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Prosecutorial Discretion

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Prosecutorial discretion is the authority of a prosecutor, or the prosecutor's or other office charged with enforcing a law, to decide whether and how to enforce the law. The outer boundary of such discretion is set by legal limitations on the prosecutor. Ideally, prosecutorial discretion will be exercised in accordance with considerations of fairness, equality, and public safety. However, often more mundane considerations, such as resource limitations, political pressures, or personal advancement, will dictate its exercise. While the term *prosecutorial discretion* is applied largely in the criminal justice context, administrative agencies with civil enforcement authorities also exercise such discretion.

The tension between the desire for uniform and consistent decision making on one hand and the need for flexibility to assure individualized treatment on the other shapes prosecutorial discretion. While it is difficult to strike a coherent balance between the two, standards—whether internal or external—should guide the work of prosecutors, and the adherence to such standards must be judicially reviewable.

The scope and breadth of prosecutorial discretion depend on the rules governing the criminal justice system and its players. While prosecutors in all countries, even those that mandate compulsory prosecutions and prohibit plea bargaining, exercise some discretion, U.S. prosecutors appear to find themselves with the widest, and least supervised, discretion.

Prosecutorial discretion may begin with the planning of investigations and the choice of prosecutorial targets and extends to the charging decision. With few exceptions, such as police brutality and political corruption cases, scholars have not much studied the planning and choice issues. Charging discretion includes the decision whether to charge an individual, the selection of the types of charges, and their number, the timing of the indictment, and to some extent the court in which the charges will be filed. In the U.S. criminal justice system, the prosecutor has broad authority to engage in plea bargaining with the defendant, which allows the prosecutor to drop charges or promise a lesser sentence in exchange for a guilty plea. Americanstyle plea bargains are a uniquely American concept; nevertheless, similar bargains occur in other countries but usually only for minor offenses, on a smaller scale, and less systematically. Finally, the prosecutor's discretion carries into the sentencing procedure, where she

may recommend leniency. Importantly, prosecutorial discretion exists beyond these important stages in the individual decisions prosecutors must make throughout a criminal case.

History

In the United States, the office of the local prosecutor with its expansive discretion developed haphazardly throughout the early part of the nineteenth century, in part as a reaction to private prosecutions that had predominated in England. As early as the mid-nineteenth century, the breadth of prosecutorial discretion and the absence of professionalism led to the creation of crime commissions that criticized the absence of effective controls on prosecutors. No oversight mechanisms or other controls were implemented. Even though prosecutors are supposed to exercise government control impartially and operate in the public's interest, these assumptions may be more myth than reality. Careerism, excessive zeal for convictions, and attempts at the reprivatization of prosecution may undermine the prosecutor's role as **[p. 1215 ↓]** an impartial advocate. The notion of the prosecutor as an impartial arbiter, in any event, fits only uneasily into the adversarial system.

In the U.S. federal system, prosecutorial discretion rests with individual U.S. attorneys, who are only loosely controlled by the Department of Justice. The U.S. attorneys' independence harks back to the Judiciary Act of 1789, which directed the president to appoint attorneys for each federal judicial district. These attorneys functioned without any oversight for over forty years and continue to operate largely independently. Ultimately, in state and federal systems prosecutorial discretion results from the local character of prosecutors' offices and the adversarial model, which leaves the two opposing parties in control of the proceedings that will be conducted in front of lay fact finders.

The different historical development of the U.S. criminal justice system may explain the divergence in the extent of prosecutorial discretion. Great Britain only recently adopted a professional prosecution service that has taken over some prosecutions. Prior to that development, barristers who would regularly serve as defense and prosecution counsel

conducted all criminal trials. They had little institutional ability to exercise discretion, much of which rested with the police.

In European civil law systems, prosecutors tend to be career officials who are part of a strict hierarchy. Those features, together with the active participation of victims in prosecutions and greater judicial oversight, tend to lessen the prosecutors' ability to exercise discretion. While some recent developments, including caseload pressures and greater awareness of the existence of prosecutorial discretion, have led to its official recognition, largely in the form of granting prosecutors limited plea bargaining and diversion powers, this has been done within strict guidelines and with judicial oversight.

Even though prosecutorial discretion goes back to the early days of the United States, in recent years it has expanded dramatically. Resource constraints are among the primary reasons for this development. In addition, in the United States the proliferation of criminal statutes and their broad interpretation have expanded the arsenal available to prosecutors. The expansion of the scope of criminal jurisdiction and the development of alternative venues for ostensibly criminal cases, such as administrative or civil actions and military proceedings for so-called "enemy combatants," give prosecutors greater bargaining power. Uniquely American is the split between federal and state prosecutions. With the federalization of street crimes, in particular drug offenses, in many jurisdictions, state and federal prosecutors will negotiate over which court will try the offender, often depending on procedural rules or sentencing laws. The increasing harshness of sentencing provisions and the proliferation of mandatory sentencing laws have also had a dramatic impact. Both provide prosecutors with powerful tools, as they can exercise increasing pressure on defendants through charge selection and plea bargains. While prosecutorial discretion finds itself frequently under attack, it may serve to mitigate the otherwise dramatic consequences of overcriminalization and the harshness of American penal laws.

Justifications

Most importantly, prosecutors need to individualize justice in light of the severity of the case, the alleged offender's background, and limited resources. Prosecutors are

frequently entrusted with this level of discretion because of their institutional and professional position.

In the United States, specifically, the separation of powers doctrine grants the executive branch, of which the prosecutor's office is part, broad discretion to enforce the laws. As the Supreme Court has noted, "the decision to prosecute is particularly ill-suited to judicial review," *Wayte v. United States*, 470 U.S. 598, 607 (1985), in part because defendants might abuse it. In many other countries, prosecutorial discretion remains hidden in secrecy, undertheorized, and undefended.

Oversight

Each criminal justice system provides its unique institutional sets of checks on prosecutorial discretion. In the United States, limitations are set, for example, through grand jury indictments, jury decisions on guilt, and the requirements that courts accept plea bargains and impose sentences. Those restrictions are limited, however.

Unwritten standards or shared office practices determine charging and plea bargaining decisions in many [p. 1216 ↓] prosecutors' offices; in others, formal, written standards or procedural review mechanisms in the form of committee or supervisory review exist. The policies of federal prosecutor are set out in the U.S. Attorneys' Manual, issued by the Department of Justice. Local U.S. attorneys' offices may also develop supplementary guidelines for specific types of cases or procedures. Even though the Office of Professional Responsibility may review federal prosecutors, only rarely do such reviews lead to disciplinary actions or resignations. Agencies charged with the prosecution of civil or administrative cases often develop internal guidelines for the exercise of prosecutorial discretion as well.

Professional organizations have also issued sets of rules to guide prosecutorial discretion. Among these are the National District Attorney Association's National Prosecutor Standards and the American Bar Association's Model Rules of Professional Conduct and its Standards for Criminal Justice: Prosecution Function and Defense Function. None of these codes is binding, however.

Federal and state prosecutors as lawyers are subject to state bar review. However, many rules of professional conduct do not apply to prosecutors, and special rules are often not in place. Disciplinary reviews tend to succeed only if prosecutors violate mandatory rather than discretionary rules.

Direct oversight through the legislature or the public is likely to occur only in high profile cases. As voters elect state prosecutors for a term in many states, they can remove them. The same is not true in countries where prosecutors are not elected. There it is more likely that disciplinary actions will occur through the hierarchical structure of which prosecutors are a part. While absolute immunity shields U.S. prosecutors with regard to those activities that are an integral part of their court work, such as their advocacy, only qualified immunity applies to the investigative or administrative function.

Even though many scholars have asked for the judicial regulation of prosecutors, as is the case at least indirectly in continental Europe, there is only very limited judicial review of prosecutorial discretion in the United States. It is restricted to cases in which the prosecution violates constitutional rights, in particular the equal protection clause, or the prosecution is carried out in bad faith, a due process violation. The former may take the form of selective prosecutions, based on the defendant's race or religion, for example. The requirements for proving a selective prosecution are very high, as the defendant must show disparate treatment and an improper motive. Stringent discovery rules make it virtually impossible to meet these requirements. Due process violations are so-called vindictive prosecutions in which the prosecutor in charging offenses penalizes a defendant's exercise of constitutional or statutory rights. Appellate courts assess both types of violations under a clearly erroneous standard of review. Defendants may also sue the government civilly and recover the costs of their defense as long as they have been acquitted and vindicated after an unreasonable prosecution.

As guidelines restricting the sentencing discretion of judges have proliferated, few states have attempted to restrict prosecutorial discretion in such a manner. Prosecutorial guidelines have been most effective where courts have retained monitoring powers. In those cases, the guidelines have contributed to transparency and to more uniform sentences. A side effect of the federalization of crime may, however, be that such review becomes undermined as prosecutors are in a position to select between state and federal court in bringing charges.

Ultimately, criticism of prosecutorial discretion is part of a larger disagreement over the degree of discretion available to all players in the criminal justice system. Depending on the institutional framework, it may be possible to restrain and supervise it to a greater or lesser extent. Since justice should remain individualized, discretion should not and actually cannot be eradicated.

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See also

- [Consensual Penal Resolution](#)
- [Discretion in Legal Decision Making](#)
- [Juries](#)
- [Legality and Discretion](#)
- [Plea Bargaining](#)
- [Police](#)
- [Prosecutors](#)
- [Punishment and Sentencing Alternatives](#)

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