

If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. . . . [A] prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. . . . It is in this realm—in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal.122

Although courts reverse cases in which the prosecution has been obviously discriminatory, the suspicion remains that selective enforcement, with thoroughly hidden motives, is used by prosecutors against politi-

siveness to community needs, such discretion hides many more dangers. This author views such localism as being in contradiction to the ideals behind the equal protection clause of the United States Constitution.

It is noteworthy that the Soviet Procuracy was conceived as the institution specially organized to see that the laws would be uniformly and adequately applied throughout the newly born Soviet Republic. In 1922, when the legislative body was discussing proposals to establish the Procuracy, the majority of the legislative committee, which was elected to work on the statute, was inclined to incorporate the principle of “dual” subordination into the structure of procuratorial agencies. This meant that a local procurator would be subordinate to the superior procurator on one hand and to the local municipal government on the other hand. The leader of the Revolution and the founder of the Socialist State in Russia, Vladimir Lenin, strongly opposed the idea of “dual” subordination. In his letter to the Politbureau (the highest executive body of the Communist Party) of May 20, 1922, Lenin wrote:

I learned of the arguments only in this respect, that the advocacy of “dual” subordination was the legitimate fight against bureaucratic centralism, for the requisite independence of provinces and against the arrogant attitude of the central government to local municipal functionaries. Is there any arrogance in the viewpoint that legality cannot be one for Kaluga and another for Kazan, but should be All-Russian, single, whole and even for all the federation of Soviet Republics? . . . The procurator has the right and is obliged to do one thing: to see that a truly uniform concept of legality is established across the Republic, regardless any local distinctions and despite any local pressures. . . . Local pressure is one of the greatest, if not the greatest, antagonist of the establishment of legality . . . .

45 V. LENIN, O "Dvoinom" Podchinenii i Zakonnosti, POLN. SOBR. SOTCH. 197-98 (On "Dual" Subordination and Legality) (translated from the Russian by the author).

Lenin’s ideas were incorporated into the law. The Statute on Procuracy Supervision reads, in part: “The Procurator General of the U.S.S.R. and procurators subordinate to him shall be obliged to watch over proper and uniform application of the laws of the U.S.S.R. and of the union and autonomous republics, notwithstanding any local differences and despite any local influences.” Statute, supra note 23, Art. 2 at 183.

122. Jackson, The Federal Prosecutor, 24 AMER. JUD. SOC’Y 18, 19 (1940), quoted in Davis, supra note 6, at 190.
cally or otherwise "unpopular" persons. 123

F. Constitutional Shortfall

The broad discretion exercised by the prosecutor while deciding the major issues in criminal procedure does not further the achievement of the goals of justice and does not secure defendants' procedural rights, because the assumed purposes of many institutions are distorted in favor of, and in the interests of, the prosecution. Although theoretically under the control of judicial officials, but virtually on his judgment alone, the prosecutor directs the flow of proceedings toward trial and, in the interests of the whole criminal justice system, does his best to prevent the trial. "[T]he survival of adversary trials in present conditions depends on there not being too many of them. [Prosecutors] can offer a trial to all only if few accept the offer." 124 In ninety percent of all criminal cases, convictions result not from trials but from guilty pleas based mainly on bargaining. Again, the terms of these bargained pleas are worked out in the prosecutor's office, subject to his discretion. Yet plea bargaining serves neither the primary, "practical" goals of criminal justice—prosecution of crime, rehabilitation, deterrence, or retribution 125—not the general constitutional values upon which criminal justice should function. 126

American law and legal doctrines declare that democratic principles—the adversary system, the presumption of innocence, the prosecution's burden of proof, the jury trial, the determination of guilt in public proceedings, and the observance of procedural guarantees within constitutional "due process" requirements—are essential to criminal justice. These are not abstract values; they are universal ideals

123. In 1963, the Ninth Circuit rejected a claim that a criminal prosecution violated the constitutional rights of the defendant who had alleged that he had been "discriminatorily" picked out because of suspected radical leanings. Dear Wing Jung v. United States, 312 F.2d 73, 75 (9th Cir. 1962). The motives for selective prosecution must be established by a defendant, which makes it especially difficult to sustain this type of defense. See, e.g., United States v. Scott, 521 F.2d 1188, 1195 (9th Cir. 1975); United States v. Gardiner, 531 F.2d 953, 954 (9th Cir. 1976) (per curiam).

124. Weinreb, supra note 22, at 82.

125. Professor Vorenberg suggests that permitting the prosecutor to handle a case in his discretion "obscures the fact that the system has reacted to the pressure of increasing numbers by sacrificing a basic value—punishment appropriate to the crime—in order to avoid investing additional resources." Vorenberg, supra note 69, at 671. For a criticism of current prosecutorial administration through the prism of the "practical" purposes of criminal justice, see Weinreb, supra note 22.

126. For an excellent analysis of plea bargaining from a constitutional viewpoint, see Plea Bargaining, supra note 61.
nourished by human strivings to ensure justice. They are designed to protect the individual's dignity and liberty against the encroachment of the powerful and, at the same time, to ensure "domestic tranquility." They are also the means to achieve the goals of justice in general and in concrete cases. The legality of the procedure provides the legality of the substance: the "validity and moral authority of a conclusion largely depend on the mode by which it was reached."

Within the ideal model of "due process," every defendant is presumed innocent until his guilt is proven in an adversary trial, at which the openness of the proceedings and the presence of jury, counsel, and judge protect him against the punitive zeal of the police and the prosecution. In reality, nothing of the kind happens. In ninety percent of all cases, the trial, which is supposed to showcase the triumph of majestic rights, is cut off by the guilty plea, which has been induced by the prosecutor and shaped by his discretion. The presumption of guilt is substituted for the presumption of innocence. How the truth can be established in a quick ritual of a judge's acceptance of this plea is questionable. Thus, in current American criminal administration, prosecutorial discretion neutralizes the effects of democratic principles, for they are lost in its actual operation.

IV. Conclusion

Broad powers vested in the prosecutor, together with an unchallenged privilege to use them at his pleasure, is an American phenomenon. Another characteristic of the American prosecutor that is very important for a concrete understanding of his potential is the close connection between the prosecutor and politics. Unlike European prosecutors, who are usually career officials, American prosecutors are active politicians. Whether elected or appointed, the American prosecutor comes to his office through politics and, in many instances, subjects the policy of his office to political considerations. "The key to understanding the prosecutorial system is political. Elected district attorneys with

127. The universal nature of these values, however vaguely formulated in the Bill of Rights, is affirmed by the Marxist viewpoint. For example, American communists state: "Socialism here will extend democracy to its fullest, taking as its starting point the democratic traditions and institutions of the American people. We believe and advocate that . . . a socialist society in our country will guarantee all the liberties defined in the Bill of Rights . . . ." PROGRAM OF THE COMMUNIST PARTY OF THE U.S.A. 103 (1970).


129. See generally PRASSEL, INTRODUCTION TO AMERICAN CRIMINAL JUSTICE 124-30 (1975).
extensive control over individual liberty create a dangerous formula. It
sometimes surfaces in personal vendettas, crusades for publicity, or im-
proper announcements concerning unproven guilt."\textsuperscript{130}

Broad powers to control the criminal process, combined with uncon-
trolled discretion, create a formula dangerous to the ideals of justice,
destructive of constitutional values, and unworkable in reducing
crime.\textsuperscript{131} The fact that these broad discretionary powers of the prose-
cutor are an integral part of the American system of criminal justice
and, by and large, predetermine the parameters and outcomes of the
system is a distinguishing mark of the state of American criminal jus-
tice today.\textsuperscript{132} In this sphere of law, where personal freedom, dignity,
reputation, or even the life of an individual are in jeopardy, the indi-
vidual's rights can hardly remain protected as long as the right of the
state to use its powers within its free discretion dominates. Broad dis-
cretion inevitably opens the way to arbitrariness. In the words of Mr.
Justice Douglas, "absolute discretion . . . is more destructive of free-
dom than any of man's other inventions."\textsuperscript{133}

Proposals to confine prosecutorial powers to "structured" or "nar-
rowed" limits remain unrealized. This is due not only to the fact that
such proposals are opposed by those who have a vested interest in re-
taining the status quo, but also to the fact that prosecutorial discretion
is truly an inherent feature of the American legal system. "The irra-
tional procedures that [Americans] employ are not irregularities of an
otherwise sound process; they constitute the process itself."\textsuperscript{134}

A tangible limitation on prosecutorial discretion is possible only with
radical reform of the substantive criminal law, unification of procedu-
ral law, and discontinuation of the "hands off" judicial posture that is
applied to prosecutorial discretion. Meanwhile, prosecution-at-plea-
sure will predetermine the direction and outcome of the administration
of the American criminal justice system.

\begin{itemize}
\item \textsuperscript{130} Id. at 126-27.
\item \textsuperscript{131} Professor Vorenberg asserts that "broad discretion does not seem to have been help-
ful in reducing crime." Vorenberg, supra note 69, at 695.
\item \textsuperscript{132} Professor Weinreb's notion sounds bitter: "No one who took careful account of the
purposes for which we have a system of criminal justice at all and the values we want to
protect would set up the process we actually have." WEINREB, supra note 22, at 144.
\item \textsuperscript{133} United States v. Wunderlich, 342 U.S. 98, 101 (1951) (Douglas, J., dissenting).
\item \textsuperscript{134} WEINREB, supra note 22, at 4.
\end{itemize}