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Andrew Horwitz

Roger Williams University School of Law

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TAKING THE COP OUT OF COPPING A PLEA: ERADICATING POLICE PROSECUTION OF CRIMINAL CASES

Andrew Horwitz*

I. INTRODUCTION

A criminal prosecutor in the American legal system is vested with an enormous amount of discretion in the handling of a criminal case.¹ In the vast majority of situations, that discretion is exercised at early stages in a prosecution in ways that cannot and will not ever be reviewed, either by the judiciary or by anyone else.² Most obviously, the basic decision to charge a person with a crime and the secondary decision of what charge or charges to file are almost entirely beyond any form of review.³ Any of a multitude of pre-trial decisions, including bail requests, discovery, and plea negotiations, are similarly outside the scope of

* Associate Professor and Director of the Criminal Defense Clinic, Roger Williams University School of Law. B.A. 1983, Haverford College; J.D. 1986, New York University School of Law. I would like to thank my colleagues, Professors Edward Eberle, Diana Hassel, Michael Yelnosky, and David Zlotnick, for their insightful comments on an earlier draft of this Article. Sylvia Josh, Humberta Goncalves, and Mary Lotuff provided able research assistance, and the Roger Williams University School of Law provided greatly appreciated financial support for this project. I would also like to thank my children, Daniel and Catherine, for some much-needed distraction and comic relief, and my wife, Alexandra K. Callam, for her love and support.

1. See, e.g., *Wayte v. United States*, 470 U.S. 598, 607 (1985); *Pugach v. Klein*, 193 F. Supp. 630, 635 (S.D.N.Y. 1961); WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* § 13.2(a) (2d ed. 1992).

2. LAFAVE & ISRAEL, *supra* note 1, § 13.2(g).

3. The United States Supreme Court has noted that "so long as the prosecutor has probable cause to believe that the accused has committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file...generally rests entirely in his discretion." *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). See also Joan E. Jacoby, *The American Prosecutor's Discretionary Power*, *THE PROSECUTOR*, Nov.-Dec. 1997, at 25, 25 (describing the prosecutor's "unreviewable authority to bring charges or dismiss them"). The only recognized limitations on prosecutorial discretion at the charging stage involve selective prosecution claims based on protected classifications or on the exercise of statutory or constitutional rights. *Bordenkircher*, 434 U.S. at 364; *Wayte*, 470 U.S. at 608.

any effective review.⁴ The United States Supreme Court has noted that most prosecutorial decisions do not lend themselves readily to judicial review and, except for some very narrow exceptions, should remain beyond the scope of judicial review for broader policy reasons.⁵ Consequently, the criminal justice system functions largely on a tremendous leap of faith that those who wield the government's prosecutorial power will wield it in a fair and just fashion. In large part, this leap of faith is justified by the prosecutor's legal training, by the prosecutor's oath of obedience to a binding code of legal ethics, and by the fact that the prosecutor, at least on the state level, is an elected official who is expected to be responsive to the electorate.

Despite those justifications, a surprising number of jurisdictions in the United States entrust the prosecution of criminal cases to police officers who are not licensed to practice law, who are not obligated to follow a legal code of ethics, and who have no particular obligation to be responsive to the electorate. The prosecution of criminal cases by police officers is a widespread practice in the lower state courts in this country. In one national survey published in 1981, twelve percent of the judges sitting in misdemeanor criminal courts indicated that a prosecuting attorney "infrequently" or "never" conducted the trial of misdemeanor defendants.⁶ In those state cases in which a prosecuting attorney did not appear at the trial, the charges were prosecuted by a police officer seventy-five percent of the time, with the arresting officer handling the overwhelming majority of the cases.⁷ There is also evidence that the police prosecution of misdemeanor offenses before federal magistrates in various United States Magistrates Courts is a relatively common practice.⁸

In only two of the many states in which police prosecute misdemeanor cases—South Carolina and New Hampshire—have the highest courts specifically ruled on and endorsed the practice, in each case finding that a police officer who prosecutes a criminal case is somehow not engaged in the practice of law.⁹ In three other states—Massachusetts, Maine, and Iowa—police prosecution is arguably

4. See, e.g., *Young v. United States ex rel. Vuitton et Fils*, 481 U.S. 787, 807 (1987); *Ganger v. Peyton*, 379 F.2d 709, 713 (4th Cir. 1967).

5. See *Wayte*, 470 U.S. at 607-08.

6. NATIONAL INST. OF JUST., U.S. DEP'T OF JUST., MISDEMEANOR COURTS: POLICY CONCERNS AND RESEARCH PERSPECTIVES B-15 (1981) [hereinafter MISDEMEANOR COURTS].

7. *Id.* at B-16. Eighty percent of the cases that were prosecuted by police officers were reportedly prosecuted by the arresting officer in the case. *Id.*

8. See *United States v. Glover*, 381 F. Supp. 1139, 1143 (D. Md. 1974) (upholding a misdemeanor conviction after trial at which a sergeant in the United States Air Force acted as prosecutor, noting that "allowing [an officer] to act, in effect, as a prosecutor, has long had the tacit approval of all of the Judges of this Court"). See also *United States v. Broers*, 776 F.2d 1424 (9th Cir. 1985) (upholding a misdemeanor conviction after a trial at which an agent of the United States Forest Service acted as prosecutor); *United States v. Downin*, 884 F. Supp. 1474 (E.D. Cal. 1995) (same).

9. For a full discussion of these cases, see *infra* notes 135-79 and accompanying text.

authorized by statute, either directly or by implication.¹⁰ In the federal system, the practice of police prosecution exists without any statutory authority and has been the subject of appellate review in only three published cases.¹¹ In the majority of jurisdictions in which police prosecution is common, the legality and wisdom of the practice has never been directly considered in any published court decision, despite the fact that it is not authorized by statute and appears to fly in the face of court rules and statutes prohibiting the unauthorized practice of law. Because police prosecution exists in many jurisdictions with little or no legal authority, and because of the large numbers of defendants who have been prosecuted in this fashion, the fact that the practice has rarely been the subject of appellate review and has never been the subject of scholarly commentary¹² is quite extraordinary. This Article represents an effort to remedy, at least in part, this lack of attention to an extremely troubling practice.

Part II of this Article will lay the groundwork for the argument that police officers who are not licensed attorneys should not be allowed to prosecute criminal cases, exploring some of the dangers that arise when a prosecutor is not trained as a lawyer and is not bound by a code of legal ethics. Part III of this Article will describe in more detail the extent to which the practice of police prosecution is prevalent in various jurisdictions in this country and the legal support, if any, that can be found for it. Part IV of this Article will examine the legal challenges that a criminal defendant might raise if he or she is prosecuted by a police officer who is not licensed to practice law. Part V of this Article will examine some of the broader public policy arguments against the practice of police prosecution.

II. PROBLEMS ARISING FROM POLICE PROSECUTION OF CRIMINAL CASES

A prosecutor¹³ has extremely broad and almost totally unreviewable discretion at virtually every stage in a criminal prosecution, from the filing of charges all the way through to the ultimate resolution of the case.¹⁴ Each stage of the process involves innumerable decisions, each of which relies on a balancing of any number of factors. In order for the criminal justice system to function as envisioned, it is vital that the key decision maker—the prosecutor—exercise

10. For a full discussion of these statutes, see *infra* notes 215–29 and accompanying text.

11. See *infra* notes 204–14 and accompanying text for a discussion of cases cited *supra* note 8.

12. This author's research has not disclosed a single law review article that directly addresses the practice of police prosecution of criminal cases.

13. The term "prosecutor" will be used throughout this Article to refer to any individual "who prosecutes another for a crime in the name of the government." BLACK'S LAW DICTIONARY 1221 (6th ed. 1990). On occasion, as should be clear from the context, the term may also be used to describe the office of the public prosecutor. When there is a need to distinguish between a duly licensed attorney in the role of prosecutor and an unlicensed police officer in that role, the former will be referenced as a "prosecuting attorney" and the latter as a "police prosecutor."

14. See *supra* notes 1–5 and accompanying text.

discretion based upon a firm foundation in and understanding of a variety of legal principles. Early on in our country's history, the states and the federal government moved away from the private prosecution of crimes and toward the election of public prosecutors, based primarily on the belief that an independent, well-trained prosecutor will guard the process against all forms of abuse.¹⁵ In order to have some assurance that the vast prosecutorial power will be wielded by someone who is competent to wield it, every state now employs a public prosecutor and requires the public prosecutor to be an attorney duly licensed to practice in that jurisdiction.¹⁶ Given the recognition of the need for protection from abuse inherent in each of those movements, it is truly surprising how many jurisdictions allow the overwhelming bulk of prosecutorial discretion to be exercised by police officers who are neither trained as lawyers nor admitted to practice law.

Moving beyond issues of basic legal competence, there are significant ethical issues that arise throughout the prosecution of a criminal case. A prosecutor is entrusted to act as a minister of justice, seeking not merely to convict the guilty, but also to protect the innocent and to protect the integrity of the criminal justice system.¹⁷ Consequently, it is vital that a prosecutor exercise his or her vast discretion within the constraints of legal ethics. The presumption that the prosecutor both understands and will obey the applicable legal ethical provisions derives from the taking and passing of both a bar examination and the Multistate Professional Responsibility Examination, from an investigation into the attorney's character and fitness to practice law conducted by the state's legal licensing board, and from the attorney's sworn obedience to legal ethics. While the appropriate exercise of prosecutorial discretion is dependent upon far more than the observation of minimum legal ethical standards,¹⁸ there are some basic prosecutorial attributes that are notoriously absent when the prosecutor is not a licensed attorney: legal education and training concerning the ethical rules that govern the prosecution of a criminal case, and an expressed commitment, enforced by the disciplinary process, to abide by those ethical rules in their daily activities.¹⁹

15. See Andrew Sidman, Note, *The Outmoded Concept of Private Prosecution*, 25 AM. U. L. REV. 754, 762-65 (1976).

16. *Id.* at 764.

17. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 cmt. (3d ed. 1996) [hereinafter MODEL RULES]; MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1981) [hereinafter MODEL CODE]; AMERICAN BAR ASSOC., A.B.A. STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 3-1.2(c) (3d ed. 1993) [hereinafter A.B.A. PROSECUTION STANDARDS].

18. Indeed, as is argued in Part V of this Article, a prosecutor plays an extremely significant role in determining public policy with respect to the enforcement of criminal laws. It is widely recognized that a prosecutor can and must make frequent decisions not to prosecute even in the face of sufficient evidence to support a finding of probable cause. Professors LaFave and Israel, in their leading criminal procedure treatise, catalogue a number of reasons that a prosecutor might elect not to prosecute, including legislative overcriminalization, limitations on prosecutorial resources, and the need to individualize justice. LAFAVE & ISRAEL, *supra* note 1, § 13.2(a).

19. By 1997, thirty-nine states and the District of Columbia had adopted some version of the Model Rules of Professional Conduct, thereby subjecting attorneys who

This section of the Article will explore the ways in which legal competence and ethical rules and guidelines predominate throughout the criminal justice process, describing some of the many ways in which the injection of a police prosecutor may be detrimental to the fair administration of the criminal law.

A. The Decision to Charge a Crime

Few areas of prosecutorial discretion are as important and as subject to abuse, whether by vindictiveness, favoritism, or sheer incompetence, as the decision of whether or not to charge an individual with a crime.²⁰ Legal competence is, of course, absolutely essential at the charging stage of a criminal case if the criminal justice system is to function in a fair and just manner. In the most basic sense, we count on a prosecutor to screen out cases prior to filing charges in order to eliminate cases that are not supported by sufficient evidence. At least two levels of legal expertise are required in order for a prosecutor to make that decision appropriately. First, of the evidence that has been gathered, which pieces will or will not be admissible at a trial?²¹ A strong working knowledge of the various laws concerning the suppression of unlawfully seized evidence, as well as of the rules of evidence, is a necessary prerequisite to a proper evaluation concerning admissibility. Second, is the legally admissible evidence sufficient to justify a criminal charge?²² A strong legal knowledge of the elements of any given

practice in those jurisdictions to the imposition of discipline for the failure to abide by its terms. Most of the remaining states continue to follow some version of the Model Code of Professional Responsibility, with a similar disciplinary enforcement mechanism in place. By contrast, the A.B.A. Prosecution Function Standards are aspirational in nature, intended to "provide prosecutors with reasoned and appropriate advice" and to "serve as a guide to what is deemed to be proper conduct." A.B.A. PROSECUTION STANDARDS, *supra* note 17, Standard 3-1.1 cmt. The Standards "are not intended...to serve as rules to be used as the basis for the imposition of professional discipline; applicable codes of ethics adopted in each jurisdiction serve that function." *Id.*

20. In his leading article on prosecutorial discretion, Professor Wayne R. LaFave identified the charging decision as "that part of the prosecutor's discretion which carries with it the greatest potential for misuse." Wayne R. LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532, 537 (1970).

21. Both the American Bar Association and the National District Attorneys Association have incorporated this obvious proposition into their standards for how prosecutors should proceed. See A.B.A. PROSECUTION STANDARDS, *supra* note 17, Standard 3-3.9(a) ("A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient *admissible* evidence to support a conviction.") (emphasis added); NATIONAL DISTRICT ATT'YS ASSOC., NATIONAL PROSECUTION STANDARDS, Standard 43.3 (2d ed. 1991) [hereinafter NDAA PROSECUTION STANDARDS] ("A prosecutor should file only those charges which he reasonably believes can be substantiated by *admissible* evidence at trial.") (emphasis added).

22. Again, this obvious proposition is reflected in the relevant sources that serve to guide a prosecutor's behavior. See MODEL RULES, *supra* note 17, Rule 3.8(a) ("A prosecutor shall refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause."); MODEL CODE, *supra* note 17, DR 7-103(A) ("A public prosecutor...shall not institute...criminal charges when he knows or it is obvious that the charges are not supportable by probable cause."); A.B.A. PROSECUTION STANDARDS, *supra*

offense is a prerequisite here, as is a solid understanding of what does and does not constitute probable cause and proof beyond a reasonable doubt.

The erroneous decision to charge a person with a crime that is not supported by sufficient evidence, while potentially remediable through the criminal justice system with either an acquittal after trial or the eventual dismissal of the charges, can have a devastating impact on the individual's life.²³ On the other hand, at least an erroneous decision to charge is to some extent remediable. Perhaps of even more concern to the interests of society is the erroneous failure to charge a person with a crime based upon a mistaken belief that the conduct alleged is not criminal or that the evidence is legally insufficient; that kind of error, because it will never be discovered, can never be remedied through the system, leaving society completely unprotected at the hands of the incompetent prosecutor. If incompetence causes a police prosecutor to overlook or discount admissible evidence, or to misapprehend the elements of an offense and the proof necessary for a conviction, a wrongdoer may benefit at the expense of justice.

The fact that a prosecuting attorney is bound by a code of ethics can play an enormous role in the exercise of prosecutorial discretion at the charging stage. First and foremost, a prosecuting attorney is expected to "seek justice"²⁴ and is prohibited from using the criminal process to further some interest other than the legitimate prosecution of criminal charges.²⁵ While there may be a whole host of reasons why a prosecutor might want to file charges against a particular individual or refrain from filing,²⁶ an attorney is bound to exercise his or her charging discretion based only on legally permissible factors.²⁷ For example, a prosecutor's personal relationship with an individual, whether hostile or friendly, should play no

note 17, Standard 3-3.9(a) ("A prosecutor should not institute, or cause to be instituted, or permit the continued pendency of criminal charges when the prosecutor knows that the charges are not supported by probable cause.").

23. See, e.g., *Young v. United States ex rel. Vuitton et Fils*, 481 U.S. 787, 814 (1987) ("Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life.").

24. A.B.A. PROSECUTION STANDARDS, *supra* note 17, Standard 3-1.2. See also MODEL RULES, *supra* note 17, Rule 3.8 cmt. ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

25. See, e.g., A.B.A. PROSECUTION STANDARDS, *supra* note 17, Standard 3-3.9(d) ("In making the decision to prosecute, the prosecutor should give no weight to the personal or political advantages or disadvantages which might be involved or to a desire to enhance his or her record of convictions."); Standard 3-1.3(f) ("A prosecutor should not permit his or her professional judgment or obligations to be affected by his or her own political, financial, business, property, or personal interests."); NDAA PROSECUTION STANDARDS, *supra* note 21, Standard 42.4 (providing that a prosecutor should not consider his or her "rate of conviction" or any "[p]ersonal advantages" or "[p]olitical advantages" that may result from the prosecution of the case).

26. The ethical rules cited in the previous footnote make specific reference to some of the more common inappropriate reasons that a prosecutor might wish to prosecute or refrain from prosecution, including personal, professional, and political advantage or disadvantage.

27. See *supra* note 25.

role in the charging decision.²⁸ A prosecutor's desire to keep illegal or unconstitutional police conduct from being revealed, or to shield a police officer or department from the prospect of civil liability, must not enter into the prosecutorial decision of whether to charge an individual with a crime.²⁹ A prosecutor's desire to enhance his or her professional standing or to improve his or her chances for promotion must likewise be kept out of the charging decision.³⁰ While each of these factors almost certainly enters into many charging decisions made by prosecuting attorneys, at least the public and the putative defendant enjoy some protection from the ethical prohibitions against such conduct.

When a charging decision is made by a police officer who is not an attorney, the protection offered by the legal ethical rules is completely absent. While attorneys are bound by various rules concerning conflicts of interest, there seems to be virtually no prohibition against the police abuse of the power to charge. Certainly, a person charged with a crime without sufficient evidence may eventually get those charges dismissed and may pursue an action based on a claim of malicious prosecution. Such suits are very difficult to win and do not truly restore a person to the status that person may have enjoyed prior to the filing of the charges. A defendant would have legal recourse if a decision to charge could be proved to have been made in violation of the equal protection clause, as for example if the defendant were charged because of his or her race,³¹ but such litigation is virtually never successful.³² Cases in which the evidence is legally sufficient but that are prosecuted purely out of bias, personal animus, or some other inappropriate consideration, are much harder to address. There appears to be no legal sanction that can be imposed on a police officer, and the system does a very

28. See *supra* note 25.

29. See *supra* note 25. A number of cases have explicitly stated that it is unethical for a prosecutor to prosecute a case in order to attempt to shield a police officer or department from civil liability. See, e.g., *MacDonald v. Musick*, 425 F.2d 373, 375 (9th Cir. 1970) (noting that "[i]t is no part of the proper duty of a prosecutor to use a criminal prosecution to forestall a civil proceeding by the defendant against policemen, even where the civil case arises from the events that are also the basis for the criminal charge"); *Boyd v. Adams*, 513 F.2d 83, 89 (7th Cir. 1975) (quoting language from *MacDonald v. Musick* with approval); *Gray v. City of Galesburg*, 247 N.W.2d 338, 341 (Mich. Ct. App. 1976) (quoting *Boyd v. Adams*, 513 F.2d at 89). The Model Code of Professional Responsibility expressly prohibits an attorney from presenting, participating in presenting, or threatening "to present criminal charges solely to obtain an advantage in a civil matter." MODEL CODE, *supra* note 17, DR 7-105(A). See also NDAA PROSECUTION STANDARDS, *supra* note 21, Standard 43.5 (providing that a prosecutor "should not file charges for the purpose of obtaining from a defendant a release of potential civil claims"). For a thorough discussion of the ethical issues involved when a prosecutor seeks to use the criminal process to protect the civil interests of the police, see James A. Trowbridge, *Restraining the Prosecutor: Restrictions on Threatening Prosecution for Civil Ends*, 37 ME. L. REV. 41, 57-62 (1985).

30. See *supra* note 25.

31. See, e.g., *Wayte v. United States*, 470 U.S. 598, 608 (1985); *United States v. Batchelder*, 442 U.S. 114, 125 (1979); *Oyler v. Boles*, 368 U.S. 448, 456 (1962).

32. LAFAYE & ISRAEL, *supra* note 1, § 13.4(b).

poor job of reviewing those types of discretionary decisions.³³ Most acute, however, is the complete lack of protection for the public when its interests, rather than those of the accused, are not protected.

It is clear that a police prosecutor is much more likely to be subject to certain kinds of institutional biases than is a prosecuting attorney. Several examples should serve to clarify the point. The arresting officer in a criminal case, who in many jurisdictions is also the prosecuting officer, may be in some jeopardy concerning allegations of police brutality, false arrest, or various other violations of an individual's rights. One way of providing greater protection for the officer is to be sure that criminal charges are filed, because a case that never makes it through the charging stage puts the officer in a much worse posture in terms of civil or criminal litigation.³⁴ Indeed, a significant body of literature suggests that police officers commonly file charges that are largely or entirely untrue in order to try to insulate themselves from such allegations.³⁵ Another way of providing that kind of protection is to secure an agreement from the individual that he or she will not file civil charges in exchange for an agreement not to charge him or her with a crime.³⁶ While some courts, including the United States Supreme Court, have enforced these sorts of waiver agreements under certain circumstances,³⁷ there are significant ethical restraints upon an attorney considering such an agreement.³⁸ Whether charges are filed or not filed for these purposes, the public is poorly served by the injection of these issues into the decision of whether or not to prosecute.

33. As indicated elsewhere in this Article, the United States Supreme Court has declared that the decision to charge is particularly ill suited to judicial supervision or review. *See supra* notes 3-5 and accompanying text.

34. *See, e.g.,* *Lynch v. City of Alhambra*, 880 F.2d 1122, 1127 (9th Cir. 1989) (noting that an arresting officer who "may have used excessive force in effecting an arrest," simply because he or she is "facing potential civil liability, has every incentive to arrest on a marginal or nonexistent violation, and push for a charge and release").

35. *See, e.g.,* PAUL CHEVIGNY, *POLICE POWER: POLICE ABUSES IN NEW YORK CITY* 143 (1969); Stanley Z. Fisher, "Just the Facts, Ma'am": *Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 NEW ENG. L. REV. 1, 15 (1993); Lawrence Sherman, *Learning Police Ethics*, CRIM. JUST. ETHICS, Winter/Spring 1982, at 10, 15.

36. This sort of an arrangement, often referred to as a "release-dismissal agreement," when entered into by a prosecuting attorney, raises any number of thorny ethical issues. While a five to four majority of the United States Supreme Court in 1987 refused to hold that release-dismissal agreements are *per se* void as against public policy, it acknowledged that such agreements might "tempt prosecutors to bring frivolous charges, or to dismiss meritorious charges, to protect the interests of other officials." *Town of Newton v. Rumery*, 480 U.S. 386, 395 (1987). Despite the concerns that it expressed, the Court adopted a case-by-case analysis for assessing the validity of waiver agreements. *Id.* at 397. Numerous lower courts have found that such agreements are unenforceable and that an attorney is ethically prohibited from entering into such an agreement. *See cases cited supra* note 29. Even if an agreement to forgo civil litigation in a particular case would be legally unenforceable, the mere fact that a defendant has signed such an agreement would prevent most defendants from even considering future litigation.

37. *See, e.g.,* *Town of Newton v. Rumery*, 480 U.S. 386 (1987); *Bushnell v. Rossetti*, 750 F.2d 298 (4th Cir. 1984).

38. *See supra* note 29.

Institutional bias also arises in terms of the prosecuting officer's relationships with his or her fellow officers. If the prosecuting officer were to recognize that some evidence was gathered in an illegal fashion, there would be an enormous disincentive for the officer to acknowledge the illegality, particularly if it meant refusing to file charges. Not only would the prosecuting officer risk engendering tremendous resentment from an officer upon whom he or she is likely to have to rely in the future, but the prosecuting officer also risks setting up a colleague for the possibility of internal review or potential litigation. This sort of behavior violates what has frequently been described as one of the central maxims of police culture: protect your fellow officers at all costs.³⁹ The far easier path is to charge the individual and then use the prosecutorial power to resolve it quickly.

Yet another form of bias arises when the "victim" of the alleged crime is a police officer or the police department. Certainly an officer who has arrested someone for assaulting him or her or resisting arrest, even if the charge is legitimate, is not likely to view a case in the same fashion as would an attorney without any personal connection to the case.⁴⁰ While a prosecuting attorney must recuse himself or herself from a case in which he or she has a conflict of interest,⁴¹ a police prosecutor is not bound by any similar rule. A defendant who has been charged with a crime may try to raise some due process issues surrounding the prosecutor's conflict of interest,⁴² but the defendant will have already been harmed in the sense that the charges have already been filed.

One last form of institutional bias arises due to the differing levels of immunity that attach to prosecuting attorneys and police officers. In *Imbler v. Pachtman*,⁴³ the United States Supreme Court held that prosecuting attorneys, who had traditionally enjoyed absolute immunity from civil liability at common law for acts performed within the scope of their official duties, would also have absolute immunity from civil liability under 42 U.S.C. § 1983.⁴⁴ The Court noted that "[t]he function of a prosecutor that most often invites a common-law tort action is his decision to initiate a prosecution, as this may lead to a suit for malicious prosecution if the State's case misfires."⁴⁵ The Court then detailed a number of hazards that anything short of absolute immunity would create. Primarily, the Court suggested that a prosecutor's exercise of discretion would be inappropriately

39. See Sherman, *supra* note 35, at 15.

40. *Id.* at 14 (suggesting that one of the primary values that police officers are taught is that "[d]isrespect for police authority is a serious offense that should always be punished with an arrest or the use of force").

41. See A.B.A. PROSECUTION STANDARDS, *supra* note 17, Standard 3-1.3(a) ("A prosecutor should avoid a conflict of interest with respect to his or her official duties."); NDAA PROSECUTION STANDARDS, *supra* note 21, Standards 7.1-7.3.

42. A number of cases have addressed a defendant's due process right not to be prosecuted by a prosecutor who suffers from a conflict of interest. See, e.g., *Brotherhood of Locomotive Firemen and Enginemen v. United States*, 411 F.2d 312, 319 (5th Cir. 1969); *Ganger v. Peyton*, 379 F.2d 709 (4th Cir. 1967); *Cantrell v. Commonwealth*, 329 S.E.2d 22 (Va. 1985).

43. 424 U.S. 409 (1976).

44. *Id.* at 427.

45. *Id.* at 421.

altered "if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages."⁴⁶ Furthermore, the Court suggested that "a prosecutor understandably would be reluctant to go forward with a close case where an acquittal likely would trigger a suit against him for damages."⁴⁷ Because even the threat of litigation could result in those problems, the Court held that any form of qualified immunity would be insufficient to protect the public good.

In contrast, the Supreme Court held in *Pierson v. Ray*⁴⁸ that police officers would enjoy the benefit of a "defense of good faith and probable cause" to actions under 42 U.S.C. § 1983, similar to the protection that police officers enjoyed at common law.⁴⁹ As the Court went to great lengths to point out in *Imbler*, there is a world of difference for the potential civil litigation defendant between absolute immunity, which stops a law suit prior to the discovery stage, and this form of qualified immunity, which relies on the proof of factual issues at a trial.⁵⁰ Thus, all of the fears and concerns expressed by the Supreme Court in *Imbler* are very much alive and well in the arena of police prosecutions.

B. The Decision of What to Charge

Much like in the area of whether or not to file charges at all, discretion in the area of what charges to file is extraordinarily broad and subject to very limited review. Because the overcharging or undercharging of a criminal case can have extremely serious consequences for the accused and for society,⁵¹ issues of competence and legal training loom large. A police officer who is not an attorney cannot be expected to navigate the series of complex legal and strategic decisions that can enter into the charging decision in an appropriate fashion.⁵²

Once a prosecutor has decided to file charges, he or she may have a broad range of criminal charges from which to choose. Many forms of criminal behavior

46. *Id.* at 424-25.

47. *Id.* at 426 n.24.

48. 386 U.S. 547 (1967).

49. *Id.* at 557. There is no reason to believe that the Court, in deciding either *Imbler* or *Pierson*, ever contemplated a situation in which a police officer was acting as a prosecutor. While it is conceivable that a court could apply the rule announced in *Imbler* to a police prosecutor, the Court's heavy reliance in *Imbler* on a prosecutor's "amenability to professional discipline," *Imbler*, 424 U.S. at 429, would render that application both inappropriate and highly unlikely.

50. *Imbler*, 424 U.S. at 424-26.

51. See NDAA PROSECUTION STANDARDS, *supra* note 21, Standard 43 cmt. ("The selection of a particular charge will have an important bearing upon the conduct of the criminal proceedings.").

52. The National District Attorneys Association has determined that the decision concerning what charges to file must be "the prerogative and the responsibility of the prosecutor." NDAA PROSECUTION STANDARDS, *supra* note 21, Standard 43 cmt. The Standards emphasize that the "[a]pplication of the prosecutor's determination to any specific situation involves a complex charging decision" in which any number of legal and non-legal factors must be weighed. *Id.*

constitute the violation of several criminal statutes at once.⁵³ Deciding which crime or crimes to charge requires a detailed knowledge not only of the elements of each offense, but also of the rules of evidence, of any potential suppression issues, and of the various potential legal defenses to each crime. Whether or not to charge a defendant with lesser included offenses is a tricky strategic decision that requires a great deal of litigation expertise. In the absence of legal training that is sufficient to make proper charging decisions, a police officer is most likely to err on the side of overcharging, assuming that this is the safer course for him or her to take.⁵⁴ The nature of the crime or crimes charged inevitably has an enormous impact on the manner in which the case will be handled in court, including whether or not bail will be set, whether or not counsel will necessarily be assigned if the defendant is indigent,⁵⁵ and whether the case will be handled in a specialized lower court or in a court of general jurisdiction. As such, the decisions that a prosecutor makes at the outset about what level of crime to charge may be among the most important decisions that a prosecutor makes in a case.

Ethical standards can play a significant role in the proper determination of criminal charges. While a prosecuting attorney is ethically prohibited from overcharging a case in order to gain strategic advantage,⁵⁶ there does not appear to be any prohibition against a police prosecutor engaging in the very same conduct.

53. See A.B.A. PROSECUTION STANDARDS, *supra* note 17, Standard 3-3.9 cmt. ("The structure of the substantive law of crimes is such that a single criminal event will often give rise to potential criminal liability for a number of different crimes."). A common example in the misdemeanor setting would involve a hostile interaction between a defendant and a police officer from which could derive any or all of the following charges: disorderly conduct, resisting arrest, obstruction of justice, and assault on a police officer.

54. In his leading article on plea bargaining, Albert W. Alschuler noted that police officers and prosecuting attorneys share this motivation for overcharging. Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 93 (1968). He went on to explain, however, that a police officer's motivation to "play it safe," stemming as it does from the fact that an officer is "not usually versed in the subtleties of the law," can lead to "charges that even prosecutors regard as extravagant." *Id.*

55. While a person who is charged with a felony has a federal constitutional right to appointed counsel if he or she cannot afford private representation, *Gideon v. Wainwright*, 372 U.S. 335 (1963), a person who is charged with a misdemeanor has a federal constitutional right to appointed counsel only if he or she is ultimately sentenced to a term of imprisonment. *Scott v. Illinois*, 440 U.S. 367 (1979).

56. See NDAA PROSECUTION STANDARDS, *supra* note 21, Standard 43.4 ("The prosecutor should not attempt to utilize the charging decision only as a leverage device in obtaining guilty pleas to lesser charges."); A.B.A. PROSECUTION STANDARDS, *supra* note 17, Standard 3-3.9(f) ("The prosecutor should not bring or seek charges greater in number or degree than can reasonably be supported with evidence at trial or than are necessary to fairly reflect the gravity of the offense."). As the A.B.A. Standards point out:

The line separating overcharging from the sound exercise of prosecutorial discretion is necessarily a subjective one, but the key consideration is the prosecutor's commitment to the interests of justice, fairly bringing those charges he or she believes are supported by the facts without "piling on" charges in order to unduly leverage an accused to forgo his or her right to trial.

A.B.A. PROSECUTION STANDARDS, *supra* note 17, Standard 3-3.9 cmt.

Because the charges filed establish the outer limits of a defendant's potential criminal liability, they provide the framework for any negotiation that follows; thus, a defendant may be placed at an extraordinary strategic disadvantage if a police prosecutor has overcharged the case, a fact that would not be lost on a seasoned police officer.

A prosecuting officer may have some other agenda in the determination of the charge or charges to be filed. Overcharging may serve as the best protection from either litigation or internal review concerning allegations of brutality, false arrest, or the invasion of other rights. Overcharging may also serve to further an officer's personal agenda concerning a particular case or an officer's quest for promotion within the department. Undercharging may similarly serve an officer's personal agenda concerning a particular case. There do not appear to be any rules that would prohibit a prosecuting officer from exercising his or her charging discretion in an abusive fashion, other than the minimal legal protection offered to a defendant who can prove that the abuse took the form of some kind of equal protection violation.⁵⁷ As noted earlier, a prosecutor's charging decisions are almost totally unreviewed and almost completely unreviewable;⁵⁸ as a consequence, society is left virtually unprotected from the acts of an unscrupulous police prosecutor.

C. Discovery and Disclosure

One of the cornerstones of fairness in the criminal justice system is the requirement that information, and, in particular, exculpatory information, be disclosed to the accused. Local statutes and rules generally govern when and what a prosecuting attorney must provide to an accused by way of discovery. Since it is ordinarily presumed that the discovery process will be handled by a prosecuting attorney, these statutes and rules do not tend to impose any discovery obligations directly upon the police. Even if one assumes that the rules can and should be applied to a police prosecutor, a police prosecutor is likely to encounter significant difficulty in formulating the proper legal interpretation of the statutes and rules. What is and is not discoverable can sometimes be a complex inquiry requiring significant legal expertise that a police officer would generally lack.

Legal rules concerning discovery in criminal cases generally include a variety of categories of evidence that must be turned over to the defendant. At a minimum, the prosecutor is generally required to determine what is and is not "relevant" to the case. An erroneous prosecutorial decision regarding relevance can have serious consequences. Too little discovery is obviously of serious concern to a defendant, and while there are some judicial remedies available, they tend to relate only to cases that actually proceeded to trial⁵⁹ and are, for that reason, clearly too little, too late for most defendants. When there is a judicial remedy available, there is an enormous cost in terms of judicial resources when the remedy involves a

57. See *supra* notes 31–32 and accompanying text.

58. See *supra* notes 2–5.

59. See generally LAFAYE & ISRAEL, *supra* note 1, § 20.6(b).

new trial. Too much discovery can also be a concern, primarily in its failure to provide adequate protection for prosecution witnesses.⁶⁰

In the area of exculpatory evidence, the complexity of the legal issues is of much greater concern when disclosure is entrusted to a police officer. Determining whether the disclosure of a particular piece of evidence is constitutionally required under the leading United States Supreme Court cases⁶¹ can be a complicated endeavor. Indeed, several courts have noted the difficulty that can arise in determining whether evidence qualifies as exculpatory or, more commonly, whether evidence qualifies as material to the case.⁶² Expecting an untrained police officer to exercise this kind of complex legal judgment is entirely unrealistic. Moreover, it is not at all clear that the constitutional obligation to disclose exculpatory evidence to the defendant would extend to a police prosecutor.⁶³ Quite obviously, the consequences of the failure to disclose exculpatory evidence can be devastating, not only for the defendant who may be wrongly convicted, but also for society, which may be left unprotected from the truly culpable criminal who goes unprosecuted.

A defendant has very limited legal recourse when a prosecutor fails to disclose exculpatory evidence. Obviously, and most importantly, the defendant can never pursue a legal recourse unless the exculpatory evidence somehow comes to his or her attention, which is highly unlikely in most circumstances.⁶⁴ Even if a

60. The American Bar Association specifically recognized, in drafting Rule 3.8 of the Model Rules of Professional Conduct, that under certain circumstances the "disclosure of information to the defense c[an] result in substantial harm to an individual or to the public interest." MODEL RULES, *supra* note 17, Rule 3.8 cmt. For similar reasons, Standard 55.2(b) of the NDAA PROSECUTION STANDARDS, *supra* note 21, provides that the disclosure of the identity of a confidential informant should not be required so long as the "failure to disclose will not infringe on the constitutional rights of the defendant."

61. See, e.g., *United States v. Bagley*, 473 U.S. 667 (1985); *United States v. Agurs*, 427 U.S. 97 (1976); *Brady v. Maryland*, 373 U.S. 83 (1963).

62. See, e.g., *McMillian v. Johnson*, 88 F.3d 1554, 1567 n.14 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 2514 (1997) (noting that decisions about disclosure, which the court described as "often difficult," should be left to prosecutors "who possess the requisite legal acumen"); *Walker v. New York*, 974 F.2d 293, 299 (2d Cir. 1992).

63. A number of courts have explicitly held that a police officer is under no constitutional obligation to disclose exculpatory evidence to the defendant. See, e.g., *McMillian*, 88 F.3d at 1567 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 2514 (1997); *Walker*, 974 F.2d at 298-99 (2d Cir. 1992); *Campbell v. Maine*, 632 F. Supp. 111, 121 (D. Me. 1985), *aff'd*, 787 F.2d 776 (1st Cir. 1986); *Hauptmann v. Wilentz*, 570 F. Supp. 351, 389 & n.43 (D.N.J. 1983), *aff'd*, 770 F.2d 1070 (3d Cir. 1985). In each of these cases, however, the government was represented in the criminal prosecution by a licensed attorney. Thus, courts holding that a police officer has no duty to disclose exculpatory evidence to the defense have simply assumed the presence of a prosecuting attorney. Some courts have stated that a police officer has a constitutional obligation to disclose exculpatory evidence to the prosecutor. See, e.g., *McMillian*, 88 F.3d at 1567; *Walker*, 974 F.2d at 298-99; *Campbell*, 632 F. Supp. at 121. It is unclear what those statements would mean when the police officer and the prosecutor are the same person.

64. See Daniel J. Capra, *Access to Exculpatory Evidence: Avoiding the Agurs Problems of Prosecutorial Discretion and Retrospective Review*, 53 *FORDHAM L. REV.* 391,

defendant does become aware of exculpatory evidence and can establish that it was in the prosecutor's control, he or she still has quite an uphill battle in order to overturn a conviction. A conviction will be overturned only if the undisclosed evidence is "material" and if there is a "reasonable probability" that, had the disclosure been made, the "result of the proceeding would have been different."⁶⁵ Moreover, under current case law, due process appears to require only that exculpatory information be provided sufficiently in advance of trial to allow for its use at trial.⁶⁶ Consequently, it may well be that a defendant who pleads guilty when a prosecutor has withheld exculpatory evidence cannot seek to have his or her conviction overturned on those grounds.⁶⁷

It is widely acknowledged that the existence of ethical rules that encourage prosecuting attorneys to engage in broad and early discovery⁶⁸ can play an enormously productive role in the fair and efficient functioning of the criminal justice system.⁶⁹ However, more critical to the concerns that arise when a police officer acts as a prosecutor are the ethical rules relating to the disclosure of exculpatory evidence. Because the legal remedies available to a defendant who is the victim of nondisclosure offer so little protection, the ethical obligations placed upon an attorney to disclose exculpatory evidence⁷⁰ are of paramount importance. In light of the fact that exculpatory evidence often will be in the sole possession of

391 (1984); Stephen P. Jones, Note, *The Prosecutor's Constitutional Duty to Disclose Exculpatory Evidence*, 25 U. MEM. L. REV. 735, 764 (1995).

65. United States v. Bagley, 473 U.S. 667, 682 (1985).

66. See, e.g., LAFAVE & ISRAEL, *supra* note 1, § 20.7(g); United States v. Presser, 844 F.2d 1275, 1283 (6th Cir. 1988); United States v. Starusko, 729 F.2d 256, 262 (3d Cir. 1984).

67. The question of whether a prosecutor has any constitutional obligation to disclose exculpatory evidence in a case in which the defendant pleads guilty has yet to be resolved by the United States Supreme Court, and lower courts are split on the issue. See generally Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957 (1989); Note, *The Prosecutor's Duty to Disclose to Defendants Pleading Guilty*, 99 HARV. L. REV. 1004 (1986).

68. For example, Standard 52.2 of the NDAA PROSECUTION STANDARDS, *supra* note 21, encourages prosecutors to "diligently pursue discovery of material information and freely, fully, and promptly comply with lawful discovery requests from defense counsel." The commentary to that Standard suggests that prosecutors should "seek to exceed" the minimum compliance requirements for discovery "in every case where it is appropriate." *Id.* Standard 52.2 cmt.

69. The A.B.A. Prosecution Standards note that "many experienced prosecutors have habitually disclosed most, if not all, of their evidence to defense counsel. This practice, it is believed, often leads to guilty pleas in cases that would otherwise be tried." A.B.A. PROSECUTION STANDARDS, *supra* note 17, Standard 3-3.11 cmt. "Voluntary disclosure also serves to open areas in which the parties can stipulate to undisputed or other facts for which a courtroom contest is a waste of time." *Id.*

70. MODEL RULES, *supra* note 17, Rule 3.8(d); MODEL CODE, *supra* note 17, DR 7-103(b); A.B.A. PROSECUTION STANDARDS, *supra* note 17, Standard 3-3.11; NDAA PROSECUTION STANDARDS, *supra* note 21, Standards 25.4, 53.5.

the prosecution,⁷¹ a defendant is forced to rely to an extraordinary extent on the good faith of an ethical prosecuting attorney to disclose that evidence.

The ethical obligations placed upon prosecuting attorneys to disclose exculpatory evidence are far broader and offer a defendant far greater protection than the minimum constitutional disclosure requirements. The American Bar Association Standards for Criminal Justice require a prosecuting attorney to "make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused."⁷² Both the Model Rules of Professional Conduct and the Model Code of Professional Responsibility contain similar provisions: the Model Rules require the "timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense,"⁷³ while the Model Code requires the "timely disclosure...of the existence of evidence, known to the prosecutor...that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment."⁷⁴ Thus, a prosecuting attorney is ethically obligated to disclose exculpatory information to the defense early on, not just on the eve of a trial if there is one. Equally importantly, a prosecuting attorney is ethically obligated to disclose all exculpatory evidence or information, not just that evidence or information that the prosecutor deems to be material and that the prosecutor concludes could have an impact on the outcome of the proceedings. In addition, the Standards for Criminal Justice make explicit another obligation that is implied by the other ethical guidelines, providing that a prosecuting attorney "should not intentionally avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused."⁷⁵ All of these rules, if followed, provide for a far greater flow of information to the defense. Thus, even if a police prosecutor were to abide by the minimal disclosure requirements outlined by the Supreme Court's due process decisions, significant categories of evidence that an attorney would disclose in accordance with his or her ethical duties might never be disclosed by a police prosecutor.⁷⁶

71. See *supra* note 64.

72. A.B.A. PROSECUTION STANDARDS, *supra* note 17, Standard 3-3.11(a).

73. MODEL RULES, *supra* note 17, Rule 3.8(d).

74. MODEL CODE, *supra* note 17, DR 7-103(B).

75. A.B.A. PROSECUTION STANDARDS, *supra* note 17, Standard 3-3.11(c).

76. One need look no further than the facts of one of the United States Supreme Court's leading cases in this area, *United States v. Agurs*, 427 U.S. 97 (1976), for an example of the difference. The defendant in that case was convicted after trial of murder in the second degree despite her claim of self-defense. *Id.* at 98-99. The testimony at trial revealed that the decedent was in possession of two knives shortly before the incident, but the prosecutor failed to disclose to the defense that the decedent had been convicted of the crimes of assault and possession of a deadly weapon. *Id.* at 99-101. Under the prevailing local law, evidence of these convictions would have been admissible at trial to establish that the decedent had a history of violence and may well have been the aggressor. *Id.* at 100 & n.3. While a prosecuting attorney was ethically obligated to disclose that information, see *supra* notes 72-74 and accompanying text, the Supreme Court held that the non-disclosed

Even with the existence of clear and binding ethical rules, the pressure to suppress exculpatory evidence often overwhelms a prosecuting attorney;⁷⁷ in the absence of any ethical obligation to disclose, the pressure to suppress even evidence that must be disclosed under the Constitution would seem to face even less resistance. As reluctant as a prosecuting attorney may be to turn over exculpatory material to the defense, it is not hard to imagine that the arresting officer or department would be that much less likely to do so in the absence of mandatory ethical rules. There are several reasons that a police officer who is not an attorney might withhold exculpatory evidence. First, as noted earlier, the simple failure to identify the evidence as exculpatory might prevent disclosure. Second, the evidence might expose illegal or inappropriate conduct on the part of that officer or one of his or her colleagues, creating a risk of litigation or internal sanction. Third, the evidence might be inconsistent with something that was said to the accused or others for the purpose of investigation or during an interrogation; while it seems clear that lying to or misleading an accused for these purposes is both common and entirely legal,⁷⁸ an officer may not choose to have his or her tactics exposed.⁷⁹ Fourth, the officer may have some kind of personal agenda concerning the particular case or defendant, or may simply hold the belief that the accused is guilty of the crime or crimes charged.

Concerns about police suppression of exculpatory evidence are made all the more realistic in light of the significant evidence of rampant police lying and perjury. Virtually every investigation into the topic has reached the conclusion that lying among police officers extends far beyond the investigative context, in which

evidence was not material, and that the prosecutor's failure to disclose it did not violate the defendant's right to due process of law. *Agurs*, 427 U.S. at 113-14.

77. See, e.g., C. Ronald Huff & Arye Rattner, *Convicted But Innocent: False Positives and the Criminal Justice Process*, in *CONTROVERSIAL ISSUES IN CRIME AND JUSTICE* 130, 137 (Joseph E. Scott & Travis Hirschi eds., 1988) (noting that prosecutors' failure to disclose exculpatory evidence due to the "pressure to obtain convictions" is "[p]robably the single most important contribution to false conviction made by prosecutors"); Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 694 (1987) (noting that "[p]rosecutorial suppression of exculpatory evidence or presentation of false evidence is not an isolated phenomenon"); Jones, *supra* note 64, at 747 (noting that United States Supreme Court decisions on the disclosure of exculpatory evidence suggest that a "constitutional remedy is necessary because of the lack of effectiveness of the ethical rules").

78. See, e.g., Jerome H. Skolnick, *Deception by Police*, CRIM. JUST. ETHICS, Summer/Fall 1982, at 40, 43 (suggesting that "[o]ne might properly conclude, from examining police practices that have been subjected to the highest appellate review, that the police are authoritatively encouraged to lie"). See also Deborah Young, *Unnecessary Evil: Police Lying in Interrogations*, 28 CONN. L. REV. 425 (1996); Laura Hoffman Roppe, Comment, *True Blue? Whether Police Should Be Allowed to Use Trickery and Deception to Extract Confessions*, 31 SAN DIEGO L. REV. 729 (1994).

79. Professor Deborah Young has suggested that police officers may be reluctant to have these sorts of tactics exposed for fear that it might result in a loss of public trust and respect for the police. Young, *supra* note 78, at 458-59.

it has held to be legally justifiable, and into the realm of outright perjury.⁸⁰ The common consensus in the literature is that "perjury represents a subcultural norm rather than an individual aberration" for police officers.⁸¹ The most common explanations and justifications for police perjury include: protecting the arresting officer, other police officers, or some notion of police authority in general; avoiding the suppression of evidence obtained through illegal police conduct; and assuring the criminal prosecution and conviction of an individual that the officer has determined to be guilty of that particular crime or of other crimes that might not be prosecuted.⁸²

The only real motivation for a prosecuting attorney to disclose exculpatory evidence, and the only real check on the suppression of exculpatory evidence, is that attorneys are bound by ethical rules and, at least in theory, subject to discipline.⁸³ Without a code or rule that binds a police officer to disclose exculpatory evidence, it is unclear what would motivate a police officer who has decided to prosecute a case to disclose exculpatory evidence, particularly if he or she is convinced that the accused is guilty.

D. Plea Negotiations

The vast majority of criminal cases, particularly misdemeanors, are resolved by some form of negotiated plea.⁸⁴ Like many other parts of the criminal justice process, plea negotiations are largely unreviewed and unreviewable. And like every other part of the process, a presumption of legal expertise provides some assurance that the system is functioning roughly as designed. The lack of legal expertise is a significant concern during those plea negotiations conducted by police prosecutors. A negotiation can go awry for a large variety of reasons, including poor tactical choices, varying perceptions of the strength of one's

80. See, e.g., Tom Barker & David Carter, "Fluffing Up the Evidence and Covering Your Ass:" *Some Conceptual Notes on Police Lying*, 11 *DEVIANT BEHAVIOR* 61, 67-70 (1990); Fisher, *supra* note 35, at 9-17; Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 *U. COLO. L. REV.* 75, 82-83, 107 (1992); Sherman, *supra* note 35, at 15; Skolnick, *supra* note 78, at 42-43.

81. Skolnick, *supra* note 78, at 42.

82. See sources cited *supra* note 80.

83. See, e.g., *Disciplining Prosecutors*, 40 *CRIM. L. REP.* 2431 (1987) (noting that "bar discipline may be the best available sanction against prosecutorial misconduct" because appellate reversal of criminal convictions and contempt findings are rare and because prosecutors "are virtually immune from civil liability for their professional misdeeds"). On the other hand, several commentators have suggested that even the disciplinary process provides little or no incentive for a prosecutor to comply with the ethical disclosure requirements. See, e.g., Rosen, *supra* note 77; Jones, *supra* note 64, at 747; Lyn M. Morton, Note, *Seeking the Elusive Remedy for Prosecutorial Misconduct: Suppression, Dismissal, or Discipline?*, 7 *GEO. J. LEGAL ETHICS* 1083 (1994).

84. One statistical study of state criminal cases in 1995 concluded that only four percent of those cases were resolved with a trial. BRIAN J. OSTROM & NEAL B. KAUDER, *EXAMINING THE WORK OF STATE COURTS, 1995: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT* 57 (1996).

position, and varying perceptions of power and leverage. A police officer who has misapprehended the strength or weakness of his or her case, or who is simply a poorly skilled negotiator, will alter the outcome of a plea negotiation in a significant way. In some situations, the accused may wind up with "too good a deal" from the public's point of view; in others, the accused may be treated too harshly.

When a defendant is unrepresented by counsel, as he or she often will be in misdemeanor cases,⁸⁵ a particularly troubling scenario inevitably ensues. A defendant will often have any number of questions about how the system functions, what the consequences of a plea offer are likely to be, whether a given explanation of his or her conduct constitutes a legal defense, what the possible sentence after trial may be, and so forth. In practical terms, an unrepresented defendant may well look to the prosecutor for information and advice, making a set of assumptions about the prosecutor's duty to be relatively objective and fair or, at a minimum, truthful. As Supreme Court Justice John Paul Stevens has explained, for a criminal defendant "the assistance of someone to explain why he is being held, the nature of the charges against him, and the extent of his legal rights, may be of such importance as to overcome what is obvious to most, that the prosecutor is a foe and not a friend."⁸⁶ Even in those situations in which a police prosecutor tries in good faith to provide objective information or advice, that information or advice is reasonably likely to be inaccurate, misleading, or biased.⁸⁷ In the context of a negotiated plea, a judge will rarely engage in more than a superficial colloquy to assure that the defendant has some minimal understanding of the plea and its immediate consequences; that sort of inquiry is highly unlikely to expose a defendant's reliance on suspect information or advice.⁸⁸ Neither the accused nor

85. In a national survey published in 1981, forty-one percent of misdemeanor court judges indicated that defendants who plead guilty were "infrequently" or "never" represented at the time of the plea. MISDEMEANOR COURTS, *supra* note 6, at B-14. In that same survey, eleven percent of the judges indicated that defendants were "infrequently" or "never" represented by an attorney at trial. *Id.* at B-15.

86. *Patterson v. Illinois*, 487 U.S. 285, 310 (1988) (Stevens, J., dissenting).

87. *Id.* (noting that "the adversary posture of the parties...will inevitably tend to color the advice offered").

88. In an extremely enlightening and disturbing essay, Francis D. Doucette, a Massachusetts criminal defense attorney, has shed light on this process by describing and discussing one particular case that was handled by a police prosecutor in a Massachusetts district court. Francis D. Doucette, *Non-Appointment of Counsel in Indigent Criminal Cases: A Case Study*, 31 NEW ENG. L. REV. 495 (1997). Two defendants, one the driver of a vehicle and the other a passenger, were charged with the misdemeanor offense of possession of marijuana with the intent to distribute. *Id.* at 496. After what the author describes as a "brief conference in the corridor" between the police prosecutor and the two unrepresented defendants, the case was summarily resolved with a negotiated plea. *Id.* at 496-97. The judge accepted the plea agreement after "conducting a perfunctory colloquy regarding the defendants' waiver of the right to a jury trial, and warning the defendants about immigration consequences if they were not United States citizens." *Id.* at 497. As the author so cogently points out, the defendants were certainly never advised of the variety of legal defenses that might have been available to them, many of which seemed to have had a significant likelihood of success. *Id.* at 497-99. One can only speculate on the contents of the "brief

the public is well served by a process in which the only supposed legal expertise comes from a police officer who is not licensed to practice law.

An attorney is ethically prohibited from giving advice to unrepresented parties, most particularly to unrepresented adversaries.⁸⁹ While it is possible for a plea negotiation between a prosecutor and an unrepresented defendant to take place without some form of discussion that could fairly be characterized as "advice," it is quite difficult to accomplish. Any effort on the part of the prosecutor to discuss the evidence in the case, the likelihood of conviction or the possible consequences of a conviction after trial, or any effort on the part of the prosecutor to suggest that a plea offer should be considered or accepted, must fairly be characterized as the prohibited giving of advice.⁹⁰ Consequently, a prosecuting attorney's negotiation with an unrepresented defendant, if it is to be conducted within ethical constraints, requires a rigid adherence to a set of rules that would seem unnatural and perhaps counter-intuitive to a police officer.

The ABA Criminal Justice Standards ("Standards") recognize the ethical hazards that a prosecuting attorney faces in entering into a plea negotiation with an unrepresented defendant, particularly given the inherently "unequal bargaining positions between prosecutor and accused."⁹¹ The commentary to Standard 3-4.1 counsels a prosecutor to

take great care not to state or imply to the accused that the prosecutor is disinterested or on the accused person's "side." When the prosecutor knows or reasonably should know that the unrepresented person misunderstands the prosecutor's role in the matter, the prosecutor must make reasonable efforts to correct such a misunderstanding.⁹²

conference in the corridor," *id.* at 496, but the probability that it contained inaccurate, misleading, or biased information is extremely high. Moreover, it is clear that the judge's "perfunctory colloquy," *id.* at 497, would never have revealed any such impropriety. Indeed, the author suggests that the pleas entered in the case may have been "involuntary" because the defendants "were never advised by counsel at all but rather conferred for a few minutes with a police prosecutor." *Id.* at 507.

89. See MODEL RULES, *supra* note 17, Rule 4.3 cmt. (providing that an attorney "should not give advice to an unrepresented person other than the advice to obtain counsel"); MODEL CODE, *supra* note 16, DR 7-104(A)(2) (providing that an attorney shall not "[g]ive advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client"). For an excellent discussion of these rules and their application to negotiations in civil litigation, see Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiations with Unrepresented Poor Persons*, 85 CAL. L. REV. 79 (1997).

90. See Engler, *supra* note 89, at 93-101.

91. A.B.A. PROSECUTION STANDARDS, *supra* note 17, Standard 3-4.1 cmt.

92. *Id.* See also MODEL RULES, *supra* note 17, Rule 4.3 (containing virtually identical provisions).

The Standards actually go so far as to recommend that a record of a plea negotiation with an unrepresented defendant should be made and preserved.⁹³

These ethical standards acknowledge the practical reality that an unrepresented defendant will often look to the prosecutor for advice. While an attorney is ethically bound to clarify his or her role as prosecutor and to avoid offering any sort of advice, the standards do not apply to police officers and, therefore, do not prohibit a police officer's provision of advice to an unrepresented defendant. In fact, it is clear that many forms of advice, such as an explanation of the supposed advantages of cooperation, are a routine and legally acceptable part of the police interrogation process.⁹⁴

Perhaps the largest ethical concern stemming from a police officer's acting as a prosecutor in a negotiation is that there appear to be no boundaries concerning what representations he or she may make to the accused. As a general matter, attorneys are duty bound not to lie or misrepresent facts or law.⁹⁵ Prosecuting attorneys also face more specific obligations in the context of plea negotiations, including the obligation not to imply more power to influence the disposition than the prosecutor actually possesses⁹⁶ and the obligation not to make any assurances about what sentence will be imposed by the court.⁹⁷ The fine line between misrepresentation and "puffery" is often quite difficult even for an attorney to identify.⁹⁸ With a police officer as negotiator, it is not clear that there is any incentive to find that line, as there appears to be no prohibition on misrepresentation or lying by police officers. In the context of an investigation or interrogation, deception and misrepresentation are common police tactics, and courts have often held that such conduct on the part of an officer is entirely

93. A.B.A. PROSECUTION STANDARDS, *supra* note 17, Standard 3-4.1(b).

94. See sources cited *supra* note 78.

95. See MODEL RULES, *supra* note 17, Rule 4.1(a) (providing that an attorney shall not knowingly "make a false statement of material fact or law"); Rule 8.4(c) (providing that an attorney shall not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation"); MODEL CODE, *supra* note 17, DR 7-102(A)(5) (providing that an attorney shall not "[k]nowingly make a false statement of law or fact"); DR 1-102(A)(4) (providing that an attorney shall not "[e]ngage in conduct involving dishonesty, fraud, deceit or misrepresentation").

96. A.B.A. PROSECUTION STANDARDS, *supra* note 17, Standard 3-4.2(b); NDAA PROSECUTION STANDARDS, *supra* note 21, Standard 69.2.

97. A.B.A. PROSECUTION STANDARDS, *supra* note 17, Standard 3-4.2(a); NDAA PROSECUTION STANDARDS, *supra* note 21, Standard 69.1.

98. In an excellent article on plea negotiation tactics, Professor Rodney J. Uphoff asserts that "[t]he line between a lie or deliberate misrepresentation and bluffing, posturing, puffing or gamesmanship...is not always clear." Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systematic Approach*, 2 CLINICAL L. REV. 73, 123-24 (1995). Uphoff notes that "there is widespread disagreement among practitioners and scholars as to the kinds of statements and tactics that are improper." *Id.* at 124. See also MODEL RULES, *supra* note 17, Rule 4.1 cmt. (acknowledging the ambiguities of negotiations by noting that "[u]nder generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact"); James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. B. FOUND. RES. J. 926.

lawful.⁹⁹ It is unclear when and under what provision or rule a police prosecutor must change hats and expose a prior falsehood.

The negotiation process is laden with the same potential conflicts as is every stage in the system that precedes it. An officer could use the negotiation process for self-protection, either by brokering an agreement that ensures that he or she will not be sued or by insisting on a harsh disposition. An officer could use a plea negotiation to foster his or her own agenda, such as vying for an internal promotion based on a good conviction rate. An officer who is a witness in the case may have some personal interest in the case, may or may not want to appear as a witness (overtime pay can be a great police motivator), and may want an unduly harsh or unduly lenient result. Again, simple feelings about a particular case or a particular defendant could be inappropriately injected into the process. While a prosecuting attorney may be subject to the same kinds of motivations, he or she is ethically prohibited from considering them in the plea negotiation process.¹⁰⁰

E. Witness Preparation

Several difficult issues arise when a trial attorney begins the process of preparing a witness to testify in court. One such set of issues revolves around professional competence. A successful direct examination at trial and the witness's survival of cross-examination without heavy damage rely heavily upon pre-trial preparation with the witness. For that reason, every leading trial advocacy text involves some significant discussion of witness preparation.¹⁰¹ In order to properly prepare a witness, a lawyer must have a thorough understanding of the applicable rules of evidence; without that understanding, it would be quite difficult to prepare an examination of a witness that would not elicit inadmissible or inappropriate responses.¹⁰² In addition, the lawyer must have a sound theory of the case and must have plotted out the way in which he or she intends to prove each element of the offenses charged.¹⁰³ Someone with no legal training is extremely unlikely to be in

99. See *supra* note 78.

100. See *supra* notes 25–30 and accompanying text. The NDAA National Prosecution Standards highlight that plea negotiations “should not be used merely to enhance the prosecutor’s conviction record or clean up backlogs in his office” because “as a prosecutor the responsibility is for a fair conviction, not a high conviction rate or easy caseload.” NDAA PROSECUTION STANDARDS, *supra* note 21, Standards 66–72 cmt.

101. See, e.g., ROGER HAYDOCK & JOHN SONSTENG, TRIAL: THEORIES, TACTICS, TECHNIQUES § 8.4 (1991); STEVEN LUBET, MODERN TRIAL ADVOCACY: ANALYSIS AND PRACTICE 29–30, 79–81 (2d ed. 1997); THOMAS A. MAUET, TRIAL TECHNIQUES § 10.11(2) (4th ed. 1996); ALBERT J. MOORE ET AL., TRIAL ADVOCACY: INFERENCES, ARGUMENTS AND TECHNIQUES, 157–59 (1996).

102. See, e.g., HAYDOCK & SONSTENG, *supra* note 101, § 8.4(C) (stressing that an advocate must give the witness a variety of specific instructions, including “to testify only to what the witness saw, did, said, or heard” and to “avoid[] speculation, guesses, and assumptions”); MAUET, *supra* note 101, § 10.11(2) (stressing that an advocate must “[p]repare the witness for the procedural and evidentiary rules that govern his testimony”).

103. See, e.g., HAYDOCK & SONSTENG, *supra* note 101, § 8.3(A) (stressing that “[t]he preparation of direct examination begins with a review of the legal theories, actual story, and significant issues of the case”); MAUET, *supra* note 101, § 10.11(2) (stressing

control of these various facets of trial preparation. The public is certainly poorly served when a criminal prosecution is entrusted to a person with no legal training on how to prepare a witness.

As every practicing attorney recognizes, the line between preparing a witness to testify effectively and suborning perjury is often quite thin and quite evasive.¹⁰⁴ Like in so many other parts of the criminal justice system, the process relies almost purely on a prosecutor's sense of ethics as a means of protecting the legal system and the accused. The temptation to simply tell the witness what it is that you would like him or her to say is likely to be overwhelming, even for the officer who is operating in good faith.¹⁰⁵ Similarly, there is a substantial temptation to encourage a witness to inject inadmissible evidence into a trial, particularly for a police prosecutor who is frustrated by evidentiary or procedural rules that may seem unduly restrictive. Expecting an untrained police officer to comply with these rules is unrealistic, particularly because there appears to be no compelling reason for an officer to do so.

F. Trial

The issues arising from the lack of prosecutorial expertise during a trial, while not the most alarming or disturbing of such issues, are probably the most readily apparent. From the point of view of the accused, they are not the most alarming because they take place in public and are, therefore, the most subject to judicial review and correction. From the point of view of protecting the public, however, they are of paramount importance. Law schools across the country have recognized that trial advocacy encompasses a complex combination of skills requiring rigorous academic study and practice.¹⁰⁶ In order to be an effective advocate at trial, one must have a solid understanding of the rules of evidence and

that, in order to properly prepare a witness to testify, an advocate should know "what [he or she is] legally required to prove, what [his or her] theory of the case is, and what [his or her] themes and labels will be for the trial").

104. See LUBET, *supra* note 101, at 79-81; Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1478-82 (1966); Harry I. Subin, *The Criminal Lawyer's "Different Mission": Reflections on the "Right" to Present a False Case*, GEO. J. LEGAL ETHICS 125, 131 & n.31 (1987); Richard C. Wydick, *The Ethics of Witness Coaching*, 17 CARDOZO L. REV. 1 (1995). Professors Freedman, Subin, and Wydick each refer in their discussions to a famous scene from ROBERT TRAVER, *ANATOMY OF A MURDER* (1958), in which a defense attorney describes the elements of an insanity defense to a client prior to seeking the client's version of the events surrounding a murder. That scene has been the source for a great many law school discussions of the ethical issues involved in witness preparation.

105. Professor Deborah Young has suggested that the same concepts that motivate police officers to lie in the investigative stage of a case may well lead those same officers to encourage witnesses to lie. Young, *supra* note 78, at 463.

106. This author's survey of recent law school catalogues revealed that approximately ninety-five percent of American law schools offer a course that incorporates trial advocacy skills.

of the issues of proof at the trial.¹⁰⁷ In addition, one must have a well developed theory of the case, sometimes involving complex judgments about what evidence to introduce and when and how to introduce it.¹⁰⁸ One must also have the ability to convey the trial theory effectively to the trier of fact. In a criminal case, legal issues involving the suppression of evidence are frequently litigated pre-trial, requiring expertise on a variety of constitutional and statutory issues. A police officer with no law school training is not in a good position to possess or acquire this knowledge and these skills. The failure to introduce admissible evidence, the inadvertent failure to prove an element of an offense, and simple lack of advocacy skills are quite likely to interfere with the successful prosecution of a criminal case. Obviously, the public at large is not well served by a botched prosecution.

The lack of prosecutorial skill will inevitably lead to some troubling situations. A judge might well be tempted to respond to a police prosecutor's lack of skill by offering some advice or assistance, either in bench conferences laden with explicit or subtle advice or by questioning witnesses from the bench. A judge may feel bound to explain the foundational requirements for a piece of evidence or to point out an obvious failure of proof on the part of the untrained prosecutor rather than simply dismiss a case due to prosecutorial ineptitude.¹⁰⁹ Under such circumstances, the public perception of a neutral judiciary is severely damaged, as the judge becomes, in essence, a second prosecutor.¹¹⁰ Indeed, a number of courts have held that undue judicial participation in a prosecution violates the defendant's right to due process of law.¹¹¹

Lack of knowledge and skill will also inevitably lead to prosecutorial misconduct during the course of a trial. As reflected by the various ethical rules

107. Every leading trial advocacy text devotes an entire chapter to a discussion of making and responding to evidentiary objections at trial. *See, e.g.,* HAYDOCK & SONSTENG, *supra* note 101, § 5; LUBET, *supra* note 101, at 261-309; MAUET, *supra* note 101, § 9; MOORE ET AL., *supra* note 101, at 292-310.

108. Similarly, every leading trial advocacy text contains an extensive discussion of the importance of developing a sound theory of the case. *See, e.g.,* HAYDOCK & SONSTENG, *supra* note 101, § 3.3; LUBET, *supra* note 101, at 8-10; MAUET, *supra* note 101, § 10.6; MOORE ET AL., *supra* note 101, at 9-64.

109. This is precisely what occurred in *State v. Morin*, 327 A.2d 702 (N.H. 1974). In a trial concerning a drunk driving charge, a police prosecutor's attempt to prove that the defendant was driving relied exclusively on the use of hearsay evidence. *Id.* at 702. When that attempt failed, the police prosecutor rested his case. *Id.* Instead of granting the defendant's motion to dismiss the case due to the obvious failure of proof, the judge on his own motion continued the case in order for the police prosecutor to call a witness to supply additional evidence. *Id.* The resulting conviction was of no small consequence to the defendant, who was sentenced to thirty days in jail and a three year license revocation. *Id.* at 702-03. For a more detailed discussion of this case, see *infra* notes 165-71 and accompanying text.

110. *See Morin*, 327 A.2d at 703-04 (Griffith, J., dissenting) (finding that "an ordinary person in the position of [the] defendant would feel that the combined prosecution by the prosecutor and the court was unjust").

111. *See, e.g.,* *Figueroa Ruiz v. Delgado*, 359 F.2d 718 (1st Cir. 1966); *United States v. Marzano*, 149 F.2d 923 (2d Cir. 1945); *Furtado v. Furtado*, 402 N.E.2d 1024 (Mass. 1980).

that guide attorneys, trial attorneys are required to exercise legal judgment before posing questions and making arguments. Rule 3.4(e) of the Model Rules of Professional Conduct provides that, throughout the course of a trial, an attorney shall not "allude to any matter that the lawyer does not reasonably believe...will...be supported by admissible evidence."¹¹² A prosecuting attorney may refer in an opening statement only to evidence that the prosecutor has "a good faith and reasonable basis for believing...will be tendered and admitted in evidence."¹¹³ During the presentation of evidence, a prosecuting attorney may not knowingly "offer inadmissible evidence, ask legally objectionable questions, or make other impermissible comments or arguments."¹¹⁴ A prosecuting attorney may not display tangible evidence in front of a judge or jury unless he or she has "a reasonable basis for its admission in evidence."¹¹⁵ The commentary to the ABA Criminal Justice Standards suggests that a "high level of experienced litigation judgment is often required, and a prosecution office should have its senior litigation lawyers available for consultation," when decisions regarding the admissibility of evidence are at issue.¹¹⁶ These particular ethical provisions are structured not only to provide ethical guidance for the trial attorney, but also to assist the trial attorney in avoiding reversible or prejudicial error. A police officer is obviously in no position to make this complex series of legal judgments, and errors will inevitably result. In the face of a legally inappropriate argument or question, a judge may be forced to resort to the costly remedy of declaring a mistrial.

As in other areas of a criminal prosecution, there are significant ethical restraints that a prosecuting attorney must respect during the trial of a criminal case. Most fundamentally, an attorney is ethically prohibited from introducing evidence that he or she knows to be false.¹¹⁷ Throughout a trial, a prosecuting attorney is required to act fairly and in good faith.¹¹⁸ A prosecuting attorney may not ask a question that implies a fact that the prosecutor has no good faith basis to believe is true.¹¹⁹ A prosecuting attorney may not "use the power of cross-examination to discredit or undermine a witness if the prosecutor knows the witness is testifying truthfully,"¹²⁰ nor should a prosecuting attorney seek to

112. MODEL RULES, *supra* note 17, Rule 3.4(e). See also MODEL CODE, *supra* note 17, DR 7-106(C).

113. A.B.A. PROSECUTION STANDARDS, *supra* note 17, Standard 3-5.5; NDAA PROSECUTION STANDARDS, *supra* note 21, Standard 76.2.

114. A.B.A. PROSECUTION STANDARDS, *supra* note 17, Standard 3-5.6(b).

115. *Id.* at Standard 3-5.6(d).

116. *Id.* at Standard 3-5.6 cmt.

117. MODEL RULES, *supra* note 17, Rule 3.3(a)(4); MODEL CODE, *supra* note 17, DR 7-102(A)(4); A.B.A. PROSECUTION STANDARDS, *supra* note 17, Standard 3-5.6(a).

118. See A.B.A. PROSECUTION STANDARDS, *supra* note 17, Standards 3-5.5 to 3-5.9; NDAA PROSECUTION STANDARDS, *supra* note 21, Standards 76, 77, 85.

119. A.B.A. PROSECUTION STANDARDS, *supra* note 17, Standard 3-5.7(d); NDAA PROSECUTION STANDARDS, *supra* note 21, Standard 77.2.

120. A.B.A. PROSECUTION STANDARDS, *supra* note 17, Standard 3-5.7(b); NDAA PROSECUTION STANDARDS, *supra* note 21, Standard 77.5 & cmt.

"intimidate or humiliate [a] witness unnecessarily."¹²¹ No such ethical constraints bind a police prosecutor, leaving a defendant with no recourse for abuse of the trial process unless that abuse becomes apparent to the presiding judge.

If the police prosecutor is also a witness in the case, as must happen routinely when the police prosecutor is also the arresting officer in the case,¹²² a separate set of ethical concerns comes into play. Under both the Model Rules and the Model Code, an attorney is generally precluded from participating as an advocate in a trial in which he or she is likely to be a witness.¹²³ In particular, most courts have "disapproved of the practice of a prosecuting attorney's testifying in a case," allowing the practice only "under extraordinary circumstances."¹²⁴ These restrictions are founded on two distinct, but interrelated, concerns. First, there is a significant risk that the fact-finder will blur the distinction between the person's two roles. As described in the commentary to the Model Rules, "[a] witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof."¹²⁵ As a consequence, the defendant may be deprived of a fair opportunity to cross-examine a statement made by the police officer in his or her capacity as an advocate, but absorbed by the fact-finder as testimony. Second, the restrictions help guard against the likelihood that the fact-finder will accord a witness's testimony greater weight if that witness is also an officer of the court or, in the case of a prosecutor, a representative of the government. While a fact-finder might be inappropriately deferential to police testimony under the best of circumstances, the problem is significantly exaggerated when that police officer is given the power to prosecute the case.¹²⁶

G. Sentencing

While the sentencing decision in a criminal case rests with the judge, it is clear that the prosecutorial recommendation with respect to sentencing, even in a case in which there has been no plea agreement, carries a great deal of weight. In order to make an appropriate sentencing decision, an attorney must be well versed

121. A.B.A. PROSECUTION STANDARDS, *supra* note 17, Standard 3-5.7(a); NDAA PROSECUTION STANDARDS, *supra* note 21, Standards 77.1, 77.6 & cmt.

122. See MISDEMEANOR COURTS, *supra* note 6, at B-16.

123. MODEL RULES, *supra* note 17, Rule 3.7(a); MODEL CODE, *supra* note 17, DR 5-102(A).

124. Erwin S. Barbre, Annotation, *Prosecuting Attorney as a Witness in Criminal Case*, 54 A.L.R.3d 100, § 2(a) (1974).

125. MODEL RULES, *supra* note 17, Rule 3.7 cmt.

126. In *People v. Paperno*, 429 N.E.2d 797 (1981), a criminal case in which the prosecutor who tried the case had significant involvement at the investigatory stage, the New York Court of Appeals acknowledged the seriousness of these issues. In addressing concern about statements made by an advocate with personal knowledge about the case, the court noted that the "unsworn witness rule" is "founded upon the possible danger that the jury, impressed by the prestige of the office of the District Attorney, will accord great weight to the beliefs and opinions of the prosecutor." *Id.* at 801.

not only in local practice, but also in the legal aspects of any sentencing guidelines or requirements. A police officer with no legal training, and particularly an arresting officer who prosecutes only those cases in which he or she has made an arrest, is unlikely to be able to represent the public effectively at a sentencing proceeding.

Ethical obligations bind a prosecuting attorney at the sentencing stage of a criminal prosecution. Most importantly, a prosecutor "should not make the severity of sentences the index of his or her effectiveness.... [H]e or she should seek to assure that a fair and informed judgment is made on the sentence and to avoid unfair sentence disparities."¹²⁷ In addition, a prosecuting attorney is ethically required, in connection with sentencing, to "disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor."¹²⁸ A police prosecutor faces no such ethical restrictions, and appears free to request whatever sentence he or she deems appropriate for that particular defendant, whether harsh or lenient, based on whatever motivations and biases that police prosecutor may have. Additionally, there appears to be no particular incentive for a police prosecutor to provide mitigating sentencing information to a court unless he or she is interested in having a lenient sentence imposed.

H. A Closing Comment About Legal Competence and On-The-Job Training

It may be tempting for one to conclude that, in the context of a misdemeanor prosecution, on-the-job training will be a sufficient substitute for legal education with respect to the development of legal competence. This conclusion is sorely misguided for two clearly identifiable reasons. First and foremost, it relies on the premise that trial-and-error is an effective learning technique. In the absence of any qualified supervision, there is simply no assurance that persistent errors will ever be detected. Worse yet, if those errors do not reap visibly bad results, it is highly likely that erroneous practices will be "learned" and repeated. In the misdemeanor setting, most defendants plead guilty at a very early stage of the prosecution, making it unlikely that erroneous charging decisions will ever surface. For similar reasons, it is equally unlikely that anyone would be in a position to bring erroneous discovery decisions to the attention of a police prosecutor. While poor witness preparation or poor trial advocacy skills are more likely to come to the attention of a particular police prosecutor, it is unlikely that he or she will have an adequate opportunity to correct those problems. In most of the jurisdictions that allow police prosecution, it appears that the police prosecutor is generally the arresting officer.¹²⁹ Because the percentage of misdemeanor cases that result in a trial is extremely low,¹³⁰ it is hard to imagine that any individual officer would accumulate enough experience to have a noticeable impact on his or her

127. A.B.A. PROSECUTION STANDARDS, *supra* note 17, Standard 3-6.1(a); NDAA PROSECUTION STANDARDS, *supra* note 21, Standard 88.4.

128. MODEL RULES, *supra* note 17, Rule 3.8(d); MODEL CODE, *supra* note 17, DR 7-103(B). See also A.B.A. PROSECUTION STANDARDS, *supra* note 17, Standard 3-6.2(b).

129. See *supra* note 7 and accompanying text.

130. See *supra* note 84.

skills. In those jurisdictions in which an individual police officer is designated as a police prosecutor, there is a slightly greater chance of learning through experience, but the very significant drawbacks of trial-and-error learning remain unabated.

The conclusion that on-the-job training might be sufficient in the misdemeanor context also relies on the premise that misdemeanor cases are unlikely to present complex legal issues. In fact, it is well recognized that many misdemeanor cases present extremely complicated legal and factual issues.¹³¹ Perhaps the clearest example is in the area of drunk driving, which is widely acknowledged to be "one of the most challenging legal fields of study today."¹³² Donald H. Nichols, one of the nation's leading authors on drunk driving litigation, has noted that, in order to effectively prosecute a drunk driving case, a prosecutor "must grapple with scientific issues, constitutional issues, statutory issues, procedural issues and numerous areas of civil and criminal law."¹³³ Domestic violence cases also often raise complicated evidentiary questions, such as the admissibility of the alleged perpetrator's prior bad acts and, when a complaining witness refuses to testify, the admissibility of his or her prior statements to the police. The prosecution of any category of possessory crimes will inevitably involve complicated search and seizure issues. And as the United States Supreme Court has recognized, disorderly conduct cases, vagrancy cases, public drunkenness cases and the like frequently "bristle with thorny constitutional questions."¹³⁴ Thus, the premise that misdemeanor prosecution is "easy" and can be left in the hands of the legally untrained is quite far off the mark.

Even if one were to accept the concept that on-the-job training would lead to sufficient legal competence, all of the concerns raised by the lack of ethical rules described in the preceding section of this Article would remain unaddressed. Furthermore, as will be examined in detail in Parts IV and V of this Article, there are a variety of legal and public policy concerns that would likewise remain unaddressed. Before proceeding to those issues, however, this Article will review the scant legal authority for the practice of police prosecution.

III. EXISTING LEGAL AUTHORITY FOR POLICE PROSECUTION

As noted earlier, one is hard pressed to find any explicit legal authority or justification for the practice of allowing police officers to prosecute criminal cases. In only two states—South Carolina and New Hampshire—have the highest courts

131. See, e.g., *Argersinger v. Hamlin*, 407 U.S. 25, 33 (1972) (noting that the Court was "by no means convinced that legal and constitutional questions involved" in petty-offense cases "are any less complex" than those involved in other criminal cases); Doucette, *supra* note 88, at 500 (1997) (noting that "labeling a criminal offense a misdemeanor gives little or no clue to its legal or factual complexity").

132. See, e.g., 1 DONALD H. NICHOLS, *DRINKING/DRIVING LITIGATION: CRIMINAL AND CIVIL* vii (1996).

133. *Id.*

134. *Argersinger v. Hamlin*, 407 U.S. 25, 33 (1972). Statutes aimed at these types of offenses can often be challenged as unconstitutionally vague or, in the case of disorderly conduct, as violative of the defendant's free speech rights under the First Amendment.

specifically ruled on and authorized the practice. In the federal system and in two other states—New York and Delaware—some support for the practice can be found in the decisions of several lower courts, while in three other states—Massachusetts, Maine, and Iowa—police prosecution is at least arguably authorized by statute. This section of the Article will examine and analyze those cases and statutes.

A. Common Law Authority for Police Prosecution

In a series of court opinions spanning the last twenty-five years, the Supreme Court of South Carolina has specifically authorized the prosecution of misdemeanor criminal cases by police officers in its lower trial courts. In 1972, the court invoked its powers under the common law to specifically approve for the first time the practice of allowing the arresting police officer to prosecute a criminal case, noting that such a practice had prevailed in the state's magistrate's courts for at least a decade.¹³⁵ In that case, *State v. Messervy*, an intermediate appellate court had overturned a criminal conviction for driving under the influence of alcohol because the arresting officer had made a closing argument to the jury in the case after also testifying as a witness.¹³⁶ The Supreme Court of South Carolina reinstated the conviction, relying predominantly on two notions that it failed to develop or explain sufficiently. First, it indicated without further explanation that "the large number of traffic court violations" prosecuted in the magistrate's courts rendered the appearance of a prosecuting attorney impracticable.¹³⁷ Because the court failed to differentiate between criminal cases and non-criminal cases, this economic justification for the practice of police prosecution is virtually impossible to evaluate.¹³⁸ It is highly unlikely, however, that criminal offenses constitute a significant percentage of the court's "traffic" violations. Second, the court indicated that "[t]he patrolman's conduct (same as an attorney) is subject to the scrutiny of the magistrate at all times...."¹³⁹ In fact, very few of a prosecutor's most important discretionary decisions actually take place in the presence of a judge, and even those that do cannot readily be subjected to effective judicial review.

One of the ironies of the court's holding is that it authorized misdemeanor prosecution only by the arresting officer,¹⁴⁰ the officer who is most likely to have a personal stake in the case and to be influenced by that personal stake. Moreover, prosecution by individual arresting officers rather than designated police prosecutors virtually assures that the police prosecutor will have no expertise in the art of prosecution and that different defendants will be treated differently based on the personality of the arresting officer.

135. *State v. Messervy*, 187 S.E.2d 524 (S.C. 1972).

136. *Id.* at 524.

137. *Id.* at 525.

138. For a full discussion and critique of the economic justification for allowing police prosecution, see *infra* notes 415–28 and accompanying text.

139. *Messervy*, 187 S.E.2d. at 525 (parenthetical in original).

140. *Id.*

Several years after deciding *Messervy*, the Supreme Court of South Carolina both clarified and expanded its prior ruling on the practice of police prosecution. In *State ex rel. McLeod v. Seaborn*,¹⁴¹ the court expanded the pool of those police officers who may prosecute a criminal case from only the arresting officer to include the arresting officer's supervisors. More importantly, the court addressed an issue that had not been raised in its prior decision: whether such a practice constitutes the unauthorized practice of law by a person without a license.¹⁴² A South Carolina statute provides that "[n]o person may practice or solicit the cause of another person in a court of this State unless he has been admitted and sworn as an attorney."¹⁴³ Despite the clear and unambiguous language of that statute, and over the objection of the state's Attorney General,¹⁴⁴ the court held that "the prosecution of misdemeanor traffic violations in the magistrates' courts by either the arresting officer or a supervisory officer assisting the arresting officer does not constitute the unlawful practice of law."¹⁴⁵ In reaching this extraordinary conclusion, the court noted that prosecuting police officers prosecute "in their official capacities as law enforcement officers and employees of the State."¹⁴⁶ The court then concluded that prosecuting police officers "do not hold themselves out to the public as attorneys, and their activity in the magistrates' courts does not jeopardize the public by placing 'incompetent and unlearned individuals in the practice of law.'"¹⁴⁷ The court justified its holding by asserting that police prosecution "renders an important service to the public by promoting the prompt and efficient administration of justice,"¹⁴⁸ and that it could "discern no purpose or policy consistent with [the statute prohibiting unauthorized practice] that would be served by enjoining the Highway Patrol from continuing this activity."¹⁴⁹

The primary assertion underlying the court's opinion, that police officers are not "'incompetent and unlearned individuals in the practice of law,'"¹⁵⁰ is, of course, open to serious debate. It is hard to imagine that the court honestly believed that the minimal training received at the police academy is an acceptable substitute for attendance at and graduation from an accredited law school and the passage of a bar examination; if that were the court's position, it is unclear why a police officer should not then be allowed to represent a criminal defendant in a pending

141. 244 S.E.2d 317 (S.C. 1978).

142. *Id.* at 318.

143. S.C. CODE ANN. § 40-5-310 (Law. Co-op. 1997).

144. *McLeod*, 244 S.E.2d at 318.

145. *Id.* at 319.

146. *Id.* Any implication that employment by the State was central to the court's decision is belied by the court's subsequent decision in *Easley v. Cartee*, 424 S.E.2d 491 (S.C. 1992), in which the court held that privately employed licensed security officers may prosecute misdemeanor cases.

147. *McLeod*, 244 S.E.2d at 319 (quoting *State v. Wells*, 5 S.E.2d 181, 186 (S.C. 1939)).

148. *Id.* at 319.

149. *Id.*

150. *Id.* (quoting *Wells*, 5 S.E.2d at 186).

case. Moreover, the court's reasoning completely ignores the very important role that the obedience to ethical rules plays in the professional life of any prosecutor.

A well-reasoned dissent, authored by Chief Justice Lewis, raised several of these issues.¹⁵¹ First, the dissent pointed out that a prosecuting police officer performs many activities, including making and resisting motions, examining and cross-examining witnesses, making and resisting objections to the admission of evidence, arguing points of law to the court, and presenting arguments to the jury, that clearly constitute the practice of law.¹⁵² After concluding that the majority's holding was in conflict with the statute, the dissent provided a catalogue of some of the very troubling issues that the holding raised but did not resolve:

What degree of competency is required of these newly created attorneys? By what Code of Ethics will their professional conduct be judged? What authority will discipline them? Will this Court have the authority to suspend or disbar them from further practice in the magistrates' courts, if they are found guilty of misconduct; or will the State Highway Patrol have the sole right to judge the conduct of its employees and, therefore, the ethical standards of this new breed of lawyer that the majority opinion is now permitting to be created by edict of the Highway Department?¹⁵³

The Chief Justice opined that the court should consider authorizing the practice of law by what he termed a "paralegal" only after "standards for their competence, conduct, and regulation are established, for, if the State can be represented by a paid paralegal, certainly the defendant can also."¹⁵⁴ The Chief Justice concluded that "[e]xpediency is no justification for the action now taken by the majority."¹⁵⁵

Despite the vigor of Chief Justice Lewis's dissent in *McLeod*, the same court has recently moved even further in the direction of authorizing police prosecution of criminal cases. In 1992, the court rejected specific proposals submitted by a special subcommittee of the Unauthorized Practice of Law Committee of the South Carolina Bar, explicitly "reaffirm[ing] the rule that police officers may prosecute traffic offenses in magistrate's court and in municipal court."¹⁵⁶ Further, in case there were any doubts about what limiting effect might have been created by the court's use of the phrase "traffic offenses," the court issued an opinion just two months later that upheld a misdemeanor shoplifting conviction that had been prosecuted before a jury by a private security officer.¹⁵⁷ In that case, the court explicitly held that "the prosecutorial authority granted to law enforcement officers and licensed security guards applies with equal force to non-

151. *Id.* (Lewis, J., dissenting). Interestingly, Justice Lewis had joined the majority opinion in *State v. Messervy*, 187 S.E.2d 524 (S.C. 1972), just six years earlier. His dissent did not explain the reasoning behind his vote in the earlier case.

152. *Id.*

153. *Id.*

154. *Id.* at 320.

155. *Id.*

156. *In re Unauthorized Practice of Law Rules*, 422 S.E.2d 123, 125 (S.C. 1992).

157. *Easley v. Cartee*, 424 S.E.2d 491 (S.C. 1992).

traffic misdemeanors within the jurisdiction of a magistrate's or municipal court."¹⁵⁸

The court-sanctioned use of police officers as prosecutors in criminal cases has an even longer history of explicit court approval in New Hampshire. In 1953, the Supreme Court of New Hampshire specifically approved the practice of police prosecution in *State v. Urban*.¹⁵⁹ Although New Hampshire did not have a specific statute prohibiting the unauthorized practice of law, it did have a statute that made it unlawful for a police officer to "appear in any court or before a justice as attorney for any party in a suit."¹⁶⁰ The court noted that although no court had ever decided whether this statute was intended to preclude police officers from prosecuting criminal cases, there were a number of published New Hampshire cases in which passing reference had been made without negative comment to police prosecution.¹⁶¹ Furthermore, the court pointed out that similar statutes in Maine, Massachusetts, and Vermont had not been found to preclude police prosecution of criminal cases.¹⁶² Concluding that the legislature intended only to prohibit police officers from appearing as attorneys in civil matters, the court held that "in prosecuting a misdemeanor in a municipal court a police officer is not acting 'as attorney for any party in a suit' within the meaning of the statute."¹⁶³

In the years since *Urban* was decided, the Supreme Court of New Hampshire has had several opportunities to revisit the issue of police prosecution, each time upholding the practice. In *State v. LaPalme*, the court affirmed a misdemeanor conviction for cruelty to animals that had been secured by a police prosecutor, noting only that "[t]he prosecution of misdemeanors by police officers is a practice that has continued in one form or another since 1791 and is still permissible under existing statutes."¹⁶⁴ In *State v. Morin*, a virtual case study in some of the hazards of police prosecution, the court affirmed a drunk driving conviction in which the police prosecutor had badly mishandled the case at trial. In that case, in a trial before a judge, the police prosecutor had tried to prove the defendant's operation of the motor vehicle exclusively through the use of hearsay evidence; when that evidence was not allowed, the police prosecutor rested without providing any competent evidence that the defendant had operated a motor vehicle.¹⁶⁵ Although the evidence that the prosecutor had presented was clearly legally insufficient to support a conviction, the judge "on his own motion ordered a continuance" in order for the police prosecutor to secure the evidence necessary for his case.¹⁶⁶ A new witness was presented on the date of the continuance and the

158. *Id.* at 492 n.2.

159. 100 A.2d 897 (N.H. 1953).

160. *Id.* at 897 (quoting N.H. REV. L. ch. 380, § 23 (current version at N.H. REV. STAT. ANN. § 104:25 (1996))).

161. *Urban*, 100 A.2d at 898.

162. *Id.*

163. *Id.* at 898 (quoting N.H. REV. L. ch. 380, § 23 (current version at N.H. REV. STAT. ANN. § 104:25 (1996))).

164. 179 A.2d 284, 285 (N.H. 1962).

165. 327 A.2d 702 (N.H. 1974).

166. *Id.*

defendant was convicted and sentenced to serve thirty days in jail, pay a substantial fine, and lose his license to drive for three years.¹⁶⁷

Although the majority opinion in *Morin* affirmed the conviction, a vigorous dissent argued that "the unsolicited intervention by the court after the prosecution had rested, designed to generate evidence which would permit a conviction, was impermissible."¹⁶⁸ The dissent pointed out that the independence of a criminal trial court is compromised any time it "assist[s] in the preparation or presentation of the prosecution's case, either ex parte or in court."¹⁶⁹ The dissent, quoting Learned Hand, concluded that the judge in the case before the court had "exhibited a prosecutor's zeal, inconsistent with that detachment and aloofness which courts have again and again demanded, particularly in criminal trials."¹⁷⁰ Because he was "persuaded that an ordinary person in the position of [the] defendant would feel that the combined prosecution by the prosecutor and the court was unjust,"¹⁷¹ the dissenting justice would have overturned the conviction.

Perhaps because of the recurrence of the problems that arose in *Morin*, the court's next opinion addressing the issue of police prosecution, *State v. Aberizk*,¹⁷² challenged the wisdom of the practice of police prosecution. The court cited Standard 3-2.1 of the American Bar Association's Standards for Criminal Justice, which recommends that "[t]he prosecution function should be performed by a public prosecutor who is a lawyer subject to the standards of professional conduct and discipline."¹⁷³ The court then cited *Morin* in support of the proposition that "[t]he absence of an independent, professional prosecutor may reduce pre-trial screening of charges, lead to greater involvement of the trial court in eliciting evidence, and restrict counsel's opportunity to object to the admission of evidence."¹⁷⁴ The court went on to suggest that "[i]mprovements in the challenged procedure [would be] a desirable subject for legislative consideration in the framework of available time, education, and budgetary resources."¹⁷⁵ Nonetheless, the court affirmed the drunk driving conviction that had resulted from a trial prosecuted by a police officer.¹⁷⁶

Despite the court's fairly strong language, it made clear in a decision published almost a decade later that the practice of police prosecution continued unabated in New Hampshire and that the court was not inclined to bring it to a halt. In *Bilodeau v. Antal*,¹⁷⁷ the court was called upon to rule on the contours of the

167. *Id.* at 702-03.

168. *Id.* at 703 (Griffith, J., dissenting).

169. *Id.* (citing AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, FUNCTION OF THE TRIAL JUDGE, Standard 6.4 (1st ed. 1972)).

170. *Morin*, 327 A.2d at 703 (quoting *United States v. Marzano*, 149 F.2d 923, 926 (2d Cir. 1945) (Learned Hand, J.)).

171. *Id.* at 703-04.

172. 345 A.2d 407 (N.H. 1975).

173. A.B.A. PROSECUTION STANDARDS, *supra* note 17, Standard 3-2.1.

174. *State v. Aberizk*, 345 A.2d at 408. *See also Morin*, 327 A.2d 702.

175. *Aberizk*, 345 A.2d at 408.

176. *Id.*

177. 455 A.2d 1037 (N.H. 1983).

state's prohibition of the unauthorized practice of law. In dicta, the court "reaffirm[ed] the right of law enforcement officers to prosecute criminal cases on behalf of the State."¹⁷⁸ Curiously, the court's very next sentence and paragraph held that a medical expert who is not a licensed attorney must be barred from examining and cross-examining witnesses in a medical malpractice deposition, relying on the following logic:

Lawyers alone are uniquely knowledgeable about the procedural and evidentiary law of our State, in addition to the substantive law of the case at hand. Perhaps more important, lawyers are subject to discipline, and may be sued privately if their performance falls below the level of reasonable care and diligence. We see no reason why trial counsel cannot refer a complex medical-malpractice case to a lawyer who is competent to handle such a case, or take the requisite time to master the medical details.¹⁷⁹

The court made no effort to reconcile its prohibition of the practice of law by a medical expert with its continued approval of allowing police officers to practice law, despite the fact that the reasoning supporting the prohibition would seem to apply with far greater force in the context of a criminal prosecution and trial.

In only two other states do there appear to be any court opinions dealing with the propriety of police prosecution of criminal cases. In contrast to South Carolina and New Hampshire, however, the opinions originate from lower courts and have little precedential value in terms of justifying the practice. In New York, there are several published opinions from the 1930s that address the issue,¹⁸⁰ each of which suggested that the practice of police prosecution was firmly in place at that time, but only one of which actually condoned the practice. In *People v. Black*,¹⁸¹ a 1935 New York County Court decision, the court upheld a criminal conviction that had been obtained by an inspector from the state's Conservation Department, despite the defendant's contention that the conviction was void because the prosecutor was not licensed to practice law. As the court noted, the relevant statute "contain[ed] a positive and proper prohibition for 'any natural person to practice or appear as an attorney-at-law...for another in a court of record...without having first been duly and regularly licensed to practice law in the courts of record in this state.'"¹⁸² The court concluded that "[t]he clear and only

178. *Id.* at 1041 (citing *Aberisk*, 345 A.2d at 408 (N.H. 1975) and *State v. LaPalme*, 179 A.2d 284, 285 (N.H. 1962)).

179. *Id.* (citations omitted).

180. *See, e.g., People v. Black*, 282 N.Y.S. 197, 199 (N.Y. Cty. Ct. 1935) (affirming misdemeanor conviction secured by conservation department inspector prosecutor, noting the "long-established practice of presentation of minor criminal cases before justices of the peace by Conservation Department inspectors, state troopers, and other public officers"); *People v. Wood*, 272 N.Y.S. 258 (N.Y. Cty. Ct. 1934) (vacating misdemeanor criminal conviction because sheriff who prosecuted the case was not licensed to practice law); *People v. James*, 269 N.Y.S. 626 (N.Y. Cty. Ct. 1934) (vacating misdemeanor conviction because district game inspector who prosecuted the case not licensed to practice law).

181. 282 N.Y.S. 197 (N.Y. Cty. Ct. 1935).

182. *Id.* at 200 (quoting N.Y. PENAL LAW § 270).

permissible intent of the Legislature was to protect the general public from exploitation at the hands of unscrupulous or unskilled persons posing as lawyers, or unauthorized persons demanding or receiving compensation for purely legal service.”¹⁸³ Finding that the prosecutor in the case was a state employee who neither held himself out to be an attorney nor received any special compensation for acting in his capacity as a prosecutor, the court reasoned that the policies supporting the statute did not require that the conviction be reversed.¹⁸⁴ After acknowledging that the statute was “clear in its phrasing,”¹⁸⁵ the court held that enforcing the statute with its literal interpretation would result in “such unreasonable, unjust, or absurd consequences as to compel a conviction that they could not have been intended by the legislature.”¹⁸⁶ For that reason, the court concluded that a law enforcement officer who acts as a prosecutor does not violate the prohibition against practicing law without a license.¹⁸⁷

One passage from the court’s opinion in *Black* makes the court’s misperception of the relevant issue particularly clear:

Who was hurt? Can the defendant appellant complain because he was not prosecuted by a more experienced and skilled person? Going before a layman justice, may he be heard on the mere ground that the case against him was presented by another layman, when he was ably represented by an admitted attorney of high standing?¹⁸⁸

The court completely failed to recognize that a defendant relies heavily upon the ethics and competence of a prosecutor for the protection of his most basic constitutional rights.¹⁸⁹ Even if one assumes that the layperson is operating in completely good faith, there are a whole host of ways in which vital rights can be undermined by an unskilled prosecutor.¹⁹⁰ These problems are exaggerated, not reduced, when the judge presiding over the case is not a licensed attorney, as there is even less oversight provided for the protection of the defendant’s rights. The court was equally dismissive of the obvious risk that the public was harmed by the practice of allowing unskilled laypersons to prosecute criminal matters, stating only that “[the prosecutor’s] employer, the state, does not and cannot be heard to complain of his acts.”¹⁹¹ The notion that the executive branch of the state, by endorsing what on its face clearly constituted a violation of a state statute, could somehow waive the right of the public to seek the protection of the laws passed by its own legislature, seems bizarre at best.

Several much more recent court opinions, while not directly ruling on the issue of police prosecution, make it abundantly clear that the practice has continued

183. *Id.*

184. *Id.* at 200–01.

185. *Id.* at 201.

186. *Id.* (quoting 25 RULING CASE LAW § 214 at 959).

187. *Id.*

188. *Id.*

189. *See supra* Part II.

190. *See supra* Part II.

191. *Black*, 282 N.Y.S. at 200–01.

right through to the 1990s. In 1989, a New York trial court noted the "long-established and accepted procedure and practice of over a century," which "today has the force of law," to have the prosecution of misdemeanors and offenses in lower courts "conducted by local authorities, that is, by the police, State troopers...town and village attorneys and corporation counsels."¹⁹² Similarly, the Second Circuit noted in 1992 the "long-standing tradition of lay prosecutions for misdemeanor offenses in New York."¹⁹³ The unauthorized practice of law is expressly prohibited by statute in New York,¹⁹⁴ and neither the legislature nor any higher court has ever suggested that police officers were exempt from the statute's provisions.

In Delaware, where police prosecution of misdemeanors appears to be pervasive,¹⁹⁵ this author's research produced only one court opinion touching on the subject. In *Evans v. Barron*,¹⁹⁶ in the context of deciding a case involving a speeding ticket, a judge of the Delaware Superior Court upheld the power of the state police to prosecute traffic offenses in Justice of the Peace Courts. There, the court confirmed the "well-established practice of the State Police in prosecuting traffic offenders in the Justice of the Peace Courts."¹⁹⁷ Nonetheless, "[n]either [the] petitioner nor the State proffer[ed] any finding or persuasive authority to authorize or preclude the police conduct in issue."¹⁹⁸ In light of "the absence of any authority to the contrary,"¹⁹⁹ the court upheld the practice, although it specifically limited its decision to offenses "contained in the Motor Vehicle Code or [within] the jurisdiction of the Justice of the Peace Court."²⁰⁰ By statute, the jurisdiction of the Justice of the Peace Courts includes forty-six specific misdemeanor offenses, many of them punishable by up to one year in jail,²⁰¹ and the Motor Vehicle Code also appears to contain several criminal offenses.²⁰² The judge in this case did not address the fact that the Supreme Court of Delaware has expressly held that it has the "exclusive right to license attorneys at law" and that "presuming to practice law without a license is a contempt of [the court's] authority and punishable as such."²⁰³

192. *People v. Jackson*, 548 N.Y.S.2d 987, 991 (N.Y. Sup. Ct. 1989), *rev'd*, 558 N.Y.S.2d 590 (N.Y. App. Div.), *appeal denied*, 566 N.E.2d 1177 (N.Y. 1990) (quoting *In re Johnson v. Boldman*, 203 N.Y.S.2d 760, 761-62 (N.Y. Sup. Ct. 1960) and *People v. Wyner*, 142 N.Y.S.2d 393, 396 (N.Y. Cty. Ct. 1955)).

193. *Linares v. Senkowski*, 964 F.2d 1295, 1298 (2d Cir. 1992).

194. N.Y. JUD. LAW § 484 (West 1997). Two Opinions issued by the state's Attorney General suggest that a police officer who prosecutes a criminal case is not engaged in the unauthorized practice of law under this statute. 1974 Op. Att'y Gen. 166; 1933 Op. Att'y Gen. 111.

195. Telephone Interview with Captain Thomas DiNetta, Delaware Police Academy (June 20, 1997).

196. No. 81A-AU-7 (Del. Super. Ct. 1982) (on file with author).

197. *Id.* at 4.

198. *Id.*

199. *Id.*

200. *Id.* at 4 n.5.

201. See DEL. CODE ANN. tit. 11, §§ 2702, 4206 (1995).

202. See, e.g., DEL. CODE ANN. tit. 21, §§ 4172(a), 4601, 4604 (1997).

203. *Delaware Optometric Corp. v. Sherwood*, 128 A.2d 812, 816-17 (Del. 1957).

This case has very little precedential value and is simply further evidence of the fact that police prosecution in Delaware is widespread, without any legal support or justification for the practice.

In the federal court system, there are only three published cases in which the practice of police prosecution has been subjected to judicial scrutiny. Although the court in each instance upheld the validity of the resulting criminal conviction, the cases contain very little cogent legal analysis. In *United States v. Glover*,²⁰⁴ the United States District Court for the District of Maryland upheld a larceny conviction that resulted from a trial at which the prosecutor was an Air Force officer who was not licensed to practice law. The court acknowledged that the local court rules required one to be licensed to practice law in order to practice before the court, but noted that the practice of police prosecution had "long had the tacit approval of all of the Judges of th[e] Court."²⁰⁵ The court then engaged in a review of the trial transcript, concluding that the police prosecutor "thoroughly prepared his case [and] conducted himself quite ably" and that the defendant "received a fair trial."²⁰⁶ By suggesting without further analysis that the trial was "fair," the court simply assumed the conclusion of what should have been the central legal issue in the case—whether a trial can ever be fair when every discretionary decision that preceded it and every discretionary decision made during the trial itself is made by a prosecutor who is not licensed to practice law. The court's opinion is devoid of any exploration of the myriad ways in which the case might have been affected by the decisions that the police prosecutor made outside of judicial review. For example, a dry review of a trial transcript tells an appellate court precious little about plea offers that a prosecuting attorney might have made, exculpatory evidence that a police prosecutor may not have disclosed, or a conflict of interest that the police prosecutor might have had in prosecuting the case. Significantly, although it upheld the underlying conviction, the *Glover* court expressed some reservations about the practice of police prosecution. The court concluded its opinion by noting that "justice, and its appearance, would be better served if the United States Attorney's Offices were sufficiently enlarged and funded to permit and require their participation as prosecutors in criminal proceedings before Federal Magistrates."²⁰⁷

The two other federal court opinions on point offer even less legal analysis than the *Glover* opinion. In *United States v. Broers*,²⁰⁸ the Ninth Circuit declared without any analysis whatsoever that the prosecution of a misdemeanor case by a federal agent who is not licensed to practice law "does not in and of itself implicate due process."²⁰⁹ The court's per curiam opinion simply cited *Glover* for its dismissive legal conclusion and affirmed the misdemeanor conviction that was

204. 381 F. Supp. 1139 (D. Md. 1974).

205. *Id.* at 1143.

206. *Id.* at 1146.

207. *Id.*

208. 776 F.2d 1424 (9th Cir. 1985).

209. *Id.* at 1425.

the result of a trial conducted by a special agent of the United States Forest Service who was not licensed to practice law.²¹⁰

Under essentially the same set of facts, the United States District Court for the Eastern District of California in *United States v. Downin*²¹¹ simply cited *Broers* for the otherwise unjustified proposition that “the use of a lay prosecutor in a petty offense case does not inherently violate due process.”²¹² That court went on to acknowledge, however, that the practice might violate the local court rule requiring admission to the bar in order to practice. In a truly extraordinary footnote, the court stated that the “historic reason for the local rule, namely, this court’s reliance on the State Bar of California for discipline of members of its bar, suggests that the local rule is irrelevant to any interest of the defendants.”²¹³ It is hard to comprehend how being prosecuted for a crime by an individual who is not subject to any form of ethical rules or professional discipline cannot be a legitimate concern for the defendant. As the history and caselaw surrounding unauthorized practice rules elsewhere make clear,²¹⁴ the rules are designed to protect all members of society, not just the purported client, from the unscrupulous and incompetent practitioner.

B. Statutory Authority for Police Prosecution

There are three states in which the legislature appears to have given its approval, either explicitly or tacitly, to the prosecution of criminal cases by police officers. In Massachusetts, the legislature has seen fit to acknowledge, but not explicitly authorize, the widespread practice of allowing police officers to prosecute criminal cases. Rule 2(b)(13) of the Massachusetts Rules of Criminal Procedure provides that the term “prosecutor” as used within the rules “means any prosecuting attorney or prosecuting officer, and shall include a city solicitor, a police prosecutor, or a law student approved for practice pursuant to and acting as authorized by the rules of the Supreme Judicial Court.”²¹⁵ The commentary suggests that this broad definition “reflects the fact that many cases in the District Courts are prosecuted by a police prosecutor.”²¹⁶ While this rule does, in fact, reflect the reality of the common practice in Massachusetts, it does not appear to make the practice legal. By statute, the unauthorized practice of law is a misdemeanor criminal offense in Massachusetts,²¹⁷ and neither the legislature nor any published court opinion has exempted police officers from the scope of that statute. The state’s highest court, the Supreme Judicial Court, has twice acknowledged the pervasiveness of police prosecution in the state, but in neither case did it explicitly rule on the legality of the practice. In a 1980 opinion, *Furtado v. Furtado*,²¹⁸ the court noted in passing that “[p]olice prosecutors, who normally

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- 210. *Id.*
 - 211. 884 F. Supp. 1474 (E.D. Cal. 1995).
 - 212. *Id.* at 1480.
 - 213. *Id.* at 1481 n.13.
 - 214. See *infra* note 388 and accompanying text.
 - 215. MASS. R. CRIM. P. 2(b)(13) (1996).
 - 216. MASS. R. CRIM. P. 2(b)(13) cmt (1996).
 - 217. MASS. GEN. LAWS ch. 221, § 41 (1998).
 - 218. 402 N.E.2d 1024 (Mass. 1980).

are not members of the bar, customarily prosecute offenses, particularly minor offenses, in the District and Municipal Courts of the Commonwealth."²¹⁹ The court, after citing the definition of the term "prosecutor" found in Rule 2(b)(13) of the Rules of Criminal Procedure, went on to suggest in dicta that "certain criminal proceedings may be prosecuted by a person who is not a member of the bar."²²⁰ Just a few months later, in *Burlington v. District Attorney for the Northern District*,²²¹ the court noted that "it has long been assumed, and reflected in actual practice, that a district attorney, to the extent that his appearance in criminal cases in District Court is discretionary with him, may elect to leave such prosecutions to local police officers designated by the particular police command of the municipality."²²² In neither case did the court address the question of whether a police officer who prosecutes is engaged in the unauthorized practice of law.

In Maine, the statute that prohibits the unauthorized practice of law, in conjunction with a related statute, expressly authorizes police officers to "represent [a] municipality in District Court in the prosecution of alleged violations of ordinances which the officer may enforce."²²³ Because ordinances in Maine can be either criminal or civil in nature,²²⁴ the statute provides explicit legislative authority for police officers to prosecute criminal cases.²²⁵

In Iowa, the statute that outlines the duties of the county attorney specifically requires the county attorney to prosecute all misdemeanors involving domestic abuse.²²⁶ The statute then provides that the county attorney "shall prosecute other misdemeanors when not otherwise engaged in the performance of other official duties."²²⁷ Although another Iowa statute provides that "the power to admit persons to practice as attorneys and counselors in the courts of [Iowa]...is vested exclusively in the supreme court,"²²⁸ Iowa officials have nonetheless interpreted the county attorney statute to allow police officers to prosecute misdemeanor cases when the county attorney is "otherwise engaged."²²⁹

219. *Id.* at 1034.

220. *Id.*

221. 412 N.E.2d 331 (Mass. 1980).

222. *Id.* at 333-34 (citing KENT B. SMITH, CRIMINAL PRACTICE AND PROCEDURE § 850 (1970)).

223. ME. REV. STAT. ANN. tit. 30-A, § 2671(3) (West 1997); ME. REV. STAT. ANN. tit. 4, § 807 (West Supp. 1997).

224. *See* ME. REV. STAT. ANN. tit. 17-A, § 4-B (West 1997).

225. In practice, it appears that this authorization is rarely utilized. Telephone Interview with Alan Hammond, Training Manager, Maine Criminal Justice Academy (July 22, 1997).

226. IOWA CODE § 331.756(4) (1996).

227. *Id.*

228. IOWA CODE § 602.10101 (1996).

229. Telephone Interview with Peter Grady, Assistant Attorney General, Office of the Attorney General of the State of Iowa (June 18, 1997). It is worth noting, however, that the practice of police prosecution appears to be little used in the state. *Id.*

C. Police Prosecution in the Absence of Specific Authority

In as many as half a dozen other states,²³⁰ the prosecution of misdemeanor criminal cases by police officers who are not licensed to practice law appears to occur without any reference to the practice in any published court opinion or any statute or rule promulgated by the state's legislature. In some of these states, such as Rhode Island,²³¹ Pennsylvania,²³² and New Jersey,²³³ the practice apparently occurs on a daily basis. In others, the practice may be far less frequent.²³⁴

230. There is some basis for asserting that police officers prosecute criminal cases in the following jurisdictions beyond those already referenced in the text of this Article: Minnesota, New Jersey, New Mexico, Pennsylvania, Rhode Island, Vermont, and Virginia. See *infra* notes 231-34 and accompanying text.

231. As the Director of the Roger Williams University Criminal Defense Clinic, which represents misdemeanor defendants in the District Courts of Rhode Island, this author can verify through personal experience that police prosecution is a daily and pervasive practice in the state. While police officers do not represent the state at the trial stage, they routinely engage in plea negotiations and every stage of representation up until the trial. In many cities and towns, an attorney will never see a case unless all efforts at resolution prior to trial have failed.

232. In a law review article published in 1988, Professor Seth F. Kreimer noted that "police officers initially prosecute many misdemeanor complaints" in Allegheny County, Pennsylvania. Seth F. Kreimer, *Releases, Redress, and Police Misconduct: Reflections on Agreements to Waive Civil Rights Actions in Exchange for Dismissal of Criminal Charges*, 136 U. PA. L. REV. 851, 884 (1988). He went on to cite an interview with the Executive Director of the Greater Pittsburgh Chapter of the ACLU for proposition that "in misdemeanor cases, the initial prosecution is undertaken by the police officers." *Id.* at 884 n.128 (citing interview with James Lieber conducted on June 30, 1987).

233. *Id.* at 884 n.129 (citing WILLIAM B. LITRELL, *CONSTRUCTING CRIME: POLICE AND PROSECUTOR'S MANAGEMENT OF THE CHARGING PROCESS* 25 (1974) (Ph.D. dissertation) for the proposition that "misdemeanor cases [are] presented in New Jersey by municipal prosecutors or police officers").

234. In New Mexico, it appears that police officers prosecute misdemeanor cases in some of the lower trial courts. Telephone Interview with Al Rackstrew, Director, Criminal Prosecutions Division, Office of the Attorney General of the State of New Mexico (June 25, 1997). In Virginia, the practice is reportedly allowed by some judges in the lower courts but not by others. Telephone Interview with James Hopper, Assistant Attorney General, Office of the Attorney General of the Commonwealth of Virginia (June 27, 1997). There is also some evidence that the practice occurs or has occurred in Minnesota and Vermont. See Kreimer, *supra* note 232, at 884 n.129 (citing Rachel N. Doan, *Case Study of a Management Innovation in a Misdemeanor Court*, in MISDEMEANOR COURTS, *supra* note 6, at 160, 162, for the proposition that the "availability of prosecution services in Minnesota misdemeanor courts is limited"); State v. Urban, 100 A.2d 897, 898 (N.H. 1953) (suggesting that police officers prosecute criminal cases in Vermont). But see Telephone Interview with Julio Barone, Assistant Attorney General, Office of the Attorney General of the State of Minnesota (June 20, 1997) (indicating that the only police officers allowed to prosecute criminal cases are those who are licensed to practice law); Telephone Interview with Cindy Maguire, Legal Counsel to the Department of Public Safety, State of Vermont (June 27, 1997) (indicating that police officers do not prosecute criminal cases).

IV. POTENTIAL DEFENSE CHALLENGES TO POLICE PROSECUTION

A defendant who is convicted of a criminal offense in a prosecution conducted in part or in full by a police officer who is not licensed to practice law may be able to challenge the validity of that conviction. There are two primary arguments that a defendant can plausibly advance in this context. First, an argument can be made under the common law in most jurisdictions that the conviction, secured as it was by the unauthorized practice of law, is simply void. Second, an argument can be made that the defendant has been deprived of due process of law by being prosecuted by a layperson, and in particular by being prosecuted by a police officer who may well have had a conflict of interest in prosecuting the case.

A. A Conviction Resulting from the Unauthorized Practice of Law is Void

There is significant authority to support the contention that a conviction that is secured through a prosecution by someone who is not licensed to practice law may be held to be void for that reason alone. In the context of civil litigation, any number of states have held that the unauthorized practice of law serves to void or nullify any legal proceedings conducted by that party.²³⁵ Of the few courts that have directly considered the question in the context of a criminal prosecution, most have held the same way. In South Carolina and New Hampshire, the two jurisdictions in which the highest courts have explicitly approved of police prosecution, the courts have done so by finding that a police officer who prosecutes a criminal case somehow is not engaged in the unauthorized practice of law,²³⁶ a finding that defies both common sense and straightforward legal analysis. In only a small handful of exceptional cases have courts upheld criminal convictions secured by a prosecutor who was explicitly acknowledged to have been engaging in the unauthorized practice of law.

In a case that dealt squarely with the issue at hand, a county court in New York held in *People v. James*²³⁷ that the prosecution of a criminal case by a law enforcement officer constituted the unauthorized practice of law, thereby rendering the defendant's criminal conviction after a trial by jury void as a matter of law.²³⁸ The defendant in that case stood accused of criminally possessing a racoon in violation of the state's game laws and was prosecuted by a district game inspector who had not been admitted to practice law. In the course of voiding the resulting conviction, the court noted that its finding that the prohibition of the unauthorized practice of law applied to law enforcement officers was not only required by the canons of statutory construction, but was also "salutary":

235. See Vitauts M. Gulbis, Annotation, *Right of Party Litigant to Defend or Counterclaim on Ground that Opposing Party or His Attorney Is Engaged in Unauthorized Practice of Law*, 7 A.L.R.4th 1146, § 4(a) (1981), and cases cited therein.

236. See *supra* notes 135-79 and accompanying text.

237. 269 N.Y.S. 626 (N.Y. Cty. Ct. 1934).

238. *Id.* at 630.

The officer who makes the investigation, lays the information, procures the issuance of the warrant, and makes the arrest of the person accused of the crime, should not be allowed to act as prosecuting attorney. No argument is needed that allowing a person to act as investigator, complainant, arresting officer, principal witness, and prosecuting attorney, does not tend to promote justice.... [N]othing should be done to violate the spirit and express provision of the Constitution and statute guaranteeing a man accused of a crime a fair and impartial trial. This cannot be done if too much power and too many functions are vested in or permitted to be exercised by the arresting officer.²³⁹

Citing several cases that considered the ramifications of the unauthorized practice of law in the civil context, the court held that "where a trial is conducted by a person who is forbidden to conduct the trial of the same it renders the judgment void."²⁴⁰

Two other New York courts have held precisely the same way, voiding a criminal conviction that resulted from the unauthorized practice of law by a law enforcement officer. In *People v. Wood*,²⁴¹ the court voided a criminal conviction that resulted from a jury trial in which the county sheriff acted as the prosecutor. The court there found that the sheriff "actively conducted the trial of the issue before the Justice Court and jury" despite the fact that "he was prohibited and forbidden to conduct the same by the provisions of...the Penal Law" that criminalized the unauthorized practice of law.²⁴² Consequently, the court held that "the judgment rendered in this case was and is void, if for no other reason."²⁴³ Similarly, in *People v. O'Neil*,²⁴⁴ the court held that it was "improper" for a trial judge to allow the arresting officer in a criminal case to cross-examine a witness, thereby functioning as a prosecutor.²⁴⁵ The court found that it was in violation of

239. *Id.* at 629.

240. *Id.* at 630 (citing *Puma v. McConigle* 132 N.Y.S. 242 (N.Y. City Ct. 1911); *Kaplan v. Berman*, 75 N.Y.S. 1002 (N.Y. Sup. Ct. 1902); *Newburger v. Campbell*, 58 How. Pr. 313 (N.Y. C.P. 1880)). Curiously, despite its strong declaration that one person should not act as "investigator, complainant, arresting officer, principal witness, and prosecuting attorney," *id.* at 629, the court stated in dicta that it would actually allow such a practice. Noting that a party "has a right to act as attorney on his own behalf," the court stated that had the arresting officer in the case, rather than the district game inspector, acted as prosecutor, the court "would [have] be[en] constrained to hold that he was not violating the provisions" of the statute that prohibits the unauthorized practice of law. *Id.* at 630. The court suggested that the arresting officer, "being the complainant, would have a right to conduct the prosecution in his own behalf." *Id.* Of course, this position relies on an extraordinarily basic misapprehension of the nature of a criminal proceeding, in which the prosecution is conducted on behalf of the citizenry, not an individual complainant.

241. 272 N.Y.S. 258 (Cty. Ct. 1934).

242. *Id.* at 263-64.

243. *Id.* at 264. Much like the court in *James*, although far less explicitly, the court suggested in dicta that its holding might have been different if that arresting officer, who it inaptly labeled the "complainant," had prosecuted the case directly. *Id.* at 263.

244. 248 N.Y.S. 674 (Ct. Spec. Sess. 1931).

245. *Id.* at 676.

state law for the judge to "permit any one not a lawyer to exercise such privilege, unless he is a party defendant, when he is within his right to examine and cross-examine witnesses."²⁴⁶

Ironically, a decision issued by the Supreme Court of South Carolina, a court that has explicitly endorsed the practice of police prosecution, further supports the proposition that a conviction secured by the unauthorized practice of law should be declared void. In *State v. Sossamon*,²⁴⁷ the court reversed a conviction that was tried for the prosecution by a police officer who was neither the arresting officer nor a supervisor of the arresting officers. Because the court's prior decisions on the subject had authorized prosecutions only by the arresting officer and his or her supervisor, the court reversed the conviction, presumably because the state was represented at trial by a police officer who was engaging in the unauthorized practice of law.²⁴⁸

Moving beyond the narrow arena of cases involving prosecutions conducted by law enforcement officers, there is further support for the notion that a conviction secured by an unauthorized prosecutor is void. In *People v. Jackson*,²⁴⁹ a New York trial court set aside a jury's verdict when it was revealed that the assistant district attorney who prosecuted the case had never passed a bar examination and, therefore, had never been duly licensed to practice law.²⁵⁰ The court's well-reasoned and thorough opinion was reversed on appeal in a dismissive paragraph, in which the Appellate Division found that while the unauthorized practice of law in that context was "improper," the "procedural irregularity [was] insufficient to constitute reversible error" absent proof of prejudice to the defendant.²⁵¹ Nonetheless, the trial court's opinion is worthy of note in support of the proposition that the unauthorized practice of law renders a criminal prosecution void. The court summarized the underlying theme of several of the New York cases when it noted as follows: "Where the court permits a conviction to remain in force where...illegality [is] used to obtain it, the court can only be deemed to be a partner in such...illegality. The court therefore adopts the per se rule that a felony conviction obtained by a nonlawyer prosecutor must be vacated without regard to prejudice."²⁵²

Similarly, the highest courts in Illinois and Wisconsin have voided criminal convictions that were secured by prosecutors who were unauthorized to practice in their respective states. In *People v. Munson*,²⁵³ the Supreme Court of Illinois reversed a conviction for robbery, quashing an indictment because the prosecutor who had presented the case to the grand jury was not licensed to

246. *Id.* at 677.

247. 378 S.E.2d 259 (S.C. 1989).

248. *Id.* at 259.

249. 548 N.Y.S.2d 987 (Sup. Ct. 1989), *rev'd*, 558 N.Y.S.2d 590 (App. Div. 1990).

250. *Id.* at 995.

251. *People v. Jackson*, 558 N.Y.S.2d 590, 590 (App. Div. 1990), *rev'g* 548 N.Y.S.2d 987 (Sup. Ct. 1989).

252. *People v. Jackson*, 548 N.Y.S.2d at 995.

253. 150 N.E. 280 (Ill. 1925).

practice law. While the case was decided on the grounds of the unauthorized grand jury presentation, the court explicitly stated that its holding with respect to the prosecutor's authority to appear before the grand jury "likewise applie[d] to his participation on the trial of the cause."²⁵⁴ The court continued that "[t]he statute prohibiting the practice of law by one who is not licensed is to be observed in fact as well as in theory, and the fact that there may be associated in the trial of the case other persons actually licensed to practice law in nowise validates the participation of one not so authorized."²⁵⁵

In *State v. Russell*,²⁵⁶ the Supreme Court of Wisconsin reversed a first degree murder conviction because the case was prosecuted by a man who, while "a distinguished criminal lawyer" in another jurisdiction, was not licensed to practice law in Wisconsin.²⁵⁷ The court acknowledged that "foreign counsel [could], by special favor, be permitted to appear for his clients in [Wisconsin] courts." Nonetheless, the court held that foreign counsel could not be licensed "to assist in discharging the duties and performing the functions of the office of the district attorney" because the State of Wisconsin "is not his client."²⁵⁸ Because the state was represented by a prosecutor who was not duly licensed, the court summarily reversed the conviction, noting that the defendant "ought not to have been compelled to submit to such a trial."²⁵⁹ The court continued: "She has suffered all the terrible consequences of an illegal trial and conviction for murder in the first degree. She was, of course, prejudiced by it. The error is material."²⁶⁰

There is, as noted, a very small group of published cases that uphold a criminal conviction on appeal after explicitly recognizing that the conviction was secured through the unauthorized practice of law. All of these cases stem from the acts of one particular prosecutor, Daniel J. Penofsky, an Assistant District Attorney in Brooklyn, New York, who had never passed a bar examination but who managed to masquerade as a licensed attorney for at least fourteen years. In *People v. Carter*,²⁶¹ the New York Court of Appeals had its last word on this issue, holding that the mere fact of the prosecutor's unauthorized practice of law, without a showing of some specific form of prejudice, was not sufficient to justify overturning the convictions before the court. In a federal habeas corpus challenge to two convictions secured by Mr. Penofsky, premised on the argument that the

254. *Id.* at 283.

255. *Id.*

256. 53 N.W. 441 (Wis. 1892).

257. *Id.*

258. *Id.* at 442.

259. *Id.* at 443.

260. *Id.* Justice Scalia's concurring opinion in *Young v. United States ex rel. Vuitton et Fils*, 481 U.S. 787 (1987) (Scalia, J., concurring), also lends credence to the argument that the prosecution of a criminal case by one who is not authorized to do so, even if a licensed attorney, renders the ensuing conviction void. In that case, Justice Scalia opined that the trial court's appointment of special prosecutors was without legal authority and, therefore, void. *Id.* at 815. Justice Scalia then concluded that, "since we cannot know whether [the defendants] would have been prosecuted had the matter been referred to a proper prosecuting authority, the convictions are likewise void." *Id.*

261. 566 N.E.2d 119 (N.Y. 1990).

prosecutions by a layman violated due process, then United States District Court Judge Louis J. Freeh held precisely the same way,²⁶² as did several lower state court opinions, some pre-dating the *Carter* opinion²⁶³ and some post-dating it.²⁶⁴ It is important to note, however, that neither the Court of Appeals opinion in *Carter* nor the federal court decision directly addressed the question of whether the illegality involved in the prosecution of the cases rendered the convictions void. While some of the lower state court opinions are less than clear, it seems that few, if any, directly considered the possibility that a common law rule might require a finding that the convictions are void. It is also worth noting that at least two lower state court opinions and a vigorous dissent in *Carter* presented quite different views, each supporting the proposition that the actions of a prosecutor who is engaged in the unauthorized practice of law must be deemed void.²⁶⁵

The situation faced by the New York courts in addressing the numerous cases involving Mr. Penofsky's unauthorized practice of law presented a very difficult set of facts for the courts. Any ruling that concluded that his unlawful practice of law rendered a conviction void would have set in motion a barrage of litigation. As a prosecutor in a very busy district attorney's office for more than a decade, it is probable that he participated in thousands of cases and well over one hundred trials. No doubt that fact weighed heavily on each of the courts that addressed the issue. Judge Freeh was quite explicit in discussing this aspect of his decision:

We also cannot ignore the practical implications of accepting petitioners' due process claim—every defendant convicted by Penofsky during his fourteen-year tenure as a prosecutor would be entitled to a new trial. Petitioners have not demonstrated a sufficient basis for invalidating such a large number of cases and have not

262. *Munoz v. Keane*, 777 F. Supp. 282, 286 (S.D.N.Y. 1991), *aff'd sub nom* Linares v. Senkowski, 964 F.2d 1295 (2d Cir. 1992).

263. See *People v. Jackson*, 558 N.Y.S.2d 590 (App. Div. 1990), *rev'g* 548 N.Y.S.2d 987 (Sup. Ct. 1989); *People v. Reyes*, 554 N.Y.S.2d 587 (App. Div. 1990); *People v. Linares*, 550 N.Y.S.2d 703 (App. Div. 1990); *People v. Munoz*, 550 N.Y.S.2d 691 (App. Div.).

264. See *People v. Rohena*, 584 N.Y.S.2d 100 (App. Div. 1992); *People v. Rohena*, 581 N.Y.S.2d 66 (App. Div. 1992).

265. See *People v. Carter*, 566 N.E.2d 119, 124-25 (N.Y. 1990) (Titone, J., dissenting) (arguing that the court's decision "makes a mockery of...the rules prohibiting legal practice by laypersons" and "lead[s] to the absurd conclusion that those charged with the duty of enforcing the criminal laws may, in the process, break them"); *People v. Jackson*, 548 N.Y.S.2d 987, 995 (Sup. Ct. 1989), *rev'd*, 558 N.Y.S.2d 590 (App. Div. 1990) (holding that a conviction secured by the unauthorized practice of law was void because to "permit[] a conviction to remain in force where fraud and illegality are used to obtain it" makes the court "a partner in such fraud and illegality"); *People v. Greenfield*, 543 N.Y.S.2d 864, 866 (Sup. Ct. 1989) (holding that the state could not "rely on the arguably criminal conduct" of an unlicensed prosecutor who signed a declaration of readiness for trial and that the signed document was void).

suggested any way to limit the scope of their proposed constitutional rule. Accordingly, we decline to adopt it.²⁶⁶

While understandable as a practical consideration, it is clear that the duration and extent of Mr. Penofsky's unlawful practice served to distort the legal analysis in each of these cases, and that a more honest approach to the problem would lead in only one direction: the conclusion that illegality on the part of the state cannot be countenanced or relied upon for the benefit of the state, and the acts of a person engaged in the crime of practicing law without a license must render the consequences of those acts void.

B. Criminal Prosecution by a Police Officer Violates Due Process

The Fourteenth Amendment to the United States Constitution provides that "No State shall...deprive any person of life, liberty, or property, without due process of law."²⁶⁷ While many of the modern Supreme Court decisions concerning the due process clause concern the application of other rights specifically enunciated elsewhere in the Constitution,²⁶⁸ it is clear that the due process clause stands on its own in establishing the right to procedural fairness in a criminal case. Although the right to due process is often described as the right to a "fair trial,"²⁶⁹ any number of decisions by the Supreme Court reflect the fact that a defendant is entitled to due process throughout a criminal proceeding, not just at the trial stage.²⁷⁰ At its core, the due process clause assures a criminal defendant that the process applied to his or her case will be fundamentally fair. Because the vast majority of a prosecutor's discretionary decisions are made at the early stages of the process, beyond the ability or willingness of the judicial process to review,²⁷¹ the fair functioning of the criminal justice system relies largely upon assumptions about the integrity and competence of those who prosecute.²⁷² The licensing

266. *Munoz v. Keane*, 777 F. Supp. 282, 286 (S.D.N.Y. 1991), *aff'd sub nom* *Linares v. Senkowski*, 964 F.2d 1295 (2d Cir. 1992).

267. U.S. CONST. amend. XIV, § 1.

268. For example, the right to be free from unreasonable searches and seizures enunciated in the Fourth Amendment, the right to remain silent enunciated in the Fifth Amendment, and the right to counsel and the right to a public trial enunciated in the Sixth Amendment.

269. See, e.g., *Bracy v. Gramley*, 520 U.S. 899 (1997); *Withrow v. Larkin*, 421 U.S. 35, 46 (1975); *In re Murchison*, 349 U.S. 133, 136 (1955).

270. See, e.g., *United States v. Salerno*, 481 U.S. 739 (1987) (recognizing defendant's right to due process at pre-trial detention hearing); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (recognizing defendant's right to due process at parole revocation hearing); *Santobello v. New York*, 404 U.S. 257 (1971) (recognizing defendant's right to due process in plea bargaining). See also *Hill v. Texas*, 316 U.S. 400, 406 (1942) (reversing a conviction stemming from an indictment handed down by a grand jury that had been constituted by a racially discriminatory selection process because the Court's duty is "to see to it that throughout the procedure for bringing [a defendant] to justice he shall enjoy the protection which the Constitution guarantees").

271. See *supra* notes 1-5 and accompanying text.

272. In holding that prosecutors have absolute immunity from civil liability under 42 U.S.C. § 1983, the United States Supreme Court relied heavily on the fact that "a

procedures employed by the various states provide the underpinnings for those assumptions, assuring that a prosecuting attorney possesses some minimum level of competence, at least no clear evidence of suspect ethics or morals, and a stated willingness to abide by ethical constraints. If a prosecutor is not duly licensed to practice law, the presumption that a prosecutor has handled a criminal case competently and ethically is completely unfounded and unsupportable. The next section of this Article will maintain that the due process clause of the Fourteenth Amendment prohibits the prosecution of a criminal case by a police officer who is not licensed to practice law.

1. Due Process Cases

Only four published court opinions appear to have directly considered the question of whether a defendant has a due process right to be prosecuted by a licensed attorney. Two of these opinions arose from Daniel J. Penofsky's unauthorized practice of law in New York.²⁷³ The eventual revelation of Mr. Penofsky's fraud and of his actual status as a layperson produced a spate of litigation, resulting in several opinions from the New York state courts as well as opinions from the Southern District of New York and the Second Circuit.²⁷⁴ While these opinions addressed a series of issues related to Mr. Penofsky's unadmitted status, only two—one from the New York Court of Appeals and one from the Southern District—squarely addressed the due process issue.²⁷⁵

prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers." *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976). The Court held out the amenability to discipline, in conjunction with the extraordinarily unlikely scenario of a prosecutor facing criminal charges for intentionally violating a defendant's constitutional rights, as the "checks" that "insure that prosecutors are mindful of the constitutional rights of persons accused of crimes." *Id.* See also *Munoz v. Keane*, 777 F. Supp. 282, 284 n.7 (S.D.N.Y. 1991), *aff'd sub nom* *Linares v. Senkowski*, 964 F.2d 1295 (2d Cir. 1992).

273. *Munoz*, 777 F. Supp. 282 (S.D.N.Y. 1991), *aff'd sub nom* *Linares v. Senkowski*, 964 F.2d 1295 (2d Cir. 1992); *People v. Carter*, 566 N.E.2d 119 (N.Y. 1990). For a related discussion of the cases involving Mr. Penofsky, see *supra* notes 263–68 and accompanying text.

274. See *supra* notes 261–66.

275. See *supra* note 273. Two other New York state court opinions are worthy of some mention in this context. One Appellate Division decision, *People v. Linares*, 550 N.Y.S.2d 703, 703 (App. Div. 1990), after noting that the defendant claimed a denial of due process, declared only that "since defendant was not prejudiced, there was no reversible error." Thus, it is unclear whether that court conducted any analysis of the due process claim. In addition, one trial court decision concerning Mr. Penofsky, later reversed on appeal, held that the prosecution of a felony case must be conducted by a licensed attorney. *People v. Jackson*, 548 N.Y.S.2d 987 (Sup. Ct. 1989), *rev'd*, 558 N.Y.S.2d 590 (App. Div. 1990). It is not clear from that court's decision, however, whether it ever reached the due process question; indeed, it seems much more likely based on the wording of the opinion that the court's decision was rooted in statutory and common law doctrine.

In *People v. Carter*,²⁷⁶ the New York Court of Appeals dispensed with the due process argument in a rather summary fashion, providing no significant legal analysis and little clarity about the extent of its holding on the due process issue. The court noted that the defendants in each of the cases in the consolidated appeal "should have been prosecuted...by an Assistant District Attorney who was duly admitted to practice,"²⁷⁷ at least in part because of the "undeniably broad discretion vested in public prosecutors and the extent of their control 'over individuals' liberty and reputation."²⁷⁸ Nonetheless, the court relied heavily on the fact that it was provided with "no authority for the proposition that a defendant has a due process right to be prosecuted by a duly admitted attorney."²⁷⁹ With no further discussion, the court held that, "in the absence of [a showing of] prejudice, the fact that Penofsky was not a lawyer did not result in a deprivation of defendant's constitutional due process rights."²⁸⁰ In so holding, it appears that the court never squarely decided whether or not there is a due process right to be prosecuted by an attorney; rather, the court held only that if such a right exists, its violation is harmless error absent an explicit showing of prejudice.

The Southern District of New York, under essentially the same facts, decided the due process issue much more directly, holding in *Munoz v. Keane*²⁸¹ that it "decline[d] to adopt"²⁸² what it had termed "a new constitutional right—the right to be prosecuted by a licensed attorney."²⁸³ Much like the Court of Appeals opinion in *Carter*, the Southern District opinion relied heavily on the fact that such a constitutional right had never been specifically articulated in any prior case.²⁸⁴ Unlike the Court of Appeals, however, the Southern District conducted some independent analysis of the underlying claim. The court's analysis, however, was deeply flawed in its reliance on two quite questionable propositions.

First, the court flatly asserted that "a criminal defendant does not rely on a prosecutor to protect his rights."²⁸⁵ This rather startling proposition is all the more extraordinary because the court quoted the United States Supreme Court only two pages earlier in its opinion as follows: "It is as much [a prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."²⁸⁶ In a wide variety of settings, including pre-trial discovery, plea negotiations, and jury selection, a criminal defendant is forced to rely quite heavily on the ethical and constitutional

276. 566 N.E.2d 119 (N.Y. 1990).

277. *Id.* at 123.

278. *Id.* at 124 (quoting *People v. Zimmer*, 414 N.E.2d 705, 707 (N.Y. 1980)).

279. *Id.* at 123.

280. *Id.* at 124.

281. 777 F. Supp. 282 (S.D.N.Y. 1991), *aff'd sub nom* Linares v. Senkowski, 964 F.2d 1295 (2d Cir. 1992).

282. *Id.* at 286.

283. *Id.* at 285.

284. *Id.*

285. *Id.* at 286.

286. *Id.* at 284–85 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)) (alteration in original).

obligations on a prosecutor to "seek justice, not only a conviction."²⁸⁷ Exculpatory evidence in the hands of a prosecutor will generally find its way to a criminal defendant if and only if the prosecutor obeys his or her ethical and constitutional duties in the face of any number of competing interests. A plea negotiation is founded upon the fact that the defense can rely on factual representations made by a prosecutor who is faithful to his or her constitutionally and ethically prescribed role. In jury selection, a prosecutor is ethically and constitutionally obliged not to use improper factors to exclude potential jurors. In each of these areas, and in countless others throughout the criminal process, a defendant must rely on the good faith of the prosecutor to protect his or her rights. The court's assertion that "defense counsel and an impartial trial judge are capable of monitoring the prosecutor's conduct in order to ensure that no constitutional violations occur"²⁸⁸ is not only inconsistent with the conclusion that has been reached by the United States Supreme Court,²⁸⁹ but also simply incorrect.

Second, the court asserted that there are significant "checks" on prosecutorial misconduct beyond the professional disciplinary process.²⁹⁰ The court asserted that "Penofsky, like all prosecutors, had to be aware that were he to abuse his power and violate a defendant's constitutional rights, the conviction would likely be overturned either on direct appeal or by collateral attack."²⁹¹ In fact, prosecutors are aware of quite the opposite; the likelihood of a criminal conviction being overturned, even in the face of an error on the record of constitutional magnitude, is remote. The vast majority of such constitutional errors are subject to a harmless error analysis on appeal, the death knell to most criminal appeals.²⁹² The

287. *Id.* at 286. See also A.B.A. PROSECUTION STANDARDS, *supra* note 17, Standard 3-1.2(c).

288. *Munoz*, 777 F. Supp. at 286.

289. See *Young v. United States ex rel. Vuitton et Fils*, 481 U.S. 787, 807 (1987).

290. *Munoz*, 777 F. Supp. at 285 n.8.

291. *Id.* The court also asserted somewhat cryptically that "all the normal constitutional protections applicable to criminal prosecution [were] in effect" in the cases before the court. *Id.* By "normal," one can assume that the court meant to refer to other more clearly identifiable constitutional rights, such as the right to counsel and the right to a trial by jury. Any number of other constitutional rights, such as the right to be provided with exculpatory evidence in the possession of the state and the right to be tried by a jury that is not selected on the basis of race, are entirely dependent on the good faith of the prosecutor. Whether or not those protections were "in effect" in these cases seems to be the very question that the court was asked to resolve. How the fact that certain of the defendants' constitutional rights were observed operated as a "check" on prosecutorial misconduct that could have occurred beyond the scope of the record is certainly hard to discern. The court's assertion also seems to overlook the fact that being prosecuted by a licensed attorney is certainly the "normal" state of affairs in a criminal case.

292. Justice Stevens has expressed his concern that the Supreme Court's "broad presumption in favor of harmless error...has a corrosive impact on the administration of justice." *Rose v. Clark*, 478 U.S. 570, 588 (1986) (Stevens, J., concurring). He has stated that the "automatic application of harmless-error review in case after case, and for error after error, can only encourage prosecutors to subordinate the interest in respecting the Constitution to the ever-present and always powerful interest in obtaining a conviction in a particular case." *Id.* at 588-89.

error of constitutional magnitude that appears on the record, however, is only one small category of the potential ethical and constitutional violations that an unscrupulous or incompetent prosecutor may create; a far more likely scenario is the one in which the constitutional or ethical violation never surfaces at all, therefore remaining entirely immune from judicial review. Because the judicial system offers a defendant precious little protection from an unethical prosecutor, the only real check on prosecutorial misconduct is the attorney's ethical and moral commitment to obey the law.²⁹³

Relying on these two faulty premises, and emphasizing "the practical implications" of recognizing a due process right to be prosecuted by a licensed attorney—granting a new trial to "every defendant convicted by Penofsky during his fourteen-year tenure as a prosecutor"—the court held that there was no such right.²⁹⁴ The court then went on to note in dicta that, even if there were such a due process right, the violation of that right would be subject to harmless error analysis because it "does not qualify as a 'structural defect...[in] the trial mechanism.'"²⁹⁵ As noted below, this conclusion, which the court reached without any analysis in its opinion, is as flawed as the court's holding.

The two other published opinions that directly address the due process implications of a prosecution conducted by a non-attorney each offer even less legal analysis. In *United States v. Broers*,²⁹⁶ the Ninth Circuit declared without any analysis whatsoever that the prosecution of a misdemeanor case by a federal agent who is not licensed to practice law "does not in and of itself implicate due process."²⁹⁷ In that case, the court affirmed a misdemeanor conviction that resulted from a trial conducted by a special agent of the United States Forest Service who was not licensed to practice law.²⁹⁸ The court's per curiam opinion supported its dismissive legal conclusion with nothing more than a simple citation to *United States v. Glover*,²⁹⁹ an earlier case from the District of Maryland. Because the *Glover* court had not conducted a due process analysis, however, the citation offers little explanation or support for the court's holding.

Similarly, the United States District Court for the Eastern District of California in *United States v. Downin*³⁰⁰ upheld a misdemeanor conviction in the face of a due process attack on a prosecution conducted by an unlicensed federal agent. That court simply cited *Broers* for the otherwise unsupported proposition that "the use of a lay prosecutor in a petty offense case does not inherently violate due process."³⁰¹ The court also indicated that, because there was "no suggestion on

293. See *supra* note 83.

294. *Munoz*, 777 F. Supp. at 286.

295. *Id.* at 286 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991)) (alteration in original).

296. 776 F.2d 1424 (9th Cir. 1985).

297. *Id.* at 1425.

298. *Id.*

299. 381 F. Supp. 1139 (D. Md. 1974). For a fuller discussion of this case, see *supra* notes 204–07 and accompanying text.

300. 884 F. Supp. 1474 (E.D. Cal. 1995).

301. *Id.* at 1480.

the record that the outcome of the trial was affected by the alleged error," any error "must be considered harmless."³⁰² This declaration seriously underestimates the vast areas of discretionary power that a criminal prosecutor exercises that are outside the scope of any judicial review.

2. Proper Due Process Analysis: Establishing a Constitutional Error

In light of the novelty of the issue, a well-reasoned and thoughtful analysis of the due process right to be prosecuted by a licensed attorney would necessarily involve an analysis of several different but analogous lines of cases. From these lines of cases, some basic propositions can be gleaned that provide a firm underpinning for the due process argument. First, the cornerstone of the constitutional guarantee of due process is the requirement that a person who is accused of a crime is entitled to a process that is fundamentally fair. The notion that the criminal justice system has operated fairly in any given case rests almost exclusively on the presumption of regularity that attaches to a prosecutor's actions; indeed, as many courts have made clear, the system must operate in this fashion due to the myriad of unreviewable discretionary decisions that a prosecutor makes in the course of a prosecution. For that reason, a criminal defendant generally faces the difficult burden of proving that some part of the process was fundamentally unfair. Simple logic would suggest that a presumption of regularity cannot apply when there is no assurance that the prosecutor has ever expressed the willingness and ability to abide by ethical rules or that the prosecutor has any legal training or competence whatsoever.

Second, a number of cases stand for the proposition that a person who is accused of a crime is entitled to the exercise of prosecutorial discretion, particularly at the charging stage. While a prosecutor's exercise of that discretion is virtually unreviewable, the complete failure to exercise discretion or the inability to exercise it impartially have been held to be in violation of due process. If the person acting as prosecutor is making decisions without the guidance and restrictions provided by an attorney's ethical rules, or if he or she is making decisions without proper legal training, the accused is deprived of the fair exercise of discretion that an attorney would provide.

Third, a number of Supreme Court cases firmly establish that due process of law requires not only that the process be fundamentally fair, but also that it have the appearance of fairness. One significant and widely recognized function of the criminal justice system is to assure the public that it is being protected fairly and justly; any procedure that fundamentally undermines that function will not survive constitutional scrutiny on due process grounds. The prosecution of a criminal case by a person who is not admitted to practice law creates the appearance of lawlessness; the prosecution of a criminal case by a police officer, particularly by the officer who made the arrest, creates the appearance of a police state. The delegation of the prosecution of a criminal case to a non-lawyer undermines the

302. *Id.* at 1481.

public's faith in the integrity of the criminal justice system in violation of due process of law.

a. Fundamental Fairness and the Presumption of Regularity

In *United States v. Armstrong*,³⁰³ the Supreme Court made explicit a general rule that courts have consistently followed when issues arise concerning the prosecution of a criminal case: that prosecutors' decisions are supported by a "presumption of regularity" such that "in the absence of any clear evidence to the contrary, courts [should] presume that they have properly discharged their official duties."³⁰⁴ In *Armstrong*, which involved a claim of selective prosecution, the Court stressed the need for broad judicial deference to prosecutorial judgments. Because it wished to avoid judicial interference with the proper exercise of prosecutorial discretion, the Court held that a defendant must present clear evidence of a violation "[i]n order to dispel the presumption that a prosecutor has not violated equal protection."³⁰⁵

The leading Supreme Court case in the area of prosecutorial conflicts of interest, *Young v. United States ex rel. Vuitton et Fils*,³⁰⁶ emphasizes the great faith that the criminal justice system places in a prosecutor to exercise his or her discretion both ethically and constitutionally. That faith involves two components: competence to exercise discretion and ethical standards by which to do so. In *Young*, the trial court had appointed a private attorney with a clear conflict of interest to prosecute a criminal case. The private attorney in the case represented Louis Vuitton, a leather goods manufacturer, which was the beneficiary of a civil injunction that prevented the defendants from infringing Vuitton's registered trademark.³⁰⁷ The criminal charges, prosecuted by Vuitton's attorney, alleged that the defendants were in criminal contempt for violating that injunction.³⁰⁸ Although the case produced several distinct opinions, the Court overwhelmingly condemned the practice of appointing counsel for an interested party to prosecute a criminal

303. 517 U.S. 456 (1996).

304. *Id.* at 464 (quoting *United States v. Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926)). Other recent Supreme Court decisions have strongly suggested the same rule. *See, e.g.*, *United States v. Mezzanatto*, 513 U.S. 196, 210 (1995) ("in the absence of clear evidence to the contrary, courts presume that [public officers] have properly discharged their official duties") (quoting *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926)); *Town of Newton v. Rumery*, 480 U.S. 386, 397 (1987) ("tradition and experience justify our belief that the great majority of prosecutors will be faithful to their duty"); *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986) (plurality opinion) (discussing "presumption of regularity" that attaches to the actions of a grand jury).

305. *Armstrong*, 517 U.S. at 467.

306. 481 U.S. 787 (1987). Perhaps it should be noted here, in the interests of full disclosure, that the author participated as a clinical law student in drafting a petition for *certiorari* to the United States Supreme Court on behalf of a defendant in this case.

307. *Id.* at 790-91.

308. *Id.* at 791-92.

contempt³⁰⁹ and, relying on its supervisory authority over criminal contempt proceedings, permanently prohibited the practice.³¹⁰

The main problem with the appointment of an interested prosecutor, as the Court pointed out, is that judicial supervision alone cannot sufficiently detect whether a prosecutor has violated his or her ethical and constitutional duties.

A prosecutor exercises considerable discretion in matters such as the determination of which persons should be targets of investigation, what methods of investigation should be used, what information will be sought as evidence, which persons should be charged with what offenses, which persons should be utilized as witnesses, whether to enter into plea bargains and the terms on which they will be established, and whether any individuals should be granted immunity. These decisions, critical to the conduct of a prosecution, are all made outside the supervision of the court.³¹¹

Having noted that the vast majority of prosecutorial decisions occur beyond the scope of judicial review, the Court highlighted the importance of some independent assurance that a prosecutor will live up to the high standards of his or her profession.

Between the private life of the citizen and the public glare of criminal accusation stands the prosecutor. That state official has the power to employ the full machinery of the state in scrutinizing any given individual. Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life. For this reason, we must have assurance that those who would wield this power will be guided solely by their sense of public responsibility for the attainment of justice.³¹²

Thus, the Court implicitly held that the presumption of regularity that attaches to prosecutorial behavior is inappropriate when a prosecutor has a recognized conflict of interest. Absent that presumption of regularity, a court is in no position to judge whether or not a prosecutor has abided by the high ethical and constitutional standards that bind prosecutors in the performance of their public duties. Although

309. Eight of the nine justices agreed that it was error for the District Court to have appointed Vuitton's counsel to prosecute. Justices Brennan, Marshall, Blackmun, and Stevens concluded that the error was so fundamental that it required the reversal of the convictions without any inquiry into whether the error may have been harmless. *Id.* at 809-10 (plurality opinion). Justices Powell and O'Connor and Chief Justice Rehnquist, after finding that the appointment was in error, would have remanded for the lower court to determine whether the error was harmless. *Id.* at 825-27 (Powell, J., concurring in part and dissenting in part). Justice Scalia concluded that the District Court, as a part of the judicial branch of government, did not have the power to appoint a prosecutor and that the subsequent prosecution and conviction was void. *Id.* at 815-25 (Scalia, J., concurring). Only Justice White, who filed a separate dissenting opinion, found "no error, constitutional or otherwise." *Id.* at 827 (White, J., dissenting).

310. *Id.* at 808-09.

311. *Id.* at 807.

312. *Id.* at 814.

the Court of Appeals had found "the evidence offered at trial 'ample' to support the convictions" and that there was "[n]o reason to believe" that the...prosecutor in this case acted unethically,"³¹³ the Supreme Court reversed the convictions.

The unavoidable implication of the Court's decision in *Young* is the recognition that little more than a presumption that a prosecutor acts competently and in good faith serves to protect a criminal defendant from the abuse of prosecutorial power. The Court's heavy reliance on the ethical standards binding attorneys makes clear that the Court regards those standards as an essential element of that presumption.³¹⁴ Unaddressed because of the facts of the case, but equally applicable, is the notion that some assurance of basic legal competence would necessarily support that presumption of regularity. Similarly, logic would dictate that a presumption of regularity and compliance with ethical and constitutional standards would be totally inapplicable to a situation in which a prosecutor has never even been licensed to practice law.

A 1980 opinion issued by the New York Court of Appeals, also relating to a prosecutor with a conflict of interest, suggests the same rule. In *People v. Zimmer*,³¹⁵ the court reversed several criminal convictions that had been secured by a prosecutor with a clear conflict of interest. After outlining the extraordinary breadth of discretion enjoyed by a criminal prosecutor, the court emphasized the difficulty of determining whether a prosecutorial conflict of interest has infected a particular prosecution.

It would be simplistic...to think of the impact of a prosecutor's conflict of interest merely in terms of explicit instances of abuse. Even [a] thumbnail description of prosecutorial power is enough to indicate that resulting prejudice can at least as easily flow from an act of omission as from one of commission, from discretion withheld as from discretion exercised.³¹⁶

Because of the "practical impossibility of establishing that the conflict has worked to [the] defendant's disadvantage,"³¹⁷ and based on a finding that "any presumption of impartiality tends to be undermined when there is a clear conflict of interest,"³¹⁸ the court reversed the conviction. Although the court did not specify whether its holding was required by the due process clause, the court did note that the issues in the case involved the "defendant's entitlement to fundamental fairness"³¹⁹ and were

313. *Id.* at 827 (Powell, J., concurring) (quoting *United States ex rel. Vuitton Fils v. Klayminc*, 780 F.2d 179, 185 (2d Cir. 1985)).

314. *See also* *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976) (noting the central importance of a prosecutor's "amenability to professional discipline" in assuring that a prosecutor will be "mindful of the constitutional rights of persons accused of crime").

315. 414 N.E.2d 705 (N.Y. 1980).

316. *Id.* at 707.

317. *Id.*

318. *Id.*

319. *Id.* at 706.

replete with "due process implications."³²⁰ The clear implication of the court's holding is that there is little but a presumption of prosecutorial regularity to assure the fair and just administration of the criminal process, and that anything that seriously undermines that presumption may well require reversal on due process grounds.

The very genesis of the presumption of regularity in the prosecution of criminal cases would seem to lie in the requirement that a prosecuting attorney must be licensed to practice law in the jurisdiction in which he or she has been elected. Indeed, there is a long history of cases holding to that effect.³²¹ In those cases in which such a requirement has been questioned or challenged, the courts have stressed the extraordinary level of discretion vested in the public prosecutor and the potential hazards of trusting a non-attorney to fill that post. The reasoning behind the holdings in each of these cases suggests that the presumption that a prosecutor has performed his or her duties ethically and constitutionally requires that the prosecutor be a licensed attorney.

In one of the most recent of these cases, *Curry v. Hosely*,³²² the New York Court of Appeals held that an elected District Attorney must be licensed to practice law, stressing that, by virtue of his or her "broad 'discretion to investigate, initiate [and] prosecute' crimes," a District Attorney "may have 'more control over individuals' liberty and reputation...than...any other public official.'"³²³ The court noted that "the word 'attorney' in its commonly understood sense" refers to "an officer of the court qualified to prosecute and defend legal actions on behalf of clients, bound by rules and principles of professional ethics and subject to internal processes of attorney discipline."³²⁴ Moreover, the court cited with approval American Bar Association Standard for Criminal Justice 3-2.1, which provides that "[t]he prosecution function should be performed by a...lawyer subject to the standards of professional conduct and discipline."³²⁵ Thus, by emphasizing both competence and ethical standards, the thrust of the court's opinion was to suggest that a presumption of regularity may flow only from extrinsic assurances that a prosecutor is both competently trained and ethically bound.

Similarly, in *State ex rel. Indiana v. Moritz*,³²⁶ the Supreme Court of Indiana held that the respondent, although he had been elected to the office of prosecuting attorney, was not permitted to practice law without being duly licensed to practice. The court there noted that any contrary holding could allow a person who did not "have any legal education whatsoever" to "represent the State...and

320. *Id.* at 708. In *People v. Benoit*, 575 N.Y.S.2d 750, 756-57 (N.Y. Crim. Ct. 1991), a lower court strongly suggested that *Zimmer* recognized a due process right to be prosecuted by a disinterested prosecutor.

321. See, e.g., *People ex rel. Elliot v. Benefiel*, 91 N.E.2d 427 (Ill. 1950); *State ex rel. Indiana Bar Ass'n v. Moritz*, 191 N.E.2d 21 (Ind. 1963); *Curry v. Hosely*, 657 N.E.2d 1311 (N.Y. 1995); *State ex rel. Summerfield v. Maxwell*, 135 S.E.2d 741 (W. Va. 1964).

322. 657 N.E.2d 1311.

323. *Id.* at 1312 (quoting *Zimmer*, 414 N.E.2d at 707) (alteration in original).

324. *Id.*

325. A.B.A. PROSECUTION STANDARDS, *supra* note 17, Standard 3-2.1.

326. 191 N.E.2d 21 (Ind. 1963).

the public interest.”³²⁷ The court then held that the public “should be protected against an unqualified person who must exercise discretion based upon legal knowledge” because “[s]uch a prosecutor could, in his ignorance and lack of discretion which should be controlled by legal principles, institute unwarranted criminal proceedings.”³²⁸ Again, the strong emphasis on legal training suggests that a presumption of regularity in a prosecutor’s actions can be supported only when a legally qualified person is in the position of prosecutor.

It is the prevalence of cases and statutes requiring a prosecutor to be an attorney that renders the claim that there is a due process right to be prosecuted by a licensed attorney so novel. While it is clear that the practice of police prosecution is pervasive in a number of states in this country,³²⁹ it is equally clear that the practice generally extends only to lower level criminal cases, in which a defendant’s incentive and ability to raise constitutional claims is severely reduced.³³⁰ The fact that the prosecutor in any given criminal case is so broadly presumed to be a licensed attorney lends support to the notion that it is an elemental part of a fundamentally fair criminal process. As the cases that require that a public prosecutor be a licensed attorney strongly suggest, it is through the licensing and disciplinary mechanisms that society is best protected from an incompetent or unscrupulous prosecutor. Indeed, it is only these mechanisms that allow the system to operate with a presumption that a prosecutor has exercised his or her vast and largely unreviewable discretion in an appropriate fashion.

b. The Right to the “Fair Minded Exercise of the Prosecutor’s Discretion”

A number of cases have recognized, either explicitly or implicitly, that a person who is accused of a crime has a right to the exercise of prosecutorial discretion. The clearest elaborations upon this right have come in the context of cases dealing with a prosecutor who suffers from a conflict of interest. In *Ganger v. Peyton*,³³¹ the Fourth Circuit explicitly held that the due process clause prevents the prosecution of a criminal case by a prosecutor with a conflict of interest. The prosecutor there represented the defendant’s wife in a divorce action at the same time that he prosecuted the defendant for an assault on the wife.³³² The court held that the prosecutor’s conflict “denied [the defendant] the possibility of [the] fair minded exercise of the prosecutor’s discretion.”³³³ As the court clearly articulated, “not every criminal case goes to trial. Prosecuting attorneys frequently decline to

327. *Id.* at 24.

328. *Id.* at 25.

329. *See supra* notes 6–8 and accompanying text.

330. In some of the states in which the practice is prevalent, such as Rhode Island and Delaware, the defendant’s entitlement to a de novo trial on appeal renders the litigation of constitutional issues in the lower trial court virtually impossible. In other jurisdictions, as the First Circuit noted in *Figueroa Ruiz v. Delgado*, 359 F.2d 718, 722 (1st Cir. 1966), many issues will evade appellate review because “the cost of appeal is disproportionate to the penalty.”

331. 379 F.2d 709 (4th Cir. 1967).

332. *Id.* at 711.

333. *Id.* at 712.

charge, or nol pros, [c]riminal cases.... Aside from the possibility of a favorable charge decision, including nol pros, there is always the prospect of plea bargaining."³³⁴ The court highlighted the fact that, due to his conflict of interest, the prosecutor "was not in a position to exercise fairminded judgment with respect to (1) whether to decline to prosecute, (2) whether to reduce the charge to a lesser degree of assault, or (3) whether to recommend a suspended sentence of [sic] other clemency."³³⁵ Because the court "d[id] not know and c[ould] not now ascertain what would have happened if the prosecuting attorney had been free to exercise the fair discretion which he owed to all persons charged with crime in his court,"³³⁶ the court reversed the conviction as violative of the defendant's due process rights. Almost two decades later, in *Jones v. Richards*,³³⁷ the Fourth Circuit reconfirmed its holding in *Ganger*, emphasizing the "necessity for the fair minded exercise of the prosecutor's discretion, including his options of whether to seek indictment, upon what charge, whether to plea bargain, and the possibility of a nol pros."³³⁸

The United States Supreme Court's decision in *Young v. United States ex rel. Vuitton et Fils*³³⁹ also supports the proposition that a person accused of a crime has a right to the exercise of prosecutorial discretion. In the process of condemning the appointment of an interested prosecutor, the Court listed some of the ways in which a conflict of interest might "influence the discharge of [the prosecutor's] public duty."³⁴⁰ Included in that list were decisions concerning who to investigate and how, whether to offer a plea bargain, and whether to offer immunity in exchange for testimony against others.³⁴¹ As the plurality opinion emphasized, "[a] prosecution contains a myriad of occasions for the exercise of discretion, each of which goes to shape the record in a case, but few of which are part of the record."³⁴²

The implication of the Court's decision in *Young* is that even the ultimate conviction of a crime before an impartial judge and jury does not serve to cure the defect of having a prosecutor whose ability to exercise fair discretion has been undermined. The repeated references to the vast discretion with which prosecutors are vested, and the specific references to pre-trial decisions concerning investigation, charging, and plea bargaining, make it clear that the Court was seeking to protect something more than the right to a fair trial.

A line of cases involving indictments handed down by improperly constituted grand juries also provides very strong support for the argument that an accused enjoys a constitutional right to the fair exercise of prosecutorial discretion. Much like a prosecutor, a grand jury is empowered to decide whether or not to charge an accused with a crime or crimes, and, if so, with what charges. And much

334. *Id.*

335. *Id.* at 712-13 (footnote omitted).

336. *Id.* at 714.

337. 776 F.2d 1244 (4th Cir. 1985).

338. *Id.* at 1246.

339. 481 U.S. 787 (1987).

340. *Id.* at 805.

341. *Id.* at 805-06.

342. *Id.* at 813.

like those of a prosecutor, the decisions of a grand jury are subject to very limited judicial review. For that reason, the United States Supreme Court's 1986 decision in *Vasquez v. Hillery*,³⁴³ which the plurality opinion in *Young* cited with approval,³⁴⁴ is directly relevant to this issue.

In *Vasquez*, the Supreme Court held that a conviction must be reversed if it stems from an indictment handed down by a grand jury that was selected in a racially discriminatory fashion. The Court rejected the notion that a "conviction after a fair trial...purged any taint attributable to the indictment process."³⁴⁵ The holding in the case simply reinforced the holdings of a long list of similar cases stretching back almost a century, in which the Court had made only vague references to the fact that an accused might be harmed, focusing more clearly on the prophylactic value of reversing a conviction obtained after a tainted indictment.³⁴⁶ In *Vasquez*, however, the Court explicitly discussed the way in which an accused might be prejudiced by an improperly constituted grand jury, noting that, "[o]nce having found discrimination in the selection of a grand jury, [the Court] simply cannot know that the need to indict would have been assessed in the same way by a grand jury properly constituted."³⁴⁷ As Justice Powell explained in his dissenting opinion in the case:

The Court...decide[d] that discrimination in the selection of the grand jury potentially harmed respondent, because the grand jury is vested with broad discretion in deciding whether to indict and in framing the charges, and because it is impossible to know whether this discretion would have been exercised differently by a properly selected grand jury.³⁴⁸

Thus, inherent in the Court's opinion in *Vasquez* is the notion that one who is criminally accused is entitled to the exercise of discretion beyond the level of whether a charge is supportable by sufficient evidence; were that not the case, a fair trial would presumably eradicate any potential prejudice that resulted from the improperly constituted grand jury. As the plurality opinion of the *Vasquez* Court noted:

The grand jury does not determine only that probable cause exists to believe that a defendant committed a crime, or that it does not. In the hands of the grand jury lies the power to charge a greater offense or a lesser offense; numerous counts or a single count; and perhaps most significant of all; a capital offense or a noncapital offense—all on the basis of the same facts. Moreover, '[t]he grand jury is not bound to indict in every case where a conviction can be obtained.' Thus, even if a grand jury's determination of probable cause is

343. 474 U.S. 254 (1986).

344. *Young*, 481 U.S. at 813.

345. *Vasquez*, 474 U.S. at 260.

346. See, e.g., *Rose v. Mitchell*, 443 U.S. 545 (1979); *Cassell v. Texas*, 339 U.S. 282 (1950); *Pierre v. Louisiana*, 306 U.S. 354 (1939); *Neal v. Delaware*, 103 U.S. 370 (1881).

347. *Vasquez*, 474 U.S. at 264.

348. *Id.* at 275 (Powell, J., dissenting).

confirmed in hindsight by a conviction on the indicted offense, that confirmation in no way suggests that the discrimination did not impermissibly infect the framing of the indictment and, consequently, the nature or very existence of the proceedings to come.

When constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm.³⁴⁹

The underlying premise of the Court's decision, therefore, is that the accused is entitled to the full and fair exercise of the charging authority's vast discretion, and that the entitlement to the fair exercise of that discretion has been denied if the authority exercising the discretion is not properly constituted. A grand jury selected through a discriminatory process is clearly an improperly constituted charging authority. Similarly, a prosecutor who is practicing law despite never having been duly admitted to practice law is an improperly constituted charging authority. Even a trial and conviction before a judge or jury "in no way suggests" that a prosecutor's lack of legal training and expertise or lack of ethical guidelines "did not impermissibly infect the framing of the [charges] and, consequently, the nature or very existence of the proceedings to come."³⁵⁰

Several state court cases have held that a prosecutor must actually exercise discretion in every individual case, and that the complete failure to exercise discretion constitutes reversible error. In *State v. Pettit*,³⁵¹ for example, the Supreme Court of Washington vacated a criminal sentence when a prosecutor's office employed a mandatory policy in which every case that met certain criteria received precisely the same sentencing recommendation. The court held that the "fixed formula" constituted "an abuse of the discretionary power lodged in the prosecuting attorney."³⁵² Noting that it had frequently "recognized the necessity for the exercise of sound discretion by public officials," the court remanded for "resentencing based on a recommendation reached through the exercise of prosecutorial discretion."³⁵³ Similarly, the Supreme Court of Arizona in *State v. City Court of Tucson*³⁵⁴ struck down a prosecutorial office policy requiring all

349. *Id.* at 263 (quoting *United States v. Ciambone*, 601 F.2d 616, 629 (2d Cir. 1979) (Friendly, J., dissenting)). Justice White, who joined in the remainder of the Court's opinion, without explanation chose not to join in this particular paragraph. *See id.* at 264 n.6. The three dissenting justices acknowledged that "a different grand jury might have decided not to indict or to indict for a less serious charge," but stated that the grand jury's decision to indict was "correct as a matter of law, given respondent's subsequent, unchallenged conviction." *Id.* at 277 (Powell, J., dissenting). The dissenters maintained that a defendant "has no right to a grand jury that errs in his favor." *Id.* Justice O'Connor, who filed a separate concurring opinion, did not address the issues discussed in this paragraph. *Id.* at 266-67 (O'Connor, J., concurring).

350. *Id.* at 263.

351. 609 P.2d 1364 (Wash. 1980).

352. *Id.* at 1368.

353. *Id.*

354. 150 Ariz. 99, 722 P.2d 267 (1986).

prosecutors to move to disqualify a particular judge from all drunk driving cases. There, the court held that the policy "infringed upon the obligation of each Deputy City Prosecutor to exercise his or her individual professional judgment on a case by case basis."³⁵⁵

An individual who is prosecuted by a person who is not a licensed attorney is deprived of the fair minded exercise of discretion by a legally trained and ethically bound prosecutor at all stages of a criminal prosecution, perhaps most importantly at the charging stage. The ultimate conviction of a crime by a judge or jury does not change the obvious fact that the case may not have even proceeded to trial had a qualified prosecutor been handling the case.

c. The Appearance of Fairness

In *Peters v. Kiff*,³⁵⁶ the Supreme Court restated the "well established" rule that due process is denied by circumstances that create even "the appearance of bias."³⁵⁷ In that case, the Court reversed the conviction of a white defendant who had been indicted by a grand jury that was selected in a racially discriminatory fashion. Unlike many of the Court's prior grand jury discrimination cases, which had relied on an equal protection analysis, *Peters* was decided strictly on due process grounds. The Court maintained that "[i]llegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process," thereby "creat[ing] the appearance of bias in the decision of individual cases."³⁵⁸ For that reason, the Court was unwilling to engage in a harmless-error analysis, holding that the due process clause required the per se reversal of a conviction stemming from such a tainted indictment.³⁵⁹

In *Rose v. Mitchell*,³⁶⁰ the Court offered further support for the proposition that the Constitution requires both the actuality and the appearance of fairness. The Court there noted that racial discrimination in the grand jury selection process "destroys the appearance of justice" and "impairs the confidence of the public in the administration of justice."³⁶¹ Further, the Court posited that:

The harm is not only to the accused, indicted as he is by a jury from which a segment of the community has been excluded. It is to society as a whole. "The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the

355. *Id.* at 270. See also *State v. Cook*, 512 P.2d 744, 746 (Wash. Ct. App. 1973), *rev'd on other grounds*, 525 P.2d 761 (Wash. 1974) (noting that the "prosecuting attorney must exercise his independent judgment as to the prosecution or dismissal of a complaint" and that "legal representation of the state by a particularly qualified person was therefore a distinct advantage conferred upon [the defendant] by statute").

356. 407 U.S. 493 (1972).

357. *Id.* at 502.

358. *Id.* at 502-03.

359. *Id.* at 504-05.

360. 443 U.S. 545 (1979).

361. *Id.* at 555-56.

community at large, and to the democratic ideal reflected in the processes of our courts."³⁶²

While the Court reversed the conviction on equal protection grounds, the reasoning would seem to apply with equal force to a due process analysis of the nature of the error.

More recently, the plurality opinion in *Young v. United States ex rel. Vuitton et Fils*³⁶³ expressed the same concepts. The plurality determined that the appointment of an interested prosecutor violates fundamental fairness simply because it "creates an appearance of impropriety that diminishes faith in the fairness of the criminal justice system in general."³⁶⁴ As the justices emphasized, a prosecutor is "armed with expansive powers and wide-ranging discretion. Public confidence in the disinterested conduct of that official is essential."³⁶⁵ While the *Young* Court did not explicitly address the due process ramifications of the "appearance of impropriety," its reference to the undermining of "the public perception of the integrity of [the] criminal justice system" as an error that is "fundamental [in] nature" strongly supports the argument that even the appearance of injustice violates due process.

The New York Court of Appeals suggested the same in *People v. Zimmer*.³⁶⁶ In that case, the court overturned a criminal conviction because the prosecutor in the case suffered from a conflict of interest. The court stressed the requirement that prosecutorial responsibilities, "carried out in the name of the State and under the color of law, be conducted in a manner that foster[s] rather than discourage[s] public confidence in our government and the system of law to which it is dedicated."³⁶⁷ In a series of rhetorical questions, the court expounded on the nature of the problem presented when the prosecutor's qualifications in a given case are at issue:

[W]hat of the appearance of things? No matter the good faith and complete integrity of the District Attorney, under these circumstances what impression could the defendant have had of the fairness of a prosecution instituted by one with the personal and financial attachments of this prosecutor? Would it have been unreasonable for the defendant or others to doubt that the public officer, whose burden it was to screen the complaint for frivolousness and, if necessary, guide its destiny before the Grand Jury, would do so disinterestedly?³⁶⁸

The court held that the prosecutor should have recused himself from the prosecution of the case and, in light of his failure to do so, that the trial court should have dismissed the indictment. Without explicitly stating that its holding

362. *Id.* at 556 (quoting *Ballard v. United States*, 329 U.S. 187, 195 (1946)).

363. 481 U.S. 787 (1987).

364. *Id.* at 811.

365. *Id.* at 813.

366. 414 N.E.2d 705 (N.Y. 1980).

367. *Id.* at 708.

368. *Id.* (citation omitted).

was required by the due process clause, the court noted that the issues in the case involved the "defendant's entitlement to fundamental fairness"³⁶⁹ and were replete with "due process implications."³⁷⁰

The prosecution of a criminal case by a person who is neither licensed to practice law nor bound by any specific code of ethical behavior certainly serves to undermine the appearance of fairness in the operation of the criminal justice system. Allowing a criminal prosecution conducted by one who is unqualified and untrained "destroys the appearance of justice" and "impairs the confidence of the public in the administration of justice."³⁷¹ The situation is worse yet if the prosecutor is a police officer. Forcing a person who has been arrested by a particular police department to rely on a member of that same department, often the arresting officer, to exercise prosecutorial discretion, evaluate the legality of the police actions in the case, evaluate the legal strength of the prosecution's case, evaluate the worth of the case in terms of its deterrent value, provide the accused with exculpatory evidence, and, if necessary, try the case, would certainly cause most defendants to question the fundamental integrity of the proceedings. For that reason alone, the practice of allowing a police officer who is not a licensed attorney to prosecute a criminal case deprives a criminal defendant of due process of law.

3. Proper Due Process Analysis: Requiring Automatic Reversal

Were a court to decide that the prosecution of a criminal case by a person who is not licensed to practice law is a violation of due process, that court would then need to decide whether the error is such that it requires automatic reversal of the resulting criminal conviction. Using the analysis dictated by the Supreme Court's decision in *Arizona v. Fulminante*,³⁷² the court must first decide whether the constitutional error is a "trial error," in which case it should be analyzed under the "harmless error" doctrine, or whether the constitutional error is a "structural defect[] in the constitution of the trial mechanism," in which case it requires automatic reversal.³⁷³ For the reasons that follow, prosecution by a police officer falls much more readily into the "structural defect" category.

In trying to make some sense out of the Supreme Court's jurisprudence in this field,³⁷⁴ there appear to be two broad categories in which the Court has held that a constitutional error is "structural." The first category involves cases in which the error is such that its impact upon the outcome of the case is inherently

369. *Id.* at 706.

370. *Id.* at 708.

371. *Rose v. Mitchell*, 443 U.S. 545, 555-56 (1979).

372. 499 U.S. 279 (1991).

373. *Id.* at 306-10.

374. Several scholars have made compelling arguments suggesting that the purported dichotomy between "trial" errors and "structural" errors is illusory and that the Court's jurisprudence in this area is deeply flawed. See, e.g., David McCord, *The "Trial"/"Structural" Error Dichotomy: Erroneous, and Not Harmless*, 45 U. KAN. L. REV. 1401 (1996); Charles J. Ogletree, Jr., Comment, *Arizona v. Fulminante: The Harm of Applying Harmless Error to Coerced Confessions*, 105 HARV. L. REV. 152 (1991).

indeterminate. Professors LaFave and Israel have suggested that this aspect is "[u]ndoubtedly the characteristic of 'structural' defects most frequently mentioned in Supreme Court opinions."³⁷⁵ Unlike trial errors, the impact of which can at least purportedly be evaluated in the context of the trial record, "the impact of violations in the structural category could not be measured by reference to the evidence produced because the violation might well have had a bearing on the failure to produce other evidence, or to take other actions, that would have been influential."³⁷⁶

The Supreme Court's opinions in *Young v. United States ex rel. Vuitton et Fils*³⁷⁷ and *Vasquez v. Hillery*³⁷⁸ offer very strong support for the proposition that allowing a police officer to prosecute a criminal case is an error that falls into that category. The plurality opinion in *Young* held that a prosecution conducted by a prosecutor with a conflict of interest was an error that could not be subjected to harmless error analysis, largely for the reasons just noted. After describing the appointment of an interested prosecutor as "an error whose effects are pervasive,"³⁷⁹ the Court continued:

Such an appointment calls into question, and therefore requires scrutiny of, the conduct of the entire prosecution, rather than simply a discrete prosecutorial decision. Determining the effect of this appointment would thus be extremely difficult. A prosecution contains a myriad of occasions for the exercise of discretion, each of which goes to shape the record in a case, but few of which are part of the record.... "[T]o assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation."³⁸⁰

Similarly, the Court explained its "continued adherence to a rule of mandatory reversal" in *Vasquez* by noting the "difficulty of assessing [the] effect on any given defendant" of discrimination in the grand jury selection process.³⁸¹ A police prosecutor acting as the charging authority, much like a grand jury, and then acting as prosecutor of those charges, would have a completely indeterminate impact on the entire criminal proceeding. Any effort to determine from a dry record, after the fact, how the process might have proceeded had a licensed attorney handled the case, would involve, as the Court noted in *Young*, nothing more than "unguided speculation."³⁸²

The second category of errors that have been deemed to be "structural" involve situations in which the interest protected by the constitutional right is

375. LAFAVE & ISRAEL, *supra* note 1, § 27.6(c).

376. *Id.*

377. 481 U.S. 787 (1987).

378. 474 U.S. 254 (1986).

379. *Young*, 481 U.S. at 813.

380. *Id.* (quoting *Holloway v. Arkansas*, 435 U.S. 475, 490-91 (1978)).

381. 474 U.S. at 264.

382. 481 U.S. at 813 (quoting *Holloway*, 435 U.S. at 490-91).

something beyond the truth seeking function of the system, such that "an impact upon outcome, or the lack thereof, simply is irrelevant to the function of the right violated."³⁸³ The plurality opinion in *Young* highlighted this factor in reaching its finding that the prosecution of a case by an attorney with a conflict of interest required automatic reversal:

[T]he appointment of an interested prosecutor creates an appearance of impropriety that diminishes faith in the fairness of the criminal justice system in general. The narrow focus of harmless-error analysis is not sensitive to this underlying concern.... A concern for actual prejudice in such circumstances misses the point, for what is at stake is the public perception of the integrity of the criminal justice system. "Justice must satisfy the appearance of justice,"...and a prosecutor with conflicting loyalties presents the appearance of precisely the opposite. Society's interest in disinterested prosecution therefore would not be adequately protected by harmless-error analysis, for such analysis would not be sensitive to the fundamental nature of the error committed.³⁸⁴

Similarly, the *Vasquez* Court based its requirement of mandatory reversal on the notion that racial discrimination in the selection of grand jurors strikes at so fundamental a societal interest in fairness that it "is not amenable to harmless-error review."³⁸⁵ Prosecution of a criminal case by a police officer who is not licensed to practice law strikes at an equally fundamental societal interest—the public perception of justice that the Court spoke of in *Young*, without which the integrity, legitimacy, and efficacy of the criminal justice system would be severely undermined.

V. PUBLIC POLICY CONCERNS ARISING FROM POLICE PROSECUTION

There are a variety of ways in which entrusting the vast and unreviewed power of prosecutorial discretion to a police officer who is not a licensed attorney, even if one assumes that the majority of prosecuting police officers are legally competent and will abide by all applicable legal ethics provisions, is simply bad public policy. First and foremost, the practice of law by an individual who is not duly licensed to practice in that jurisdiction appears to be unlawful in every state in this country.³⁸⁶ In the most obvious sense, the prosecution of a criminal case in a fashion that involves unlawful action by the state engenders tremendous disrespect for the law. The words of the great Supreme Court Justice Louis D. Brandeis ring just as true today as when he wrote them in 1928:

Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are

383. LAFAVE & ISRAEL, *supra* note 1, § 27.6(c).

384. 481 U.S. at 811–12 (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

385. 474 U.S. at 263–64.

386. See 7 C.J.S. *Attorney & Client* § 30(a) (1980).

commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.³⁸⁷

The prohibition of the unauthorized practice of law has been justified largely in terms of protecting the putative client and society at large from the unscrupulous or incompetent practitioner.³⁸⁸ Even if an individual could establish that he or she would act in an ethical and competent fashion, the general prohibition would hold for the greater good of society.³⁸⁹ It is hard to imagine a context in which more harm might be done to an individual or to society as a whole than to entrust the enormous power of the criminal justice system to one who is engaging in the unauthorized practice of law. Consequently, it is hard to imagine a context in which the general prohibition should be more rigorously enforced. While any instance in which the public is left unprotected against the unauthorized practice of law is certainly cause for concern, it is that much worse when the unlicensed practitioner

387. *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

388. *See, e.g., People v. Black*, 282 N.Y.S. 197, 200 (N.Y. Cty. Ct. 1935) (prohibition is "to protect the general public from exploitation at the hands of unscrupulous or unskilled persons posing as lawyers"); *Bennie v. Triangle Ranch Co.*, 216 P. 718, 719 (Colo. 1923) (prohibition is "for the protection of citizens and litigants in the administration of justice, against the mistakes of the ignorant on the one hand, and the machinations of unscrupulous persons on the other"); *Robb v. Smith*, 4 Ill. 46, 47 (1841) (prohibition is "for [citizen's or suitor's] protection against the mistakes, the ignorance, and unskillfulness of pretenders").

389. A justice of the Appellate Division of New York has expressed this viewpoint in striking and appropriate language. The majority opinion in *People v. Felder*, 61 A.D.2d 309 (N.Y. App. 1978), affirmed the convictions of several criminal defendants who had been represented by a person who, unbeknownst to them, was not licensed to practice law. In a strongly worded dissent, Justice Hawkins wrote as follows:

I do not believe it is at all germane that this layman may have acted more or less capably than the most skilled lawyer. Surely, one need not expound upon the State's concern in licensing the profession of law. Whether he did so expertly or inexpertly is totally irrelevant. In licensing, the admitting court or State assures and certifies that the licensee has met minimal standards of education and character promulgated and adhered to by his peers over the centuries. I suggest that if we condone what occurred here, we are rendering a grievous disservice to the public and, also, denigrating our honorable and learned pursuit.

Id. at 318 (Hawkins, J., dissenting).

purports to actually *represent* the public through his or her unlawful activity. Condoning illegal activity conducted in the name of the state is hard to justify under any circumstances, but even more so when the state is engaged in the process of attempting to enforce and engender respect for the criminal laws.

Even if the practice of law by a police officer who is not licensed to practice were not in and of itself unlawful,³⁹⁰ the public is entitled to be properly represented in a criminal case. If conduct is deemed to be sufficiently detrimental to the public welfare that it has been criminalized, the public should expect to be represented in a prosecution of that conduct by a licensed, competent, and ethically bound attorney. As the United States Supreme Court noted over thirty-five years ago in *Gideon v. Wainwright*,³⁹¹ "[l]awyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society."³⁹² While the Court's proclamation did not match the reality of the day, or of today for that matter, it is hard to dispute the inherent logic of the Court's reasoning: "[t]hat government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the wide-spread belief that lawyers in criminal courts are necessities, not luxuries."³⁹³ In a case in which the defendant is represented by counsel, it may be that much more important for the protection of the public that the government be represented by counsel in order to preserve the balance of representation. As the Supreme Court stated in *Herring v. New York*,³⁹⁴ "[t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free."³⁹⁵ That premise is not fully realized when the government is not represented by a licensed attorney.

Because virtually every jurisdiction in the country is now served by an elected public prosecutor,³⁹⁶ the public should expect to be represented not just by any duly licensed attorney, but by that particular prosecutor or a by licensed member of his or her staff. Having elected a particular official for representation in criminal cases, it is remarkable that the public does not actually receive the benefit

390. There is some support in the case law for the proposition that the prosecution of a criminal case by a police officer may not constitute the unauthorized practice of law. These cases tend to rely on narrow readings of the statutes prohibiting unauthorized practice, justifying a practice that was already firmly rooted in the jurisdiction. See *supra* notes 135-79 and accompanying text.

391. 372 U.S. 335 (1963).

392. *Id.* at 344.

393. *Id.* See also *State v. Moritz*, 191 N.E.2d 21, 24 (Ind. 1963) (concluding that because "the enforcement of the criminal law is in the interest of protecting the public," it "naturally follows that it is [in] the interest of the public to have a competent attorney to carry out the duties of such an office").

394. 422 U.S. 853 (1975).

395. *Id.* at 862. See also *United States v. Cronin*, 466 U.S. 648, 655-56 (1984) (quoting *Herring* with approval); *Argersinger v. Hamlin*, 407 U.S. 25, 65 (1972) (Powell, J., concurring) (noting Justice Powell's "longheld conviction that the adversary system functions best and most fairly only when all parties are represented by competent counsel").

396. See Joan E. Jacoby, *The American Prosecutor: From Appointive to Elective Status*, PROSECUTOR, Sept.-Oct. 1997, at 25, 28-29.

of that official's representation when its interests are so clearly at stake.³⁹⁷ The exercise of prosecutorial discretion, particularly at the stage at which the prosecutor decides whether or not to file a criminal charge, involves the consideration of a great many factors that have little or nothing to do with the evidence in the case or with the guilt or innocence of the accused. Frequently, if not in every case, the prosecutor is required to make public policy determinations based on the law enforcement priorities of the jurisdiction and notions of individualized justice.³⁹⁸ In some instances, a prosecutor will determine that a particular criminal statute should remain totally unenforced because it is outdated, unimportant, excessively expensive to prosecute, or otherwise unenforceable.³⁹⁹ In an individual case, a prosecutor must often balance such diverse factors as a consideration of the deterrence value of the particular prosecution, whether the mere act of prosecuting the case will cause undue harm to the offender, the desire on the part of the alleged victim to forgo the prosecution, and the possibility that the offender can provide assistance in other law enforcement matters.⁴⁰⁰ These determinations center not around issues of guilt or innocence or even around issues of evidence or proof, but rather around issues of pure public policy. As the American Bar Association's Prosecution Function Standards have made clear, "the prosecutor acts as a decision maker on a broad policy level.... [T]he character, quality, and efficiency of the whole system is shaped in great measure by the manner in which the prosecutor exercises his or her broad discretionary powers."⁴⁰¹

Discussions of prosecutorial power and discretion often refer to the office of public prosecutor as a quasi-legislative⁴⁰² or quasi-judicial⁴⁰³ position. The position is quasi-legislative in that the prosecutor, by adopting a policy of non-enforcement of a particular statute, can essentially override the legislative body that enacted that statute. The position is quasi-judicial in that the prosecutor is called upon to make decisions based on a variety of equitable factors, decisions that will often be determinative of the outcome of the case. Particularly in a misdemeanor case, in which there is a very high probability that the case will be resolved by a negotiated plea regardless of the strength of the evidence,⁴⁰⁴ the very decision to go

397. See, e.g., *People v. Vlasto*, 355 N.Y.S.2d 983, 991 (N.Y. Crim. Ct. 1974) (asking rhetorically whether, if a criminal defendant is entitled to counsel even in certain petty offense cases, it "should...not equally follow that the People are entitled to be adequately represented by the counsel they have selected—the district attorney").

398. See, e.g., LAFAVE & ISRAEL, *supra* note 1, § 13.2(a); *Wayte v. United States*, 470 U.S. 598, 607 (1985).

399. See, e.g., LAFAVE & ISRAEL, *supra* note 1, at § 13.2(a).

400. *Id.*

401. A.B.A. PROSECUTION STANDARDS, *supra* note 17, Standard 3-1.2 cmt.

402. See, e.g., Alschuler, *supra* note 54, at 53; NDAA PROSECUTION STANDARDS, *supra* note 21, Standards 66–72 cmt.

403. See, e.g., *Ganger v. Peyton*, 379 F.2d 709, 714 (4th Cir. 1967); A.B.A. PROSECUTION STANDARDS, *supra* note 17, Standard 3-1.2 cmt.

404. In practice, a weaker case is probably more likely, not less likely, to result in a negotiated plea. Professor Albert Alschuler has suggested that the strongest pressure to plead guilty is brought to bear in cases in which the evidence is weak. Alschuler, *supra* note 54, at 59–60.

forward with a prosecution is often the determinative decision with respect to the outcome of the case. As Professor John B. Mitchell has noted, "our system is one in which guilty pleas routinely follow a charge and, therefore, the decision to charge is, in many cases, tantamount to conviction."⁴⁰⁵

Once it is recognized that the role of the prosecutor, to a rather large degree, involves making determinations concerning public policy, it becomes obvious that the duly elected public prosecutor, and not the local police department, must be in control of the prosecution of criminal cases. The American Bar Association, in Standard 3-2.1 of its Prosecution Function Standards, has taken the position that "[t]he prosecution function should be performed by a public prosecutor who is a lawyer subject to the standards of professional conduct and discipline."⁴⁰⁶ The commentary explains that Standard 3-2.1 is "designed to discourage the practice of police or private prosecution," noting that "[t]he absence of a trained prosecution official risks abuse or casual and unauthorized administrative practices and dispositions that are not consonant with our traditions of justice."⁴⁰⁷ At the heart of the development of the public prosecutor as an elected position is the notion that "the election of prosecutors at the local level...increases the likelihood that the prosecutor will be responsive to the dominant law enforcement views and demands of the community."⁴⁰⁸ An elected official is subject to removal from office, at the expiration of his or her term if not before, if he or she is making policy decisions that are inconsistent with the will of the

405. John B. Mitchell, *The Ethics of the Criminal Defense Attorney—New Answers to Old Questions*, 32 STAN. L. REV. 293, 308 (1980). Professor Mitchell argues that one of the primary means for discouraging prosecutors from filing charges in cases in which the evidence is weak is for defense attorneys to routinely take weak cases to trial. *Id.* at 308–09.

406. A.B.A. PROSECUTION STANDARDS, *supra* note 17, Standard 3-2.1. Similarly, the National District Attorneys Association has concluded that "the prosecutor should be a member of the state's bar in good standing." NDAA PROSECUTION STANDARDS, *supra* note 21, Standard 3.2.

407. A.B.A. PROSECUTION STANDARDS, *supra* note 17, Standard 3-2.1 cmt. For reasons that one can only speculate about, the commentary stops short of recommending the complete abolition of police prosecution. While it recognizes "the desirability of transferring drunkenness offenses, minor traffic offenses, and similar matters out of the traditional criminal processes and into some form of administrative process," the commentary continues by stating that "where this has not yet been done, such matters often can be prosecuted without the aid of a professional public prosecutor." *Id.* No effort is made to explain why this procedure should be allowed or how it can be justified, which is particularly startling when it is so directly contradictory to the plain wording of the standard.

408. NDAA PROSECUTION STANDARDS, *supra* note 21, Standard 3 cmt. The American Bar Association has refrained from taking a position on the election of prosecutors, noting that "[o]pinion has long been divided on the question of whether the office of the prosecutor should be appointive or elective." A.B.A. PROSECUTION STANDARDS, *supra* note 17, Standard 3-2.3 cmt. Some observers have opined that the public is in a poor position to oversee the actions of a local prosecutor. *See, e.g.,* LaFave, *supra* note 20, at 538 (maintaining that "while the local prosecutor is in theory responsible to the electorate, the public can hardly assess prosecution policies which are kept secret").

public. One of the premises underlying our electoral process is that a political adversary will explore and expose those activities on the part of an elected official that will be unpopular with the electorate. Consequently, if a public prosecutor chooses not to prosecute or to be lenient in the prosecution of a particular criminal offense, that would presumably become an issue for public debate at the next election. Similarly, if a prosecutor were to devote substantial resources to the prosecution of a particular criminal offense, that judgment would likewise be debated at the next election. If these same decisions are made by a police officer, or even by a police department on a broader scale, it is much harder to envision those decisions as the subject of public debate in that the electoral process cannot be relied upon to expose or address the issues. While a mayor or some other elected official may ultimately be held accountable for the actions of a police prosecutor, the ability of the public to see and to participate in these public policy judgments is much farther removed. Although responsiveness to the electorate can certainly have a distorting and unproductive effect on the prosecutor's role,⁴⁰⁹ it can also be one of the most significant checks on the exercise of prosecutorial discretion;⁴¹⁰ without such a check, the unbridled power of the office is subject to extraordinary abuse.

It is also likely that certain categories of cases are treated differently by a police prosecutor from the way in which they might be treated by a prosecuting attorney. The most obvious of these categories is the class of crimes directly involving the police, such as resisting arrest or assault on a police officer. Given the inclination of police officers to see themselves as a cohesive unit and to emphasize the importance of preserving the reputation of and respect for the department,⁴¹¹ these cases are likely to be prosecuted far more seriously by a police prosecutor than by an attorney who may have a broader perspective on the appropriate use of prosecutorial resources. These cases will generally also raise issues of conflict of interest, in that they often involve allegations that the arresting officers were engaged in some level of force or violence. It is not hard to imagine

409. Professor Alschuler, quoting from the findings of the Wickersham Commission, maintains that "[t]he system of prosecutors elected for short terms...is ideally adapted to misgovernment.... The 'responsibility to the people' contemplated by the system of frequent elections does not so much require that the work of the prosecutor be carried out efficiently as that it be carried out conspicuously." Alschuler, *supra* note 54, at 106 (quoting NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON PROSECUTION 15 (1931)). He continues by noting that "the desire for publicity and the fear of offending those who control local politics" distort the proper functioning of the system. *Id.*

410. See *Sinclair v. State*, 363 A.2d 468 (Md. 1976). The court stated, "As a general rule, whether [the] State's Attorney does or does not institute a particular prosecution is a matter which rests in his discretion. Unless that discretion is grossly abused or such duty compelled by statute or there is a clear showing that such duty exists,"...his decision is controlling and he is accountable for it to no one other than the electorate.

Id. (quoting *Brack v. Wells*, 40 A.2d 319, 321 (Md. 1944)).

411. See *Sherman*, *supra* note 35, at 14-15.

that an arresting officer who used force to subdue a defendant might have a particular interest in the prosecution of that case, and if he or she is not the prosecuting officer, might have a far easier time exerting influence over a fellow officer than over a prosecuting attorney.

In the other direction, certain categories of crimes might be prosecuted far less vigorously by an average police prosecutor than by an attorney. The most obvious example of this sort of case would be in the realm of domestic violence. Over the past decade, there has been a very strong movement in state legislatures in the direction of requiring mandatory arrests in domestic violence situations.⁴¹² In large part, this movement has been in response to the concern that police officers were not taking domestic violence situations seriously, opting to tell the alleged abuser to "take a walk" or "cool down" rather than making an arrest.⁴¹³ Undoubtedly, the states that have enacted this sort of legislation have determined that a mandatory arrest policy, by taking discretion out of police hands, will better serve to protect the public. Certainly, it would seem that the recognition that police officers, on average, lack a sufficient understanding of the seriousness of domestic violence would suggest that the very same officers might not prosecute domestic violence cases as vigorously as might a prosecuting attorney. Similarly, there is significant reason to believe that police officers are far less likely than prosecuting attorneys to treat drunk driving cases as seriously as might a prosecuting attorney.⁴¹⁴

Perhaps the most pervasive justification for allowing the practice of police prosecution is the notion that it would be difficult or impossible to staff and fund the prosecution of all criminal cases with a duly licensed prosecuting attorney. This justification appears in the opinions of the Supreme Courts of South Carolina and New Hampshire, the only two state high courts that have explicitly authorized police prosecution. In *State v. Messervy*,⁴¹⁵ the Supreme Court of South Carolina acknowledged that "[i]deally, the State's case would be presented by a prosecuting

412. See generally ELLEN PENCE, CRIMINAL JUSTICE RESPONSE TO DOMESTIC ASSAULT CASES: A GUIDE FOR POLICY DEVELOPMENT (1985); LAWRENCE W. SHERMAN ET AL., POLICING DOMESTIC VIOLENCE: EXPERIMENTS AND DILEMMAS (1992).

413. See Lawrence W. Sherman & Richard A. Berk, *The Specific Deterrent Effects of Arrests for Domestic Assaults*, 49 AM. SOC. REV. 261 (1984). See also PENCE, *supra* note 414; SHERMAN, *supra* note 413.

414. This author's four years of active practice in Rhode Island, where the misdemeanors in some jurisdictions are prosecuted predominantly by police officers and in other jurisdictions predominantly or exclusively by prosecuting attorneys, provides significant anecdotal support for this proposition. Perhaps an explanation can be found in the notion that most police officers, like most adults in this country, have driven an automobile after having consumed alcohol; it may be easier for a police officer to see himself or herself as a drunk driving defendant than as a defendant charged with any other offense, and it may be harder for a police officer than for a prosecuting attorney to put those feelings in their proper perspective. Professors Barker and Carter, in the course of their research into police lying, concluded that police officers may well have a more lenient attitude in practice toward drunk driving offenses than their departmental official policies would suggest. See Barker & Carter, *supra* note 80, at 65.

415. 187 S.E.2d 524 (S.C. 1972).

attorney," but concluded that the high volume of cases made that scenario impracticable.⁴¹⁶ Similarly, the Supreme Court of New Hampshire in *State v. Aberizk*⁴¹⁷ was critical of the practice of police prosecution, suggesting that requiring the appearance of a prosecuting attorney was "a desirable subject for legislative consideration in the framework of available time, education, and budgetary resources."⁴¹⁸ Along the same lines, the United States District Court for the District of Maryland suggested in *United States v. Glover*⁴¹⁹ that "justice, and its appearance, would be better served if the United States Attorney's Offices were sufficiently enlarged and funded to permit and require their participation as prosecutors in criminal proceedings before Federal Magistrates."⁴²⁰ Yet nowhere in any of these decisions is there any analysis of the resources that would be required, nor any discussion of how the majority of jurisdictions in the United States manage to handle their criminal caseloads exclusively with licensed prosecutors. Ultimately, of course, the question of whether the proper conduct of a criminal prosecution is of high enough priority to merit funding is a question of public policy; the notion that such staffing is impracticable or impossible is belied by the practice in other jurisdictions.

There are several ways to address concerns regarding staffing and funding. The most obvious is to determine which types of cases are serious enough or important enough to be prosecuted by licensed prosecuting attorneys; if a category of cases does not rise to that level of seriousness or importance, it would seem hard to justify continuing to prosecute those cases as criminal offenses. Indeed, both the Model Penal Code and the American Bar Association Standards for Criminal Justice have endorsed the decriminalization of a whole host of lesser offenses, particularly in the area of disorderly conduct, loitering, and public drunkenness.⁴²¹ Even if a jurisdiction were not prepared to decriminalize certain lesser offenses, thereby reducing the criminal caseload to manageable levels, it could make some effort to distinguish between different kinds of offenses prosecuted within the same court. In South Carolina, for example, the Supreme Court lumped together misdemeanor offenses with an enormous volume of traffic offenses when it concluded that prosecuting attorney staffing was impracticable.⁴²² The court did not explore whether grouping the misdemeanor cases onto particular days was a feasible option. In contrast, the Iowa legislature has seen fit to require the appearance of a prosecuting attorney in all cases of domestic violence, thereby distinguishing that category of cases from all other misdemeanor cases, in which the county attorney's appearance is essentially optional.⁴²³ With the exception of Iowa, all other jurisdictions that allow police prosecution seem to allow the practice on all misdemeanor cases.

416. *Id.* at 525.

417. 345 A.2d 407 (N.H. 1975).

418. *Id.* at 408.

419. 381 F. Supp. 1139 (D. Md. 1974).

420. *Id.* at 1146.

421. See MODEL PENAL CODE art. 250 & explanatory note (1985); A.B.A. PROSECUTION STANDARDS, *supra* note 17, Standard 3-2.1 cmt.

422. *State v. Messervy*, 187 S.E.2d 524, 525 (S.C. 1972).

423. IOWA CODE § 331.756(4) (1996).

Those who would defend an economic justification for allowing police prosecution grossly underestimate two significant factors. First, they underestimate the significance of a misdemeanor prosecution. Even if the underlying offense is perceived as relatively trivial, a criminal conviction can, in certain circumstances, cost a person a job, an apartment in public housing, a professional license, a driver's license, and, of course, freedom from incarceration.⁴²⁴ Moreover, there are a variety of misdemeanors that the public appears to take quite seriously. It is ironic that perhaps the most obvious of these offenses, domestic violence offenses and drunk driving offenses, are the two kinds of cases that are most likely to be undervalued by a police prosecutor as compared with a prosecuting attorney.⁴²⁵

Second, and perhaps more important, those who would defend an economic justification for allowing police prosecution underestimate the significance of the public's perception of the criminal justice system. The lower courts, in which the practice of police prosecution is prevalent, are the primary point of contact, if not the only point of contact, that most citizens will ever have with the criminal justice system.⁴²⁶ Arthur T. Vanderbilt, the late Chief Justice of the Supreme Court of New Jersey, repeatedly expressed the viewpoint that the lower courts are the "most important" courts in the state.⁴²⁷ He explained that viewpoint as follows:

[I]t must be apparent to all who consider the matter that the local courts of first instance are the very foundation for the enforcement of the criminal law. On them rests the primary responsibility for the maintenance of peace in the various communities of the state, for the safety on our streets and highways, and, most important of all, for the development of respect for law on the part of our citizenry, on which in the last analysis all of our democratic institutions depend.⁴²⁸

424. In *Argersinger v. Hamlin*, 407 U.S. 25, 48 & n.11 (1972) (Powell, J., concurring), Justice Powell described a whole host of what he termed "[s]erious consequences" that can follow from a misdemeanor conviction. After noting that "[l]osing one's driver's license is more serious for some individuals than a brief stay in jail," *id.* at 48, he listed a series of other direct and adverse consequences, including the stigma of a conviction, forfeiture of public office, disqualification from licensed professions, and the loss of pension rights. *Id.* at 48 n.11. Justice Brennan made the same point in *Scott v. Illinois*, 440 U.S. 367, 380 & n.10 (1979) (Brennan, J., dissenting), reiterating Justice Powell's list and adding two items of his own: impeachment of one's testimony in any future legal proceeding and exclusion from jury duty.

425. See *supra* notes 412-14 and accompanying text.

426. See, e.g., *In re Yengo*, 371 A.2d 41, 45-47 (N.J. 1977); *In re Mattera*, 168 A.2d 38, 47 (N.J. 1961); *In re Field*, 576 P.2d 348, 355 (Or. 1978).

427. Arthur T. Vanderbilt, *The Municipal Court—The Most Important Court in New Jersey: Its Remarkable Progress and its Unsolved Problems*, 10 RUTGERS L. REV. 647, 650 (1956).

428. *Id.* Several state court opinions have expressed the same sentiments. The New Jersey Supreme Court has written: "It is [in the lower courts] that most citizens have their sole exposure to the judicial process. The respect they have for the judiciary hinges upon that exposure." *In re Mattera*, 168 A.2d at 47. Similarly, the Supreme Court of

If the public perception is that the proceedings in these courts are not legitimate—that illegal practices will be condoned, that the public prosecutor will not even bother to appear to protect the public interest—then any notion that the criminal justice system is legitimate and deserving of respect or pride is severely undermined.

Thus, even if one embraces the unlikely presumption that all police prosecutors will act both competently and ethically—a presumption that is certainly not accurate even when it comes to attorneys—there is a whole host of reasons that allowing police officers to prosecute criminal cases is simply bad public policy. The practice appears to be unlawful on its face in most of the jurisdictions in which it occurs. Even if it were lawful, the delegation of what is obviously the prosecuting attorney's job involves a wholesale delegation of public policy decisions from a duly elected public official to persons with no particular duty to be responsive to the electorate. Furthermore, and most importantly, the practice engenders disrespect for the criminal justice system.

VI. CONCLUSION

Allowing police officers who are not licensed attorneys to prosecute criminal cases, a phenomenon that is widespread in the lower courts of a number of jurisdictions in the country, is a highly problematic practice. While it may seem superficially harmless to entrust a misdemeanor prosecution to a police officer, this Article has engaged in an extended exploration into the role of a public prosecutor in protecting the public, the criminal justice system, and the criminal defendant, to reveal how entirely inappropriate it is to make that delegation of responsibility. A prosecutor has enormous and almost entirely unreviewed and unreviewable discretion in the handling of a criminal case. The proper exercise of that discretion is dependent upon a number of factors, not the least of which are legal training and ethical obligations. Indeed, the criminal justice system functions almost entirely on a presumption that the extraordinary power of the government, as wielded through a prosecutor, is being applied fairly and justly. That presumption is founded upon the fact that the prosecutor is an attorney who, having been licensed to practice law in the jurisdiction, has been fully trained in the law and is bound by the codes of ethics that govern the conduct of attorneys. The licensing process also assures that a prosecuting attorney has passed some form of screening with respect to honor and integrity and that he or she has sworn an obedience to the various codes of ethics. The fact that a prosecuting attorney is subject to the threat of professional discipline if he or she violates any of the relevant ethical obligations provides further assurance that a prosecuting attorney is faithfully executing the duties of his or her office in a fair and just fashion. When the person who prosecutes a criminal case is not a licensed attorney, none of these protections or assurances is in place

Oregon has noted: "The impressions [citizens] receive [in the lower courts] serve to shape their opinion of the judicial system. We cannot permit that opinion to be anything but one of confidence and respect." *In re Field*, 576 P.2d at 355 (quoting *In re Yengo*, 371 A.2d at 46).

and the presumption that prosecutorial discretion is being exercised fairly is entirely unfounded.

A prosecutor's lack of legal training can have a terribly detrimental effect on the criminal justice system in a wide variety of ways. The most obvious problems arise when a case proceeds to trial with a prosecutor who is not competently trained in trial practice and procedures, the rules of evidence, the elements of a criminal offense, and the relevant legal defenses. While these are the most obvious problems, they are almost certainly not the most serious, given the very small number of criminal cases that proceed to trial. Much more alarming problems related to legal competence arise at the charging stage, where errors in either direction—overcharging or undercharging—can completely undermine the fair functioning of the system. Errors made at the discovery stage or ineffectiveness at the plea negotiation stage due to lack of legal training can have precisely the same effect.

The fact that a police prosecutor is not bound by an attorney's code of ethics or answerable to the disciplinary process for attorneys is perhaps the most disturbing aspect of the practice of police prosecution. A prosecutor plays a unique and difficult role in the criminal justice system because he or she is required to protect the defendant and the integrity of the system at the same time that he or she must vigorously advocate for the state. The requirement that a prosecutor protect the defendant and the integrity of the system is enforced almost exclusively through the ethical obligations placed upon a prosecuting attorney. Because there appear to be no binding ethical restrictions upon a police prosecutor, there are no assurances that information conveyed to the defendant or to a court will be complete, accurate, or truthful. Similarly, there are no assurances that exculpatory information will ever be conveyed to a defendant. And perhaps most importantly, there are no assurances that the criminal justice system will not be used or abused to further a police officer's individual agenda. Obviously, these concerns seriously undermine the fair functioning of the criminal justice system.

Even if one were to assume that a police officer were as legally competent as a prosecuting attorney and as obedient to all of a prosecuting attorney's ethical requirements, several troubling issues still remain. A public prosecutor is a duly elected official, answerable to the electorate and charged with the responsibility of prioritizing the use of prosecution resources and determining fairness on an individualized basis. The elected prosecutor's failure to perform those roles, either directly or through his or her staff, constitutes an entirely unjustified delegation to a police department that is not directly accountable in any fashion. Moreover, there are very serious problems in terms of the appearance of justice in courts in which police officers serve as prosecutors. When a prosecuting attorney fails to appear to prosecute a criminal case, a message is being conveyed that the case is not of any particular importance—certainly not the message that our criminal justice system ought to be conveying. By allowing a layperson to practice law, an act that is illegal in every state in the country, the practice condones illegality at the same time that it purports to be enforcing the law. In addition, by failing to distinguish between the functions of the police department and the functions of a prosecutor's office, the practice suggests the existence of a totally unsupervised police state.

For all of these reasons, this Article has suggested that the practice of allowing police officers to prosecute criminal cases is terribly misguided. But worse than that, the practice should render any resulting conviction void and violates a criminal defendant's constitutional right to due process of law. There is significant support for the proposition that a conviction must be voided if it results from the unauthorized practice of law; the cases supporting this proposition rely predominantly on the notion that the state cannot be seen as a participant in this form of illegality. In addition, while it is an almost entirely novel legal claim, there is significant support for the proposition that police prosecution violates due process in several ways. First, the presumption of regularity that attaches to the actions of a duly licensed prosecuting attorney cannot be justified in the context of a police prosecution; as such, there is no basis for believing that the defendant's due process rights throughout the criminal process have been observed. Second, the defendant has, by definition, been denied the exercise of a prosecuting attorney's discretion to which he or she is constitutionally entitled. While a criminal defendant is not entitled to any particular outcome from the exercise of a prosecutor's discretion, and while a defendant is not entitled to judicial review of the exercise of that discretion except in very rare circumstances, a defendant most certainly is entitled to have that discretion exercised fairly by one who is authorized to exercise it. Third, the substantial appearance of injustice connected to the prosecution of a criminal case by a police officer, not a licensed, trained, and ethically bound attorney, violates due process.

In the end, society would be far better served if the extraordinary power of the government to charge and criminally prosecute its citizens were entrusted only to those who are elected to exercise it, legally authorized to exercise it, fully and appropriately trained to exercise it, and ethically bound to exercise it fairly and justly. Anything short of that is a betrayal of one of our nation's most firmly held tenets: that the raw power of the government must be exercised wisely, sparingly, and judiciously.