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## “That Justice Shall Be Done”—Constitutional Requirements, Ethical Rules, and the Professional Ideal of Federal Prosecution

Charles R. Wilson

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# “That Justice Shall Be Done”—Constitutional Requirements, Ethical Rules, and the Professional Ideal of Federal Prosecution

CHARLES R. WILSON\*

*Although the government technically loses its case, it has really won if justice has been done.*<sup>1</sup>

-Robert H. Jackson

*Seventy-five years ago, then-Attorney General and subsequent Supreme Court Justice Robert H. Jackson delivered a speech entitled *The Federal Prosecutor*. This Article revisits Jackson’s speech to extract a few insights about ethics and professional responsibility, specifically with regard to prosecutorial discretion. Beyond the constitutional and ethical obligations involved in representing the United States in court, federal prosecutors must continually aspire to a professional ideal derived from their duty to seek and serve justice. This Article submits that this professional ideal—as envisioned by Jackson and alluded to by the Supreme Court—is also applicable to every lawyer as he or she exercises discretion in the day-to-day practice of law.*

I.	INTRODUCTION.....	112
II.	BACKGROUND ON JACKSON.....	112
III.	PROSECUTORIAL DISCRETION.....	115
IV.	SIGNIFICANT AREAS OF DISCRETION.....	117
	A. WHETHER OR NOT TO PROSECUTE: INVESTIGATION AND CHARGING DECISIONS.....	119
	B. HOW TO PROSECUTE: LEVERAGE, LENIENCY, AND THE DUTY TO DISCLOSE.....	125
V.	THE DUTY TO SEEK JUSTICE.....	133
VI.	CONCLUSION.....	137

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\* Judge, United States Court of Appeals for the Eleventh Circuit. This Article is adapted from the keynote address at the Francis X. Riley Lecture on Professionalism at the Northern Illinois University College of Law on March 27, 2015. I am grateful to my law clerk, Lane E. Cryar—without her assistance, this Article would not have been possible.

1. Robert H. Jackson, U.S. Att’y Gen., Address at the Second Annual Conference of United States Attorneys: The Federal Prosecutor (Apr. 1, 1940), *in* 31 AM. INST. CRIM. L. & CRIMINOLOGY 3, 4 (1940).

## I. INTRODUCTION

Seventy-five years ago, before an assembled group of United States Attorneys, then-Attorney General of the United States Robert H. Jackson delivered a speech that still resonates today.<sup>2</sup> Jackson's speech—called *The Federal Prosecutor*—has been recognized by former Attorney General Janet Reno for “the way it eloquently and honestly explains the essence of prosecutorial responsibility.”<sup>3</sup> I had the pleasure of serving as the United States Attorney for the Middle District of Florida during Attorney General Reno's term, and I too have found Jackson's words to be meaningful and timeless, during my time as a federal prosecutor and now, while serving the federal judiciary. This Article revisits Jackson's speech, extracting a few lessons about ethics and professional responsibility, specifically with regard to prosecutorial discretion. Beyond the constitutional and ethical obligations involved in representing the United States in court, federal prosecutors must continually aspire to a professional ideal derived from their duty to seek and serve justice.<sup>4</sup> I submit that this ideal—as envisioned by Jackson and oft alluded to by the Supreme Court—is also applicable to every lawyer as he or she exercises discretion in the day-to-day practice of law.

## II. BACKGROUND ON JACKSON

For those who may not be familiar with Robert Jackson, he is the only person in the history of the United States to hold the three offices of United States Solicitor General, Attorney General, and Justice of the Supreme Court in the course of his career.<sup>5</sup> Jackson spent a mere seventeen months as the Attorney General of the United States before President Franklin D. Roosevelt nominated him to be an Associate Justice for the United States

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2. *See id.*

3. Janet Reno & Geoffrey M. Klineberg, *What Would Jackson Do? Some Old Advice for the New Attorney General*, 2 HARV. L. & POL'Y REV. 197, 198 (2008).

4. *See* Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259, 261 (2001) (describing the Supreme Court's invocation of “the high professional ideal of the ‘prosecutor's obligation to serve the cause of justice’” in *United States v. Agurs*, 427 U.S. 97 (1976)); *see also* Bruce A. Green, *Why Should Prosecutors “Seek Justice”?* 26 FORDHAM URB. L.J. 607, 612, 615 (1999) (describing “the prosecutor's duty to seek justice or do justice” as “a professional ideal” and a “professional obligation” (internal quotation marks and footnote omitted)).

5. *See* SUSAN NAVARRO SMELCER & KENNETH R. THOMAS, CONG. RESEARCH SERV., R41299, FROM SOLICITOR GENERAL TO SUPREME COURT NOMINEE: RESPONSIBILITIES, HISTORY, & THE NOMINATION OF ELENA KAGAN 7–14 (2010) (describing the past work experience of each of the now-five Solicitor Generals appointed to the Supreme Court).

Supreme Court.<sup>6</sup> Much of his jurisprudence while serving on the Court is memorable: he was the author of a dissent in *Korematsu v. United States*, the case in which the majority of the Supreme Court affirmed the constitutionality of placing Japanese-American citizens in internment camps during World War II.<sup>7</sup> His dissenting viewpoint was "ultimately vindicated as being the only legally and morally correct position."<sup>8</sup>

Additionally, Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer* established the three-tier test used to this day to evaluate claims of presidential power.<sup>9</sup> In that important separation-of-powers decision, Jackson identified three situations in which presidential action could be challenged and the corresponding amount of power with which the president had acted, depending on whether the president acted pursuant to, in the absence of, or in contradiction to congressional authorization.<sup>10</sup> Many first-year law students can recall the "zone of twilight in which [the president] and Congress may have concurrent authority"<sup>11</sup> language (and may have had to apply at least one of the three scenarios Jackson described on a final exam). Indeed, just this last term, the Supreme Court invoked Jackson's framework to decide a case.<sup>12</sup>

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6. The United States Department of Justice, *Attorney General: Robert Houghwout Jackson*, BIOGRAPHIES OF THE ATTORNEYS GENERAL, <http://www.justice.gov/ag/bio/jackson-robert-houghwout> (last updated Nov. 4, 2014).

7. *Korematsu v. United States*, 323 U.S. 214, 243-48, 219-20 (1944); *see id.* at 243-48 (Jackson, J., dissenting).

8. Constance L. Martin, *The Life and Career of Justice Robert H. Jackson*, 33 J. SUP. CT. HIST. 42, 53 (2008). While even several members of the current Supreme Court have criticized the majority opinion in *Korematsu*, Jackson's dissent has better withstood the test of time. *See* Eric L. Muller, *12/7 and 9/11: War, Liberties, and the Lessons of History*, 104 W. VA. L. REV. 571, 586 & n.75 (2002) ("Eight of the nine currently sitting Justices on the Court have either written or concurred in opinions describing *Korematsu* as an error . . . . It seems safe to say that the majority opinion in *Korematsu* would not command a single vote today, let alone a majority." (footnotes omitted)); *see also* John Q. Barrett, *A Commander's Power, A Civilian's Reason: Justice Jackson's Korematsu Dissent*, 68 LAW & CONTEMP. PROBS. 57, 59 (2005) ("Justice Jackson's dissent in *Korematsu v. United States* merits its very high place in both the American legal and the human canons."); David A. Harris, *On the Contemporary Meaning of Korematsu: "Liberty Lies in the Hearts of Men and Women,"* 76 MO. L. REV. 1, 8 (2011) (describing current views of the majority opinion in the *Korematsu* decision and noting, "the eminent constitutional scholar Laurence Tribe of Harvard Law School wrote that the dissenting opinion of Justice Jackson, not the majority opinion of Justice Black, has 'carried the day in the court of history.'" (quoting 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 237 n.118 (3d ed. 2000))).

9. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-38 (1952) (Jackson, J., concurring).

10. *Id.* at 635-38.

11. *Id.* at 637.

12. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2083 (2015) ("In considering claims of Presidential power this Court refers to Justice Jackson's familiar tripartite framework from *Youngstown Sheet & Tube Co. v. Sawyer*." (citation omitted)).

And no reference to Jackson's tenure as Supreme Court Justice would be complete without acknowledging Jackson's majority opinion in *West Virginia State Board of Education v. Barnette*, a notable case involving the Free Exercise Clause of the First Amendment.<sup>13</sup> Jackson strikingly remarked: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."<sup>14</sup> Certainly, whether writing in dissent, in concurrence, or for the majority, Jackson wrote in such a way that his opinions remain both relevant and influential.

After only four years on the Supreme Court bench, Jackson once again became a prosecutor. This time, Jackson voluntarily took a leave of absence from the Supreme Court to serve as Chief United States Prosecutor at the International War Crimes Tribunal in Nuremberg, Germany.<sup>15</sup> Jackson was criticized by some in the United States—including some of his fellow Justices—for his decision to leave his prestigious position and go to Nuremberg, but he maintained that the work there was just as significant as anything he would be doing at the Supreme Court.<sup>16</sup> Jackson saw this service as a mission that was "important to the nation and to the world."<sup>17</sup> At Nuremberg, he prosecuted Nazi war criminals with a renowned vigor, demonstrating the eloquence he had become known for while he was Attorney General.<sup>18</sup> In fact, the opening and closing arguments that he gave before the Nuremberg court have been praised as being "among the best speeches of the twentieth century."<sup>19</sup> At the end of his career, he described his time as a

13. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

14. *Id.* at 642.

15. See, e.g., Brian R. Gallini, *Nuremberg Lives on: How Justice Jackson's International Experience Continues to Shape Domestic Criminal Procedure*, 46 LOY. U. CHI. L.J. 1, 4 (2014) (noting that, through Jackson's work at Nuremberg, Jackson became "the first and only Supreme Court Justice to serve as an international prosecutor").

16. Reno, *supra* note 3, at 203 n.27.

17. *Id.*

18. See, e.g., Henry T. King, Jr., *Robert Jackson's Vision for Justice and Other Reflections of A Nuremberg Prosecutor*, 88 GEO. L.J. 2421, 2427 (2000).

Jackson envisioned Nuremberg to be a landmark for the world to follow . . . . The trial weighed, for the first time in a truly international forum, the substitution of law for force in governing human relationships. No other litigation could match Nuremberg in its ambitious scope. In his prosecution, Jackson's passion and eloquence arose to the importance of the events surrounding him.

*Id.* King, who was also a prosecutor at Nuremberg, commented that "[e]ven a bare transcript could capture the magic of Robert Jackson's eloquence at the trial." *Id.*

19. MICHAEL S. PAULSEN & LUKE PAULSEN, *THE CONSTITUTION: AN INTRODUCTION* 238 (Basic Books 2015); see *The Legacy of Nuremberg, Part I to Justice on Trial*, AM. RADIOWORKS (July 2002), perma.cc/AAA9-L63Z; King, *supra* note 18, at 2427 ("When

prosecutor during the Nuremberg trials as "the most important, enduring, and constructive work of [his] life,"<sup>20</sup> although he returned to the Supreme Court and, over the next decade, left a resounding impact on our jurisprudence there as well.

Jackson's legacy says quite a lot about the kind of lawyer that he was. But it was during those seventeen months relatively early in his career, while he served as Attorney General, that he gave the speech that is the subject of this Article.

### III. PROSECUTORIAL DISCRETION

Jackson gave his *Federal Prosecutor* speech at the second annual conference of United States Attorneys on April 1, 1940. It is worth noting that United States Attorneys are executive officials of the Government.<sup>21</sup> They are appointed by and serve at the discretion of the President of the United States, with the advice and consent of the Senate.<sup>22</sup> Accordingly, as Jackson commented, the federal prosecutor is "required to win an expression of confidence in [his or her] character by both the legislative and the executive branches of the government before assuming the responsibilities of a federal prosecutor."<sup>23</sup>

Surveying the federal prosecutors gathered before him, Jackson observed that "assembled in this room is one of the most powerful peace-time forces known to our country."<sup>24</sup> This observation was not unfounded. As Jackson stated: "The prosecutor has more control over life, liberty, and rep-

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[Jackson] rose on November 21, 1945, in the well of the Nuremberg Courthouse to deliver the opening statement for the prosecution, the world listened.").

20. E. Barrett Prettyman, Jr., *Robert H. Jackson: "Solicitor General for Life,"* 17 J. SUP. CT. HIST. 75, 83 (1992) (internal quotation mark omitted) (citing Robert H. Jackson, A *Foreword to* WHITNEY R. HARRIS, *TYRANNY ON TRIAL: THE EVIDENCE AT NUREMBERG*, at xxxvii (Dall: SMU Press 1st ed. 1954)).

21. See, e.g., *Ponzi v. Fessenden*, 258 U.S. 254, 262 (1922) ("[The Attorney General] is the hand of the [P]resident in taking care that the laws of the United States in protection of the interests of the United States in legal proceedings and in the prosecution of offenses be faithfully executed."). By way of background, the first Judiciary Act established the federal public prosecutor in 1789; this Act gave United States Attorneys—federal prosecutors—"the exclusive power to bring federal criminal prosecutions." Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments*, 6 SETON HALL CIR. REV. 1, 2 & n.6 (2009) (citing the Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93). Aided by Assistant United States Attorneys, United States Attorneys represent the United States in federal court within their assigned jurisdiction. The United States Attorneys all report to the Attorney General. The Attorney General and officials in the Department of Justice in Washington set the policies for federal prosecutors, while each United States Attorney operates relatively independently for local decisions within his or her jurisdiction.

22. See 28 U.S.C. § 541 (2012).

23. Jackson, *supra* note 1, at 3.

24. *Id.*

utation than any other person in America. His discretion is tremendous.”<sup>25</sup> Jackson recognized that the tremendous amount of discretion entailed in federal prosecution brings with it a “dangerous power.”<sup>26</sup> To this day, discussions about prosecutorial discretion involve wide-ranging issues and bring wide-ranging reactions; for instance, consider some of the issues involving prosecutorial discretion that have received significant attention in the news recently. The presentation of evidence to the grand jury in Ferguson, Missouri involved the exercise of prosecutorial discretion.<sup>27</sup> Similarly, President Obama’s executive action on immigration policy also rested on principles of prosecutorial discretion, although the limits of those principles are currently being challenged in federal courts with varying results.<sup>28</sup> People on both ends of the political spectrum have supported or disavowed the use of prosecutorial discretion in each of these instances, although for differing reasons. However, while it may have its critics, and although it may be polarizing in some contexts, prosecutorial discretion is an integral component of our legal system. As Jackson explained, there are simply too many laws and too many violations of those laws for prosecutors *not* to exercise discretion. “What every prosecutor is practically required to do,” Jackson said, “is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain.”<sup>29</sup> The same type of judgment calls that compel a police officer to pull over the person going twenty miles per hour above the

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25. *Id.*

26. *Id.* at 5.

27. See Michael C. Dorf, *Prosecutorial Discretion Under Fire*, posted in *Courts & Procedure*, JUSTIA.COM (Dec. 3, 2014), [perma.cc/B7XL-4T8U](https://perma.cc/B7XL-4T8U); see also Tierney Sneed, *Ferguson Authorities Face Criticism Over Handling of Mike Brown Case*, USNEWS.COM (Nov. 26, 2014, 2:51 p.m. EST), [perma.cc/6CLB-L5J8](https://perma.cc/6CLB-L5J8) (describing the evidence presented to the grand jury that resulted in the non-indictment of the police officer involved in the highly publicized shooting death of Michael Brown); Robert Weisburg, *Stepping Back: Thoughts on the Ferguson Grand Jury and Prosecutor*, STANFORD LAWYER (Dec. 4, 2014), [perma.cc/G35Z-XA5K](https://perma.cc/G35Z-XA5K) (providing some context with regard to the use of the grand jury and the role of the prosecutor in the Ferguson case).

28. See Dorf, *supra* note 27; Dr. Alicia Triche, *Caesar or Chavez? President Obama’s Polarizing Executive Action on Immigration*, 62 FED. LAW. 10 (April 2015) (noting that “[t]he response [to President Obama’s executive action] has been polarized, visceral, and intense”); compare *United States v. Juarez-Escobar*, 25 F. Supp. 3d 774, 786 (W.D. Pa. 2014) (holding that President Obama’s immigration actions exceeded executive authority and that non-enforcement of immigration laws is not a valid exercise of prosecutorial discretion), and *Texas v. United States*, No. 1:14-cv-00254 (S.D. Tex. Feb. 16, 2015) (preliminary injunction blocking implementation of immigration programs at issue), with *Arpaio v. Obama*, 27 F. Supp. 3d 185, 208 n.12, 209–10 (D.D.C. 2014) (rejecting the reasoning in *Juarez-Escobar* and dismissing challenge to the president’s executive action).

29. Jackson, *supra* note 1, at 5.

posted speed limit rather than the person going five miles per hour over is what guides the prosecutor in determining whom to prosecute.<sup>30</sup>

So what is prosecutorial discretion in the federal criminal context? Given the numerous potential violations of law and finite law-enforcement resources, prosecutorial discretion refers to the range of permissible choices that federal prosecutors may make. And these choices are extensive; there is a reason why Jackson described the prosecutor as having "more control over life, liberty and reputation than any other person in America."<sup>31</sup> In Jackson's words, the federal prosecutor

can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. . . . The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial. He may dismiss the case before trial, in which case the defense never has a chance to be heard. Or he may go on with a public trial. If he obtains a conviction, the prosecutor can still make recommendations as to sentence, as to whether the prisoner should get probation or a suspended sentence, and after he is put away, as to whether he is a fit subject for parole.<sup>32</sup>

Simply put, prosecutorial discretion refers to—and prosecutorial function requires—the decisions that a prosecutor must make with regard to how to do his or her job.

#### IV. SIGNIFICANT AREAS OF DISCRETION

Federal prosecutors have varying degrees of discretion in virtually all aspects of criminal prosecution, from start to finish, including whom to investigate; whether or not to press charges; what charges to pursue; and how to pursue those charges, such as whether to offer or accept a plea bargain, or file a motion with the court for a lessened sentence. Many of the

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30. As Jackson stated, "We know that no local police force can strictly enforce the traffic laws, or it would arrest half the driving population on any given morning." *Id.*; see Dorf, *supra* note 27 (using a speeding analogy to discuss the element of discretion in President Obama's executive action on immigration).

31. Jackson, *supra* note 1, at 3.

32. *Id.*



decisions made with regard to each of these stages are unreviewed, as a practical matter, or unreviewable, as a legal matter. The courts will typically decline to review prosecutorial decisions, citing constitutional grounds; specifically, the separation of powers doctrine, since federal prosecutors are considered agents of the executive branch.<sup>33</sup> Moreover, even in times that the judicial branch *could* potentially exercise reviewing authority, the courts will often find reasons “not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.”<sup>34</sup> Thus, prosecutorial decisions often involve a significant amount of unchecked discretion—and accordingly, a significant amount of power.

Of course, federal prosecutors must abide by the Constitution and the obligations of due process and equal protection set forth within, and ethical rules also constrain federal prosecutors’ actions.<sup>35</sup> Accordingly, federal prosecutors are subject to an admittedly complex scheme of ethical regulations: from state ethical codes, to local rules adopted by federal courts, to the internal policies of the Department of Justice. The constitutional requirements generally set the floor—the basic obligations—and the ethical responsibilities set a higher standard, imposing rules not necessarily re-

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33. See *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1153 (D.C. Cir. 2005) (“It is well established that the exercise of prosecutorial discretion is at the very core of the executive function. Courts consistently hesitate to attempt a review of the executive’s exercise of that function.”); *United States v. Goodson*, 204 F.3d 508, 512 (4th Cir. 2000) (exercise of prosecutorial discretion “implicates the constitutional doctrine of separation of powers”); see also *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (describing prosecutorial discretion in deciding whether to indict as “a decision which has long been regarded as the special province of the Executive Branch”); *Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375, 379–80 (2d Cir. 1973) (“It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.” (internal quotation mark omitted)).

34. *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965); see *Newman v. United States*, 382 F.2d 479, 482 (D.C. Cir. 1967) (stating, with regard to prosecutorial discretion, that “it is not the function of the judiciary to review the exercise of executive discretion whether it be that of the President himself or those to whom he has delegated certain of his powers”).

35. In 1999, Congress passed the McDade Amendment, which made federal prosecutors subject to the same rules of professional conduct that govern all private lawyers practicing in federal courts. Under this provision, all federal government lawyers have to comply with the local rules of professional conduct for the state or states in which they practice. See 28 U.S.C. § 530B (2012); 28 C.F.R. § 77.1 (2012) (implementing 28 U.S.C. § 530B). See generally Gregory B. LeDonne, *Revisiting the McDade Amendment: Finding the Appropriate Solution for the Federal Government Lawyer*, 44 HARV. J. ON LEGIS. 231 (2007) (describing the movement toward and creation of the McDade Amendment).

quired by the Constitution.<sup>36</sup> However, both the constitutional requirements and the ethical rules generally describe prohibitions on behavior. Through examining a few of the areas in which prosecutors have significant discretion, we can see how prosecutors must also hold themselves to an even higher standard, beyond the threshold requirements—the professional ideal, which stems from the prosecutorial obligation to serve justice.

#### A. WHETHER OR NOT TO PROSECUTE: INVESTIGATION AND CHARGING DECISIONS

One area in which prosecutors have nearly unchecked discretion is with regard to investigation and charging decisions; the decisions of whom to investigate and whether or not to prosecute.<sup>37</sup> The United States Attorney may independently choose which cases to investigate; as Jackson stated, the federal prosecutor

can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. . . . Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted. It is in this realm . . . that the greatest danger of abuse of prosecuting power lies.<sup>38</sup>

Jackson thus recognized that sometimes decisions to investigate and prosecute federally are based, not on the facts of the charged offense, but instead on other conduct or characteristics of the defendant.<sup>39</sup> This is problematic; instead of discovering the commission of a crime and looking for the person who has committed it, the prosecutor may be tempted to pick the

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36. See Russell M. Gold, *Beyond the Judicial Fourth Amendment: The Prosecutor's Role*, 47 U.C. DAVIS L. REV. 1591, 1633–34 (2014).

37. See *In re U.S.*, 345 F.3d 450, 453–54 (7th Cir. 2003) (“Custom, limited prosecutorial resources that compel prioritizing prosecutions, federal criminal statutes that overlap with each other and with state criminal statutes, plea bargaining, and the federal sentencing guidelines themselves combine to lodge enormous charging discretion in the Justice Department, to the occasional frustration of judges—yet without giving rise to any judicial remedy.” (citing *United States v. Batchelder*, 442 U.S. 114, 123–24 (1979)); see also Griffin, *supra* note 4, at 266–70 (describing in detail the discretion entailed in these decisions and the limited standards governing the same); Robert N. Miller, *Balancing the Duty to Prosecute and the Obligation to Do Justice*, 37 LITIG. 47, 48 (2011) (noting that “very few cases have successfully set aside a prosecutor’s charging decisions”).

38. Jackson, *supra* note 1, at 3, 5.

39. See *id.* at 5.

person and then try to “pin some offense” on him or her.<sup>40</sup> As Jackson stated in his speech, this occurs when 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.”<sup>41</sup>

Jackson also recognized that, given the abundance of federal criminal statutes, prosecutors are regularly required to make judgment calls about which of the many actions that are covered by criminal law are truly worthy of criminal punishment. Picking which cases to investigate, and in turn, which cases to prosecute after investigation involves extraordinary discretion, and these decisions may be based on the best evidence available.<sup>42</sup> Making prudent judgment calls is perhaps even more important today than it was in 1940 when Jackson gave his speech, as the number of codified federal criminal laws has increased significantly since then. In fact, scholars, government officials, and legislators do not know the total number of federal criminal laws on the books, or how to quantify the number of separate crimes.<sup>43</sup> In 1982, the Justice Department attempted to determine the total number of federal criminal laws.<sup>44</sup> After spending two years on the project, the Department compiled an inconclusive list, estimating that there were around 3,000 criminal offenses, a number that does not include any interpretive case law or regulatory provisions that have the force of law.<sup>45</sup> This project is “considered the most exhaustive attempt to count the number of federal criminal laws,” although it took place thirty-three years ago.<sup>46</sup> By 1998, the American Bar Association reported that the body of federal criminal law had become so expansive that “there is no conveniently accessible,

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40. *Id.*

41. *Id.*

42. For example, Al Capone was prosecuted for tax evasion rather than mob-related activities. See Harry Litman, *Pretextual Prosecution*, 92 GEO. L.J. 1135, 1135–36 (2004). Professor Litman, a former United States Attorney for the Western District of Pennsylvania and Deputy Assistant Attorney General, avers that “the Al Capone case is a paradigm of one extreme sort of targeted-defendant case—building a federal case, any case, to convict a pre-identified defendant.” *Id.* at 1135 n.2. He also found Jackson’s *Federal Prosecutor* speech persuasive and informative. See *id.* at 1155–56.

43. See Paul J. Larkin, Jr, *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL’Y 715, 726 (2013) (“There are so many federal criminal laws that no one, including the Justice Department, the principal federal law enforcement agency, knows the actual number of crimes.”); see also Gary Fields & John R. Emshwiller, *Many Failed Efforts to Count Nation’s Federal Criminal Laws*, WALL ST. J., (July 23, 2011), <http://www.wsj.com/articles/SB10001424052702304319804576389601079728920> (“For decades, the task of counting the total number of federal criminal laws has bedeviled lawyers, academics and government officials.”).

44. Shameema Rahman, *Frequent Reference Question: How Many Federal Laws Are There?* LIBRARY OF CONGRESS (Mar. 12, 2013), [perma.cc/PD95-QCJE](http://perma.cc/PD95-QCJE); see Fields & Emshwiller, *supra* note 43.

45. Rahman, *supra* note 44.

46. *Id.*

complete list of federal crimes.”<sup>47</sup> Two years ago, the Congressional Research Service concluded it lacked the resources necessary to calculate the number of criminal offenses in the United States Code, but a general estimate is that there are currently over 4,500.<sup>48</sup>

Nor is the sheer number of federal crimes the only potential issue; the language of the statute itself may also be broad or unclear. For instance, the Supreme Court recently considered one such statute in *Yates v. United States*.<sup>49</sup> There, a plurality of the Court overturned fisherman John Yates’s criminal conviction under the Sarbanes-Oxley Act for destruction of “tangible objects” (Yates threw undersized fish overboard in an attempt to hide illegal fishing).<sup>50</sup> The Court construed the statutory language narrowly, “reject[ing] the Government’s unrestrained reading” and concluding that fish are not “tangible objects” when that term is read in context.<sup>51</sup> The Court noted, “Yates would have had scant reason to anticipate a felony prosecution” when he threw the fish overboard.<sup>52</sup>

And although Justice Kagan would have upheld Yates’s conviction, she noted in her dissent that the section at issue was “a bad law—too broad and undifferentiated, with too-high maximum penalties, which give prosecutors too much leverage and sentencers too much discretion.”<sup>53</sup> Justice Kagan continued: “In those ways [the section at issue] is unfortunately not an outlier, but an emblem of a deeper pathology in the federal criminal code.”<sup>54</sup> Accordingly, even though the Supreme Court was divided as to the

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47. TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIMINAL LAW 9 (Am. Bar Ass’n, 1998). “An exact count of the present ‘number’ of federal crimes contained in the statutory sections and the administrative regulations is difficult to achieve and the count is subject to varying interpretations. In part, the reason is not only that the criminal provisions are now so numerous and their location in the books so scattered, but also that federal criminal statutes are often complex . . . . While a figure of ‘approximately 3,000 federal crimes’ is frequently cited, that helpful estimate is now surely outdated by the large number of new federal crimes enacted in the 16 years . . . intervening since its estimation. Especially considering both statutory and administrative regulations, the present number of federal crimes is unquestionably larger.” *Id.* at n.11.

48. See *Defining the Problem & Scope of Over-Criminalization & Over-Federalization: Hearing Before the Over-Criminalization Task Force of 2013 of the H. Comm. on the Judiciary*, 113th Cong. 65 (2013) (statement of F. James Sensenbrenner, Member, H. Comm. on the Judiciary), perma.cc/8TEJ-VHAD; *id.* at 1 (“At present, the United States Code contains approximately 4,500 Federal crimes, as well as innumerable regulations and rules, many of which carry severe fines and jail time for violations, and there is no indication that Congress is slowing down.”); see also Fields & Emshwiller, *supra* note 43.

49. *Yates v. United States*, 135 S. Ct. 1074 (2015).

50. *Id.* at 1078–79 (plurality opinion).

51. *Id.* at 1081, 1087–89.

52. *Id.* at 1087.

53. *Id.* at 1101 (Kagan, J., dissenting).

54. *Yates v. United States*, 135 S. Ct. 1074, 1101 (2015).

outcome of the case, the Justices seemed to agree that the statutory language was problematic.

The difficulty of identifying how many federal crimes there are—much less knowing all of them—has led some scholars to conclude that there are very few people in the United States who cannot be indicted for a technical violation of federal law.<sup>55</sup> Jackson had the foresight to recognize this issue in 1940, noting that, “[w]ith the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone.”<sup>56</sup> Thus, the vast number of federal criminal statutes—and the fact that some, like the wire fraud and mail fraud statutes, are written so broadly<sup>57</sup>—requires prosecutors to exercise their discretion and good judgment as to which of the many cases that may be “technically covered by the criminal law are really worthy” of investigation, prosecution, and ultimately punishment.<sup>58</sup> Investigation and charging decisions are also an area of prosecutorial discretion with little to no oversight. Judges cannot instruct a prosecutor to investigate someone nor can they prevent the prosecutor from investigating someone.<sup>59</sup> And Congress can make a law, but, as a general matter, the legislative branch cannot compel a prosecutor to enforce it; that is, to investigate someone for violating a law.

Some of this independent authority is a necessary part of the job. For instance, prosecutors must be able to exercise independent judgment in deciding whom to investigate or charge; they cannot and should not be swayed by the popularity (or infamy) of the defendant or the ever-changing tide of public opinion. As Jackson noted, federal prosecutors should be “dispassionate and courageous” even “[i]n times of fear or hysteria[, when] political, racial, religious, social, and economic groups, often from the best of motives, cry for the scalps of individuals or groups because they do not like their views.”<sup>60</sup> Along these lines, the Supreme Court has recognized that absolute immunity for official misconduct or malicious prosecution is necessary to permit prosecutors to exercise “the independence of judgment required by [their] public trust.”<sup>61</sup>

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55. See, e.g., Fields & Emshwiller, *supra* note 43.

56. Jackson, *supra* note 1, at 5.

57. See 18 U.S.C. §§ 1341, 1343 (2012); see also Larkin, *supra* note 43, at 726–27 (“[T]he federal mail and wire fraud statutes . . . reach almost any use of the mails or telecommunications facilities to carry out virtually any dishonest scheme.”).

58. Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117, 2136–37 (1998).

59. “A judge in our system does not have the authority to tell prosecutors which crimes to prosecute or when to prosecute them.” *United States v. Giannattasio*, 979 F.2d 98, 100 (7th Cir. 1992).

60. Jackson, *supra* note 1, at 5.

61. *Imbler v. Pachtman*, 424 U.S. 409, 423 (1976).

Accordingly, the federal prosecutor has the sole, exclusive discretion to decide whether or not to investigate and prosecute any federal crime that is supported by probable cause.<sup>62</sup> If the prosecutor decides there is probable cause, this decision is essentially unreviewable. The Supreme Court has held that only the person prosecuted or threatened with prosecution might have standing to challenge the decision,<sup>63</sup> and there is a limited array of constitutional challenges to such prosecutorial decisions. For instance, a "vindictive prosecution," wherein a prosecutor penalizes a defendant for exercising a protected constitutional or statutory right by charging the defendant with a more serious crime, violates the Due Process Clause of the Fifth Amendment.<sup>64</sup> A "selective prosecution," wherein a prosecutor chooses to prosecute a defendant based on race, religion, or other impermissible bases, violates the Equal Protection Clause.<sup>65</sup> The defendant bears a heavy burden of proof to sustain such claims, and the courts will scrutinize such a challenge carefully since the prosecutor's judgments about the public interests involved in prosecuting individuals or crimes are not subject to individual challenge or judicial review.<sup>66</sup> However, although the courts may defer to prosecutors' decisions with regard to the subjects of investigation and charges, the government must still make these decisions on a case-by-case basis. That is to say, the United States Attorney's office cannot violate the law or just ignore it entirely; the prosecutors must actually be exercising discretion when determining whether to investigate and charge an individual for a violation.

As for the prosecutors' ethical requirements in these decisions, Model Rule 3.8 provides: "The prosecutor in a criminal case shall . . . refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause."<sup>67</sup> By stipulating that the prosecutor must not prosecute a charge

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62. See *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) ("[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.").

63. See *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973).

64. See *Bordenkircher*, 434 U.S. at 363 ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is patently unconstitutional." (internal citations omitted)); see also *Prosecutorial Discretion*, 34 GEO. L.J. ANN. REV. CRIM. PROC. 197, 206–09 (2005).

65. See, e.g., *Wayte v. United States*, 470 U.S. 598, 608–09 (1985) ("It is appropriate to judge selective prosecution claims according to ordinary equal protection standards." (footnote omitted)).

66. See *id.* at 607; see also *Miller*, *supra* note 37, at 48; see, e.g., *United States v. Arenas-Ortiz*, 339 F.3d 1066, 1068 (9th Cir. 2003) ("We must exercise a high degree of deference to the decision of prosecuting authorities to bring charges, because the Constitution assigns that decision to the executive branch of government.").

67. MODEL RULES OF PROF'L CONDUCT r. 3.8(a) (Am. Bar Ass'n 2013).

“that the prosecutor knows” is unsupportable, the rule “requires prosecutors to exercise independent judgment.”<sup>68</sup> Similarly, the ABA Criminal Justice Standards Committee stated “that perhaps no duty . . . [i]s ‘more critical’ than that of the prosecutor to exercise independent judgment.”<sup>69</sup> Thus, both constitutional obligations and ethical rules impose a duty requiring the prosecutor to independently exercise good judgment in determining the subject of an investigation and whether to bring charges. The parameters of good judgment, however, are left open.<sup>70</sup>

Interestingly, even if the prosecutor chooses to investigate someone and that investigation is fruitful—that is to say, the person is likely culpable—judges cannot then compel a prosecutor to bring charges. As one appellate court noted, “the problems inherent in the task of supervising prosecutorial decisions do not lend themselves to resolution by the judiciary. The reviewing courts would be placed in the undesirable and injudicious posture of becoming ‘superprosecutors.’”<sup>71</sup> Even when the federal statutes at issue contain mandatory language that seems to compel prosecution—such as that the United States Attorneys are “authorized *and required* . . . to institute prosecutions against all persons violating [these] provisions”<sup>72</sup> or “each United States attorney . . . *shall* prosecute for all offenses against the United States”<sup>73</sup>—that language does not necessarily preclude the exercise of prosecutorial discretion.<sup>74</sup> The Supreme Court has recognized that “the decision of a prosecutor in the Executive Branch not to indict . . . has long been regarded as the special province of the Executive Branch.”<sup>75</sup> Similarly, if the prosecutor does indict an individual and then subsequently decides to dis-

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68. Gold, *supra* note 36, at 1636–37.

69. *Id.* at 1637 (quoting *Recommendation*, 2008 A.B.A. SEC. CRIM. JUST. REP. 105D, at 45).

70. As one former prosecutor noted, “prosecutors for the most part struggle mightily to exercise their discretion in a fair and just manner, which, in some cases, is neither easy nor obvious. I personally struggled daily to balance my duty to prosecute with the need to do justice.” Miller, *supra* note 37, at 48–53 (offering specific examples as well as “guiding principles” to assist with the day-to-day challenges of exercising prosecutorial responsibility).

71. *Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375, 380 (2d Cir. 1973).

72. 42 U.S.C. § 1987 (2012) (emphasis added).

73. 28 U.S.C. § 547(1) (2012) (emphasis added).

74. *See Inmates of Attica Corr. Facility*, 477 F.2d at 381; *see also* Wesley M. Oliver, *Toward A Common Law of Plea Bargaining*, 102 KY. L.J. 1, 36 (2014) (“Courts have demonstrated the same reluctance to intervene in prosecutors’ decisions to decline charges as they have prosecutors’ decisions to pursue charges.”).

75. *Heckler v. Cheney*, 470 U.S. 821, 832 (1985); *see also* *United States v. Armstrong*, 517 U.S. 456, 464 (1996).

miss the charges, the courts will generally not intervene and require the prosecutor to pursue those charges.<sup>76</sup>

Consequently, there are very few ethical or constitutional constraints on prosecutorial discretion in this context. The limits derive from a duty to exercise independent judgment and abide by constitutional requirements of equal protection and due process. However, while the prosecutor has broad discretion in making these initial decisions, and there is limited judicial review of those decisions, that does not mean they go unnoticed. Even though judges may not be able to tell a prosecutor whether he should bring or drop a charge, and thus do not "review" a charging decision in the formal sense of the word, these decisions are observed—and remembered—by judges. The decision of whom to charge and what to charge certainly affects the credibility of prosecutors that appear before us. Jackson was also aware of this fact; he remarked in his speech that a federal prosecutor "must remember" that "judges will be the members of his own profession[ ] and that lawyers rest their good opinion of each other not merely on results accomplished but on the quality of the performance."<sup>77</sup>

#### B. HOW TO PROSECUTE: LEVERAGE, LENIENCY, AND THE DUTY TO DISCLOSE

The prosecutor also exercises protected discretion in deciding *how to prosecute*, including which specific crime to charge (that is, under which statute to prosecute), when to grant immunity, and whether to accept a plea bargain. Those choices are not subject to review; "no court has any jurisdiction to inquire into or review [the United States Attorney's] decision" to treat differently "[t]wo persons [who] may have committed what is precisely the same legal offense."<sup>78</sup>

Turning first to the issue of which crime to charge—as mentioned previously, there are several thousand distinct crimes in the United States Code, and many of the criminal statutes overlap. The Supreme Court has held that, "when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants."<sup>79</sup> And the United States Attorneys' Manual instructs federal prosecutors to charge "the most serious offense that is

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76. See, e.g., *In re U.S.*, 345 F.3d 450, 452–54 (7th Cir. 2003) ("We are unaware . . . of any appellate decision that actually upholds a denial of a motion to dismiss a charge [even on the basis of bad faith]. That is not surprising. The Constitution's 'take Care' clause (art. II, § 3) places the power to prosecute in the executive branch, just as Article I places the power to legislate in Congress.")

77. See Jackson, *supra* note 1, at 4.

78. *Newman v. United States*, 382 F.2d 479, 481–82 (D.C. Cir. 1967).

79. See *United States v. Batchelder*, 442 U.S. 114, 123–24 (1979).



consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction."<sup>80</sup> Thus, it is up to the prosecutor to decide under which statute to prosecute. The charges that are brought may be intended to produce a specific result: for instance, they may compel a plea bargain. Charging decisions can induce a defendant to plead out rather than go to trial, when the defendant is presented with the serious charge and accompanying length of imprisonment the prosecutor intends to pursue if the defendant does not plead guilty to a lesser charge. With plea agreements, defendants waive significant rights, including their right to a jury trial and the potential for appellate review.

The use of charging decisions to apply pressure to plead guilty came up recently in oral argument at the Supreme Court. In *Whitfield v. United States*, the Supreme Court considered a penalty enhancement for forcibly moving a person during a bank robbery.<sup>81</sup> The federal bank robbery statute carries a maximum sentence of twenty years in prison.<sup>82</sup> The provision at issue in the case before the Court imposed enhanced penalties to a defendant who, "in avoiding or attempting to avoid apprehension," "forces any person to accompany him without the consent of such person."<sup>83</sup> The question before the Court was how far a defendant must move a person before the enhanced penalties are implicated; specifically, whether just a few steps or "short distance" would qualify.<sup>84</sup>

At oral argument, several Justices expressed concern that prosecutors could charge defendants with forced accompaniment—thus implicating a mandatory minimum penalty of ten years imprisonment—in nearly every bank robbery, if the Court decided that a "single step" rule applied.<sup>85</sup> Justice Breyer noted that this interpretation would give prosecutors "vast discretion in bank robbery cases,"<sup>86</sup> while Justice Kagan intoned that the difference between a slight movement and a significant one should perhaps not be left to "prosecutorial good judgment."<sup>87</sup> Chief Justice Roberts characterized the problem as one that would potentially leave the prosecutor "armed with another [ten] years automatically in his pocket," which would be used "to extort a plea bargain of . . . six years" from a defendant who might have otherwise gone to trial.<sup>88</sup> Chief Justice Roberts also observed that this might

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80. U.S. ATTORNEYS' MANUAL, § 9-27.300 (U.S. Dep't of Justice 2014), [perma.cc/X5LJ-ENDQ](https://perma.cc/X5LJ-ENDQ).

81. *Whitfield v. United States*, 135 S. Ct. 785 (2015).

82. 18 U.S.C. § 2113(a) (2012).

83. *Id.* § 2113(e); *Whitfield*, 135 S. Ct. at 787.

84. *See Whitfield*, 135 S. Ct. at 787-88.

85. *See generally* Transcript of Oral Argument, *Whitfield v. United States*, 135 S. Ct. 785 (2015) (No.13-9026), [perma.cc/THC8-975U](https://perma.cc/THC8-975U).

86. *Id.* at 43-44.

87. *Id.* at 33.

88. *Id.* at 35.

give a prosecutor "another ace in his hand,"<sup>89</sup> since, if the defendant is not brandishing a weapon or assaulting anyone, the prosecutor may not have "enough leverage."<sup>90</sup> And the Chief Justice pointed out that, *if* this leverage was being abused, there would be no evidence of it—there would be no "reported case because [the defendant] would have pled guilty," which often results in a waiver of appeal rights.<sup>91</sup>

Ultimately, however, concerns about prosecutors' charging decisions do not govern statutory interpretation. As Justice Kennedy noted (in the form of a rhetorical question), even if the Court had "substantial evidence that prosecutors were using the threat of this extra charge in order to obtain guilty pleas," that would likely not be a proper basis to rule that the statute was "inoperable altogether."<sup>92</sup> The Court instead interpreted the statute in accord with its text and congressional intent, finding that the statute permits a prosecutor to pursue a mandatory minimum of ten years whenever the defendant forcibly moves a victim, however slightly.<sup>93</sup> Thus, the Court held in a unanimous decision that "accompaniment" as used in the statute applied to even a short distance, even though the Court engaged in an interesting and candid discussion at oral argument as to how charging decisions under that statute may result in pressure to waive trial rights.

While *Whitfield* is an example of how the application of one particular statute may result in pressure to plead, as a whole, plea bargains are more common than trials. Over ninety percent of criminal cases are resolved by plea bargains.<sup>94</sup> These guilty pleas often include appeal waivers, so the cases never make it to the appellate courts.<sup>95</sup> In the plea bargaining process, the

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89. *Id.* at 45.

90. Transcript of Oral Argument at 45, *Whitfield v. United States*, 135 S. Ct. 785 (2015) (No.13-9026), perma.cc/THC8-975U (observing that, when the defendant hasn't "wav[ed] a gun" or "assault[ed] the people," "that's where the prosecutor says[,] . . . you know, it's a good thing I've got these [ten] years or otherwise he might go to trial").

91. *Id.* at 46–47 ("[H]ow would you see the evidence of prosecutorial abuse? When you have these cases, [the prosecutor] says I'm going to charge you with a 10-year minimum, and the guy says, my gosh, I can't risk that, I'm going to plead guilty to 6 years or 7 years. I don't see how that pattern could show up in any kind of statistics.").

92. *Id.* at 51; *see id.* 51–52 (Assistant Solicitor General Fletcher responding, "I don't think this Court has ever suggested that the charging decisions with respect to a particular statute should inform the way the statute is interpreted").

93. *Whitfield v. United States*, 135 S. Ct. 785, 787 (2015). It is also worth noting that at oral argument, the attorney arguing on behalf of the government noted that there was no evidence that prosecutorial abuse was occurring: "I don't think there's any indication that prosecutors are departing from the instruction to consider the circumstances of individual cases in bringing charges." *See Whitfield* Transcript, *supra* note 85, at 52.

94. *See United States v. Ruiz*, 536 U.S. 622, 632 (2002) (describing the government's "heavy reliance upon plea bargaining in a vast number—90% or more—of federal criminal cases").

95. *See id.* at 633.

prosecutor assesses culpability and then selects the charge for which he or she will accept a guilty plea. The selected charge is accompanied by an advisory sentencing guideline promulgated by the United States Sentencing Commission. Consequently, some say that, in proffering and accepting plea agreements, the prosecutor serves as the “central adjudicator of facts” as well as replacing the judge as arbiter of most legal issues and of the appropriate sentence to be imposed.<sup>96</sup> Although in 2005, the Supreme Court rendered the Sentencing Guidelines advisory in *United States v. Booker*,<sup>97</sup> which, as a purely practical matter, constrains the leverage that prosecutors had in a mandatory sentencing regime, judges frequently sentence within the guideline range. Thus, even though the federal judiciary has some authority over this process, prosecutors’ charging and plea bargaining decisions play a significant role in determining criminal sentences.

These decisions bring difficult ethical problems that are not directly addressed by the professional rules or constitutional standards. Although the Supreme Court has noted that plea bargaining is “an essential component of the administration of justice,”<sup>98</sup> as a matter of professional responsibility, plea bargaining is almost entirely unregulated. Neither the text of Model Rule 3.8 or the ABA’s Criminal Justice Standards provide much guidance to prosecutors.<sup>99</sup> For instance, a prosecutor may offer charging or sentencing concessions to an accomplice in order to secure the accomplice’s testimony against a codefendant. Generally, prosecutors ask practical, strategic questions when determining whether to proffer a plea agreement with a reduced sentence: if there are multiple defendants and one is willing to testify against the other in exchange for leniency, the prosecutor must consider whether the testimony is likely to be believed by the jury, how much testimony or information the defendant has access to, and/or whether the government needs the testimony to advance its case against the other defendant.<sup>100</sup>

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

97. *United States v. Booker*, 543 U.S. 220, 226 (2005).

98. *Santobello v. New York*, 404 U.S. 257, 260 (1971) (“The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called ‘plea bargaining,’ is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.”).

99. See R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About a Prosecutor’s Ethical Duty to “Seek Justice,”* 82 NOTRE DAME L. REV. 635, 654 (2006) (noting that “plea bargaining in criminal cases is almost completely unregulated as a matter of professional responsibility”).

100. See *id.* at 654–55.

However, some ethical rules may be implicated—although not directly addressed—by these decisions. If a witness has been offered leniency in exchange for testimony, this could influence the witness to testify in a manner consistent with the prosecutor's view of the case. This could potentially implicate Model Rules 3.3 and 3.4, which pertain to an attorney's duty of candor to the tribunal and his ethical responsibility not to put a witness on the stand if he knows or believes that the witness may commit perjury.<sup>101</sup> The constitutional obligations of a federal prosecutor may also be triggered, albeit implicitly. The Supreme Court determined that the Due Process Clause is not violated when the government relies on bargained-for testimony in a criminal trial.<sup>102</sup> Instead, the Court has found that the prosecutor must disclose to the defense counsel any promises made to the witness.<sup>103</sup> This mandatory disclosure to the defense counsel serves as a safeguard to prevent unfairness, since the defense also has the right to cross-examine the witness for bias.<sup>104</sup>

But the fundamental issues of *when—and to whom*—it is ethically appropriate to grant leniency in exchange for cooperation are left entirely to the prosecutor's own discretion. And there are important ethical questions implicated by these decisions. For instance, the prosecutor should consider whether the defendant seeking a plea agreement is perhaps the more dangerous or morally culpable offender.<sup>105</sup> Agreeing to reduce prison time in exchange for testimony carries with it an implicit discretionary decision that the societal benefits achieved from convicting another defendant "outweigh the costs associated with granting leniency" to the cooperative defendant.<sup>106</sup> Thus, the prosecutor, in pursuing several culpable people, may often have to decide which one is the worst of the lot, and make a deal with the other "slightly less bad" individual to ensure that the worst one is punished.<sup>107</sup>

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101. See MODEL RULES OF PROF'L CONDUCT r. 3.3–3.4 (Am. Bar Ass'n 2013); see also Cassidy, *supra* note 99, at 655–56.

102. Lisenba v. California, 314 U.S. 219, 227 (1941); see Cassidy, *supra* note 99, at 656 & n.142.

103. See Giglio v. United States, 405 U.S. 150, 154–155 (1972) ("A promise made by one attorney must be attributed, for these purposes, to the Government. . . . To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it.").

104. See Hoffa v. United States, 385 U.S. 293, 311 (1966) ("The established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury."); see also Cassidy, *supra* note 99, at 656–57.

105. See Cassidy, *supra* note 99, at 654–55.

106. *Id.* at 655.

107. See *id.* at 654–56.

The nature of this decision prompted one district attorney to remark: “If you are going to try the devil, you have to go to hell to get your witnesses.”<sup>108</sup>

Even though we may accept that there is often a hierarchy of criminal defendants, with some serving as the primary perpetrators and others as only accomplices, in certain circumstances the prosecutor must consider whether it is morally and ethically right to offer a favorable deal to an accomplice in exchange for information or testimony. For example, what if the accomplice assisted in truly egregious activities—such as providing children to a child pornographer for exploitation and abuse, or participating in a violent crime like murder or sexual assault?<sup>109</sup> How much cooperation would warrant a reduction in the punishment that such a person deserves? Such a question is rightfully left to the discretion of the individual prosecutor, but how to exercise that discretion is an open question.

In fact, the related question of “how much” of a reduction to grant in exchange for cooperation must be answered primarily by the prosecutor. It is within the discretion of the United States Attorney to seek downward departures in sentencing; a prosecutor can bargain for cooperation or testimony from a defendant by suggesting that, if the defendant provides substantial assistance to the government, the prosecutor will file a substantial assistance motion with the district court, encouraging a downward departure from the sentencing guidelines.<sup>110</sup> Many plea agreements provide only that the government will consider whether the defendant’s aid qualified for substantial assistance, and judicial review of the prosecutor’s discretionary decision as to whether or not to actually file a substantial assistance motion is limited, even if the prosecutor promised to consider filing and then does not do so.<sup>111</sup> While the ultimate sentencing authority rests with the judge,

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108. *State v. Sims*, 588 S.E.2d 55, 64 (N.C. Ct. App. 2003).

109. *See Cassidy*, *supra* note 99, at 659–60.

110. *See* U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (U.S. Sentencing Comm’n 1989); *see also* *United States v. Forney*, 9 F.3d 1492, 1499 (11th Cir. 1993) (“[I]t is beyond dispute that a sentencing court cannot depart from a mandatory minimum sentence in the absence of a 5K1.1 motion by the government.” (citing *Wade v. United States*, 504 U.S. 181, 183–84 (1992))).

111. Some circuit courts will review the decision for good faith, whereas others decline to review the decision at all. *Compare* *United States v. Robinson*, 978 F.2d 1554, 1569 (10th Cir. 1992) (“When a plea agreement leaves discretion to the prosecutor, the court’s role is limited to deciding whether the prosecutor has made its determination in good faith.”), *and* *United States v. Knights*, 968 F.2d 1483, 1487 (2d Cir. 1992) (“[W]hen a cooperation agreement allows for a substantial-assistance motion contingent on the government’s subjective evaluation of a defendant’s efforts to cooperate, the district court may review only to determine whether the prosecution based its decision on impermissible considerations such as race or religion, or whether the prosecutor has made its determination in good faith.” (internal quotation marks omitted)), *with* *United States v. Burrell*, 963 F.2d 976, 985 (7th Cir. 1992) (“A prosecutor’s refusal to request a downward departure is . . . not reviewable

courts are hesitant to intrude on the prosecutor's decision. This is because the prosecutor is in a better position to assess the value of cooperation and the importance of the testimony; these decisions are poorly suited to judicial review.<sup>112</sup> But it has been noted by judges and scholars alike that the discretionary use of plea agreements may lead to situations where codefendants who are more deeply entrenched in a criminal enterprise—a "higher up"—and are thus more likely to have access to important information, while they are more involved in the criminal organization and thus more culpable, end up being treated more favorably than lower-level accomplices, who do not know anything and thus have nothing to offer.<sup>113</sup> There may also be public pressure to obtain a high-profile conviction that can result from making deals with the mid-level players that also incentivizes this system. Consequently, if a prosecutor's primary goal is seeking convictions—rather than serving justice—this may result in ethically questionable results. The constitutional and ethical obligations of the federal prosecutor are perhaps most notable in the context of the duty to disclose evidence. The Supreme Court established a brightline constitutional requirement in *Brady v. Maryland* that prosecutors must voluntarily disclose material, exculpatory evidence to the defendant or his or her counsel, even if the defendant does not request it.<sup>114</sup> The *Brady* Court alluded to separate prosecutorial duties of "justice" and "fairness" in addition to the constitutional requirements of due process. As Justice Marshall noted, "[t]he message of *Brady* and its progeny is that a trial is not a mere sporting event; it is a quest for truth in which the prosecutor, by virtue of his office, must seek truth even as he seeks victory."<sup>115</sup> And prosecutors' ethical duties to disclose exculpatory evidence surpass the constitutional floor established in

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for arbitrariness or bad faith. The prosecutor, not the court, is to assess the value of the defendant's assistance.").

112. See Cassidy, *supra* note 99, at 657–58 ("Issues of the value of cooperation and the importance of the testimony to law enforcement objectives are considered particularly ill-suited to judicial review.").

113. See *id.* at 655–56; Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 212 (1993) ("Defendants who are most in the know, and thus have the most 'substantial assistance' to offer, are often those who are most centrally involved in conspiratorial crimes. The highly culpable offender may be the best placed to negotiate a big sentencing break. Minor players, peripherally involved and with little knowledge or responsibility, have little to offer and thus can wind up with far more severe sentences than the boss."); see also *United States v. Brigham*, 977 F.2d 317, 317–18 (7th Cir. 1992) (discussing mandatory minimum penalties and noting, "Drones of the organization—the runners, mules, drivers, and lookouts—have nothing comparable to offer. They lack the contacts and trust necessary to set up big deals, and they know little information of value. Whatever tales they have to tell, their bosses will have related.").

114. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

115. *Monroe v. Blackburn*, 476 U.S. 1145, 1148 (1986) (Marshall, J., dissenting from denial of certiorari).

*Brady* and the *Brady* progeny.<sup>116</sup> Due process mandates only that prosecutors disclose material, exculpatory evidence.<sup>117</sup> But “the ethical rules require prosecutors to disclose exculpatory evidence even when not material.”<sup>118</sup> According to Model Rule 3.8(d), “The prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense.”<sup>119</sup> The federal prosecutor’s constitutional obligations do not mandate disclosure of evidence that is cumulative or that the defense can acquire with reasonable diligence—and they may not require disclosure of evidence that is inadmissible.<sup>120</sup> The ethical rules contain no comparable limitations. Indeed, the Department of Justice has adopted for its prosecutors a broad discovery policy that goes beyond *Brady*, committing to “[d]isclos[ure] of exculpatory and impeachment information beyond that which is constitutionally and legally required.”<sup>121</sup> Further, according to Model Rule 3.8, prosecutors bear an *ethical* responsibility to help investigate and remediate possible wrongful convictions, which is not required by the constitutional obligations of due process.<sup>122</sup>

The Supreme Court has implicitly recognized the tension between the constitutional requirements and the ethical rules. In *United States v. Agurs*, the Court identified a mandatory, constitutional rule—the *Brady* requirement to deliver obviously exculpatory evidence to the defense.<sup>123</sup> The Court then invoked “the high *professional ideal* of the ‘prosecutor’s obligation to serve the cause of justice,’” but the members of the Court clearly disagreed about its meaning.<sup>124</sup> The majority opinion finally recommended that the

116. See Gold, *supra* note 36, at 1620, 1633.

117. *Brady*, 373 U.S. at 87; see Gold, *supra* note 36, at 1633.

118. Gold, *supra* note 36, at 1633–34 & n.241 (citing ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 09-454 (2009)).

119. MODEL RULES OF PROF’L CONDUCT r. 3.8(d) (Am. Bar Ass’n 2013); see Gold, *supra* note 36, at 1634–35.

120. See Gold, *supra* note 36, at 1634, 1638–39.

121. U.S. ATTORNEYS’ MANUAL § 9-5.001(C) (U.S. Dep’t of Justice 2014), perma.cc/SR27-ULBC. Of course, although that is the policy, not all prosecutors may follow *Brady*’s requirements as closely as they ought. In 2013, then-Chief Judge Kozinski of the Ninth Circuit remarked that “There is an epidemic of *Brady* violations abroad in the land. Only judges can put a stop to it.” *United States v. Olsen*, 737 F.3d 625, 626 (9th Cir. 2013) (denying petition for rehearing en banc) (Kozinski, C.J., dissenting).

122. MODEL RULES OF PROF’L CONDUCT r. 3.8(g)(2)(ii) (Am. Bar Ass’n 2013); *id.* at 3.8(h).

123. *United States v. Agurs*, 427 U.S. 97 (1976), *modified by* *United States v. Bagley*, 473 U.S. 667 (1985); see also Griffin, *supra* note 4, at 260–61.

124. Griffin, *supra* note 4, at 261 (quoting *Agurs*, 427 U.S. at 111); compare *Agurs*, 427 U.S. at 111 (majority opinion’s application of prosecutorial obligation to serve justice), with *id.* at 115–16 (Marshall, J., dissenting) (dissenting Justices’ application of the prosecutorial obligation to serve justice).

prosecutors act prudently, "resolv[ing] doubtful questions in favor of disclosure," but clarifying that "the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial."<sup>125</sup> Thus, the "prudent prosecutor" will comport with higher standards than either the Constitution or the ethical rules require.<sup>126</sup> This is no doubt an acknowledgment of the high professional ideals that prosecutors must continually aspire to meet.

## V. THE DUTY TO SEEK JUSTICE

Despite all of the areas in which the prosecutor has immense discretion and incredible power, the most important duty of a federal prosecutor, as Jackson noted, is to seek and to serve justice.<sup>127</sup> This requirement emanated from an earlier Supreme Court case and has been reflected in almost every Supreme Court decision to take up prosecutorial ethics since that time.<sup>128</sup> It is also firmly incorporated in the ethical rules, although they do not attempt to define what this requirement means.

As Jackson told the gathered federal prosecutors: "Your positions are of such independence and importance that while you are being diligent, strict, and vigorous in law enforcement you can also afford to be just. Although the government technically loses its case, it has really won if justice has been done."<sup>129</sup> Jackson was alluding to a Supreme Court decision rendered five years earlier, *Berger v. United States*.<sup>130</sup> In that case, the Supreme Court awarded the criminal defendant a new trial because of comments the prosecutor made during the trial.<sup>131</sup> The Court described the heavy duty the federal prosecutor bears, since he or she is, as the Court stated,

the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to

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125. *Agurs*, 427 U.S. at 108.

126. Professor Griffin made this point quite well in her informative article, *The Prudent Prosecutor*. See Griffin, *supra* note 4, at 259–62, 304–307 (considering prosecutorial ethics through reference to *Agurs* and proposing that "[p]rosecutorial discretion requires public moral judgment, a judgment rooted in prosecutorial practice and experience").

127. See Jackson, *supra* note 1, at 4.

128. For a thorough discussion of the prosecutorial duty to seek justice, Professor Green's article entitled *Why Should Prosecutors "Seek Justice"?* offers in-depth commentary, including the sources of and justifications for the duty to seek justice, as well as a historical outline. See generally Green, *supra* note 4.

129. Jackson, *supra* note 1, at 4.

130. *Berger v. United States*, 295 U.S. 78 (1935).

131. *Id.* at 88–89.



govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but *that justice shall be done*.<sup>132</sup>

A variation on that phrase—“that justice shall be done”—has been repeated in almost every Supreme Court case to consider the duties and responsibilities of the federal prosecutor since that time.<sup>133</sup> Indeed, the concept of serving justice is such a fundamental part of being a federal prosecutor that, inscribed on the very walls of the Department of Justice building, outside the Attorney General’s office, is the sentence: “The United States wins its point whenever justice is done its citizens in the courts.”<sup>134</sup>

The ethical rules that guide prosecutors’ conduct similarly have incorporated this concept. In the Model Rules of Professional Conduct, the first comment to Rule 3.8 (the rule governing prosecutors) states, “[a] prosecutor has the responsibility of a minister of justice, and not simply that of an advocate.”<sup>135</sup> Likewise, the National District Attorneys Association’s Prosecution Standards state, “[t]he prosecutor is an independent administrator of justice. The primary responsibility of a prosecutor is to seek justice.”<sup>136</sup> And, just in case you thought the same concept could not be stated again in

132. *Id.* at 88 (emphasis added).

133. Justices on the Supreme Court have also directly quoted *Berger*’s “justice shall be done” adage on at least twenty-one occasions in the past seventy years or so, which is a testament to how well this expression captures the essence of prosecutorial responsibility. *See Cone v. Bell*, 556 U.S. 449, 451 (2009); *Bradshaw v. Stumpf*, 545 U.S. 175, 190 (2005) (Souter, J., concurring); *Strickler v. Greene*, 527 U.S. 263, 281 (1999); *Kyles v. Whitley*, 514 U.S. 419, 439 (1995); *Georgia v. McCollum*, 505 U.S. 42, 68 (1992) (O’Connor, J., dissenting); *United States v. Williams*, 504 U.S. 36, 62 (1992) (Stevens, J., dissenting); *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 803 (1987); *Monroe v. Blackburn*, 476 U.S. 1145, 1148 (1986) (mem.) (Marshall, J., dissenting from denial of certiorari); *United States v. Bagley*, 473 U.S. 667, 675 n.6 (1985); *United States v. Young*, 470 U.S. 1, 25 (1985) (Brennan, J., concurring in part and dissenting in part); *Gannett Co. v. DePasquale*, 443 U.S. 368, 384 n.12 (1979); *Lee v. United States*, 432 U.S. 23, 38 (1977) (Marshall, J., dissenting); *United States v. Agurs*, 427 U.S. 97, 111 (1976); *Faretta v. California*, 422 U.S. 806, 849 (1975) (Blackmun, J., dissenting); *Donnelly v. DeChristoforo*, 416 U.S. 637, 649 (1974) (Douglas, J., dissenting); *United States v. Wade*, 388 U.S. 218, 256 n.5 (1967) (White, J., dissenting in part and concurring in part); *Lynch v. Overholser*, 369 U.S. 705, 733 (1962) (Clark, J., dissenting); *Campbell v. United States*, 365 U.S. 85, 96 (1961); *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 407 (1959) (Brennan, J., dissenting); *Jencks v. United States*, 353 U.S. 657, 668 (1957); *Viereck v. United States*, 318 U.S. 236, 248 (1943).

134. *See* Memorandum from David W. Ogden, Deputy Att’y Gen., U.S. Dep’t of Justice, to Dep’t Prosecutors (Jan. 4, 2010), [perma.cc/WYR9-CMPD](http://perma.cc/WYR9-CMPD); *see also Brady*, 373 U.S. at 87 (quoting the inscription from the Department of Justice building).

135. MODEL RULES OF PROF’L CONDUCT r. 3.8 cmt. 1 (Am. Bar Ass’n 2013).

136. NAT’L DIST. ATT’YS ASS’N, NATIONAL PROSECUTION STANDARDS 1-1.1 (3rd ed. 2009).

a different way, the American Bar Association's Standards for Criminal Justice note, "[t]he primary duty of the prosecutor is to seek justice . . . , not merely to convict."<sup>137</sup>

Why is this seemingly vague and elusive requirement so important? Some might say the "seek justice" imperative gives little practical advice or guidance to a prosecutor faced with a tough ethical decision. However, I think the contrary is true. We are not talking about prosecutorial misconduct, wherein a prosecutor acts *outside* of his or her discretion; the point is that there will be innumerable circumstances that neither the ethical rules nor the Constitution will clearly address.

I propose that despite the generally accepted parameters of the constitutional requirements and the more rigorous ethical rules, there is a more demanding standard beyond them both—the professional ideal. By focusing on prosecutorial discretion, we have looked at decisions where there is a range of permissible choices. The "correct" choice is usually not found in "legal provisions, judicial decisions or disciplinary rules."<sup>138</sup> Instead, in deciding among those discretionary options, the prosecutor must seek a professional ideal derived from the duty to seek and serve justice. This is less a constraint on prosecutorial action, and more a fundamental prosecutorial responsibility. As Jackson said: "Only by extreme care can we protect the spirit as well as the letter of our civil liberties, and to do so is a responsibility of the federal prosecutor."<sup>139</sup>

Importantly, I believe Jackson's speech calls on prosecutors to be self-regulating—to hold themselves to the highest of standards, seeking a "professional ideal," even when the ethical rules and constitutional requirements do not bar the behavior. Discretion is not misconduct—misconduct necessarily implies that the prosecutor did something he or she should not do. Instead, discretion involves having several permissible choices and choosing the best one. Which choice is the best one? Jackson provides the answer in his speech:

A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in the prosecu-

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137. AMERICAN BAR ASS'N, CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION, 3-1.2(b) (4th ed. 2015).

138. See Green, *supra* note 4, at 619. "[P]rosecutorial conduct may implicate ethics in the broader sense of involving what a prosecutor should do in situations where the law offers a choice. In other words, what are the most desirable ways to exercise 'prosecutorial discretion,' when is an exercise of discretion unfair or unwise, and when does the prosecutor engage in an 'abuse of discretion' (albeit, one that may not be subject to any sanction or remedy)." *Id.*

139. Jackson, *supra* note 1, at 6.

tor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.<sup>140</sup>

I have had, thus far, nine former law clerks go on to serve as federal prosecutors with the United States Department of Justice and I trust that they hold themselves to this standard. They know that a federal prosecutor has tremendous discretion, as this Article has attempted to illustrate with just a few examples. The way in which prosecutors exercise that discretion will affect their credibility with their superiors, their peers, and their subordinates. But federal prosecutors are not the only ones with discretion. All of you will make choices about how to practice, how to pursue your case: what motions to file, what avenues to pursue, even what emails to send. How you exercise that discretion will define you. Yes, you are guided by the various ethical rules, and depending on what you do, some of you may encounter constitutional constraints. Yet discretion is a necessary part of professionalism, and similarly, the spirit of professionalism cannot be defined in the Model Rules or the various ethical codes of conduct. Those set forth prohibited behaviors and include aspirational goals, but professionalism is far more than what is right or wrong or what is covered by a rule.

For example, if you practice in federal court in Illinois, you may turn to the “Standards for Professional Conduct Within the Seventh Federal Judicial Circuit.” These standards explicitly state that they are not to be used as a basis for litigation or for sanctions or penalties, and they do not supersede or detract from existing disciplinary codes.<sup>141</sup> What then is the purpose of these standards, which are simply voluntary undertakings? Reiterated throughout is the admonition that all parties must “be mindful of our obligations to the administration of justice, which is a truth-seeking process designed to resolve human and societal problems in a rational, peaceful, and efficient manner.”<sup>142</sup> These standards give specific examples of how to accomplish these goals, such as not using discovery or discovery scheduling as a means of harassment and accommodating the other counsel’s time; a lawyer can even extend the time to answer the complaint as a matter of professional courtesy.<sup>143</sup> To this end, the standards advocate civility, courteousness, punctuality, and fairness, reiterating that they are intended to encourage judges and lawyers alike to meet their obligations to each other, to

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140. *Id.*

141. STANDARDS FOR PROFESSIONAL CONDUCT WITHIN THE SEVENTH FEDERAL JUDICIAL CIRCUIT, *reprinted in* ILL. COMP. STAT. ANN., 7TH CIR. CT. APP. (1997), [perma.cc/B4CY-2MKG](http://perma.cc/B4CY-2MKG).

142. *Id.* at *Preamble*.

143. *Id.* at *Lawyers’ Duties to Other Counsel*.

"achieve the twin goals of civility and professionalism, both of which are hallmarks of a learned profession."<sup>144</sup>

Jackson said, "Any prosecutor who risks his day-to-day professional name for fair dealing to build up statistics of success has a perverted sense of practical values, as well as defects of character."<sup>145</sup> I think we can substitute "any lawyer" instead of prosecutor: any lawyer who risks his or her day-to-day professional name to "win" a case has a perverted sense of practical values, as well as defects of character.

## VI. CONCLUSION

We all have a duty to use good judgment, regardless of our current position or practice area. There will be innumerable choices that you make as an attorney that are not covered by the Constitution or the ethical rules. And while you will have various sources to help guide you in making those decisions—advisory opinions, guidelines, et cetera—there is no substitute for using good judgment, for making decisions that are *moral and ethical* as well as legal. When you make these choices, may you remember Jackson's recommendation of exercising humility and restraint—may you temper your power with practical wisdom. What we think of as "professionalism" is a day-to-day challenge. Establish habits of civility now, for, as Jackson said as well, "Reputation has been called 'the shadow cast by one's daily life.'"<sup>146</sup> When you find yourself in a position of power—whether it is over an opponent in court or against an adversary in the classroom—be, as Jackson admonished the gathered federal prosecutors, "dispassionate, reasonable[,] and just"<sup>147</sup> to those subject to that power.

While I have specifically addressed some of the rules applicable to prosecutors, these concepts—serving justice, striving to meet a professional ideal—have a broader application to professionalism and the ethical practice of law. I believe that your sense of professionalism, your civility toward others—whether you are passionately representing them, ardently prosecuting them, or perhaps opposing them in court or on the bench—is going to play the most significant role in establishing and defining who you are as an attorney, no matter what your area of practice. Professionalism is not how you act when you are forced to do so, but how you act when you exercise your discretion; when you have a variety of options and choose the one that is the fairest and most courteous. Act with "extreme care," seeking

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144. *Id.* at Preamble.

145. Jackson, *supra* note 1, at 4.

146. *See id.*

147. *Id.*

to protect the “spirit as well as the letter” of professionalism.<sup>148</sup> In closing, I will paraphrase Jackson one last time:

Your positions as attorneys are of such independence and importance that, while you are being diligent, strict, and vigorous in your practice of the law, you can also afford to be just. Although you may technically lose your case, you have won if you tempered your zeal with human kindness; if you sought truth and not victims, and if you served the law and not factional purposes. If you have done these things, and approached your task with humility, then justice has been done.

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148. *Id.* at 6.