

ARBITRARY JUSTICE



ONE



Prosecutorial Discretion: Power and Privilege

Delma Banks was convicted of capital murder in Texas and sentenced to death. Just ten minutes before he was scheduled to die, the United States Supreme Court stopped his execution and a year later reversed his sentence. The Court found that the prosecutors in his case withheld crucial exculpatory evidence.

Dwayne Washington was charged with assault with intent to kill and armed burglary in the juvenile court of Washington, D.C. Two adults were arrested with Dwayne and prosecuted in adult court. The prosecutors in the adult cases threatened to charge Dwayne as an adult if he refused to testify against the adults. When Dwayne said he could not testify against them because he didn't know anything about the crime, the prosecutors charged him as an adult, and he faced charges that carried a maximum sentence of life in an adult prison.

Andrew Klepper lived in Montgomery County, a suburb of Washington, D.C. He was arrested for attacking a woman with a baseball bat, sodomizing her at knifepoint with the same bat, and stealing over \$2,000 from her. The prosecutors in his case agreed to a plea bargain in which Andrew would plead guilty to reduced charges. As part of the agreement, Andrew would be placed on probation and sent to an out-of-state facility for severely troubled youth, where he would be in a locked facility for six to eight weeks, followed by intensive group therapy in an outdoor setting. Andrew's parents—a lawyer and a school guidance counselor—agreed to foot the bill. Andrew's two

accomplices—whose involvement in the crime was much less serious than Andrew’s—each served time in jail.

All three of these cases illustrate the wide-ranging power and discretion of the American prosecutor. In each case, the prosecutor’s actions profoundly affected the lives of the accused. Mr. Banks was almost executed by the state of Texas before the Supreme Court reversed his conviction. When Dwayne Washington told prosecutors he couldn’t help them, they followed through on their threat to charge him as an adult and he faced charges that carried a life sentence in adult prison. The favorable treatment afforded Andrew Klepper allowed him to avoid prison after committing a violent sex offense—a rare occurrence in these types of cases.

The Supreme Court ultimately found that the prosecutors in Mr. Banks’s case engaged in misconduct by failing to turn over exculpatory evidence, but the prosecutors were neither punished nor reprimanded. A trial judge found the prosecutor’s behavior in Dwayne Washington’s case to be vindictive and dismissed the charges against him. The prosecutor’s decision in Andrew Klepper’s case was never challenged; in fact, there was no legal basis for doing so.

I was a public defender at the Public Defender Service for the District of Columbia (PDS) for twelve years.¹ It was then that I learned of the formidable power and vast discretion of prosecutors. During my years at PDS, I noticed that prosecutors held almost all of the cards, and that they seemed to deal them as they saw fit. Although some saw themselves as ministers of justice and measured their decisions carefully, very few were humbled by the power they held. Most wanted to win every case, and winning meant getting a conviction. In one of its more famous criminal cases,² the U.S. Supreme Court, quoting a former solicitor general, stated that “the Government wins its point when justice is done in its courts.”³ A paraphrased version of this quotation is inscribed on the walls of the U.S. Department of Justice: “The United States wins its point whenever justice is done its citizens in the courts.”⁴ Yet most prosecutors with whom I had experience seemed to focus almost exclusively on securing convictions, without consideration of whether a conviction would result in the fairest or most satisfactory result for the accused or even the victim.

During my years as a public defender, I saw disparities in the way prosecutors handled individual cases. Cases involving educated, well-

to-do victims were frequently prosecuted more vigorously than cases involving poor, uneducated victims. The very few white defendants represented by my office sometimes appeared to receive preferential treatment from prosecutors. Although I saw no evidence of intentional discrimination based on race or class, the consideration of class- and race-neutral factors in the prosecutorial process often produced disparate results along class and race lines.

Sometimes neither race nor class defined the disparate treatment. At times it simply appeared that two similarly situated people were treated differently. Why did the prosecutor choose to give a plea bargain to one defendant and not another charged with the same offense? If there were a difference in prior criminal history or some other relevant factor, the disparate treatment would be explainable. But without a difference in the legitimate factors that prosecutors are permitted to consider in making these decisions, the disparities seemed unfair. Yet I saw such disparities all the time.

Prosecutors are the most powerful officials in the criminal justice system.⁵ Their routine, everyday decisions control the direction and outcome of criminal cases and have greater impact and more serious consequences than those of any other criminal justice official. The most remarkable feature of these important, sometimes life-and-death decisions is that they are totally discretionary and virtually unreviewable. Prosecutors make the most important of these discretionary decisions behind closed doors and answer only to other prosecutors. Even elected prosecutors, who presumably answer to the electorate, escape accountability, in part because their most important responsibilities—particularly the charging and plea bargaining decisions—are shielded from public view.

When prosecutors engage in misconduct, as in the cases of Delma Banks and Dwayne Washington, they rarely face consequences for their actions. Delma Banks almost lost his life, and Dwayne Washington lost his liberty and suffered the many other damaging effects of criminal prosecution, but their prosecutors just moved on to the next case. As for Andrew Klepper, perhaps he should have been afforded the opportunity to receive treatment and rehabilitation, but fairness demands that other similarly situated youth receive the same or similar opportunities. Current laws and policies do not require equitable treatment.

DISCRETION—A NECESSARY EVIL

Prosecutors certainly are not the only criminal justice officials who make important, discretionary decisions. Discretion is a hallmark of the criminal justice system, and officials at almost every stage of the process exercise discretion in the performance of their duties and responsibilities. In fact, without such discretion, there would be many more unjust decisions at every stage of the criminal process. A system without discretion, in which police, judges, and prosecutors were not permitted to take into account the individual facts, circumstances, and characteristics of each case, would undoubtedly produce unjust results.

Police officers, for example, who are most often at the front line of the criminal process, routinely exercise discretion when making decisions about whether to stop, search, or arrest a suspect. Although they are permitted to arrest an individual upon a showing of probable cause to believe he or she has committed a crime, they are not required to do so, and frequently do not. A police officer may observe two individuals involved in a fistfight. Such an observation provides probable cause to arrest the individuals. Yet the officer has the discretion to break up the fight, resolve the conflict between the individuals, and send them on their way without making an arrest. Such an exercise of discretion may well be in the interest of justice for all involved and would save the valuable resources of the court system for other, more serious offenses.

Traffic stops are among the most common of discretionary police decisions. There are hundreds of potential traffic violations, and every motorist commits at least a few each time he or she drives. Failing to come to a complete stop at a stop sign, driving over the speed limit, and changing lanes without signaling are just a few of the most common traffic violations for which police officers may issue tickets. They also are permitted to arrest drivers for some traffic violations,⁶ but are rarely required to do so. Few people would support a law that required police officers to stop and issue a ticket to every person who committed a traffic violation or to arrest every person who committed an arrestable traffic violation. In addition to the unpopularity of such a law, most would agree that the limited resources of most criminal justice systems should be preserved for more serious offenses.

Although discretion in the exercise of the police function appears necessary and desirable, the discretionary nature of police stops and

arrests sometimes produces unjust, discriminatory results. When police officers exercise their discretion to stop or arrest blacks or Latinos but not whites who are engaging in the same behavior, they are engaging in racial profiling—a practice that has been widely criticized⁷ and even outlawed⁸ in some jurisdictions.⁹ Thus, the discretion granted to police officers to make reasonable decisions in individual cases also sometimes produces unfair disparities along racial lines. Although the laws and policies passed to eliminate racial profiling may not totally control police discretion, they demonstrate society's recognition that such discretion must be scrutinized to assure fairness in our criminal justice system.

Judges exercise discretion in the criminal justice system as well. It is the role of the judge to make decisions in individual cases about everything from whether a particular defendant should be detained before his trial to what sentence he should receive if he is convicted of a crime. Judges who preside over trials must make decisions throughout the trial about numerous issues, including whether particular pieces of evidence should be admitted and whether to sustain or overrule objections. Although there are laws and rules that govern many of these decisions, most of them involve the exercise of judicial discretion. In fact, the standard appellate courts often use when reviewing a decision of a trial judge is whether her decision was “an abuse of discretion.”¹⁰

Judges, however, like police officers, have been criticized widely for their discretionary decisions. If a judge releases a defendant pending his trial date and he is arrested for another crime, the judge is criticized for exercising discretion poorly.¹¹ Judges have received the most criticism for their sentencing decisions, primarily from individuals who have complained that a judge's sentence was not harsh enough in a particular case. In fact, widespread criticism of the exercise of judicial discretion resulted in the institution of mandatory minimum and sentencing guideline schemes in the federal government and many states. Like police officers, judges were accused of treating similarly situated defendants differently. Proponents of mandatory minimum sentencing laws and sentencing guidelines argued that all defendants who committed certain offenses should be sentenced to the same period of incarceration, regardless of other factors such as their socioeconomic background, education or lack thereof, or other factors that are unrelated to the offense. These laws severely curtailed, and in some instances, entirely eliminated, judicial discretion.¹²

Discretionary parole and pardon decisions also have been the object of harsh criticism. Highly publicized cases of individuals committing violent crimes after parole boards made discretionary release decisions¹³ were partially responsible for the elimination of parole in the federal system and in many states.¹⁴ Governors and the president may exercise their discretion to pardon individuals who have been convicted of crimes. However, several presidents in recent history were severely criticized for exercising this discretionary power.¹⁵

Just about every official who exercises power and discretion in the criminal justice system has been criticized, held accountable, and, in some instances, stripped of some of his or her power and discretion for making discretionary decisions that produce disparate or unfair results, with one exception—the prosecutor. Although numerous scholars in the legal academy have criticized the unchecked exercise of prosecutorial discretion,¹⁶ with a few exceptions,¹⁷ public criticism of prosecutors has been almost entirely absent. The U.S. Supreme Court consistently has deferred to and affirmed prosecutorial discretion.¹⁸ The legislative branch has acted accordingly. Most of the criminal laws passed by state legislatures and the U.S. Congress have served to increase rather than reduce prosecutorial power.¹⁹

If prosecutors always made decisions that were legal, fair, and equitable, their power and discretion would be less problematic. But, as has been demonstrated with police officers, judges, parole officers, and presidents, the exercise of discretion often leads to dissimilar treatment of similarly situated people. This is no less true for prosecutors than for any other government agent or official. In fact, since prosecutors are widely recognized as the most powerful officials in the criminal justice system, arguably they should be held more accountable than other officials, not less. However, for reasons that are not entirely clear, the judiciary, the legislature, and the general public have given prosecutors a pass. Prosecutors' power and discretion have not been reduced, even when their decisions have produced grave injustices in the criminal justice system, and the mechanisms of accountability that purport to hold them accountable have proven largely ineffective.²⁰ An examination of the history of the American prosecutor offers insight into how prosecutorial power developed and expanded but provides no support or justification for how it became so entrenched and accepted over time.

A BRIEF HISTORY OF THE AMERICAN PROSECUTOR

In the early Middle Ages, when no formal system of criminal justice existed in England, the crime victim acted as police, prosecutor, and judge.²¹ The victim and the victim's family tracked down the alleged criminal, decided on the appropriate punishment, and implemented it themselves.²² Such punishment included physical punishment, restitution, or both.²³ The victim of a crime or the victim's family brought all criminal prosecutions in English common law.²⁴ This model reflected the philosophical view that a crime involved a wrong against an individual rather than against society as a whole.²⁵ As the legal system became more complex, individuals and their families hired private barristers to prosecute cases.²⁶ Obviously, this system provided no legal redress for poor and uneducated victims of crime who could neither navigate the legal system nor hire legal assistance.²⁷ The only public prosecutor in English common law was the king's attorney, whose sole responsibility was to prosecute violations of the king's rights.²⁸

Reformists such as Jeremy Bentham and Sir Robert Peel argued that the English private prosecution system promoted abusive practices, such as arrangements between private attorneys and police to secure prosecutions, prosecutions initiated out of personal animosity or vengeance, and abandonment of prosecutions after corrupt financial settlements between the criminal defendant and the private prosecutor.²⁹ Reform efforts were met with great opposition from those who profited most from the private system—the rich and the legal profession.³⁰ In 1879, Parliament passed the Prosecutions of Offenses Act, which conferred limited prosecutorial powers on the director of public prosecutions.³¹ The Act did not eliminate private prosecutions entirely, but the involvement of the victim in the initiation of English prosecutions decreased significantly due to the development of modern police departments in the late nineteenth and early twentieth centuries.³²

Criminal prosecutions in colonial America mirrored the early English experience. Before the American Revolution, the crime victim maintained sole responsibility for apprehending and prosecuting the criminal suspect.³³ The victim conducted the investigation and acted as prosecutor if the case went to trial. Alternately, the victim hired a detective and a private lawyer to perform these functions.³⁴ If

convicted, the court frequently ordered the suspect to pay restitution to the victim.³⁵ Poor criminal defendants paid for their crimes by working for the victim as a servant or having their services sold for the financial benefit of the victim.³⁶ If the victim did not want these services or was unable to sell them, the law mandated that the victim pay the jailer for maintaining custody of the prisoner.³⁷

After the commercial revolution of the eighteenth century, the population in colonial America grew. Large urban areas began to develop, and the crime rate increased.³⁸ The private mode of prosecution could no longer maintain order in the rapidly growing colonies. Some victims negotiated private settlements with their offenders, resulting in sporadic, unequal applications of the law, as well as abuses similar to those that brought about the reform movement in England.³⁹

The colonies began to develop a system of public prosecution to combat the “chaos and inefficiency” of private prosecutions in a rapidly industrializing society.⁴⁰ This development occurred not only as a remedy for the problems and abuses of private prosecution but also as a result of the shift in philosophical view of crime and society. European scholars such as Cesare Beccaria argued that crime should be viewed as a societal problem, not simply as a wrong against an individual victim.⁴¹ Thus, several colonies adopted a system of public prosecution that sought to manage the crime problem in a manner that best served the interests of society as a whole.

In 1643, Virginia became the first colony to appoint a public prosecutor—the attorney general.⁴² Virginia modeled its system on the early English one. Other colonies’ systems of public prosecution mirrored those of the native European countries of their early settlers.⁴³ Either the court or the governor appointed these first public prosecutors.⁴⁴ Such prosecutors had little independence or discretion. Their mandate involved consulting with the court or governor before making decisions.⁴⁵

The precursor to today’s elected prosecutor emerged during the rise of Jacksonian democracy in the 1820s, coinciding with the country’s move toward a system of popularly elected officials.⁴⁶ This period marked the first effort to hold prosecutors directly accountable to the people they served through the democratic process. Mississippi was the first state to hold public elections for district attorneys. By 1912, almost every state had followed this trend.⁴⁷ Today, only the District

of Columbia⁴⁸ and four states—Delaware, New Jersey, Rhode Island, and Connecticut—maintain a system of appointed prosecutors.⁴⁹

Although popular elections intuitively seemed to operate as a check on prosecutorial power and an effective mechanism of accountability, the popular election of the prosecutor actually established and reinforced his power, independence, and discretion. No longer beholden to the governor or the court, the prosecutor was now accountable to the amorphous body called “the people.” However, since the actions and decisions of the prosecutor were not generally a matter of public record, the people could not actually hold the prosecutor accountable. Nonetheless, the ballot box was seen as the most democratic mechanism of accountability.⁵⁰

The early system of federal prosecution began with the Judiciary Act of 1789.⁵¹ This Act created the office of the attorney general, whose only duties were representing the United States in cases before the Supreme Court and providing legal advice to the president and heads of departments.⁵² The same Act created district attorneys to prosecute suits for the United States in the district courts, but until 1861, the attorney general did not supervise the district attorneys.⁵³ In fact, it appears that no entity supervised these district attorneys from 1789 to 1820, when they were placed under the supervision of the secretary of the treasury (until 1861).⁵⁴ There was no clear organizational structure or chain of command, with federal prosecutors either operating independently or receiving instructions from several different federal agencies.⁵⁵ State officials and private citizens even conducted some federal prosecutions.⁵⁶

In the 1920s, a number of states formed crime commissions to examine both the status of the criminal justice system and its ability to manage the post–World War I rise in crime.⁵⁷ Their findings about the role of the prosecutor and the extent of his power and discretion shocked most of these commissions. A report by the National Commission on Law Observance and Enforcement (NCLOE) noted: “In every way the Prosecutor has more power over the administration of justice than the judges, with much less public appreciation of his power. We have been jealous of the power of the trial judge, but careless of the continual growth of the power of the prosecuting attorney.”⁵⁸ Commissions formed in California, Georgia, Illinois, Minnesota, New York, and Pennsylvania made similar observations about the power of the prosecutor.⁵⁹

The most well-known crime commission of this era was the Wickersham Commission, a national body “formed to study the status of the criminal justice system.”⁶⁰ Like virtually all of the state crime commissions, the Wickersham Commission criticized the role of the prosecutor, particularly the absence of a meaningful check on prosecutorial power and discretion.⁶¹ It noted that the popular election of prosecutors provided neither an adequate check on this power nor the best qualified candidates for the position.⁶² The Commission also recognized abuses in the plea bargaining power of prosecutors.⁶³ It recommended a number of reforms, including the establishment of a state director of public prosecutions with secure tenure to control the prosecutorial process in a systemized fashion.⁶⁴ Despite the findings and recommendations of the Wickersham Commission, other commissions, and legal scholars of the 1920s, there has been no significant reform of the prosecutorial process. In fact, today prosecutors retain even more power, independence, and discretion than they did in the early nineteenth century.⁶⁵

THE IMPORTANCE OF PROSECUTORIAL DISCRETION

Prosecutorial discretion is essential to the operation of our criminal justice system, despite the potential for abuse. Society, through the legislature, criminalizes certain behaviors and provides a process for holding people accountable when they commit crimes. The prosecutor’s duty is to use discretion in making the all-important decision of whether an individual should be charged, which charges to bring, and whether and how to plea bargain. If the accused chooses to exercise his constitutional right to a trial, the prosecutor represents the state in that trial.

The criminal justice system is adversarial by design. Ideally, a capable and zealous defense attorney represents the accused, and a similarly capable prosecutor represents the state. If both sides have sufficient resources and follow the rules, the criminal process should work fairly and produce a fair result. But the process is not that simple, nor is the theory always realized in practice. Most people charged with crimes are represented by public defenders or court-appointed attorneys who do not have sufficient resources to provide an adequate defense. Some

prosecutors don't always follow the rules, and some defense attorneys don't work hard enough for their clients. To complicate matters even more, prosecutors have a special, very different role in the criminal process. Their duty is not to simply represent the state in the pursuit of a conviction but to pursue justice. "Doing justice" sometimes involves seeking a conviction and incarceration, but at other times, it might involve dismissing a criminal case or forgoing a prosecution. These decisions, however, are left to the prosecutor's discretion. Without enforceable laws or policies to guide that discretion, all too often it is exercised haphazardly at worst and arbitrarily at best, resulting in inequitable treatment of both victims and defendants.

Discretion is as necessary to the prosecution function as it is to the police and judicial functions. It is difficult to imagine a fair and workable system that does not include some level of measured discretion in the prosecutorial process. As a part of the executive branch of government, it is the prosecutor's duty to enforce the laws, and it would be virtually impossible for her to perform this essential function without exercising discretion.

One of the reasons prosecutorial discretion is so essential to the criminal justice system is the proliferation of criminal statutes in all fifty states and the federal government.⁶⁶ Legislatures pass laws criminalizing a vast array of behaviors, and some of these laws, such as fornication and adultery, for example, stay on the books long after social mores about these behaviors have changed. In addition, some offenses warrant prosecution in some instances but not others. For example, it may be reasonable to bring a prosecution in a jurisdiction that criminalizes gambling for someone engaged in a large-scale operation but not for individuals placing small bets during a Saturday night poker game in a private home. In addition, in some cases, the evidence may not be sufficient to meet the government's heavy burden of proving guilt beyond a reasonable doubt. Without discretion, prosecutors might be required to bring criminal charges in cases that most people would view as frivolous and in cases where the evidence is weak or lacking in credibility.

Other closely related reasons why prosecutorial discretion is so essential are the limitation on resources and the need for individualized justice.⁶⁷ There are not enough resources in any local criminal justice system to prosecute every alleged criminal offense. Of course with

every prosecution comes the corresponding need for defense attorneys, judges, and other court personnel, and if there is a conviction, possibly prison facilities. Some entity must decide which offenses should be prosecuted, and prosecutors are presumably best suited to make these judgments. Most would agree that the state's limited resources should be used to prosecute serious and/or strong cases, while minor or weak cases should be dismissed or resolved short of prosecution.

Just prosecutions require a consideration of the individual facts and circumstances of each case. All defendants and crime victims are not the same. Similarly, there are significant differences between perpetrators and victims of particular types of crimes. For example, some robbers have long criminal histories while others are first offenders or provide minor assistance to more serious offenders. Some assault victims are totally innocent of wrongdoing while others may have provoked their assailants with their own criminal behavior. These examples illustrate just a few of the many factors that should be considered in deciding whether, and to what extent, a case should be prosecuted.

Despite the obvious need for the exercise of discretion at this stage of the criminal process, one might question why we delegate this important function to prosecutors and why we don't provide more oversight by the judiciary or some other entity. The most common answer has to do with the separation of powers. As part of the executive branch of government, prosecutors have been granted the power and responsibility to enforce the laws.⁶⁸ Courts have consistently deferred to the expertise of prosecutors in declining to question their motives for charging and other important prosecutorial decisions. The Supreme Court explains this deference as follows:

This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to

outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy.⁶⁹

The Court is concerned that too much interference with the prosecutor's responsibilities might interfere with the enforcement of the criminal laws, either because prosecutors might decline some prosecutions for fear of judicial reprisal or because judicial review or requiring prosecutors to explain their decisions to some other entity might result in law enforcement secrets being revealed to criminals.

THE DILEMMA OF PROSECUTORIAL DISCRETION

All of the reasons in support of prosecutorial discretion explain why it is so essential, but they do not address the problems that have resulted from the failure to monitor how that discretion is exercised. In their effort to give prosecutors the freedom and independence to enforce the law, the judicial and legislative branches of government have failed to perform the kind of checks and balances essential to a fair and effective democracy. Consequently, prosecutors, unlike judges, parole boards, and even other entities within the executive branch such as police, presidents, and governors, have escaped the kind of scrutiny and accountability that we demand of public officials in a democratic society. Prosecutors have been left to regulate themselves, and, not surprisingly, such self-regulation has been either nonexistent or woefully inadequate.

There have been some efforts to promote the fair and equitable exercise of prosecutorial discretion, but these efforts have been minimal and largely ineffective. For example, the Criminal Justice Section of the American Bar Association (ABA) promulgates standards of practice for judges, defense attorneys, and prosecutors. The standards for prosecutors address how prosecutors should perform their most important responsibilities, with the goal of assuring that prosecutors exercise their discretion fairly and in a way that will promote the administration of justice. However, these standards are aspirational. No prosecutor is required to follow or even consider them. The Justice Department also sets standards and guidelines for federal prosecutors in its U.S. attorney's manual. However, like the ABA standards, the extent to which individual prosecutors follow these guidelines is left to the U.S. attorneys in each district or, in some instances,

to the attorney general of the United States. There is no legal requirement that federal prosecutors act in accordance with the U.S. attorney's manual, nor are they accountable to anyone outside the Department of Justice if and when they fail to follow their own rules. Similarly, individual state and local prosecutors may establish policies and standards of practice in their offices, but they are not required to do so, and most don't. Although a few states have passed laws that establish standards for prosecutors,⁷⁰ there is virtually no public accountability when the standards are not followed.

Proponents of the current system of prosecution argue that prosecutors are held accountable to the people through the electoral system. They maintain that if prosecutors do not perform their duties and responsibilities fairly and effectively, they will be voted out of office. However, for reasons that will be discussed in detail in chapter 9, the electoral system and other mechanisms of accountability have proven to be ineffective.

The lack of enforceable standards and effective accountability to the public has resulted in decision-making that often appears arbitrary, especially during the critical charging and plea bargaining stages of the process. These decisions result in tremendous disparities among similarly situated people, sometimes along race and/or class lines. The rich and white, if they are charged at all, are less likely to go to prison than the poor and black or brown—even when the evidence of criminal behavior is equally present or absent. Although prosecutors certainly are not the only criminal justice officials whose discretionary decisions contribute to unfair disparities, their decisions carry greater consequences and are most difficult to challenge, as the following chapters will demonstrate.

Most prosecutors join the profession with the goal of doing justice and serving their communities, and most work hard to perform their responsibilities fairly, without bias or favoritism. But even well-meaning prosecutors often fail because they exercise discretion arbitrarily and without guidance or standards, under the daily pressures of overwhelming caseloads in a system with inadequate representation for most defendants, and judges who are more interested in efficiency than justice. The absence of meaningful standards and effective methods of accountability has resulted in widely accepted prosecutorial practices that play a significant role in producing many of the injustices in the criminal justice system.

It is important that prosecutors make charging and plea bargaining decisions on the basis of the facts and circumstances of individual cases to achieve individualized justice. But when they do so without meaningful guidance, standards, or supervision, their decisions become more arbitrary than individualized, and deep-seated, unconscious views about race and class are more likely to affect the decision-making process. It is not enough for prosecutors to base their decisions on the malleable standard of “doing justice” because such a standard is subjective and ultimately produces unexplainable and unjustifiable disparities. The goal should be to establish practices that promote the goals of individualized justice without producing unfair disparities among similarly situated defendants and victims of crime. So far, despite the worthy intentions of many hard-working prosecutors, frequently that goal is not being met.

This book will focus on how the everyday, legal exercise of prosecutorial discretion is largely responsible for the tremendous injustices in our criminal justice system. It does not focus on the intentional, illegal practices that some prosecutors engage in—fabricating evidence, coercing and threatening witnesses, and hiding exculpatory evidence. Only one chapter is devoted to these horrendous cases; others have written about them extensively. Most of the chapters will demonstrate that, despite their intent to justly enforce the laws, prosecutors engage in widely accepted practices that produce unfair results for victims, criminal defendants, and the entire justice system. This book does not tell the story of the good deeds prosecutors do. That story is told every day in the countless television dramas and news stories about prosecutors and how effectively they fight crime.⁷¹ Instead, this book will tell the story that is almost never told: that even well-meaning prosecutors routinely engage in practices that produce unfair results—practices that are hidden from the public, and even when revealed, are somehow accepted as legitimate.

Chapters 2 through 5 discuss prosecutorial discretion in the context of issues and practices that apply to both state and federal prosecutors—charging, plea bargaining, victim issues, and the death penalty. Chapter 6 focuses on federal prosecutions and the unique issues and problems they present. Chapter 7 discusses prosecutorial misconduct, and chapter 8 explores how the rules of professional conduct for lawyers have failed to monitor and give guidance to prosecutors. Chapter 9 attempts to explain how and why the existing mechanisms of

prosecutorial accountability have failed to prevent the unfair practices and results described in the previous chapters. Finally, chapter 10 discusses prospects for reform of the prosecution function.

The criminal justice system is important to all of us. Some of us and members of our families will have the unfortunate experience of being crime victims or criminal defendants. Most will be fortunate enough to avoid personal involvement with the system. But everyone has an interest in assuring the fair and just operation of a system with the power to deprive liberty and life. Everyone who believes in democracy has a vested interest in assuring that no one individual or institution exercises power without accountability to the people. This book will demonstrate that for some reason, we have given prosecutors a pass—allowing them to circumvent the scrutiny and accountability that we ordinarily require of those to whom we grant power and privilege while affording them more power than any other government official. It will show that we have become complacent, affording trust without requiring responsibility. The time has come to focus on prosecutors, require information, and, most important, institute fundamental reforms that will result in more fairness in the performance of the prosecution function.