PART II

Participants in the Courtroom Drama
Step 5
A Prosecutor Considers the Charges

The first actor in the justice system that we will cover is the prosecutor. As you will learn, prosecutors are central to the justice drama. Let’s get started with a few dialogues between prosecutors to introduce the varied roles fulfilled by them.

“Really, it’s a very marginal case,” said the senior deputy district attorney to his colleague.

The other D.A. reacted. “I’m reminded of the time [prior to three strikes] when these things came up, man, we never saw them because they’d be a misdemeanor. I mean, I don’t care how bad his record is. His record is really not that bad. I’ve seen a lot worse. What are you gonna do with two bottles of cough syrup?” (Krikorian, 1996, p. B3)

These district attorneys are part of a group of prosecutors doing a weekly review of the cases that flood their urban jurisdiction. The question under discussion is whether the accused should be considered eligible to receive a sentence of twenty-five years to life, the mandated sentence for a defendant whose crime is a “third strike.” In this case, the defendant’s crime was stealing two bottles of cough syrup, worth a total of $52.41. He has already accumulated a long criminal record during the course of forty-two years, but does his current crime merit a third-strike sentence?

The next case the group considers is that of a man in his early twenties, a gang member with prior offenses who is charged with being an ex-felon in possession of a gun. Police arrested the defendant after seeing him with a handgun “hanging out in a driveway.” Again, the issue is whether the defendant should be classified as eligible for a sentence of twenty-five years to life. The deputy district attorneys discuss some of the issues:

“I’m not inclined to strike a strike [i.e., ignore a prior conviction],” said the deputy D.A. Another deputy D.A. adds, “He’s had three robberies and he only did four years.”

“These were all recent. He’s young. He’s on the street. He doesn’t have any skills, any trades, and it doesn’t appear he has any inclination to go straight. Just hangin’ around with a gun.” (Krikorian, 1996, p. B3)

Later in this chapter, we’ll consider the outcomes of these cases (Krikorian, 1996). But first, let’s learn more about the people whose decisions have major
influence in the courtroom—prosecutors. Compared to other legal actors in the courtroom, the role of the prosecutor is perhaps the least understood by the public. Although prosecutors’ decisions are often highly visible because of media and community attention, few people are well-informed about the nature, scope, and impact of the prosecutor’s role. Part of this may be attributable to one-dimensional media depictions of prosecutors, which rarely go beyond showing the prosecution team briefly discussing the case or cross-examining a witness in court. Recall the last time you remember seeing a prosecutor shown on TV. What was the context? What was your impression of the prosecutor’s function, daily work life, and dilemmas?

The modern prosecutor’s legal role emerged gradually as society, and thus law and the legal system, became more complex and specialized. In the United States, the concept of prosecutors is part of the English common-law heritage of the American legal system. The Judiciary Act of 1789, passed by the U.S. Congress, created the federal judicial districts and the U.S. Attorney General’s office. The U.S. Attorney General is the highest-ranking law enforcement person in the land, and is selected by presidential appointment. In turn, each federal district has its own attorney general, who is appointed to be the chief prosecuting attorney in that district. At the state level, voters in each state elect their attorney general.

GETTING THE JOB: ELECTED PROSECUTORS AND POLITICS

At the state and county levels in many jurisdictions, the district attorney (the “D.A.”) is an elected official, subject to the political pressures associated with holding elective office. Assistant D.A.s are hired staff. In some states, prosecutors are appointed. County prosecutors in New Jersey, for example, are appointed by the governor with the advice and consent of the state senate.

Elected prosecutors often use this highly visible public role to move up the career ladder. Therefore, prosecutorial election campaigns are often in the spotlight of public and media scrutiny. With this in mind, how might the need of prosecutors to be responsive to the voting public affect their decision-making, their priorities, and their goals? These questions are important to consider as we look at the prosecutor’s role in detail.

THE “MINISTER OF JUSTICE”

A prosecuting attorney represents society, rather than individual victims, and in that capacity is responsible for preparing and presenting the state’s case against defendants in criminal and civil cases. Society is viewed as the injured party in prosecutions against those accused of crimes; a crime against one person is considered a crime against all. Because of this and the need for centralized power to
assess and prosecute cases, this function is vested in the state. In this sense, then, the prosecutor does not have a “client,” because he or she is representing the interests of all members of society.

Despite the popular perception of prosecutors as the agents of the state who present the government’s cases against the accused, few people realize that this is only a partial description of the prosecutor’s function. In fact, the prosecutor is also responsible for ensuring both that the guilty are prosecuted and that legal safeguards protect the innocent from unwarranted prosecution. “The basic role of the prosecutor is to seek justice and not convictions” (Gifis, 1984). Thus, the prosecutor’s role is that of a “minister of justice” (Flowers, 1996), a much broader function than the focus on prosecutions alone would suggest. Depending on the circumstances of a particular case, justice may be best served by pursuing a case against a

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BOX 5.1
Prosecutorial Politics

As you sort through the following scenario, consider which characteristics voters would want to see in a prosecutor. What is the role of ethics, personality, and other personal traits? What characteristics do you feel are most valuable in a prosecutor? What accusations would you be willing to “overlook” in this election?

Put yourself in the shoes of a San Francisco resident observing the following rough-and-tumble election fight between an incumbent district attorney and his challenger, an experienced assistant D.A. According to the local news and information from the candidates, their backers, and their opponents, there are many things for you to consider as you decide how to cast your vote. On one hand, the incumbent apparently has the lowest conviction rate of any chief prosecutor in California (comparing rates between counties). Critics question his commitment to prosecuting domestic violence cases, and many of your fellow residents are reportedly incensed when this candidate publicly suggests that a convicted rapist/murderer may be a victim of professional misconduct on the part of the person who prosecuted his case (who happens to be the incumbent’s challenger, of course). Furthermore, the incumbent has repeatedly been sanctioned by judges for courtroom outbursts, has been sued for sexual harassment, and has been accused of giving preferential treatment toward a murder defendant (Howe et al., 1999).

But what about the challenger in this election? He has twice been cited for prosecutorial misconduct, several of the murder convictions he obtained have been reversed on appeal, and critics question his possible involvement with a woman who is a convicted drug dealer. While you are digesting all this information, a vice squad raid on a massage parlor in the seedy part of the city turns up the challenger. When asked what he was doing in a tenderloin massage parlor at 11 P.M. on a Saturday night, the challenger explains that he was interviewing a nervous witness for a major upcoming murder trial, and that the witness picked the place and time (Matier and Ross, 1999).

Trying to decide on your vote, you have plenty of information to sort through, but which of it should you believe? Which of it is relevant to the question of which candidate would make a better prosecutor? You’ve got your work cut out for you.
suspect, or alternatively, by declining to prosecute a suspect even when there is sufficient evidence to support the charge that the suspect is guilty.

Although some might argue that the multiple functions of the prosecutor’s role are conflicting, that need not be the case. If you think of the prosecutor’s primary function as acting in the interests of justice, then you can see how declining to prosecute in certain cases is both compatible with, and integral to, the prosecutorial role. Not only does justice require the prosecutor to “weed out” cases where evidence is weak, but the practical need to conserve scarce legal resources for only the most serious cases demands this. Indeed, the legal system loses credibility when defendants are convicted and then later found innocent. These are some of the main reasons why we must avoid thinking of prosecutors only in terms of their ability to win convictions (see Table 5.1).

Given that the role of the prosecutor can be conceptualized in terms of justice-seeking, how does this translate into everyday activities performed by prosecutors? The tasks that prosecutors perform fall into three broad categories: planning and supervising the investigation phase of criminal and civil cases, case preparations, and responding to the issues related to appeals.

### Table 5.1 Criminal Cases Closed and Convictions by Prosecutors’ Offices, 1996

<table>
<thead>
<tr>
<th>Criminal cases closed</th>
<th>All offices</th>
<th>1,000,000 or more</th>
<th>250,000 to 999,999</th>
<th>Under 250,000</th>
<th>Part-time offices</th>
</tr>
</thead>
<tbody>
<tr>
<td>Allab</td>
<td>900</td>
<td>39,445</td>
<td>13,334</td>
<td>900</td>
<td>221</td>
</tr>
<tr>
<td>Percent convicted</td>
<td>88%</td>
<td>76%</td>
<td>81%</td>
<td>87%</td>
<td>96%</td>
</tr>
<tr>
<td>Felonyc</td>
<td>250</td>
<td>11,197</td>
<td>2,928</td>
<td>260</td>
<td>57</td>
</tr>
<tr>
<td>Percent convicted</td>
<td>89%</td>
<td>90%</td>
<td>87%</td>
<td>89%</td>
<td>93%</td>
</tr>
<tr>
<td>Misdemeanord</td>
<td>825</td>
<td>30,167</td>
<td>11,435</td>
<td>825</td>
<td>200</td>
</tr>
<tr>
<td>Percent convicted</td>
<td>91%</td>
<td>77%</td>
<td>76%</td>
<td>90%</td>
<td>98%</td>
</tr>
<tr>
<td>Felony jury trial verdicts</td>
<td>8</td>
<td>491</td>
<td>126</td>
<td>9</td>
<td>2</td>
</tr>
</tbody>
</table>

Note: Data on the total number of criminal cases closed were available for 991 offices; on felony cases closed, for 1,212 offices; and on misdemeanor cases closed, for 992. Conviction percentages for total criminal cases closed were available for 805 offices; for felony cases closed, 1,068 offices; and for misdemeanor cases closed, 830 offices. Data on felony trial verdicts were available for 1,345 offices.

Cases refers to a defendant. A defendant with multiple charges was counted as one case.

Closed case means any case with a judgment of conviction, acquittal, or dismissal with or without prejudice entered by the court.

Each respondent categorized cases as felonies according to the State statute.

Misdemeanor cases refer to cases in which criminal defendants had no felony charges against them.

There is great variety in the daily responsibilities of prosecutors, depending on the jurisdiction, the type of prosecutor (federal, state, or county), and the particular job description of the individual. For example, in some jurisdictions, assistant D.A.’s are initially assigned to work exclusively on certain phases of case processing, such as pre-trial motions. Thus, as a case is processed through the court, different prosecutors work on the case as it proceeds through each legal stage. This is termed “horizontal prosecution.” In contrast, other jurisdictions have a work style often called “vertical prosecution,” where each case is followed through all stages by the same prosecutor(s). In some locales, particularly large urban areas, prosecutors may specialize in certain types of cases, such as domestic violence, or those involving abuse of the elderly, or cases involving juvenile defendants (or juvenile victims).

PROSECUTORIAL DISCRETION

The prosecutor has a great deal of discretion—that is, the flexibility to choose among possible courses of action—when deciding what to do in a particular case. On the basis of an assessment of the evidence and other legal factors, the prosecutor can decide whether to file charges, and if so, what specific charges and how many counts (the number of charges). The prosecutor decides what offer to make to the defense as part of a possible plea bargain. The prosecutor can also ask the court to dismiss charges; conversely, the prosecutor has the discretion to refile charges against a defendant in certain circumstances, such as when a case ends in a mistrial.
Prosecutorial discretion is necessary to tailor the legal response to the circumstances of the case at hand. This reflects the fact that legal statutes, no matter how carefully crafted, cannot anticipate every conceivable set of circumstances. Thus, prosecutors must determine which statutes are applicable to the facts of a particular case, and consider whether prosecution is merited in light of that jurisdiction’s legal and social norms. Indeed, part and parcel of the prosecutor’s function is the exercise of good judgment as part of her or his discretion. “In addition, it is entirely proper—indeed, it is inevitable—that a significant factor in every prosecutor’s discretion should be the prosecutor’s own sense of morality” (Freedman, 1995, p. 24).

Prosecutors therefore have arguably more discretion than any other legal actor, including judges. How can this be? Although prosecutors certainly do not have unlimited discretion, in practice they operate with comparatively few legal constraints on their decision-making. For example, whereas judges’ decisions are routinely reviewed by a higher court as part of the appellate process, prosecutors’ decisions are rarely reviewed.

There is much evidence that prosecutors have even greater discretion today than before, as a result of changes in sentencing policy. Many legal observers believe that sentencing reforms designed to reduce judicial discretion and standardize sentencing have had the unintended consequence of simply shifting discretion away from judges and toward prosecutors. For example, in many states “Three Strikes” laws were passed with the goal of ensuring that a defendant who has two prior “serious” felony convictions would receive a mandatory prison sentence of a specified number of years (of course, the question of whether “Three Strikes” laws have achieved this is hotly debated).

Prior to mandatory sentencing policies, prosecutors negotiating a plea bargain with the defendant could offer to recommend that the judge impose a lesser sentence in exchange for the defendant’s guilty plea. The understanding was that the judge would take the prosecutor’s recommendation into consideration when sentencing. But with the advent of mandatory sentencing rules, judges’ discretion in sentencing was sharply reduced; the judge was simply required to apply the specified sentence with little or no opportunity to tailor the sentence to reflect the circumstances of the case, including the prosecutor’s sentencing suggestion.

Thus, prosecutors had to find new “carrots” to use as leverage for plea bargaining, such as agreeing to charge the defendant with a lesser charge, fewer charges, or fewer counts of a crime. The fact that the defendant accused of a crime carrying a mandatory sentence or sentence enhancement (e.g., for using a gun or committing a hate crime) faces a nonnegotiable sentence sometimes gives the prosecutor greater leverage during plea bargaining, because the prosecutor has discretion to decide the type and number of charges to file or drop. This illustrates how reducing judicial discretion has expanded the discretion already possessed by prosecutors during plea bargaining, because they are the only source of potential sentence reduction. In essence, negotiating charges is the “only game in town” for the accused person during plea bargaining.
The office of the prosecutor is often heavily scrutinized by the media, but the exercise of discretion is subject to few legal constraints and is largely unreviewed. Sanctions of prosecutors for their use or misuse of discretion are quite rare; in practice, this means that prosecutorial discretion is essentially unfettered (Pollock, 1998).

PROSECUTORIAL CHARGING DECISIONS:
LEGAL AND EXTRA-LEGAL FACTORS

If you were a prosecutor, how would you decide whether to file charges against a suspect? “That’s not hard,” you might say; “I’d just see whether the evidence supported the accusations against the suspect.” Many prosecutors might wish that their decisions were so straightforward; not surprisingly, the reality is much more complex. Just as police cannot investigate all crime reports and the U.S. Supreme Court could not possibly hear every case submitted for review, prosecutors must be selective about which cases they pursue. This is true not only because limited prosecutorial and court resources require prioritizing, but because justice is sometimes better served by declining to prosecute.

What influences a prosecutor’s decision to pursue a case? Research shows that a wide variety of factors influence this decision, including the quality of the evidence, merits of the case such as “winnability” and considerations of justice, the policies of the prosecutor’s office, the availability of court resources, and public opinion. One chief prosecutor illustrated this when he discussed his office’s policy on prosecuting prostitution cases:

Prostitution itself is really a nuisance. Our office does not make it any kind of priority issue; the judges to be honest don’t want those kinds of cases in their courts, they don’t regard them as serious, and if we go to trial the juries very often refuse to convict. (Hallinan, 1999)

Before a prosecutor can charge a suspect, evidence must indicate that there is at least probable cause to believe that a crime has occurred and that the suspect is the perpetrator. In fact, some argue that prosecutors must believe that the evidence gives them more than probable cause: the National Association of District Attorneys asserts that a prosecutor “should file only those charges which he reasonably believes can be substantiated by admissible evidence at trial” (National District Attorneys Association, 1991).

Prosecutors may initiate charges against an individual by means of filing an information, a document which formally lists the charges against the defendant, or by presenting the evidence to a grand jury and seeking an indictment. An indictment is defined as “the formal charge issued by a grand jury stating that there is enough evidence that the defendant committed the crime to justify having a trial” (American Bar Association, 2001).

Depending on whether the matter is subject to federal or state prosecution, and the type of case and local jurisdictional practices, the prosecutor may present
the evidence to a grand jury. Federal prosecutors, for example, present the state’s evidence to the grand jury so that it can determine whether the evidence is sufficient to indict a suspect. State prosecutors may file charges via either method, depending upon whether their state customarily employs grand juries, or does not (many states do not). Given their importance, let’s learn a little more about the role of grand juries and how they intersect with prosecutorial duties.

THE GRAND JURY

There are two types of juries in the American legal system. The first type is the petit jury, which is what people typically think of when they hear the word “jury.” In court cases that go to trial, whether criminal or civil, the defense and prosecution may select a group of people (traditionally twelve, but sometimes fewer) to hear the issues in that particular case.

In contrast, the second type of jury, called the grand jury, performs a quite distinct function in the legal system. Grand and petit jurors are selected from the same pool of jury-eligible citizens, but the grand jury is composed of twelve to twenty-three citizens who are impaneled to serve a specified term of service, ranging from less than one month to two years, depending on the state, but typically around one year (jurisdictions vary in the number of grand jurors and the term of service). During that time, grand jury members can consider several different legal matters arising in their geographic jurisdiction. What is the purpose of the grand jury? The Fifth Amendment to the Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . .

The Fifth Amendment’s provision for indictments illustrates one of the major purposes grand juries were intended to serve: to help prevent unjust prosecutions, such as those motivated by political or personal grievances (Hale v. Henkel, 1906).

The grand jury is an inquisitorial body, meaning that it has broad legal power to investigate the matters before it: “The purpose of the body is to investigate and inform on crimes committed within its jurisdiction and to [indict persons for] crimes when it has discovered sufficient evidence to warrant holding a person for a trial” (Gifis, 1984, p. 205). Grand juries have considerable legal power and are characterized by a number of features that enhance their ability to investigate accusations. For example, grand jury hearings are held in secret, and members can consider types of evidence not usually admissible in court, such as hearsay testimony.

Despite the key role the Fifth Amendment outlines for grand juries in criminal prosecutions, in practice today grand juries are used only in certain types of cases and while federal crimes are prosecuted through means of a grand jury
indictment, states are not required to use this mechanism for prosecuting state crimes; indeed, few do. Instead, grand juries are employed where they can be most useful, such as when a series of crimes may have been committed over the course of a long period of time (or in several different jurisdictions), or in cases involving alleged corruption of public officials. In the latter situation, the secrecy of grand jury hearings serves to protect both the reputation of the accused and the integrity of the state’s case. If the grand jury decides that the prosecutor has not presented enough evidence to support the accusation, then the grand jury will not return an indictment, and the secrecy surrounding the proceedings will protect the accused official. On the other hand, secrecy also allows the prosecutor and the grand jury to conduct investigations with less likelihood of alerting potentially guilty parties who might try to hide or dispose of evidence or witnesses, or witnesses who might wish to flee to avoid testifying.

The role of the grand jury is controversial because of disagreement about the nature and scope of its powers. In theory, the prosecution presents the state’s evidence to members of the grand jury so they can determine whether the evidence is sufficient to proceed with an indictment. Part of the controversy centers on the question of whether the grand jury is a legally autonomous body reviewing the evidence or is merely a “rubber stamp” for prosecutors. Skeptics of grand jury autonomy argue that grand jurors are likely to be unduly impressed by the arguments and evidence presented by the prosecutor.

THE GOVERNMENT’S BURDEN OF PROOF

Central to the prosecutor’s assessment of evidence when deciding whether to file charges is the fact that the prosecution bears the burden of proof: that is, they must convince a jury (or a judge in a bench trial) beyond a reasonable doubt that the accused is guilty (see Box 5.2). Although the vast majority of criminal cases are settled through plea bargaining rather than trial, the prosecutor’s charging decision must consider the possibility that the matter will go to trial.

But will the jury convict? This is a key influence on the prosecutor’s filing decision, but how does a prosecutor assess “case convictability”? Frohmann (1997) studied district attorneys in the sexual assault unit of a large urban area. She observed and interviewed these D.A.s as they evaluated potential cases and decided whether to accept them (by filing a case), reject them, or return them to police for further investigation. Frohmann documented the reasoning process used by D.A.s when they decided to reject cases where they felt the victim’s allegations had merit, but that the cases lacked “convictability.” For example, some D.A.s decided the circumstances surrounding the alleged assault would not persuade a jury to convict; their reasons included assumptions that the cultural expectations and understandings of the jurors would be so different from those of the victims and defendants that jurors would not be likely to convict. Frohmann interviewed an
assistant district attorney who discussed the legal and ethical complexities of case convictability:

What am I going to say? We are not going to file the case because we can’t get twelve people to convict, that’s our policy? Say we are down south, a white man rapes a black woman fifty years ago. There is strong evidence but we know twelve people aren’t going to convict him. Would it be ethical to play along with biases and prejudices of community? Can I say, Sorry Ms. Victim, I know you were raped, but I know the chances of winning are slim to none? That is like saying I am going to perpetuate the biases and never going to know change because I am never going to test them. There are no evidentiary problems in the case. Do we measure evidence against the ruler of convincing twelve people, but the jurors’ biases and prejudices are not on the ruler? The question is for the filing standard do you take these biases and prejudices into consideration during filing decisions . . . hopefully you don’t . . . (Frohmann, 1997, p. 536).

On the other hand, the prosecutor may decide that the evidence does not provide probable cause to indicate the suspect is guilty of the crime charged, or that even with probable cause, the quantity and quality of evidence is insufficient. The prosecutor may decline to initiate a case in order to conserve scarce resources that could be used to prosecute cases that are more likely to result in conviction. To some people, the idea of prioritizing cases and selectively using legal system resources is unsettling. Critics argue that this is “rationing justice,” which is neither fair nor just. But the reality is that it will always be necessary to allocate resources to the most deserving cases, because there could never be sufficient time, money, or personnel to pursue all cases.

In fact, this “cost-benefit” approach to prosecution characterizes decision-making throughout the justice system. Legal decision-makers must prioritize the demands on their resources and weigh the potential costs and benefits involved. For example, police departments and individual officers must determine which prob-
lems are most in need of their immediate attention; attorneys must decide which
cases to pursue; judges and others, including correctional officials, must determine
how to allocate scarce jail and prison slots when there are more inmates than space.

Selective application of legal system resources is essential to the goals of jus-
tice. All crimes for which a suspect could be prosecuted are not equally deserving
of such attention from an ethical or public safety view, and selective prosecution
distinguishes among cases in recognition of this. For example, the legal system
routinely targets cases where the risk to public safety is judged greatest, which
means other cases get less attention. As Pollock (1998, p. 237) notes, “The prose-
cutorial role is to seek justice, but justice doesn’t mean the same thing to everyone
and certainly does not mean prosecuting everyone to the fullest extent of the law.”
See Box 5.3 for two examples of cases illustrating prosecutorial dilemmas.

Prosecutors may also decline to file charges for a variety of other reasons.
One of the classic D.A. “tools” is the use of information from informants. For
example, prosecutors often plea bargain with a suspect who has valuable informa-
tion about other criminals or crimes. By offering the suspect the opportunity to
avoid being prosecuted or the chance to be prosecuted on lesser charges, the prose-
cutor is able to pursue “bigger fish.” This common practice can be especially useful
in the investigation and prosecution of criminal organizations or gangs, where
information about illegal activities would be very difficult to obtain without
“insider” information.

As one might imagine, the use of informants raises many thorny legal and
ethical questions. How reliable are informants, especially jailhouse informants? Is
it fair when suspects who are principals in a crime (and therefore have more infor-
mation to trade) are offered a better deal than suspects who were less involved (and
consequently have less information with which to bargain)? A nightmare scenario
can arise for the prosecutorial team when an informant whose testimony was an
important part of a successful prosecution is called into question.

A recent example illustrates this dilemma. Drug Enforcement Administration
(DEA) informant Andrew Chambers provided information for almost two decades
on a variety of cases across the country. Prosecutors nationwide pursued cases
against suspected drug dealers, and used Chambers as a witness, without being
aware that he had serious credibility (believability) problems. Among other things,
he apparently failed to pay income taxes and lied about the numerous times he had
been arrested. Although the DEA paid Chambers more than two million dollars in
rewards, expenses, and fees for his information, the DEA’s own internal investiga-
tion determined that Chambers’ lying began early in his association with the DEA.
To make matters worse, DEA agents were reputedly aware of the lies but did not
inform prosecutors or defense attorneys.

As Chambers’ checkered history came to light, defense attorneys across
the country began requesting retrials for clients whose convictions were supported
by information from Chambers. In addition, a number of prosecutors nationwide
The decision whether or not to initiate charges against a suspect often involves complex considerations of what would best serve the goals of justice and fairness. Here, the prosecutor’s power of discretion is fully apparent, as is the complexity of the charging decision. Consider what you would do if you were a prosecutor as you read about the following cases.

Case #1: A woman and her boyfriend go boating on the delta with her eight-year-old daughter and two other children. It’s a very hot day, and the children don’t want to wear life vests. The boat, which is towing Jet skis, is idling in the middle of the delta. The little girl is standing on the platform at the back of the boat, near the engine exhaust, when somehow she falls in the water and drowns. Her body is not recovered until the next day (Goodyear, 2000).

As a prosecutor, you must consider several issues. Why wasn’t the child wearing a life vest, as required by boating regulations? Why was she standing at the back of the boat, near the engine exhaust (with the possibility of being overcome by exhaust fumes)? Were the adults negligent in their care for the little girl? The craft was being operated at a legal, responsible speed, and no alcohol or drugs were involved. You could charge one or both adults, who are stunned at the little girl’s death, with child endangerment. Should you? Why or why not?

Case #2: On a country road one sunny afternoon, a car carrying four teenage girls is rear-ended at approximately 35 mph. The car’s gas tank bursts into flames and the girls burn to death. The driver of the car that rear-ended the victims bent down to retrieve a cigarette that he had dropped; he survived the crash unscathed. The intense explosion, damage, and burn deaths that occur in this collision seem unusual for what appears to be an all-too-common, relatively low-speed rear-end collision. In researching the circumstances of this crash, you learn that the victims’ car, a Ford Pinto, is unusually likely to suffer a ruptured fuel tank and explode when rear-ended, even at relatively slow speeds. In fact, the victims in this latest crash join dozens of others who were killed or severely disfigured after being burned in crashes involving Pintos.

Researching further, you learn that even before the Pinto was put on the market, Ford was aware of the problems with Pinto explosions. Ford’s own crash tests had revealed that the gas tank on Pintos was located too close to the rear bumper, increasing the likelihood of an explosion in the event of a rear impact. In fact, you learn that cost projections on one of Ford’s internal memos concluded that at $12.00 estimated cost per Pinto to retrofit the gas tanks and thus reduce the hazard, it would be more economical to set aside a lump sum for anticipated lawsuits by victims (Dowie, 1977).

As the prosecutor, what do you do with this information? Is this evidence of intentional wrongdoing on Ford’s part? A search through the law library tells you that no one has ever tried to prosecute a company on criminal charges of negligent homicide. But could you be the first prosecutor to do so?

Consider your reactions to the cases above. Considering one of the cases which interests you most, discuss this question: Would you make the same decision in your role as “prosecutor”? Why or why not? Do you think the prosecutor was too harsh or lenient? Too concerned about “winnability”?

If you were given the chance to retry any of these cases, which would you choose? As a prosecutor, what charges, if any would you pursue in the case? Why?
have made the decision to drop cases that relied on information from Chambers (Scott, 2000).

PURSUING A CASE: WHAT HAPPENS NEXT?

Once a district attorney has decided to file charges, there are several legal and ethical issues to consider. One of the first decisions to be made is what charges and how many counts of each charge are warranted by the case.

Charging the Defendant with . . . What?

As the chapter on plea bargaining will describe, prosecutors take into account many factors in deciding the nature and number of charges against the accused. Depending on the case, the prosecutor may consider some or all of the following in determining the charges:

- The quality and quantity of the evidence supporting potential charging options
- The impact of the charges on the defense response during plea bargaining negotiations
- The potential reaction of jurors should the case go to trial
- The victim’s wishes
- The defendant’s prior criminal history (or lack thereof)
- Public reaction to the charges
- The amount of resources required to pursue the case
- The minimum and maximum possible sentence
- The seriousness of the crime alleged
- The possible deterrent effect on other potential offenders
- The impact on other cases (for example, if multiple offenders are charged in connection with the same offense)
- Possible mitigating factors in favor of a lesser charge

THREE STRIKES CHARGING

A good example of how a wide variety of considerations can enter into the charging decision is provided by “three strikes” cases. Recall the two cases under consideration by a group of prosecutors that you read about at the beginning of the chapter. What do you think happened? In the case of the cough syrup thief, prosecutors declined to treat the case as a three strikes matter, and the defendant received a seven-year prison sentence. In contrast, the ex-felon charged with possessing a
firearm was charged with a third strike, and the defendant opted to go to trial rather than plea bargain.

**THE PROSECUTOR AS PLEA-BARGAIN ENGINEER**

As Step 11 describes, the process of plea bargaining is a critical component of the legal process, and the government’s attorney is the central figure in this process. The prosecutor decides whether to offer a plea deal and determines its terms: Reduce the charges? Reduce the number of counts (of each charge) against the defendant? Drop some charges if the defendant will plead guilty to others? As the chapter on plea bargaining tells us, there are many factors influencing the plea-bargaining process and the prosecutor's decision-making with regard to it.

**DILEMMAS OF THE PROSECUTOR'S ROLE**

As you can see, the role of the prosecutor has grown in complexity as societal and technological changes have led to the need for prosecution of sophisticated offenses

This legal paperwork results from one murder case in Pennsylvania and all of it was drafted or reviewed by the prosecutor. During the investigation and trial phases, the prosecutor is responsible for reading and understanding police and forensic reports, in addition to other documents. After deciding to pursue charges against a defendant, the prosecutor is responsible for drafting many of the important documents in the case, including the charging papers, search warrants, briefs regarding pre-trial motions and reactions to the defense attorneys’ pre-trial motions, the paperwork necessary in preparation and during the trial, and briefs regarding post-trial motions for relief. **Source:** Courtesy of Jon’a Meyer.
such as computer crimes, corporate financial schemes, and organized crime. With this increasing complexity comes potential role conflicts and dilemmas, both large and small. This section discusses some of the issues that a district attorney must contend with.

A young assistant D.A. who was prosecuting his first domestic violence case encountered an all-too-common dilemma. On the day of the trial, the victim confronted him and accused him of pressuring her to lie about her injuries. Although the court established that this accusation had no basis in fact, the incident reflected the fact that victims are not always supportive of prosecutors, for many possible reasons (Garcia, personal communication, 1997).

A quite different dilemma helps illustrate the changing responsibilities of federal prosecutors. Increasingly, federal D.A.s are working on complex cases that require tracking the actions of many suspects over a long period of time. To pursue such cases, federal prosecutors must work closely with police investigators who are assembling evidence to ensure that all evidence-gathering techniques are legal; if they are not, evidence might be declared inadmissible. A classic example of this is the “sting” operation, where police set up an operation to catch suspects in the act; this can be seen when police officers go online and assume the identity of a minor to catch potential pedophiles in cyberspace.

Thus, prosecutors are increasingly involved in the construction of a potential case during the early stages of investigation, which leads us to the question of whether the prosecutor can effectively distinguish between the “fact-finding” role of a prosecutor during the investigative stages of a case and the “adversary” role he or she will take on if the assembled evidence develops into an indictable case. At the investigative stage, the prosecutor’s role is to work with law enforcement to ensure that all relevant facts are gathered, in order to determine whether there is sufficient evidence against a particular suspect or suspects to proceed with the case—or not. Therefore, the investigative stage must focus on gathering not only facts that would tend to support the state’s version of the case, but also those that would favor the defense in the event charges are filed. The prosecutor should function in a neutral, rather than adversarial, capacity during the investigative stage. In contrast, at the adversarial stage of the case, the prosecutor functions as an advocate of the state’s case. This contrast illustrates how there can be tension between different facets of the prosecutor’s role, especially for federal attorneys.

Another dilemma arises when prosecutors encounter situations where victims want charges dropped. This occurs frequently in domestic violence cases where the offender and victim know each other (Cardarelli, 1997). However, there are many other types of cases, such as when victims of robbery or assault by gang members fear retaliation by their attackers.

What should a prosecutor do when a victim wishes to drop charges? Although the victim’s wishes are an important consideration, this fact alone is not sufficient to support a prosecutorial decision to drop charges. Because the prosecutor represents
society as a whole, rather than simply the victim, prosecutors must consider whether their duties require them to protect the victim (and future potential victims) from harm by proceeding with the case despite the victim’s wishes. Thus, many jurisdictions have “no drop” policies, whereby prosecutors can pursue cases against suspected perpetrators even where a victim refuses to file or maintain a complaint (see Box 5.4).

Prosecutors may be called upon to explain unpopular decisions to the public, whether this involves pursuing a case against a defendant who finds public sympathy or explaining the decision not to prosecute an unpopular suspect. In the latter situation, the district attorney can serve an important educational purpose in the process of explaining the legal reasons behind the decision not to prosecute. For example, in the case of Sherrice Iverson, a little girl who was sexually assaulted and killed in a Nevada casino, public outrage at the behavior of David Cash (a friend of the attacker, who witnessed part of the crime but did not intervene to stop the assault) led to repeated calls for his prosecution. However, there was no legal basis for prosecuting Cash; his failure to act was not an offense under the law at the time. Subsequently, a number of states have passed “Good Samaritan” laws providing criminal penalties for failure to report a crime. The laws’ specific provisions, exceptions, and penalties vary from state to state.

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**BOX 5.4**

**Charging Decisions:**

**How Much Should the Wishes of Victims Count?**

In the noisy and often anguished public debate about capital punishment, much is said about the wishes of victims’ families. A common question that appears in the debate is, “Should the wishes of the victims influence the prosecutor’s decision to ask—or not to ask—for the death penalty in a capital case?” What do you think?

Would you want the prosecutor (and the jurors deciding whether to sentence the defendant to life or death) to take victims’ wishes into account? Under what circumstances? Can you think of reasons why such wishes should not be formally considered by the prosecutor and/or the triers of fact (i.e., the jury or the judge)? Think about your answers to these questions.

Now consider: What if the situation were not at all what you might have imagined. What if, in fact, the families of the victim asked the prosecutor not to request the death sentence in a capital case? What if the victim himself or herself left written instructions for what to do if he or she became a murder victim—a “Declaration of Life” requesting that the killer not be given the death penalty? Would your position on how to weigh victims’ wishes change?
THE PROSECUTOR AND THE COURTROOM WORK GROUP

Although the D.A.’s decision-making processes are highly discretionary, prosecutors certainly do not act in isolation from other parts of the court system. In fact, the prosecutor’s office works closely with people representing all aspects of the legal system. It is critical for the prosecutor’s office to have a good working relationship not only with other members of the courtroom work group, such as defense counsel, judges, and court staff, but also with local law enforcement agencies, including probation and parole units. At the federal level, the prosecutor’s office must also be able to work effectively with federal agencies, such as the Federal Bureau of Investigation (FBI) and the U.S. Marshals. The relationships between prosecutors and other members of the legal system is an example of an “exchange system” because their decisions and actions are highly interdependent. For example, prosecutorial charging decisions influence police decisions on which crimes to prioritize; probation officers’ pre-sentencing reports influence plea bargaining and sentencing decisions; judges’ decisions reflect workload demands on attorneys (for example, granting or failing to grant continuances); and prison and jail overcrowding influences judges’ sentencing decisions.

Let’s look at the relationship between the prosecuting attorney and police as an example of the importance of prosecutorial relationships with other justice system actors. Good teamwork and communication between the D.A. and the police is essential for effective prosecution because the prosecutor must be able to rely on police for legally gathered and preserved evidence. The infamous O.J. Simpson case demonstrated the difficulties the prosecution can encounter when there are questions about the “chain of evidence”; specifically, how evidence was collected and preserved by police.

Conversely, the policies of the prosecutor’s office influence how police prioritize which laws they should focus on enforcing. If police do not believe that a particular type of offense will be prosecuted, then they will be inclined to focus on other crimes they know are more likely to have the attention of prosecutors (Langworthy and Travis, 1994, p. 17).

For example, until recently in California, violations of the law against statutory rape (consensual sexual relations between a minor and an adult) were rarely pursued by police, and usually only in response to a specific complaint from the minor’s parent. However, in response to new government attention to this crime and the resulting problem of teenage pregnancies, police are more likely to find that arresting a suspect for statutory rape will result in prosecution.

The need for cooperation between the prosecutor and the defense attorney is especially critical because of the due process rights of the defendant. This is quite evident when you consider the legal process called “discovery” (see Box 5.5 for more information on discovery).
The end of the trial phase of a case does not mean the end of the prosecutor’s involvement. In a criminal case, a conviction often (in death penalty cases, automatically) results in an appeal to a higher court, and a prosecutor must defend the state’s case in appellate court. Even when the defendant is acquitted, prosecutors often try to find reasons why they were unable to convince the jurors (or the judge, if it’s a bench trial) of the defendant’s guilt beyond a reasonable doubt. An acquittal does not mean the defendant has been proven innocent; it means that the prosecution failed to prove its case beyond a reasonable doubt. Thus, after an acquittal, prosecutors may ask departing jurors why the verdict turned out as it did. Sometimes jurors will respond and sometimes they will not. Prosecutors and defense attorneys are especially interested in talking to jurors when a case ends in a mistrial because the jury cannot reach consensus—known as a hung jury. In this instance,
information about how jurors viewed the case can be very useful to both sides if the prosecutor decides to re-try the case.

POST-TRIAL EVIDENCE

What happens when undeniable evidence of a defendant’s culpability turns up after he or she has been acquitted of the crime? On rare occasions, this happens. See what you think about the prosecution team’s attempts to deal with such a situation in the following case:

In 1991, Mel Ignatow stood trial on charges that he murdered his fiancée, Brenda Schaefer. At his trial, Ignatow’s former girlfriend, Mary Ann Shore-Inlow, testified that she had watched while Ignatow tied his fiancée to a coffee table, sexually tortured her, and then killed her. Shore-Inlow testified that she had taken photographs of the crime in progress, but the pictures were nowhere to be found, and the jurors apparently did not find her credible. In the absence of physical evidence linking Ignatow to the death of Schaefer, the jury acquitted Ignatow (Wessel, 1999).

Ten months later, the new tenants in Ignatow’s former residence found a roll of film in an air-conditioning duct. The developed pictures graphically documented what Ms. Shore-Inlow had described. Ignatow then admitted to his crimes against Schaefer, stating, “I did physically and sexually abuse her, and I did murder her.”

Nonetheless, because of the “double jeopardy” provision of the Fifth Amendment, Ignatow could not be retried for the murder: once acquitted, always acquitted. However, prosecutors could take some comfort from the fact that Ignatow was already in prison serving a sentence of five years for committing perjury in an unrelated legal matter (Wessel, 1999).

Looking at the aftermath of cases also illustrates the very personal consequences that the work can have on prosecutors, from the ultimate nightmare of a defendant seeking revenge to the personal satisfaction of knowing one’s work makes a meaningful difference to some people. See Box 5.6 on the hazards of a prosecutorial career, and Box 5.8 on prosecutors Buel and Darden.

COMPARING DIFFERENT TYPES OF PROSECUTORS

The term “prosecutor” is used to refer to an attorney employed by the government who has prosecutorial responsibilities. The full name for such an attorney is a “public prosecutor.” But unbeknownst to most, many jurisdictions allow a private person to function as a prosecutor to bring charges in a particular case. In theory, the private prosecutor acts under the supervision of the public prosecutor. However, whereas legally there is such a thing as a “private prosecution,” in practice this is quite rare. See Box 5.7 for another type of prosecutor.
COMPARING FEDERAL AND STATE PROSECUTORS

There are interesting distinctions between prosecutors at the federal and state level, reflecting the different types of cases each handles. The bulk of routine criminal cases are prosecuted at the state level, but in recent years an increasing number of crimes have been designated as violations of federal law. Alternatively, in some cases existing federal statutes have been applied in new ways. Federal prosecutors

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BOX 5.6
An Uncommon Occupational Hazard

The nature of the prosecuting attorney’s work almost inevitably guarantees that prosecutors will encounter some people who are very unhappy with them. In addition to the obvious potential for defendants to feel animosity toward the prosecutor, a variety of other people with a stake in the outcome of a case may be dissatisfied with the prosecutor’s decisions or trial strategies, or with the case outcome. Victims or their families may want the prosecutor to pursue a case more vigorously or to drop charges. Witnesses may resent the prosecutor’s attempt to get them to testify, and even jurors may disagree with the prosecutor’s presentation during trial. Such animosities rarely translate into violence against prosecuting attorneys in the United States, in contrast to the experiences of their counterparts in some countries. Nonetheless, work-related violence does sometimes strike prosecutors, as Joseph Warton (1995) describes:

- Malcolm Schlette waited more than thirty years to get his revenge against a prosecutor who had sent him to prison for twenty years on arson charges in 1955. Schelle, seventy-two, shot and killed former Marin County district attorney William Weissich in November 1986 and later turned the gun on himself.
- Florida assistant state’s attorney Eugene Berry was gunned down in the doorway of his Fort Myers home in January, 1982. The wife of a drug defendant he helped convict was found guilty of his murder.

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BOX 5.7
Special Prosecutors

Ken Starr is the best-known example of a special prosecutor, yet most people remain unaware of what a special prosecutor’s function is supposed to be; what’s “special” about this type of prosecutor? How does this differ from ordinary public prosecutors? The short answer is that a special prosecutor is an attorney appointed to independently investigate a specific case and determine whether charges should be pursued. The role of the special prosecutor took on special significance during the Watergate scandal, and most recently during the Clinton presidency.

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COMPARING FEDERAL AND STATE PROSECUTORS

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Comparing Federal and State Prosecutors

(also called U.S. attorneys) now deal with an increasing range of offenses, including complex offenses, such as those identified during police and FBI “sting” operations, corruption cases involving public officials, “white collar” offenses, such as product liability issues, worker safety cases, organized crime rings, and cases involving the application of federal statutes, such as RICO (Racketeer Influenced and Corrupt Organizations Act) in drug cases.

Federal prosecutors are uniquely well-positioned to develop a “new strategic role” in long-range, broad-based crime prevention efforts. Because they have information from a variety of federal, state, and local agencies concerned with crime and social problems (e.g., social work agencies), U.S. attorneys can initiate efforts to consolidate and cross-reference information and help people from different agencies connect with each other. Exchanging information about suspects and offenses—for example, “mapping” the locations, times, and participants associated with violent offenses in a particular city—can serve as the foundation for a coordinated crime-prevention strategy carried out by all participants (Glazer, 1999).

**BOX 5.8**

**The Personal Dimension of Prosecution Work**

The “working personality” of prosecutors is as varied as that of people in any other occupation, but for some prosecutors the issues they encounter become inextricably intertwined with their personal identities and beliefs. In some instances this reflects the attorney’s conscious decision to meld the personal and the professional in their work as prosecutors; in other situations, prosecutors may find that their work has significant effects on their personal lives. The following excerpts, describing the lives of two prosecuting attorneys, illustrate this.

**Excerpts from Why They Stay: A Saga of Spouse Abuse**

by Hara Estroff Marano (1996):

Whatever else American culture envisions of petite blondes, it doesn’t expect them to end up as social revolutionaries. But just that turn of fate has brought Sarah Buel to Williamsburg, Virginia, from suburban Boston, where she is assistant district attorney of Norfolk County. To a gathering of judges, lawyers, probation and police officers, victim advocates, and others, she has come to explain why and, perhaps more importantly, precisely how domestic violence should be handled, namely as the serious crime that it is: an assault with devastating effects against individuals, families, and communities, now and for generations to come.

The judges and cops and court officers pay attention to Buel because domestic violence is a daily hassle that takes a lot out of them. And if there’s one thing Buel knows, its how batterers manipulate the law enforcement system. They listen because Buel has that most unassailable credential, an honors degree from Harvard Law School. But mostly they listen because Buel has been on the receiving end of a fist. “Sometimes I hate talking about it,” she confides. “I just want people to see me as the best trial lawyer.”
Certainly Buel never had any intention of speaking publicly about her own abuse. It started accidentally when she was in a court hallway with some police officers on a domestic violence case. “See, a smart woman like you would never let this happen,” the chief said, gesturing her way. And in an instant Buel made a decision that changed her life irrevocably, and the lives of many others. “Well, it did happen,” she told him, challenging his blame-the-victim tone. He invited her to train his force on handling domestic violence. “It changed things completely. I decided I had an obligation to speak up. It’s a powerful tool.”

By speaking from her own experience, Buel reminds people that law can be a synonym for justice. In conferences and in courts, she has gotten even the most cynical judges to listen to battered women—instead of blaming them. “I am amazed at how often people are sympathetic as long as the victim closely resembles Betty Crocker. I worry about the woman who comes into court who doesn’t look so pretty. Maybe she has a tattoo or dreadlocks. I want judges to stop wondering, ‘What did she do to provoke him?’”

It’s possible, she feels, to end domestic violence, although not by prosecution alone. Buel does not dwell on herself as victim but transmutes her own experience into an example for change, “so that any woman living in despair knows there’s help.” Not like she knew. She herself was clueless. By the time she was twenty-two, Buel was an abused woman. The verbal and psychological abuse proved more damaging than the physical abuse.

But no matter who she talks to or what she says about domestic violence, “it always comes down to one thing,” says Buel. “They all ask the same question: Why do they [the women] stay.” One of the biggest reasons women stay, says Buel, is that they are most vulnerable when they leave. That’s when abusers desperately escalate tactics of control. More domestic abuse victims are killed when fleeing than at any other time.

Buel has a crystal-clear memory of a Saturday morning at the laundromat with her young son, in the small New Hampshire town where she had fled, safely, she thought, far from her abuser. “I saw my ex-partner, coming in the door. There were people over by the counter and I yelled to them to call the police, but my ex-partner said. ‘No, this is my woman. We’ve just had a little fight and I’ve come to pick her up. Nobody needs to get involved.’ I still had bruises on the side of my face, and I said, ‘No, this is the person who did this to me, you need to call the police.’ But he said. ‘No, this is my woman. Nobody needs to get involved.’ Nobody moved. And I thought, as long as I live I want to remember what it feels like to be terrified for my life while nobody even bothers to pick up the phone.”

Toward the end of her undergraduate studies, her bosses asked her where she wanted to go to law school. “Harvard,” she replied, “because they’re rich and they’ll give me money.” The lawyers laughed and told her that wasn’t how it worked: “They do the choosing, not you.” They took pains to point out she just wasn’t Harvard material. “You’re a single mother. You’ve been on welfare. You’re too old.”

Angry and humiliated, Buel began a private campaign that typifies her fierce determination. In the dark after classes, she drove around the law school, shouting at it: “You’re going to let me in.” Soon she got braver and stopped the car to go inside and look around. Then she had to see what it was like to sit in a classroom. Harvard Law not only accepted Buel but gave her a full scholarship. Once there, she was surprised there was nothing in the criminal-law syllabus about family violence despite the fact that women are more likely to be the victim of a crime in their own home, at the hands of someone they know, than on the streets.
When Boston-area colleagues requested help on an advocacy program for battered women and she couldn’t do it alone, Buel put an ad in the student newspaper; seventy-eight volunteers showed up for the first meeting. By year’s end there were 215. The Battered Women’s Advocacy Project is now the largest student program at Harvard Law; a quarter of the participants are men.

At first Buel thought it would be enough to become a prosecutor and make sure that batterers are held accountable for assaulting others. But she has come to see it differently. “That’s not enough. My role is not just to make women safe but to see that they are financially empowered and that they have a life plan.” So every morning, from 8:30 to 9:15, before court convenes, she sees that all women there on domestic issues are briefed, given a complete list of resources, training options, and more. “It’s all about options.”

What’s more, Buel now sees domestic violence as just one arc of a much bigger cycle, intimately connected to all violence, and that it takes a whole coordinated community effort to stop it, requiring the participation of much more than attorneys and judges.

For her unusually diversified approach to domestic violence, Buel gives full credit to William Delahunt, her boss, the district attorney—“He has allowed me to challenge the conventional notion of what our job is.”

There was the batterer who, despite divorce and remarriage, was thought to be the source of menacing gifts anonymously sent to his ex-wife—a gun box for Christmas, a bullet box for Valentine’s Day, followed by the deeds to burial plots for her and her new husband. The woman repeatedly hauled her ex into court for violating a restraining order; one lawyer after another got him off. “Finally I got him for harassing her in the parking garage where she was going to college; of course he denied it. The lawyer contended she was making up all the stories. But a detective found a videotape from the garage, which corroborated her charge. In the appeals court, his lawyer, a big guy, leaned into my face and hissed, ‘You may be a good little advocate for your cause, but you’re a terrible lawyer.’”

She won the appeal. (Marano, 1996)


Excerpts from The Trials of a Former Black Prosecutor by Christopher Darden and Diane Weathers (1997):

Just for a moment, put yourself in my shoes. You’re a prosecutor in the district attorney’s office, assigned to uphold the law in an unbiased manner. Then after fourteen years on the job, circumstances place you on what some people consider to be the wrong side of a very hot issue.

During the O.J. Simpson trial, I received a flood of faxes and mail attacking my role as prosecutor: “You’re incompetent.” “You’re an Uncle Tom.” “You’re only on this case because you’re Black.” “You’re ugly and have big lips.” There were even threats made on my life. The Black press joined the fray, describing me as “brooding, inarticulate, a man without a country.” One writer, in the pages of this magazine, likened me to Clarence Thomas. It was as if my efforts to search for truth in this case had made me an ultraconservative whose views on race were at odds with those of most of Black America.

One of the defense team’s tactics was to vilify me, and it worked. They turned a case, at the heart of which was the issue of domestic violence, into a case about race. Somehow O.J. Simpson became a Blacker Black man than I.
Before I was a prosecutor, I was a Black man. It was always difficult to sit there and watch, on a daily basis, Black and other minority defendants being sentenced time and time again to long prison sentences. It was stressful. It could break your spirit. I’ve also seen the bad cops. I’ve seen instances in which they lied, planted dope on a suspect, used excessive force, or sexually abused an inmate.

But I’ve also seen the victims—I mean the real victims. When I’ve sent Black people to prison, it has been for a good reason. In most cases, it’s because they have victimized another Black person. For years I have been on the board of a Los Angeles organization that counsels the survivors of people killed in violent crimes—such as the parents of a victim who suddenly find themselves raising their very young grandchildren. It is their plight that motivates me. How is it possible for us to celebrate the murderer over the murdered, the perpetrators of criminal acts over the people they have harmed? My most vocal critics complained that I was too sympathetic to the Goldmans and the Browns. But can you imagine the grief you would feel, losing your son or your daughter to such a violent act? Their tears were the same color as the tears I have seen so many times before in the eyes of Black survivors of violent crime. I cannot distinguish between the two.

Sometimes, in my darker moments, I would say to myself, ‘To hell with all the critics.’ A prosecutor’s job is to search for the truth in a criminal case, and if people don’t appreciate my efforts then let them go out and deal with the Crips and the Bloods and the crack dealing, raping, mugging, the child molestation, the drive-by shootings, the invasive home burglaries and the assorted crimes now plaguing our communities. Yes, I’m aware of the racism within the criminal-justice system. But I am also aware that in the neighborhood I grew up in, every other house has bars on the windows. On one hand, Black people are locking themselves in; on the other, they’re locking out those who are preying on them, and most often those predators are Black.

You can’t really right a wrong by sending somebody to prison. But you can help victims’ survivors achieve some sense of justice. The survivors of a violent crime deal with a great amount of anger every day. Living with anger can be destructive. It can consume you. I believe that people who have lost their parents, their children or their siblings have a right to closure. If it means incarcerating the man or woman who took their loved one away, then they should be incarcerated.

But for now I’ve left that world. I was listening to a sermon one day, and the preacher was talking about how life can be broken into seasons. Time had passed, a season had passed, my time as a prosecutor had passed. When I went back to the D.A.’s office a year later, I had to ask myself how I’d existed in that environment before. The epiphany for me was to realize the conditions under which I’d worked. And I knew that from that moment on, it was probably better to leave it alone—to risk failing, to risk succeeding—than to go back again. It’s in the past; it’s over.

My anger and frustration are fading at last. Today I do not dwell on feelings about either the verdict or the trial participants. I realize that what doesn’t kill us makes us stronger, and I’ve found an inner peace I could not have discovered but for the trials and challenges of these past three years. (Darden & Weathers, 1997)

Source: Reprinted with permission of Essence.
PROSECUTIONS GONE WRONG: PROSECUTORIAL MISTAKES AND MISCONDUCT

What happens when a prosecutor makes a mistake, especially when that mistake results in the erroneous conviction of an innocent person? Can the victims of such mistakes sue the prosecutor? The answer is usually no. Prosecutors and judges possess “absolute immunity” from lawsuits related to certain aspects of their work, and “partial immunity” with respect to other aspects (such as the investigative function). The logic behind this is to protect prosecutors (and judges, who are also protected from lawsuits related to their judgments) from the legal threat of liability so that they can do their work without fear of retribution. In theory, at least, prosecutorial (and judicial) mistakes are minimized through due process protections, such as the adversarial system and the processes of discovery and appeals.

Far more disturbing is the fact that prosecutorial misconduct and mistakes have occurred. Clarence Brandley, whose case was mentioned briefly in Step 3, was convicted and served ten years in prison, most of it on death row, for a rape-murder that he did not commit. Evidence later demonstrated that in an overzealous attempt to hurriedly find and convict a likely suspect, the local prosecutor guided and staged the case in secret meetings with the judge. Exculpatory evidence was not only overlooked but actively suppressed, critical case files mysteriously disappeared, witness testimony suddenly changed, and inconsistencies in the evidence that should have been interpreted in the defendant’s favor were conveniently ignored. It was only when a shocked court clerk told a defense attorney that something was amiss that the misconduct came to light.

In another series of cases, prosecutorial charging decisions played a crucial role in the mistaken convictions of innocent people. The article in Box 5.9 provides sobering reading.

WHAT CONSTITUTES PROSECUTORIAL MISCONDUCT?

Prosecutorial actions that can be misconduct, raising legal and ethical concerns, include but are not limited to the following (Pollock, 1998):

- Communications with the defendant outside the presence of the defense attorney
- Failure to disclose evidence to the defense as part of discovery
- Communications with the judge about a particular case outside the presence of the defense attorney
- Conflicts of interest (especially applicable to part-time prosecutors who may also have a private law practice)
- Failure to correct false witness testimony
A Prosecutor Considers the Charges

BOX 5.9

Excerpts from “Above the Law: When State Prosecutors Fail to Put Justice Before Winning, We All Lose,” by J. Keedle, 1998

This is a story of three men arrested and imprisoned for crimes they did not commit. Gilberto Rivera spent four months in jail after being wrongly charged with the murder of a gang member in Hartford’s Pope Park during a crowded festival. Despite early evidence that Hartford police botched their investigation, despite federal agents’ repeated claims that Rivera was the wrong guy and that they had the real killer in custody, the state’s attorney still signed the arrest warrant.

Ultimately, Rivera wasn’t prosecuted but he still lives in fear. To be charged is as good as a conviction on the street, and he’s always on the lookout in case someone tries to exact revenge in the name of the gang member who died.

Murray Colton spent the past decade living with the threat of prison. He was tried three times for the same crime and served a total of three years in prison. After ten years of uncertainty, he breathed a sigh of relief two months ago, when the case against him was finally dismissed. Even so, he still runs into people who, because police have no other suspects, remain convinced that he was New Haven’s notorious “dimes” murderer.

Larry Miller entered a Connecticut prison the father of two teenagers and came out a grandfather. He missed his son’s high school graduation, his daughter’s wedding, his twenty-fifth wedding anniversary, and countless birthdays and holidays. A former police officer and prison guard, he had no criminal record when he was arrested for the brutal beating and rape of two minors nearly the same age as his own children. At the age of fifty-one, he was released when the real rapist confessed—twelve years after Miller first went to prison.

At this point, there’s nothing anyone can say or do to compensate for those lost years. Miller and Rivera have wrongful arrest lawsuits pending against the Danbury and the Hartford police departments, respectively, but how do you put a price on freedom? Still, when innocent people are wrongly convicted, someone should be held responsible. The question is, who?

People often blame inadequate or incompetent defense attorneys. But in the court system, there is only one person whose job description explicitly charges him to bring out the truth and serve justice. That is the prosecutor, the state’s attorney who speaks for “the people” in the case against any defendant.

State’s attorneys alone decide who to prosecute and how vigorously they should pursue the case. They base their decisions on what they believe can be proven beyond a reasonable doubt. Unlike defense attorneys, whose sole responsibility is to their client, state’s attorneys represent us in that courtroom.

Referring to the 1992 Supreme Court case of State v. Hammond, former prosecutor and now state Supreme Court Chief Justice Robert Callahan described the job thus: “A state’s attorney has a duty, not solely to obtain convictions, but to ensure that all evidence tending to aid in the ascertaining of the truth be laid before the court, whether it be consistent with the contention of the prosecution that the accused is guilty.”

This is how the criminal justice system is supposed to work and most of the time, it does. “When I was a prosecutor in Hartford, every single day I would turn down warrants if I didn’t feel it was a case where we could go before a jury and the elements of a crime were not there,”
Other examples of prosecutorial misconduct include inappropriate attempts to prejudice the jury against the defendant, such as by deliberately dropping hints about inadmissible evidence in front of jurors during trial, and other verbal and psychological tactics of “legal warfare” in court (Gershman, 1992).

Why does prosecutorial misconduct occur? The reasons are complex, and vary from case to case. In some instances, a prosecutor’s individual bias plays a role. In many cases, however, misconduct probably reflects a combination of things, including structural features of the way the prosecutor’s role is organized. For example, there may be powerful political pressures and incentives that help lead prosecutors to overemphasize winning without giving sufficient attention to other prosecutorial functions. In this situation, a prosecutor may fail to acknowledge exculpatory evidence while giving too much weight to weak or inconclusive evidence against the accused. Although pressures on prosecutors should never be considered justification for intentional misconduct, it is critical to acknowledge the influence they may have on prosecutors to better understand their actions.

Because there is no system of formal, regular review of prosecutorial decisions by other legal actors, how do prosecutorial misconduct or mistakes come to
light? Only when a defense attorney requests a court review of the prosecutor’s actions in a case. In this situation, the court may review the prosecutor’s actions and determine that no misconduct occurred, that misconduct occurred but that it did not significantly influence the case’s outcome. In the last scenario, called “harmless error,” the court determines that the district attorney made a mistake, but finds it unlikely that the mistake would have made a material difference to the trial.

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**BOX 5.10**

**Pursuing the Guilty—At What Cost to the Innocent?**

What happens when a witness for the prosecution suffers retaliation because of his or her cooperation? Does the prosecutor bear any legal or ethical responsibility for this?

In one case, sixteen-year-old Moises Torrez witnessed a killing by a gang member he knew. Torrez was tracked down by detectives and persuaded to name the killer on condition that his own identity would not be disclosed in court. However, despite the fact that detectives had agreed to this condition, Deputy District Attorney Dennis Ferris tried to get Torrez to testify at trial. When Torrez refused, Ferris read his statement to the police in open court, and jurors subsequently found the defendant guilty. A few days later, Torrez died after being stabbed more than forty times by a street attacker.

Torrez’s family sued Ferris for wrongful death, alleging that his actions exposed Torrez to retaliation. Ruling on this case, the appellate court held that prosecutors have no legal duty to protect witnesses from possible retaliation, and thus cannot be held liable for actions taken in their official capacity as prosecutors.

One member of the appellate court, Judge Benjamin Aranda, supported the court’s reasoning on prosecutor liability but nonetheless quite clearly expressed his view of the prosecutor’s actions in a separate written opinion:

> In order to obtain a conviction, the life of a witness was deliberately put in jeopardy, if not outright sacrificed by the prosecution. (*Hernandez v. City of Pomona*, 1996).

Judge Aranda also noted that D.A. Ferris had previously been involved in a similar case, where a witness in a gang murder was killed right before trial.

Ferris defended his actions, stating that Torrez had refused an offer to be relocated, and questioning whether Torrez’s murder was an example of retaliation. Ferris noted that Torrez’s killer remained at large, leaving the motive for the killing unknown. While acknowledging that Torrez’s testimony was required for the conviction, Ferris also noted, “He probably would have been killed even if the defendant was acquitted. Once they have proof of an informer, they usually retaliate in some manner.”

Commenting on Judge Aranda, Ferris said: “I don’t think this judge knows very much about street gang prosecutions. Either we go after these gang criminals with everything we have, or we let them walk away from their crimes unpunished.” (Goldberg, 1996).
CONCLUSION

The role, responsibilities, and discretionary power of a prosecuting attorney makes him or her one of the central legal actors in the courtroom work group. Using discretion to “seek justice,” the prosecutor’s decisions are shaped by a wide array of legal, organizational, ethical, and political considerations. The American prosecuting attorney’s role is expanding as cases become more complex in legal and practical terms, requiring the prosecutor to participate in the investigatory stages to a greater degree, to work in cooperation with many different people and agencies in the legal system, and to coordinate the multiple “threads” of a potential case.

Now we turn to the next chapter to look at the prosecutor’s adversary in court: the defense attorney. What is the role of the defense attorney in the criminal justice system? Turn to Step 6 and we’ll take a look.

DISCUSSION QUESTIONS

1. What did you think of the discussions by prosecutors about the cases at the beginning of this chapter? Did it surprise you that these conversations appeared to rely so much on the prosecutors’ impressions of the defendant’s character?

2. Discuss what types of factors lead to prosecutorial misconduct. Is it simply a matter of poor ethical values on the part of individual prosecutors? Or is it also linked to the way the legal system is organized (for example, the focus on case winnability)? Given the complex situations surrounding misconduct, what can be done to prevent it?

3. How do Christopher Darden’s experiences as a prosecutor (see Box 5.8) illustrate the “double burden” that he carried as both a member of the legal establishment and a black person? Is it fair when members of minority communities are assumed to represent their communities?

4. What did you think of the Torrez case (see Box 5.10)? What are the potential consequences if we were to allow lawsuits against prosecutors for actions they took in their official capacity? How do you think this would influence prosecutors’ decisions regarding cases?

5. What are the pros and cons of having elected versus appointed prosecutors?

6. Do you think that there is any tension between the different components of the prosecutor’s role? If so, what sort of tensions exist, and why?

7. What are the pros and cons associated with increasing prosecutorial discretion at the cost of judicial discretion?

8. Compare prosecutorial discretion with that possessed by other members of the legal system. How does prosecutorial discretion compare with judicial discretion?

9. Given the circumstances in which plea bargaining occurs, should a defendant’s guilty plea be considered truly voluntary? Why or why not?

10. Is the “probable cause” standard of proof for filing charges the appropriate standard, or should a higher—or lower—standard be used? Support your answer with examples.

11. One of the most noticeable characteristics about the U.S. court system is the openness of most court proceedings. With some exceptions, such as juvenile court, courtroom proceedings are open to the public. What do you think about the secrecy of grand jury hearings?

12. Should prosecutors be allowed to use the testimony of so-called “jailhouse informers” in exchange for extending leniency to them with respect to the charges against them? Why or why not? If yes,
under what circumstances and with what limits to the rewards? For example, would you allow prosecutors to rely only on the testimony of informants whose information could be corroborated by another person?

13. Consider the issue of case convictability. Given that prosecutors must prioritize which cases to pursue, do you believe it’s always ethically acceptable for prosecutors to consider the “winnability” potential of a case? Or are there some circumstances under which prosecutors should pursue cases which they are unlikely to win? If you think there are, describe the circumstances and the reasons you think prosecutors should file charges in such cases.

14. Find a case in your local newspaper where the prosecutor’s office declined to file charges. Discuss reactions to the prosecutor’s decision: your reactions, the victim’s reactions, the reactions of members of the public. The Ignatow case is an example of a rare phenomenon; in contrast, cases of people who are convicted and later found innocent are more numerous. Do you agree that “tis better ten guilty men should go free, rather than one innocent man suffer unjust conviction”? Why or why not?

15. What is the purpose of the double jeopardy provision of the Fifth Amendment to the Constitution? Why do you think the framers of the Constitution were so concerned about protecting those accused of a crime from repeat prosecutions?

16. Consider the provisions of the Fifth Amendment’s double jeopardy protection. What are the possible benefits of this? What are the limits of the scope of double jeopardy—in other words, when is double jeopardy not applicable? Are there some situations, in your opinion, when double jeopardy should not be applicable?

17. In what ways is the courtroom work group an example of an “exchange system”? What are the implications for court functioning if there is tension or competition between different components of the system?

NOTES

1. This was the situation in San Francisco in 1999, when incumbent district attorney Terence Hallinan battled challenger Bill Fazio, an assistant D.A., for re-election. Hallinan won.

2. A “Declaration of Life” is a standardized form that a living person signs indicating that if he or she should be murdered, the victim’s wishes that the convicted killer not be given the death penalty should be respected. The document carries no legal weight, leaving the fascinating question of how much weight prosecutors should accord such wishes, if any, in a capital case. See the Logan article listed in the references section for further information.

REFERENCES


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