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Ethical Considerations for Prosecutors: How Recent Advancements Have Changed the Face of Prosecution

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ARTICLE

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Abstract. The prosecutor acts as a minister of justice with sweeping discretion to charge an individual with a crime, plea a case in a manner supported by the strength of the evidence, proceed to trial on a case, and even dismiss a case. He must balance the interest of the victim, the community, and the constitutional rights of the accused in every decision he makes.

This article will explore the role of the American prosecutor and discuss various ethical issues encountered on a daily basis. After a brief introduction, the author will succinctly discuss the history of the prosecutor and will expound on some important hallmarks of prosecutorial work such as justice and discretion. Once acquainted with these mainstays, the article will turn its analysis to two contextually recent developments in prosecutorial ethics: advancements in disclosure of evidence, and the trend of various prosecuting offices declining to pursue charges for certain offenses as a matter of policy. For the sake of brevity, the latter will be referred to as a policy-based approach to prosecution. It should be evident that these are not the only ethical issues for prosecutors. However, to best understand how prosecutors function at present, it is vital to take a look at these matters. With changes in societal expectations, culture, and the law, these two matters are of great importance.

In considering criminal discovery, profound changes have happened over the past five years giving rise to increasing duties imposed on the prosecutor. These duties altered how crimes are prosecuted and information is shared

with counsel for the accused. Having the benefit of five years since the implementation of these laws, the practical impact of these new ethical obligations will be analyzed. Next, as an increasing number of prosecuting offices are adopting a policy-based approach to prosecution, many are questioning the propriety of such an approach and whether or not it appropriates powers that are outside the role of a prosecutor. What are the ethical considerations innate to such an approach and how do they affect the role of the prosecutor?

Throughout this article, special consideration will be given not just to the theoretical implications of various statutory provisions, but also to their practical effects. How these issues affect prosecutors and cases is an important matter that will be explored. The perspective of a prosecuting practitioner with both trial and supervisory experience will be apparent throughout the analysis.

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Acknowledgments: For Anastacia and Henry, in the hope that the world we give unto them is more just and ethical than the one we received.

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I. INTRODUCTION

> The qualities of a good prosecutor are as elusive and as impossible to define as those which mark a gentleman. And those who need to be told would not understand it anyway. A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.[1]

In the American criminal justice system, the prosecutor plays an integral role. In a system that elevates truth, justice, and fair process, the prosecutor is tasked not only with abiding by common ethical tenants and rules of procedure, but also the awesome burden of ensuring the rights of the accused. While the prosecutor is by no means an advocate for the accused, he must strive to protect the accused's rights, serving as a bulwark against infringements of liberty and a promoter of the societal good. Not having a particular client, the state's attorney can verily be society's servant, taking into consideration a multitude of factors in deciding how to, or even whether or not to, proceed on any given case.

As Justice Robert Jackson alluded to in a speech delivered during the Second Annual Conference of United States Attorneys, in April 1940, the American prosecutor must temper other goals and motivations with an overwhelming preference for protection and advancement of society.[2] Considering the innumerable responsibilities entrusted to a prosecutor, it is logical that they also encounter immense ethical matters during the exercise of their professional duties.

This article will focus on two ethical issues prosecutors face. During the discussion of each issue, we will look at the occupational expectations of prosecutors as well as applicable rules that govern prosecutors. For purposes of this article, we will view ethics as a set of beliefs and principles that guide a prosecutor in the execution of their duties and the achievement of the overall goal of justice. In more complex situations, the matter of ethics will present itself as having to choose between two or more competing options, both of which are permitted.

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1. Robert H. Jackson, *The Federal Prosecutor*, 31 J. AM. INST. CRIM. L. & CRIMINOLOGY 3, 6 (1940).

2. *Id.*

The focus on only two issues is not intended to minimize other ethical considerations, nor is it intended to convey that these matters are somehow of greater gravity than others. By focusing on only two ethical considerations, we can more thoroughly explore the various facets of each. Finally, this article highlights these specific issues due to how extensively they permeate the prosecutorial profession. Given their prevalence, the author hopes that this article can help initiate meaningful discussions about societal expectations for prosecution and not merely serve as a means to stoke an intellectual fire.

This article begins with a look at the role of the prosecutor in the justice system, touching on the history of the office and a variety of ethical considerations. Next, we will look at the legal requirements imposed on prosecutors to disclose particular pieces of evidence or information. Given that the burden of proof will always lay squarely on the prosecution to prove guilt, this is of notable importance.[3] The ever-increasing public awareness of individuals who have been wrongly accused or even convicted makes this matter particularly relevant. Finally, this article will address the implications of prosecution offices choose to forego prosecution of a certain offense across the board.[4] This section will examine various motivations behind the practice as well as some of the controversies associated with the approach. As the reader will see, this final issue is often paired with changes in societal perceptions and shifts in cultural norms regarding certain offenses.[5] As communities become more accepting of certain practices that

3. *See* TEX. PENAL CODE ANN. § 2.01 ("All persons are presumed innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt.").

4. To avoid confusion, from here on out, I will refer to the head of a prosecuting office as an "elected prosecutor," regardless of the statutory manner in which he is placed in office, and I will refer to the attorneys employed by the elected prosecutor as "prosecutors."

5. *See* Lulu Garcia-Navarro, *Baltimore State's Attorney Will No Longer Prosecute Marijuana Possession Cases*, NPR (Feb. 3, 2019, 7:39 AM) https://www.npr.org/2019/02/03/690975390/baltimore-states-attorney-will-no-longer-prosecute-marijuana-possession-cases [https://perma.cc/GL4J-95ZK] (proclaiming the Maryland State Attorney for the city of Baltimore will forgo prosecuting marijuana possession cases "regardless of amount or a person's prior criminal record"); Catherine Marfin, *Texas Prosecutors Want to Keep Low-Level Criminals Out of Overcrowded Jails. Top Republicans and Police Aren't Happy*, TEX. TRIB. (May 21, 2019, 12:00 AM) https://www.texastribune.org/2019/05/21/dallas-district-attorney-john-cruezot-not-prosecuting-minor-crimes/ [https://perma.cc/M3D4-GM4Y] (describing several new policies designed to keep individuals who have committed low-level, non-nonviolent drug offenses from serving jailtime); *St. Louis County Prosecutor Makes New Marijuana Policy*, KMOV4 (Jan. 3, 2019) https://www.kmov.com/news/st-louis-county-prosecutor-makes-new-marijuana-policy/article_fd8570d8-0f48-11e9-b902-fb1a99b00c76.html [https://perma.cc/JY6Z-5K9N] (citing Interim Office Policies of St. Louis County Prosecutor (effective Jan. 2, 2019)) (last

are still criminalized, we are beginning to see an increase in dialogue on the necessity of prosecuting the action.

II. THE AMERICAN PROSECUTOR

A. *Brief History*

Before we look into some of the ethical issues associated with prosecution, it would be helpful first to discuss the nature of the prosecutor. The American prosecutor is an amalgamation of various European traditions.[6] Over time, the role, scope, and even selection process of the American prosecutor has changed and still varies amongst states to this day.[7] Initially, it was the norm for the American prosecutor to be an appointed office, but over time most states have opted to have candidates stand for election.[8] Today, elected prosecutors and their assistants are some of the most influential individuals in the criminal justice system, exerting a considerable amount of influence in various hearings and possessing vast amounts of discretion. This influence has also spread to the creation of important public policy. In the following subsections, we will look further into some of the important ethical requirements, obligations, and limits imposed on prosecutorial authority.

B. *Justice*

Although the American prosecutor is referred to by a variety of different titles across the country, one of the things that bind all prosecutors is a commitment to justice.[9] Whereas television shows or popular culture may indicate otherwise, the prosecutor's objective is not to obtain convictions or to secure lengthy prison sentences, but rather the prosecutor's primary

visited Nov. 15, 2019) ("This office will not prosecute the possession of less than 100 grams of marijuana in any capacity.").

6. Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 728 (1996).

7. *Id.*

8. *Id.* at 729–30 (1996); *see also* N.J. STAT. ANN. § 2A:158-1 (West 2018) (showing that New Jersey is an unusual outlier in that the governor nominates the heads of prosecuting offices with the advice and consent of the state senate).

9. *See* TEX. CODE CRIM. PROC. ANN. art. 2.01 ("It shall be the primary duty of all prosecuting attorneys, including any special prosecutors, not to convict, but to see that justice is done."); Smith v. Florida, 95 So. 2d 525, 527 (Fla. 1957) (emphasizing the commitment to justice a prosecutor has as an officer of the court).

objective is to seek a just resolution to a criminal charge.[10] The American Bar Association's Model Rules of Professional Conduct demonstrates a strong commitment to seeking justice in its applicable rules on prosecutors:

> The prosecutor in a criminal case shall:
>
> (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
>
> . . . .
>
> (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.[11]

These rules are particularly important because, in a way, they demonstrate the obligations prosecutors have which move beyond advocacy. In one of the comments to Rule 3.8, these special responsibilities are discussed in greater depth.[12] The first comment explicitly states, "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate."[13] In this commentary we see the frequently mentioned standard of justice. This concept cannot be understated in terms of importance, nor can it be viewed as some compartmentalized duty. The quest for justice is something that influences everything a prosecutor does.

In a comment of Rule 3.09, Special Responsibilities of a Prosecutor of the Texas Disciplinary Rules of Professional Conduct, the concept of justice above all other motivations is reiterated:

> A prosecutor has the responsibility to see that justice is done, and not simply to be an advocate. This responsibility carries with it a number of specific

10. *See* TEX. CODE CRIM. PROC. ANN. art. 2.01 (asserting that Texas prosecutors should seek to ensure justice, not merely obtain convictions).

11. MODEL RULES OF PROF'L CONDUCT R. 3.8 (AM. BAR. ASS'N 2018).

12. *See id.* at R. 3.8 cmt. 1 ("This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.").

13. *Id.*

> obligations. Among these is to see that no person is threatened with or subjected to the rigors of a criminal prosecution without good cause.[14]

This comment is particularly helpful because it offers practical ways in which the prosecutor can work to achieve justice. In an effort to ensure that an accused is afforded procedural justice, the comment goes on further to state that a prosecutor must "not initiate or exploit any violation of a suspect's right to counsel, nor should he initiate or encourage efforts to obtain waivers of important pretrial, trial or post-trial rights from unrepresented persons."[15] These practical means of achieving justice are further explored in the next subsection.

The obligation that a prosecutor has to achieve justice also includes a degree of servitude to the accused—the very individual that the prosecutor has brought criminal charges against.[16] These duties require the prosecutor to ensure that the procedural safeguards, in place to protect the criminally accused, are respected, while ensuring convictions are based on sufficient evidence.[17] Furthermore, the duties require prosecutors take remedial action if evidence subsequently arises that exculpates an individual convicted of an offense. The ability to seek criminal charges is such a powerful one in both theory and practice that it cannot come unaccompanied by certain ethical obligations.

C. *Discretion*

Perhaps one of the most unique parts of prosecution is the vast discretion that is afforded to the prosecutor in the discharge of his duties.[18] In most circumstances, individual prosecutors have discretion on how to charge a crime (if charging at all), how much weight to give a particular witness's account of the offense, and even to dictate the specifics of a plea negotiation. This is precisely where the importance of discretion comes into play.[19] Some legal commentators have gone so far as to refer to the prosecutorial office as "the most powerful office in the criminal justice

14. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.09 cmt. 1, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West 2018).

15. *Id.*

16. MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (AM. BAR. ASS'N 2018).

17. *See* TEX. CODE CRIM. PROC. ANN. art. 39.14 (declaring that a prosecutor's primary duty is not to convict but to seek justice); MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (AM. BAR. ASS'N 2018) (discussing the responsibilities of a prosecutor as a minister of justice).

18. Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259, 266 (2001).

19. *Id.*

system."[20] Discretion plays such an important role in a prosecution that it has become inextricably linked to the duties of a prosecutor.[21]

Some have recognized prosecutorial discretion as a derivation from the separation of powers.[22] Furthermore, when comparing the discretion that the American prosecutor has to prosecutors in European countries, the former has much greater latitude than the latter.[23] For example, the American prosecutor can decline to pursue criminal charges in a given case, and there are very few opportunities for judicial review of that choice to forego charges.[24] Whereas much of the final decision has to do with the weight of the evidence and the analysis of the individual prosecutor, the ultimate factor that permits such a wide range of possibilities is the discretion of the prosecutor. In fact, it is possible, when presented with the opportunity, two different prosecutors in the same jurisdiction could come to entirely different conclusions as to whether or not to proceed with filing formal charges against an individual. This seeming inconsistency is derived from a prosecutor's discretion on handling a case.[25] Filing a case is just one example of the great discretion that a prosecutor can utilize in the execution of his duties. The prosecutor has tremendous influence in bail hearings, immunity offers to witnesses, plea bargaining, and sentencing.[26] Although the prosecutor does not make the ultimate decision in matters such as bail reduction, or even the sentence imposed upon conviction, it is important to note that prosecutorial decisions leading up to those decisions can greatly influence and affect the ultimate choice of the decision-maker.

Take the matter of sentencing as an example to demonstrate this point. In Texas, upon conviction, either the judge or a jury will determine the punishment. However, the judge's or a jury's options regarding punishment are limited based upon a number of charging decisions that are made solely

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20. Misner, *supra* note 6, at 741.

21. *Id.*

22. Michelle A. Gail, *Preliminary Proceedings*, 85 GEO. L.J. 983, 983 (1996).

23. William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 OHIO ST. L.J. 1325, 1336–37 (1993).

24. *Id.* at 1337.

25. It should go without saying that, for purposes of this example and article, we are overlooking various hierarchies that may be present in a prosecuting office. Such hierarchies will at times mandate that a prosecutor act a certain way in a case. Absent some office policy however, or a directive from a supervisor, systemically a prosecutor can make such a charging decision and very little recourse is available for a private individual who may disagree with the decision.

26. *See* Misner, *supra* note 6, at 741 (elaborating on the breadth of authority afforded to the prosecutor in the areas of bail, immunity, trial strategy, bargaining, and sentencing).

by the prosecutor. For example, if the accused is charged with a felony and has previously been to prison, the prosecutor can choose to give notice and proceed on what is referred to as an enhancement.[27] Under Texas law, an accused who has been to prison once before is designated as a repeat offender, and an accused who has been to prison two or more times is considered a habitual offender.[28] The effect of a punishment enhancement is to increase the punishment range the accused faces upon conviction. It is the sole discretion of the prosecutor whether to allege such an enhancement, or whether to waive the same even after it has been alleged.

Consider for a moment, an individual who has been previously convicted and sentenced to any term of prison, is now being tried and convicted of a separate offense. For this example, presume he is charged with an offense labeled a third-degree felony, punishable with confinement for two to ten years.[29] From this basic set of facts we can derive two scenarios which should prove illustrative of the prosecutor's discretion. In one situation, the prosecutor can choose to waive the enhancement allegation, perhaps out of an attempt to induce a plea deal or perhaps based on some mitigating facts, thus making the range of punishment that the accused faces two to ten years.[30] The second situation is where the prosecutor proceeds on the punishment enhancement, thus increasing the range of punishment from the aforementioned to twenty-five years to ninety-nine years.[31] There is no requirement that a prosecutor has to justify his decision; similarly, there is nothing that can prevent the prosecutor from utilizing his discretion in how to proceed.[32]

A comparable issue that demonstrates a prosecutor's discretion, albeit one with more severe ramifications, is the matter of capital felonies. The prosecutor, after reviewing the case and the strength of the evidence, is the one that makes the determination to charge a case as a capital or a non-capital felony. This decision has severe ramifications in the matter of punishment. In Texas, a capital felony is punishable by either life in prison

27. TEX. PENAL CODE ANN. § 12.42.

28. *Id.*

29. *Id.* § 12.34.

30. *See id.* (stating the range of punishment for a third-degree felony is imprisonment "for any term of not more than 10 years or less than 2 years").

31. *See id.* § 12.42(d) (stating the range of punishment for a defendant with two prior felony convictions is imprisonment "for any term of not more than 99 years or less than 25 years").

32. *See id.* (indicating there exists no language in the statute limiting the prosecutor's discretion).

without the possibility of parole, or execution.[33] The most analogous non-capital offense (murder) is a first-degree felony and is punishable from five to ninety-nine years or life in prison.[34] Thus, a mere charging decision in a homicide case can have massive implications on the ultimate punishment range an individual faces.

Turning our attention solely to capital felonies, an important detail in the law is whether or not the state intends to seek the death penalty.[35] As long as the statutory requisites[36] are met, the decision to seek the death penalty is the sole choice of the prosecutor.[37] The effect of a prosecutor choosing to select the death penalty limits the jury's choice in punishment to either life imprisonment without the possibility of parole or execution.[38] Should the state decline to seek the death penalty in a capital felony, where upon conviction, the accused must be sentenced to life imprisonment without the possibility of parole?[39] Whereas the jury will be the ultimate finder of fact, it is evident that the prosecutor's discretion has far-reaching effects that will limit the former's choices in assessing punishment in such cases.

Is there a benefit to bestowing such discretion on a single subset of people within the criminal justice system, or is this authority a recipe for oppression under the color of law? Justice Robert Jackson saw the potential for conflict the innate discretion could cause stating that "[w]hile the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst."[40] Some have noted the discretion a prosecutor has is so great that it is the "starting point for virtually every discussion" on prosecutors.[41] A critical assessment of prosecutorial discretion can point to unequal enforcement of statutory violations, unpredictable outcomes, and even inequitable bargaining positions in terms of plea deals. Critics fail to see, however, that

33. *Id.* § 12.31.

34. *See* Tex. Penal Code Ann. §§ 19.01, 19.02(c), 12.32 (establishing murder as a first-degree felony that is punishable by life imprisonment or for a term ranging from five to ninety-nine years).

35. *See id.* § 12.31 (asserting the state has the discretion to seek the death penalty).

36. *See id.* § 19.03 (listing the statutory requisites for capital murder).

37. *See id.* § 12.31 (specifying the state has discretion to seek the death penalty or not).

38. *Id.*

39. *Id.*

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

41. *See* David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 480–81 (2016) ("The starting point for virtually every discussion of prosecutors in the United States is their tremendous clout."); Misner, *supra* note 6, at 741(suggesting discretion is inevitably debatable when critiquing the prosecutor's role in criminal justice).

prosecutorial discretion, when used cautiously and justly, can be an instrument to effect remedies to the very issues they rally against.

At some point, the decision of whether or not to charge one with a crime has to fall to some individual or entity.[42] Is a criminal practitioner who will have to put in the work on the case, speak with witnesses, and potentially try the case not best suited to make such a decision? If the discretion of the prosecutor is reduced, then the legitimate question arises: who would then make the decisions? For example, if legislative authority is increased and subsequent edicts are issued that establish various thresholds under which a crime shall not be charged but above which a crime must be charged, does not the accused suffer? Such mandates would be overly general and removed enough from the details of specific situations that they would prove incapable of fairly or justly addressing the specific needs of individual criminal cases. As things are presently constructed, prosecutors must utilize discretion to navigate through countless cases which, although fit the statutory requirements of a crime, may not warrant prosecution.[43]

Additionally, such pernicious edicts could overlook budgetary limitations that constrain local prosecutors. Local prosecuting offices should be able to determine the best use of resources in their given community. Imagine the financial burden of a state-wide edict requiring mandatory prosecution of a certain narcotic, but there was only one lab in the entire state which performed such testing. Because the laboratory analysis would be required to prove up the case, prosecuting offices would be forced to sustain the additional financial burden of having resources siphoned away to pay for this expense.

To say that a prosecutor has never abused his discretion would be naïve. As we will see below, the negative effects are innumerable when a prosecutor acts inappropriately or elevates other motivations above justice. The solution to addressing such abuses, however, should not involve throwing out the baby with the bathwater type of approach. Prosecutorial discretion has evolved over time as an effective and practical means of addressing unique and individualized problems in criminal cases. Like the

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42. It is important to note that the purpose of this section is not to advocate for limitless discretion. No reasonable individual ever wants to vest in another such boundless authority. Rather, the purpose of this article is to shed light on the practical adverse effects of limiting prosecutorial discretion.

43. Misner, *supra* note 6, at 264 (reasoning that prosecutors must maintain discretion, particularly when prosecuting cases that may no longer warrant prosecution due to a change in public attitude).

amazing benefits of nuclear energy, it does not come without its dangers; and as such, precautions need to be taken that it is never abused. Justice Jackson warned of the Orwellian potential that such abuses could cause:

> If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm-in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.[44]

Discretion in a criminal prosecution can be the most significant means of achieving justice when used wisely. If it is misused, however, then it can sow tragedy for the individuals at the receiving end of the unjust process and can cause a systemic collapse in the criminal justice world.

D. *Extrajudicial Statements*

An interesting, yet often overlooked, ethical obligation for prosecutors is the limits on extrajudicial comments made regarding a case. In addition to the ethical obligations expressed above, prosecutors also have a special duty to tread cautiously and speak with prudence when speaking about matters under investigation:

> (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused

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

> and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.[45]

Texas has a similar rule under the Texas Disciplinary Rules of Professional Conduct, which go a little further in terms of defining what is acceptable in terms of extrajudicial comments by a prosecutor.[46] Recognizing how prejudicial statements from a public official can be, these rules mandate that prosecutors are prudent in all extrajudicial comments.[47] To avoid feeding the fire of public opinion and thus possibly threatening the accused's chance at a fair trial, prosecutors are generally prohibited from discussing (among other things) the accused's character, credibility, reputation, or criminal record.[48] The elected prosecutor is further obligated to "exercise reasonable care" to prevent anyone employed by him from making such prohibited extrajudicial statements.[49] These restrictions on various extrajudicial statements by a prosecutor should clarify the importance of an accused's right to a fair and unbiased trial.

E. *The Servant*

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce

45. MODEL RULES OF PROF'L CONDUCT R. 3.8 (AM. BAR. ASS'N 2018).

46. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.07–08.

47. *See id.* (highlighting instances in which there is an increased likelihood an extrajudicial statement will result in a violation).

48. *Id.* R. 3.07(b)(1).

49. *See id.* R. 3.09(e) (according to the plain reading of "persons employed or controlled by the prosecutor" it would appear that this duty on the part of the elected prosecutor in Texas would also extend to the non-attorneys employed on his or her staff).

> wrongful conviction as it is to use every legitimate means to bring about a just one.[50]

The prosecutor is a unique animal in the menagerie of American attorneys. Unlike almost every other attorney in the country, the prosecutor is not beholden to the interest or cause of a single client.[51] Instead, the prosecutor represents a multitude of interests with varying degrees of involvement and visibility in every single case.[52] Although the prosecutor does not have a client in the usual understanding of the term, given the nature of the position, prosecutors will find themselves representing the interests of numerous "constituencies" such as the victim, the family of the victim, the community, the state, and even various procedural and constitutional rights of the defendant.[53]

This multifarious consideration of interests results in prosecutors having to balance, sometimes precariously, the desires and wishes of numerous groups.[54] As discussed above, paramount to all other interests, a prosecutor must seek justice and protecting the rights of the accused even at the expense of a particular victim's wish or even the public upheaval in the wake of an unpopular decision. Although employed by the state, the prosecutor represents the community and society, works to ensure the rights of the accused are safeguarded, and speaks for the victims of senseless crimes. The

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50. Berger v. United States, 295 U.S. 78, 88 (1935).

51. Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 57 (1991).

52. *Id.* It is important to note that frequently, these interests do not always align in terms of the desired outcome. For instance, it can be argued that the prosecutor represents the accused in a way by ensuring various procedural protections are enforced. This interest will inevitably come into conflict with the not infrequent interest of a victim (or family of a victim) in having the case resolved in a speedy manner. Additionally, there is always the community interest in resolving criminal matters in a manner that is fiscally responsible and respects the budgetary constraints that are innate in holding a government position. This consideration is often at odds with a need for additional laboratory tests or travel expenses for necessary witnesses. As one can quickly detect, prosecution is a job in which there are competing interests, a job in which difficult decisions must be made about how to resolve conflicts between various interests, and a job in which difficult decisions need to be made when an ethical obligation requires one to act in a way that might aggravate or even alienate a necessary witness or victim.

53. Zacharias, *supra* note 51, at 56–58.

54. *See* Walker A. Matthews, III, Note, *Proposed Victims' Rights Amendment: Ethical Considerations for the Prudent Prosecutor*, 11 GEO. J. LEGAL ETHICS 735, 746 (1998) ("Because the prosecutor's client is society, the prosecutor cannot be loyal by fulfilling solely the victim's wishes. Rather, the prosecutor must balance all the interests of society and be mindful of the defendant's due process rights to ensure that justice is done.").

prosecutor serves the interest of many identifiable groups, but the prosecutor's sole master should be justice.

In learning more about the prosecutor, the power he has, and the duties he is bound by, one is now in a better position to examine a few of the ethical considerations that he encounters. Whereas these are by no means the only ethical issues which arise, these are some of the more instructive ones in terms of demonstrating the nexus between the theoretical and the practical.

III. ETHICAL CONSIDERATIONS IN CRIMINAL DISCOVERY

A criminal prosecution has the potential to totally alter the life of an individual accused of an offense; it can bring closure to a family of a victim torn apart by crime, and it can help a community move forward after a sense of security or peace has been obliterated. As one can already surmise, the power to prosecute a crime is accompanied by numerous duties and obligations. One of the most critical duties is disclosing information and evidence to counsel for the accused. "[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure."[55] Whereas matters as complicated as discovery can rarely be described in a small quotation with any degree of adequacy, this proposition comes as close as any other.

Since it is the prosecutor bringing the criminal charges against the accused, the former is the one tasked with the responsibility of proving the charges. In proving up the criminal charges, prosecutors work closely with law enforcement agencies, laboratories, medical examiners, and witnesses to obtain necessary evidence. While working with these entities, prosecutors obtain important information about the crime. Sometimes this information is of a nature that but for the prosecutor turning it over, the accused may not be able to access it. Perhaps the information is a forensic DNA test the prosecutor had performed. Maybe the information in question is new information from a witness who observed the offense. Regardless of the evidence, the key point here is that the prosecutor is often in the best position to have this information or to even know of its existence.

An important aspect of ethical prosecution is the disclosure of evidence to the defense that is in the possession of the prosecutor.[56] This information, for purposes of this article referred to as discovery, can include everything from witness statements, photographs, and police reports. They

55. United States v. Agurs, 427 U.S. 97, 108 (1976).

56. MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (AM. BAR. ASS'N 2018).

are invaluable in that they can assist the accused in gleaning information about the prosecution's trial strategy and gives a valuable glimpse into any potential weaknesses in the case. Important information contained in discovery can also assist the accused and his counsel in determining how to proceed in plea negotiations and make informed decisions about the case.

In this section, we will look into the changing landscape regarding criminal discovery. In principle, discovery is based on the concept of affording the criminally accused a transparent process and the opportunity to know, with clarity, the evidence which will be presented against him by the state, therefore ensuring a fair trial.[57] We will discuss some basics of criminal discovery, its history, recent changes, and some of the more complex circumstances which may occur.

A. *Brief History*

Any discussion regarding the disclosure of criminal evidence must begin with the seminal case *Brady v. Maryland*, which dealt directly with prosecutorial withholding of evidence.[58] In this case, the petitioner was convicted of murder and sentenced to death.[59] The petitioner was accused of committing the murder along with a co-defendant, and only after his conviction and sentencing discovered that the prosecution did not disclose a statement given by the co-defendant.[60] The withheld statement contained the co-defendant's admission to committing the murder.[61]

The Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment irrespective of the good faith or bad faith of the prosecution."[62] In *Brady*, the Supreme Court relied heavily on a case decided nearly thirty years prior,[63] *Mooney v. Holohan*.[64] In *Mooney*, the prosecution knowingly sponsored perjured testimony by a witness and secured a conviction for murder.[65] Although the Supreme Court ultimately denied the petitioner's motion for leave to file

57. Brady v. Maryland, 373 U.S. 83, 87 (1963).
58. *Id.* at 87–88.
59. *Id.* at 84.
60. *Id.*
61. *Id.*
62. *Id.* at 87.
63. *Id.* at 86.
64. Mooney v. Holohan, 294 U.S. 103 (1935).
65. *Id.* at 110.

a petition on an original writ of habeas corpus,[66] the Supreme Court also declined to endorse the respondent's argument that prosecutorial action cannot result in a denial of due process.[67] The Court in *Brady* viewed its ruling as an extension of *Mooney* regarding the effects of prosecutorial nondisclosure on due process.[68]

Under *Brady*, the focus of the review hinges on the materiality of the evidence, and as such, the prosecutor's intent is irrelevant.[69] In focusing on materiality as opposed to the prosecutor's motivations, the Supreme Court was demonstrating the importance of affording the accused a fair trial and a reliable process.[70] In reaching this conclusion, the Court in *Brady* relied on *Mooney* and was careful to emphasize that the latter's principle:

> is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: "The United States wins its point whenever justice is done its citizens in the courts."[71]

Subsequent cases have continued to examine *Brady* and the role of materiality in evidence that was not disclosed. In *Giglio v. United States*,[72] the Supreme Court looked at an instance in which the "reliability of a given witness may well be determinative of guilt or innocence," and the Court found that nondisclosure of even impeachment evidence would fall within the general rule.[73] *Giglio* required a new trial if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury."[74] In *United States v. Bagley*, the Supreme Court adopted a single test for materiality, noting "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result

66. *Id.* at 115 (stating the petition was denied based on the Court's determination that the petitioner still had recourse to file a writ of habeas corpus in a state court).

67. *Id.* at 112.

68. *Brady*, 373 U.S. at 86.

69. *Id.* at 87.

70. *See id.* (asserting that the justice system suffers when an accused receives an unfair trial).

71. *Id.*

72. Giglio v. United States, 405 U.S. 150 (1972).

73. *Id.* at 153–54 (quoting Naupe v. Illinois, 360 U.S. 264, 269 (1959)).

74. *Id.* at 154.

of the proceeding would have been different."[75] "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."[76] It is important to note here that while a showing of materiality is necessary, it is not required to show that but for the nondisclosure of the evidence, the accused would have been acquitted at trial.[77] In both of the aforementioned cases, the evidence at issue was impeachment evidence as opposed to the exculpatory evidence involved in *Brady*.[78] The Court went out of its way to point out that *Brady* applies to both exculpatory and impeachable evidence.[79]

The above history is important for a greater understanding of criminal discovery. In order to understand various prosecutorial obligations, it is necessary to possess an understanding of how the duties have evolved over time, and courts have offered clarification. This matter is vitally important given the power which comes with the ability to charge and prosecute crimes. Next, we will turn our attention to some of the consequences of failure to turn over such information.

B. *Michael Morton*

It was around 5:30 in the morning when Michael Morton left his home northwest of Austin to go to work at a local grocery store.[80] Michael lived with his wife, Christine, and young son, Eric.[81] After his shift was over, Michael ran some errands around town and returned to a home that was surrounded by crime scene tape; neighbors were outside, standing in their yards.[82] When Michael asked Williamson County Sheriff Jim Boutwell if

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

76. *Id.*

77. Kyles v. Whitley, 514 U.S. 419, 434 (1995).

78. *See Bagley*, 473 U.S. at 676 ("In the present case, the prosecutor failed to disclose evidence that the defense might have used to impeach the Government's witnesses by showing bias or interest."); *Giglio*, 405 U.S. at 151–53 (noting how the prosecution agreed not to charge the defendant's conspirator if the conspirator cooperated with the government); Brady v. Maryland, 373 U.S. 83, 84 (1963) (discussing how the prosecution withheld statements from the defense, which included an admission exonerating the defendant from committing homicide).

79. *See Bagley*, 473 U.S. at 676 (stating the *Brady* rule applies to both impeachment and exculpatory evidence); *see also Brady,* 373 U.S. at 87 (holding that suppressing requested evidence favorable to the accused violates due process).

80. Pamela Colloff, *The Innocent Man, Part One*, TEX. MONTHLY (Jan. 21, 2013), https://www.texasmonthly.com/politics/the-innocent-man-part-one/ [https://perma.cc/Q73F-ZBDC] [hereinafter Colloff, *Part One*].

81. *Id.*

82. *Id.*

his wife was all right, he was told: "she's dead."[83] Over the coming weeks, Michael looked after his son as police looked into him—quickly making Michael the main suspect in his wife's murder.[84] Although there was no physical evidence linking him to the brutal murder of his wife, Michael was arrested for the crime only six weeks afterward.[85]

Unfortunately for Michael at the time, Texas law did not have a general right to discovery in criminal cases, and the prosecuting attorney, Ken Anderson, did not exactly take a progressive stance on disclosing information uncovered in the investigation.[86] The defense and prosecution sparred over what evidence the latter was required to turn over.[87] The Presiding Judge, William Lott, ordered the state to turn over certain pieces of evidence (including the reports of the lead investigator, Sergeant Don Wood) and the judge would review them to see if there was any exculpatory evidence the defense was entitled to, as a matter of law.[88] Judge Lott reviewed the documents the prosecution provided and made the determination the documents did not contain exculpatory evidence and, thus, did not order them to be disclosed.[89]

Morton's attorneys relied on a Texas evidentiary rule requiring disclosure of witness reports once the witness was sworn in and took the stand.[90] However, prosecutors chose not to call Sergeant Don Wood, the lead investigator in the case, and as such Morton's attorneys did not gain access to his reports or notes as they would have

83. *Id.*

84. *Id.*

85. *Id.*

86. Kinnamon v. State, 791 S.W.2d 84, 91 (Tex. Crim. App. 1990); Colloff, *Part One*, *supra* note 80.

87. Pamela Colloff, *The Innocent Man, Part Two*, TEX. MONTHLY (Jan. 21, 2013), https://www.texasmonthly.com/politics/the-innocent-man-part-two/ [https://perma.cc/82XM-ZZ6C] [hereinafter Colloff, *Part Two*].

88. *Id.*

89. *Id.*

90. *See* Tex. R. Evid. 612 ("An adverse party is entitled to have the writing procured at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony."); Colloff, *Part One*, *supra* note 80.

otherwise.[91] Michael was convicted of murdering his wife, Christine, and sentenced to life in prison.[92]

As one probably can anticipate, Morton's story does not end there. In our justice system, an individual who is convicted of a crime often has appeals, writs, and motions for new trial at one's disposal. However, these options can often take many years to exhaust. In Morton's case, it took twenty-five years. In 2005, Morton's post-conviction attorneys filed a motion to have a bandana, found roughly one hundred yards behind the Morton house after the murder, tested for DNA results.[93] This bandana, initially observed by a law enforcement official near a curb, was not collected initially.[94] It was only collected later when Christine Morton's brother was at the site. After observing it, he collected it and took it to law enforcement where it was kept.

The district court denied the defense request to have the bandana tested, and the defense team appealed the ruling to the Court of Appeals Third District.[95] The Appeals Court reasoned that if the bandana contained forensic evidence of Christine's DNA and the DNA of another individual who was not Morton, a jury hearing the case could have been persuaded to acquit Morton.[96] Testing was performed on the bandana to determine if a DNA profile could be found on the blood and a strand of hair located on it.[97] In May 2011, the lab concluded that the hair matched Christine Morton, and her blood was also found on it.[98] Also, on the bandana was the blood of an unidentified man, but Michael Morton's blood was not on the bandana.[99]

In addition to the revelations regarding the bandana, Morton's defense team had been able to procure additional evidence and statements which

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91. Colloff, *Part One*, *supra* note 80. Regardless of the fact that Texas at the time had no general right to criminal discovery, it is almost beyond argument that such information was material to the case and most of it exculpated Morton as it indicated there was another suspect of interest. As such, the concerned information should have been disclosed pursuant to *Brady*. *See* Brady v. Maryland, 373 U.S. 83 (1963) (emphasizing the injustice behind a prosecutor withholding exculpatory evidence from the accused).

92. Colloff, *Part One*, *supra* note 80.

93. *In re* Morton, 326 S.W.3d 634, 636–38 (Tex. App—Austin 2010, no pet.).

94. *Id.* at 638.

95. *Id.* at 637.

96. *Id.* at 644–45.

97. Colloff, *Part Two*, *supra* note 86.

98. *Id.*

99. *Id.*

had not been disclosed prior to or at trial.[100] This additional information would have objectively helped Morton's defense team as it contained neighbors' accounts of a green van parked by the vacant wooded area, which abutted Morton's house, the same area in which the bandana was found.[101] Additionally, these reports contained statements that neighbors had seen the driver walking into the same wooded area right near the Mortons' fence.[102] Even though investigators were quick to dismiss a burglary, the information also contained evidence that Christine Morton's credit card was used in San Antonio, Texas, two days after she was killed.[103] This information also contained the identity of an eyewitness who stated that he was able to identify the individual who used Christine's card.[104] The sheriff's office never followed up with the eyewitness in San Antonio.[105] Finally, the documents also contained an eight-page transcript detailing a conversation Sergeant Wood had with Christine Morton's mother several weeks after the murder.[106] Christine's mother described a conversation she had with Eric Morton, where he described his mother being attacked by a monster and not getting up.[107] The three-year-old boy goes on to describe that the monster broke the bed and threw a blue suitcase at Christine.[108] He added that the monster had a basket containing wood.[109] When asked by his grandmother if Morton was present, Eric made it clear he and his mother (along with the monster) were the only ones present.[110]

The young child's account of what happened was strikingly similar to what the investigators observed at the scene.[111] Investigators noted that a blue suitcase and a wicker basket had been placed on Christine's body and that there were also small pieces of wood found in her hair.[112] The information in and of itself was appalling, but subsequent revelations would prove to be even more repugnant.

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100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*

In the wake of receiving this information, the defense team filed a motion with the district court to review the original documents Prosecutor Ken Anderson had turned over to Judge Lott.[113] Back during Morton's trial, the judge ordered the prosecution to hand over all evidence in its possession regarding the investigation, and, in particular, reports created by Sergeant Wood.[114] As was common, the judge would then review the documents *in camera* and would determine what needed to be disclosed to the defense.[115] After the judge made his determination, all of the documents were placed in a sealed file, which would allow subsequent review in the event the matter became an issue post-trial.[116]

Morton's defense team decided to file a motion to review the sealed file to determine finally if that evidence had, in fact, been turned over to Judge Lott for review.[117] When the small file was unsealed, all that was in it were six pages containing a copy of Sergeant Wood's report, and a consent form signed by Morton to search his vehicle.[118] A feeling of unease almost certainly descended on those in the room as the implications of the discovery became apparent.[119] It was instantly apparent that all the other evidence: the statements of neighbors about the green van, sightings of the van's driver near Morton's house, and Eric's statements to his grandmother, were withheld from Judge Lott's *in camera* inspection;[120] the entire purpose of which, was for the judge to review everything and determine what the law required the prosecution to disclose. Obviously, the judge could not make a determination on documents which he did not know existed, and certainly not on documents that were intentionally withheld by the prosecution. The prosecution had failed to comport with the judge's order; they withheld exculpatory information which was never disclosed to Morton's defense team and was never heard by the jury who convicted him of murder.[121]

Morton was eventually released after twenty-five years in prison for a crime that he did not commit and sent away by a jury that did not hear all

113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *See id.* (indicating the only evidence in the file was an investigator's report written on the day of Christine's death and a form, signed by Morton, authorizing deputies to search his vehicle).
121. *Id.*

the evidence.[122] In an already tragic story where someone was killed, Morton also suffered because a prosecutor ignored a court's order and did not disclose all the evidence and suppressed evidence that almost certainly would have exonerated Morton.

C. *Texas Senate Bill 1611 "The Michael Morton Act"*

In the years after the Michael Morton story became public and he was released, there was support in the Texas Legislature to update and modify the existing criminal discovery rule.[123] Senate Bill 1611, also known as the "Michael Morton Act," was passed in the Texas Legislature and approved by the Governor during the 2013 Legislative Session.[124] The amendments to the discovery statute took effect for all prosecutions of criminal offenses that occurred on or after January 1, 2014.[125]

Before we dive deeper into the amended discovery statute, it is essential to look at the criminal discovery landscape before the Michael Morton Act. As mentioned above, criminal defendants had no general right of discovery.[126] Previously, the law required the accused to show good cause before the trial court ordered the State to produce and permit inspection of applicable documents.[127] The removal of this requirement was one of the biggest changes enacted by the Michael Morton Act.[128] Now, the defense is required to make a timely request.[129] Additionally, the Michael Morton Act codified the prosecutor's already existing obligations under *Brady*, and in essence, mandated an open file policy in requiring such wide disclosure.[130]

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122. *Id.*

123. House Comm. on Judiciary & Civil Jurisprudence, Bill Analysis, Tex. S.B. 1611, 83d Leg., R.S. (2013).

124. Michael Morton Act, Tex. S.B. 1611, 83d Leg., R.S. (2013) (codified at TEX. CODE CRIM. PROC. ANN. art. 39.14).

125. *Id.* § 4.

126. *See* Kinnamon v. State, 791 S.W.2d 84, 91 (Tex. Crim. App. 1990), *overruled on other grounds*, 884 S.W.2d 485 (Tex. Crim. App. 1994) (declaring that Article 3.49 of the Texas Code of Criminal Procedure affords criminal defendants "limited discovery").

127. Act of June 18, 1999, 76th Leg., R.S., ch. 578, 1999 Tex. Gen. Laws 557.

128. Tex. S.B. 1611 § 2(a).

129. *Id.*

130. *See generally id.* (expanding discovery rights for criminal defendants); *see also* MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (AM. BAR. ASS'N 2018) ("make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal

In what can be one of the more laborious results of the discovery statute amendments, the Michael Morton Act requires the State to make a record of all the information provided to the defense.[131]

Furthermore, before any plea agreement is accepted or before a trial is commenced, both attorneys for the state and the accused must acknowledge, either in writing or on the record, that discovery has been complied with.[132] It is worth noting that while the amendments almost exclusively impose duties upon the prosecutor, they also impose certain duties on counsel for the accused.[133] The amended statute permits defense counsel to allow the accused, witnesses, or even prospective witnesses to view the information provided by the State but, they cannot have copies of anything other than their own statement.[134] Additionally, it is required that before such information is shown to the witness, the attorney, or his agent, must redact personal information and identifiers, such as the address, telephone number, driver's license number, social security number, date of birth, and any bank number.[135]

D. *How the Prosecution is Affected*

The Michael Morton Act has been hailed by some as hard evidence of progressive discovery reform, whereas some early opponents believed it would serve as a "procedural burden[] on prosecutors, creating a multitude of opportunities for unintentional and innocuous rule violations."[136] Nevertheless, exactly how do the changes impact prosecution generally and the individual prosecutor?

As with everything else, in order to comply with something, one needs to comprehend it. Comportment with the Michael Morton Act is no different in this regard. At times, attorneys can get lulled into a false sense of compliance by overreliance on their own memory. Do not try to guess or

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all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.").

131. Tex. S.B. 1611 § 2(i).

132. *Id.* § 2(j).

133. *Id.* §§ 2(a), 2(j).

134. *Id.* § 2(f).

135. *Id.*

136. *Compare* House Comm. on Judiciary & Civil Jurisprudence, Bill Analysis, Tex. S.B. 1611, 83d Leg., R.S. (2013) (expressing concern that the Act would impose "significant procedural burdens on prosecutors"); *with* Cynthia E. Hujar Orr & Robert G. Rodery, Recent Development, *The Michael Morton Act: Minimizing Prosecutorial Misconduct*, 46 ST. MARY'S L. J. 407, 419 (2015) (referring to the Act as a "progressive discovery act designed to prevent and combat prosecutorial misconduct").

recall what the statute says—refer back to it, brush up on it, and consider taking proactive steps that will not only aid in the retention of knowledge, but will also help grow one's understanding of the law.[137] Education on any intellectual topic should always be a continual venture, as opposed to a random curio doing nothing more than collecting dust.

While the Michael Morton Act should be lauded for ushering a new era of transparency and accountability in criminal prosecution, it is not without its practical implications. Having the benefit of five years since its enactment, we have sufficient time to discuss its effects on the prosecutor objectively.

1. Delivery of Information

One of the most noticeable effects of the amended discovery statute is the increased necessity of keeping an organized and easily navigable file. Since the prosecutor is now tasked with disclosing information "as soon as practicable" upon a timely request from the defense, it is imperative to maintain a reliable method of receiving and filing defense requests for evidence.[138] It can be easy for these requests to slip through the cracks since these requests no longer require a ruling by a judge, especially for those prosecutors who have dockets that are bursting at the seams. This portion of the amended discovery statute makes it incumbent upon the prosecutor to continue to disclose information as it comes available.[139] In criminal cases, it is standard for certain types of information, such as police reports or criminal histories, to be available to the prosecutor reasonably early on. However, there are also pieces of evidence that, by their very nature, require more time to make their way to the prosecutor's file (e.g., lab reports and autopsies). The statute only requires the defense make a "timely request," after which the prosecution is on notice to disclose all of the enumerated information.[140] As a result, as any new piece of evidence or information

137. In the author's work as a prosecutor, he has found it refreshingly useful to refer back to a statute in question if it has been some time since he has worked directly with it. Additionally, making abundant use of various case law updates through bar associations can be informative and help keep the already over-worked prosecutor current on case law. Finally, engaging in meaningful discussions with colleagues has been one of the most rewarding ways to continue to learn. Even taking a moment to discuss a unique motion that was filed by defense counsel can prove to be extremely instructive.

138. TEX. CODE CRIM. PROC. ANN. § 39.14(a).

139. *Id.* § 39.14(k).

140. *Id.* § 39.14(a).

comes available, the prosecutor must be realizing the continuing duty to disclose.[141]

Since compliance with the Michael Morton Act is an ethical obligation of prosecutors, one should give serious thought to any ethical considerations implicit with compliance. The amount of evidence a prosecutor has at his disposal has increased drastically with vast technological advances.[142] Prosecutors must reconcile their time constraints and scheduling limitations with the continuing duty to disclose evidence and information as it becomes available. Whereas a prosecuting office likely has specific procedures in place to help facilitate the more clerical aspects of disseminating discovery, it is still the ethical duty of a prosecutor to confirm the statutory requirements under the Michael Morton Act have been comported with on every case. Adherence to an ordinary manner of how a prosecuting office handles discovery is not sufficient.

In addition to the matter of time spent reviewing information, prosecutors also have to give serious thought to the efficacy of whatever organizational schema is being utilized. With the increase of technology and the discovery requirements, prosecutors, now more than ever, need to guarantee that a reliable system is in place to track not just files but also

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141. At first glance, this should seem simple enough. Defense requests all applicable information pursuant to Section 39.14, and later that afternoon, the diligent prosecutor receives an autopsy report and immediately makes it available via whatever electronic duplication means the prosecuting office has. In this hypothetical, it does appear to be fairly straightforward. However, as with many things in life, things are usually a bit more complicated than they can seem. Most defense attorneys will file a 39.14 discovery motion at the onset of a case. Under the requirements of the statute, the prosecutor is obligated to continue to disclose information as it continues to become available. Whereas this is not a revolutionary idea and should not shock the conscience of any prosecutor, it does raise the practical issue of making certain to stay on top of all evidence that comes to a file. Depending on the procedures in any given office on how newly received information is logged and filed, it can be easy for lab reports, witness statements, or media, to become available and placed in the prosecutor's file without any knowledge of the prosecutor. The precarious situation is made even more insecure when one considers the amount of cases that a prosecutor has. The raising of this predicament is not intended to serve as an excuse for failure to comport with the discovery statute. Rather, it is meant to point out that inadvertent failures to disclose will occur with increasing frequency unless proper provisions are made to ensure that oversights do not occur.

142. Officer body-worn cameras ("BWC") have significantly increased the amount of information that needs to be disclosed. Since often, multiple officers respond to a scene, and each officer can sometimes have hours of footage per case, this can quickly result in huge files of video. This presents not only a time constraint, given the large number of other cases that prosecutors typically have, but also an obvious disclosure issue. Practically speaking, such footage needs to be identified and disseminated to defense counsel in a manner consistent with the technological discovery system in place. Regardless of the organizational system in place to assist in the dissemination of information, it still falls upon the prosecutor's shoulders to ensure that the obligation has been met.

whether or not information and evidence have been properly disclosed. Gone are the days where a prosecutor could expect that a haphazardly organized bankers box filled with papers, photographs, and a dog-eared codebook would sufficiently serve as a reliable means of organizing a case file. This was never ideal, under the amended statutory requirements for prosecutors, this is now a discovery disaster waiting to happen. Such a case management system—or lack thereof—is wrought with opportunities for losing documents, failing to record which evidence has been disclosed, and makes it nearly impossible for a subsequent prosecutor to decipher anything about the case when they need to review the file. This is a Michael Morton Act violation waiting to happen.

Computer systems are indeed fallible, case numbers can be entered incorrectly, and sometimes programs have glitches. Prosecutors must not become overly reliant on a computer system to ensure comportment with ethical and legal obligations. Prosecutors should frequently review files and evidence and confirm it is all available on the electronic discovery system. A logical extension of this point is possessing the knowledge on how to navigate whichever system one's jurisdiction utilizes. Imagine working intently and preparing for a case the night before jury selection when your jaw drops, and you feel a lump forming in the bottom of your stomach: there is a piece of evidence that inadvertently was not disclosed. You furiously look to confirm and then re-confirm that it was never handed over to defense counsel. If you think this is bad, imagine your horror when you realize that you do not know how to upload the newly discovered information to the electronic discovery system. Not only do you have to explain why this piece of evidence was not disclosed, but now you must explain why you were not able to disclose it as soon as you discovered it.

Increasing amounts of time will also be spent reconciling evidence and information contained in a physical file with whatever type of electronic system an office may utilize. As an increasing number of prosecuting offices are adopting electronic discovery systems to disseminate information to defense counsel, prosecutors are working to implement checks to make sure that reliance on such systems does not adversely affect ethical obligations. Technological limitations have imposed on prosecutors the necessity of confirming disclosed files are not in an unreadable format or corrupted. No one wants to be in the position of having to explain to a judge, "I thought it uploaded properly!" Furthermore, it is the experience of several prosecutors that some information, for whatever technological reason, simply cannot be digitally disseminated. In instances such as these, it is

imperative to identify them preemptively and utilize a more Neanderthal method of dissemination and ensure its effective disclosure.

The requirement that prosecutors and defense counsel memorialize disclosed information is an important requirement of the Michael Morton Act and has real-world implications. For many prosecutors, the hustle and bustle of a daily docket can be both exhilarating and tiring. Imagine sitting in a courtroom—not always the most spacious and luxurious accommodations—with a box full of case files, a computer, and a line of defense attorneys eager to discuss their clients' cases with you. Peppered in with the process is the occasional conversation in the back corridor to discuss some more sensitive matters with counsel, frequently approaching the bench for a plea, and sometimes scrambling to question a witness. Most of the time, you have not been able to meet a witness, who only showed up because they were under subpoena which they decided not to ignore, because they lacked a listed address or phone number. This is just a normal day. If it is a day in which one's court happens to have a docket of trial cases, multiply the action. In addition to everything mentioned above, the tireless prosecutor is now responsible for making announcements on the State's status on all cases set for trial regarding the readiness—or lack thereof—to proceed for trial. This entails a lot more than merely announcing ready or not ready. During these less-than-peaceful days, the prosecutor will often be coordinating with victims' advocates, investigators, law enforcement liaisons, and witnesses regarding the possible lineup and status of specific trials. This is all in addition to mentally preparing for jury selection on whichever case proceeds to trial.

Amidst all of the adrenaline, negotiations, and planning, prosecutors must take proactive steps to record the information disclosed to defense counsel as well as an acknowledgment from defense counsel that the information was received. Practically speaking, this will result in another task being added to the already work-laden prosecutor. However, it does not necessarily need to be a burden.

The important part of handling something like this is to plan ahead and take measures to ensure that the prosecutor is prepared and organized. Since the Michael Morton Act has already been in effect for over five years, it is almost assured that prosecuting offices have policies and procedures in place to assist the prosecutor in comporting with its requirements. That does not mean that those in the trenches cannot look for ways to enhance efficiency where possible. Tools such as electronic discovery can aid prosecutors by demonstrating what exactly has been disclosed. This can

work to meet the requirements of section (i) of the statute.[143] Creating a cover sheet that can be attached to the list mentioned above that offers a spot for the prosecutor and defense counsel to sign can help satisfy section (j) of the statute.[144]

The Michael Morton Act leaves it to the parties whether to memorialize the disclosure in writing or to place it on the record.[145] However, this is certainly an instance where going the extra mile is probably the best practice. By memorializing the disclosure, along with defense signature as an acknowledgment, one has the ability to make the information part of the court's file and evidence for any subsequent review that may take place if an allegation of withholding evidence is made. Does not placing something on the record also afford such an opportunity while requiring less effort? Well, yes and no. Whereas putting something on the record does result in its memorialization in the form of a transcript that could be reviewed should a question about evidence disclosed arise, the written word can prove more efficacious in detailing with more specificity the information disclosed. Transcripts of court proceedings are only as clear as the attorneys who make them[146] and some attorneys, especially newer ones, sometimes don't appreciate exactly how much can be lost in the translation.[147] Although the written word can also have its deficiencies in terms of clarity, if planned and

143. *See* TEX. CODE CRIM. PROC. ANN. § 39.14(i) ("The state shall electronically record or otherwise document any document, item, or other information provided to the defendant under this article.").

144. *See id.* § 39.14(j) ("[E]ach party shall acknowledge in writing . . . the disclosure, receipt, and list of all documents, items, and information provided to the defendant. . . .").

145. *Id.*

146. If an attorney wants a good lesson in communication, the author suggests that one reads a record from a hearing or a trial, especially one that details one's own courtroom work. This can serve as a humbling lesson in communication for some. Flipping through pages of a transcript in an attempt to decipher the exact meaning of what was being communicated can be frustrating. Numerous times, one may even find sentences trailing off into nothingness and an idea being totally lost in transcription. Perhaps one will even see the disappointing notations of a court reporter's "[INAUDIBLE]" to describe what one said. It should go without saying that in order to have any hope of communicating effectively, it is imperative actually to be heard. Reading a transcript of one's own oral advocacy can serve as a reality check for how effective one is in communicating.

147. Early on in the author's career, he had a case where a plea agreement was taken in a misdemeanor court. Counsel for the accused and the author shared the same surname, although there was no relation. During the plea agreement, it was rather evident to whom the Judge was referring to when he addressed both attorneys as "Mr. Sandoval." The author later wondered, with some concern, as to how the reporter's record would reflect the plea. Would it appear that it was the same attorney representing the state and the accused? It was not until sometime later, after anecdotally bringing it up to the same court reporter, that she informed the author that in such situations, they add a first initial before the individual's surname. Which, fortunately for the sake of clarity, they did not share.

prepared ahead of time, one is better able to ensure that oversights or ambiguous descriptions are omitted.[148]

In complying with this ethical obligation, what are some considerations for the ethical, yet time-strapped prosecutor? Well, first off, do not wait until the plea or trial announcement to try to create these documents. As discussed above, the docket can be many things, but slow-paced is not often one of them. Prosecutors should incorporate their obligations under the Michael Morton Act into part of their normal case preparation. Just as one would request witnesses for an upcoming trial and meet with them to discuss the facts of the case, or include an offer in a file, so should a prosecutor also make sure that an evidence log is kept and defense counsel has acknowledged receipt of the most up to date discovery.

If any good has come out of the tragic prosecution and incarceration of Michael Morton, it most certainly has to be the development of a more comprehensive right to discovery and disclosure of information as now required by the statute. The ethical obligations that the Act has created for prosecutors in the state of Texas not only helps to bring Texas more in line with the recommendations from the American Bar Association, but it also aims to achieve a more level playing field in the area of criminal prosecution.[149] Whereas all who work in the criminal justice system stand to learn a great deal from the story of the injustice that was done to Morton, prosecutors have a special responsibility to not fall into the same sins as those who wronged Morton. Whereas intentional suppression of evidence is particularly pernicious, the ramifications of evidence not disclosed on accident can be just as dangerous.

Prosecuting offices across the state now have the benefit of five years to test, implement, and modify various forms of comporting with the new discovery statute. Large scale overhauls of something as comprehensive as discovery takes time to hone. Many times the systems implemented, like many things in life, are far from ideal. In addition to the innate difficulty of

148. In light of this and the information discussed in a previous footnote, the importance of clearly labeling and titling information disclosed in a discovery log cannot be understated. What seems like a clear identification of a piece of information to the prosecutor handling the case, may, in fact, not be so clear to an individual who is not familiar with it. Additionally, make sure that the evidence is properly labeled. The author have seen instances where two distinct witness interviews were mistakenly labeled with the same title. If such evidence was not admitted at trial, this could cause some confusion as to whether or not all the information was disclosed to counsel for the accused.

149. *See* House Comm. on Judiciary & Civil Jurisprudence, Bill Analysis, Tex. S.B. 1611, 83d Leg., R.S. (2013) ("SB 1611 would modernize the state's discovery process and align it with recommendations from the American Bar Association . . . .").

turning such a large ship, many offices are realizing that although technological advancements have made discovery easier to disseminate, the same advancements have also greatly magnified the amount of discovery available. With this increase in evidence that needs to be disclosed, comes a need for greater resources: learning to navigate electronic discovery systems, hiring and training additional support staff, and diligently maintaining an organizational schema all take time and effort.

The amendments to the discovery statute in Texas have altered not just the manner in which information is disclosed but also how prosecutors think about the execution of their duties. This change is a positive one because any time an obligation is imposed, it should be accompanied by a strong curiosity on how it affects the overall end goal. The Michael Morton Act has caused prosecutors across Texas to reconsider the manner in which discovery is disseminated. Old practices regarding what information is turned over have given way to a more uniform system of disclosure.[150] Beyond that, it has caused us to reflect on why exactly the handing over of more information is good not just for justice in an individual case but for society as a whole. If an even playing field is what our system strives for when one is accused of a crime, then generous disclosure of information is surely in order.

IV. POLICY-BASED APPROACH TO PROSECUTION

In this section, we are going to look at the matter of discretion, albeit in a slightly different manner than what was discussed above. Rather than

150. Not too long ago, the author had an enlightening conversation with a seasoned criminal litigator with extensive experience both as a prosecutor and a defense attorney. He relayed to the author that back in 1991, he moved from one large metropolitan area to another, in order to head-up a training program on capital murders. Eventually he would go on to serve as Chief Prosecutor of the Capital Crimes unit at his new office. While preparing for his first capital murder case, in which the state was seeking the death penalty, he was contacted by the defense counsel about scheduling an appointment to view the file. He practiced in an office where at the time the defense was able to view the file, and information contained therein, but could not make copies. In more complex cases, this often resulted in defense counsel having to set appointments to review the file and take copious notes. In this case, the state's file took up several banker's boxes. The prosecutor in question took the boxes and had copies made of the entire content of the state's file. Almost thirty years later the author asked him why he did that. After a moment of thinking he sighed and told him, "if the Government is trying to have someone executed, I wanted to make sure the defendant's attorneys could represent them." On a lighter note, he recounted the reaction of the elected prosecutor when he found out what he had done. He was hauled into the boss's office and endured an expletive-laced rant that could not be called a conversation—as it seemed to have been pretty one-sided—with the irate elected concluding by telling him "don't do it again!" Of course, he went on to do it again, ten more times.

discussing the discretion individual prosecutors have in handling their caseload, we will look at the institutional discretion an office of prosecutors has in handling specific cases in a predetermined matter. Often, these decisions manifest themselves in the forms of office policies or directives regarding a particular type of case. For the sake of clarity, this article will refer to this as a "policy-based approach" to prosecution. As we will discuss below, a policy-based approach can be exhibited by an office-wide decision declining to prosecute an offense, or perhaps mandate that certain offenses will automatically be diverted to a pretrial diversion program in lieu of being filed with the court. In the section that follows, this article will look at potential issues with such a stance and whether or not this policy-based approach to prosecution is in conflict with the role a prosecutor plays.

Perhaps the most common way this matter enters into the public spotlight is when a prosecuting office decides that, as a matter of course, certain offenses will not be prosecuted.[151] Elected prosecutors in St. Louis, Dallas, and Baltimore, amongst other cities, have determined that their offices will not prosecute marijuana charges under a varying degree of circumstances.[152] Proponents of a policy-based approach cite issues such as mass incarceration, administrative efficiency, and fiscal responsibility as a few of the motivating factors behind the stance.[153] Opponents are quick to criticize the policy-based approach as one that is unfaithful to the laws

151. *See* Memorandum from Wesley Bell to the St. Louis County Prosecuting Office (Jan. 2, 2019) [hereinafter Memorandum] (mandating the St. Louis County Prosecution Office will no longer prosecute marijuana "possession of less than 100 grams"); Garcia-Navarro, *supra* note 5 ("Baltimore State's Attorney Marilyn Mosby announced she will no longer prosecute marijuana possession cases, regardless of amount or a person's prior criminal record."); Marfin, *supra* note 5 (discussing not prosecuting for low level crimes).

152. *See* Memorandum, *supra* note 151 ("[The St. Louis County Prosecution Office] will not prosecute the possession of less than 100 grams of marijuana in any situation. Prosecution of more than 100 grams of marijuana will only be pursued if evidence suggests the sale/distribution of marijuana"); Garcia-Navarro, *supra* note 5 (reporting Baltimore State's Attorney Marilyn Mosby will not prosecute marijuana possession, and will prosecute distribution of marijuana "as long as there is articulated evidence of intent to distribute beyond the mere fact of possession"); Marfin, *supra* note 5 (noting the Dallas County District Attorney will not prosecute low-level theft and first-time marijuana offenses).

153. *See* Marfin, *supra* note 5 (noting prosecutors' offices across the United States are adopting policy-based approaches to address and solve "problems like mass incarceration and court docket overcrowding in their jurisdictions"); Garcia-Navarro, *supra* note 5 (reporting the Baltimore City State's Attorney's Office stated its policy-based approach is fiscally responsible and a more efficient use of the state's resources); *see also* Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 843 (2004) (observing prosecutors' offices use a policy-based approach "in order to promote consistency and administrative efficiency").

created by the respective legislatures, soft on crime, and furthermore, an attempt to convert the prosecutorial office into a policy-making entity.[154]

A. *Cost*

Advocates of a policy-based approach to prosecution frequently cite rising incarceration numbers as a motivating factor for implementing guidelines on the types of offenses that will be prosecuted.[155] Some figures indicate that the United States spends over $180 billion a year on the criminal justice system; by far, the largest amount is spent on "public corrections agencies" such as incarceration facilities, parole, and community supervision programs.[156]

A policy-based approach to prosecution could help decrease the amount of money spent on incarcerating low-level offenders. The overwhelming majority of prosecuting offices that have adopted a policy-based approach are targeting offenses such as misdemeanor marijuana offenses and theft offenses.[157] Whereas these offenses, especially for first-time offenders, do not frequently result in incarceration as punishment, many individuals who are charged with them are still facing incarceration because they are unable to post bail.[158]

Although these individuals are housed in local jail facilities, as opposed to larger prison facilities, the cost of incarceration will still be felt by the local

154. *See* Green & Zacharias, *supra* note 153, at 880 ("The mere fact that a given charging or other decision-making policy is consistently applied does not mean that decision-making in a prosecutor's office is made on a coherent, defensible basis."); Marfin, *supra* note 5 (discussing the potential negative effects a policy-based approach may have on law enforcement personnel).

155. *See* Marfin, *supra* note 5 (emphasizing the extremity of the over-populated jail system and how this approach will address the issue).

156. Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POL'Y INITIATIVE (Jan. 25, 2017), https://www.prisonpolicy.org/reports/money.html [https://perma.cc/NC73-39PK].

157. *See* Memorandum, *supra* note 151 (announcing the St. Louis County Prosecution Office will no longer prosecute marijuana "possession of less than 100 grams"); Garcia-Navarro, *supra* note 5 (reporting the Baltimore City State's Attorney's Office will no longer prosecute mere possession of marijuana offenses); Marfin, *supra* note 5 (noting the Dallas County District Attorney will not prosecute low-level theft and first-time marijuana offenses).

158. Cindy Redcross et al., *Evaluation of Pretrial Justice System Reforms That Use the Public Safety Assessment*, MDRC CTR. FOR CRIM. JUST. RES. 3 (March 2019), https://www.mdrc.org/sites/default/files/PSA_Mecklenburg_Brief1.pdf [https://perma.cc/29DE-M5RD]; Zhen Zeng, *Jail Inmates in 2016*, U.S. DEP'T OF JUST. (Feb. 2018), https://www.bjs.gov/content/pub/pdf/ji16.pdf [https://perma.cc/UP32-BFRS]; Bernadette Rabuy & Daniel Kopf, *Detaining the Poor: How Money Bail Perpetuates an Endless Cycle of Poverty and Jail Time*, PRISON POL'Y INITIATIVE (May 10, 2016), https://www.prisonpolicy.org/reports/incomejails.html [https://perma.cc/A3JA-XEDE].

government. Whereas not everything in the political world is a zero-sum game, it is reasonable to believe that funds used to cover rising jail populations could certainly be diverted to other community needs or infrastructure projects if the jail populations remained stagnant or even decreased.

In addition to the costs associated with the criminally accused being detained pretrial, there is also the issue of budget constraints on prosecuting offices. Prosecuting crimes can be an extremely expensive matter. Expenses such as employee salaries seem obvious, but there are countless other expenses to consider, such as bar dues, continued legal education courses ("CLE's"), and access to research databases. These costs can, and do, affect how offices prioritize various offenses. "Prosecutors do not have the ability to punish all crimes. Their budgets constrain their capacity to try cases and force administrators to develop policies that allow prosecution of some crimes but not others."[159]

B. *Individualized Justice*

Any prosecutor I have spoken to will admit that the particularized needs and problems of an accused do come into consideration when evaluating an approach. Whether he has violent tendencies or suffers from substance abuse, the problems that the accused has are an important piece of information in terms of thinking of an appropriate resolution. Sometimes this part of the calculus affects not just the terms of a plea bargain.

> Finally, there is an additional "need [for prosecutors] to individualize justice." Some prosecutions might cause undue harm to the offender. The harm to the victim may be corrected without prosecution, or victims may ask that offenders not be prosecuted. There are times when a rigid application of the rules may not do justice and when "flexibility" and "sensitivity" are necessary to a just outcome. This tension between rigorous enforcement of the general criminal laws and flexible adjustment to individual circumstances is a constant in discussions about the merits of prosecutorial discretion. Legislators and prosecutors are always striving to strike the proper balance.[160]

This concept of "individualized justice" can also extend to the decision to file or refrain from filing a case against an individual. Keeping in mind that the prosecutor exalts justice above all else, it seems reasonable that one

159. Griffin, *supra* note 18, at 264.

160. *Id.* at 264–65 (citations omitted).

would factor in pieces of information that could assist in achieving a more just resolution to the case. However, is there a problem with employing this methodology as part of a broader policy-based approach to prosecution?

An essential aspect of our criminal justice system, especially from a prosecutorial standpoint, is predictability. In order for popular confidence in our system to reign, there has to be a perception that punishments and processes are not flippantly handed down. Few would want a situation where similarly situated individuals accused of a crime are treated differently. Would it be fair to sentence one co-defendant to a lengthy prison term and the other to probation where they share an equal amount of culpability and a comparable criminal history? An important consideration before utilizing an individualized justice approach is to make sure that there are identifiable standards that an accused can demonstrate before being eligible for such consideration.[161]

In implementing a policy-based approach, one could quickly identify various offenses that are lower level, which tend to disproportionately affect individuals who may suffer from addiction, mental illness, or maybe a victim themselves.[162] In opening up other alternatives to various criminal offenses, the rationale ought not to be the decriminalization of an offense, but rather an opportunity to offer aid to those who could legitimately benefit from it and are likely to respond positively to specialized treatment offered in a diversion program.

Rigid extremes can be breeding grounds for injustice, so it would appear logical that prosecutors would refrain from adopting an "always file" or a "never file" policy under the circumstances. In the pursuit of justice in any criminal case, prosecutors will always look to various distinguishing factors to determine the best resolution to a case. One of these factors can and should be the individual needs and problems of the accused. If the facts of the offense, the criminal history, and the general negative effect on the

161. For example, those accused of low-level drug cases who are first-time offenders that have an identifiable substance abuse problem could qualify for a pretrial diversion program as opposed to having a case filed against them. Such a program could require treatment for substance abuse while also requiring other appropriate skills courses.

162. Up until this point, we have focused primarily on those individuals who suffer from some form of substance abuse. However, those accused of prostitution can also be the target of a policy-based approach to prostitution and can be incentivized by a desire to aide those accused of such crimes. It is not uncommon that those accused of such offenses are facing some form of victimization themselves. Whether it be in the form of having nowhere else to turn in the wake of domestic violence or even finding themselves to be the victims of human trafficking.

community are not egregious, then the possibility of a pretrial diversion program should not be excluded as a matter of principle.

C. *Power Struggle*

Is the adoption of a policy-based approach to prosecution nothing more than expropriation of legislative authority[163] or is it an innovative method to address unique problems in communities while conserving valuable resources? However, some proponents of this approach are not willing to quickly concede that the statute represents a legislative mandate to be blindly followed without regard for particular facts. "Strong proponents of prosecutorial discretion may dispute the preeminence of legislative will on theoretical grounds as well. One can make a case for the position that elected prosecutors should serve as check on legislatures and should play an independent role in shaping the law."[164]

Implicit in this approach to prosecution is a keen awareness of the practical restrictions that prosecutors face daily. It does not necessarily reject the law-making authority of the legislature so much as it views the prosecuting office as being in a unique position to enforce penal laws and respond to the particularized problems of the community. Such problems include, although surely are not limited to, financial restraints on prosecution, local jail population, docket overload in the local court systems, as well as a potential need to focus on prosecuting more violent crimes. Being in a better position to see the specific issues most immediately affecting his community, the local prosecutor should be allowed to utilize discretion to guard against an overly zealous legislature that could be quick to criminalize but slow to fund.[165] There is a myriad of reasons to allow prosecutors discretion, the most of which:

> [I]s that it serves to mitigate the ill effects of the trend toward legislative over-criminalization. According to this view, prosecutorial discretion functions as

163. In looking at the concerns expressed above to a policy-based prosecution, it is important first to note that from a practical standpoint, the author does not believe that these reservations are based on a rigid assumption that every single possession of marijuana case must be prosecuted. Instead, most seem to express a genuine concern for administrative disregard of legislative policies. Inherent in this is also opposition to a certain stance or policy inherent in the proponent's approach.

164. Green & Zacharias, *supra* note 153, at 876.

165. *See* Shelby A. Dickerson Moore, *Questioning the Autonomy of Prosecutorial Charging Decisions: Recognizing the Need to Exercise Discretion—Knowing There Will Be Consequences for Crossing the Line,* 60 LA. L. REV. 371, 377 (1999) (describing how prosecutors who are granted some discretion when it comes to decision making in the charging process create a more efficient system).

> a kind of safety valve that alleviates the pressures of a criminal code that tends to make a crime of everything that people find objectionable, but which fails to take into account issues of enforceability or changing social mores.[166]

Justice Robert Jackson perhaps envisioned the importance of the prosecutor's discretion when he stated: "[w]hat every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest and the proof the most certain."[167]

The job of a prosecutor is more complicated than reading a criminal statute and filling in various blanks on a charging instrument. Professors Green and Zacharias point out, "[p]rosecutors do not enforce the criminal law mechanically."[168] With that in mind, take a moment to ponder how elusive justice would be if, in creating an indictment, the prosecution was reduced to nothing more than reading a statute and checking corresponding boxes off. One can reasonably understand that each criminal prosecution is filled with intricacies, facts, and strengths, which can be unique to that case. In order to responsibly and adequately exercise prosecutorial duties, a prosecutor must use the law as the starting point for very complex analysis. Prosecution is not a venture that is filled with "one-size-fits-all" type of solutions.[169]

Opponents of such an approach can be quick to point out that it amounts to nothing more than selective enforcement of a jurisdiction's penal statutes and is tantamount to turning a blind eye to the law. On its face, this can be a persuasive argument for the opposition, considering that the logical extension of the policy-based approach to prosecution can be a de facto decriminalization of various offenses. Absent any indication to the contrary in authoritative commentary or statutory history, it is not unfeasible that various pretrial diversion programs or treatment options aimed at narcotics offenders in lieu of criminal charges being formally filed are in disharmony with the legislative intent to criminalize a certain action.

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166. *Id.*

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

168. Green & Zacharias, *supra* note 153, at 840.

169. Over the course of the author's time as a prosecutor, he have had numerous opportunities where new prosecutors have asked him what the "standard offer" is for a given offense, or for a *voir dire* template an hour or so before jury selection is scheduled to start. Whereas it is important to not completely eschew the idea of standard offers or template *voir dires*, it is vitally important to impart on prosecutors that, just as each case is unique, so should be offers and trial strategies.

Such a position, however, does ignore the fact that statutorily speaking,[170] the elected prosecutor has the authority to review cases and select which ones he wishes to proceed on. Furthermore, whereas on the outset, this could appear to be a decriminalization effort of an offense. This approach to prosecution often has necessary requirements such as drug treatment programs, community service hours, or fines that an accused must comport with in order to avoid criminal charges. As Professors Green and Zacharias aptly noted, "[o]ne thus cannot determine when a decision not to prosecute fully is consistent with the legislature's ostensible desire to punish."[171] Expounding on this point of local rule, let us return to Justice Jackson's comments in *The Federal Prosecutor*:

> But outside of federal law each locality has the right under our system of government to fix its own standards of law enforcement and of morals. And the moral climate of the United States is as varied as its physical climate. For example, some states legalize and permit gambling, some states prohibit it legislatively and protect it administratively, and some try to prohibit it entirely.[172]

Whereas Justice Jackson's comments do not necessarily envision local prosecuting offices choosing to forego prosecution of offenses based on policy considerations, it does provide the concept that different localities will have different moral standards, tolerances, and priorities. At least, in theory, local prosecutors should be more likely to be intimately acquainted with the unique problems of their own community, including matters of crime. This is an important consideration when looking at a policy-based approach to prosecution and the common problems of budgetary constraints for nearly all prosecuting offices. For example, a prosecuting office in an urban jurisdiction, riddled with gun violence and under siege from gangs, in opting to address those demons may choose not to pursue criminal trespass charges against homeless individuals. Whereas a more rural jurisdiction may not have the homicide problems, its main criminal activity may be human trafficking, given its proximity to an interstate highway. In focusing on addressing the trafficking issue, the rural prosecutor may see prosecuting low-level thefts as unnecessary use of resources and offer a diversion program for first-time offenders. Obviously,

170. Or as discussed *supra*, Part II.C, in some cases per the specific states' constitution.

171. Green & Zacharias, *supra* note 153, at 875.

172. Jackson, *supra* note 1.

the problems vary from jurisdiction to jurisdiction, and it should go without saying that reasonable minds can differ on which crimes are the most pernicious plague in a given area.

D. *Final Thoughts on Policy-Based Approach to Prosecution*

A policy-based approach to prosecution should consider numerous factors before initiating implementation. Often, before such an approach is implemented, considerations such as the type of offense and the particular threat to community safety posed by the accused are heavily weighed. If implemented, this approach should be an end to a greater means, as opposed to an end itself. To do otherwise could, in fact, violate the sacrosanct tenant of prosecution: seeking justice. One can disagree with a particular policy-based approach without necessarily arguing that the particular elected prosecutor ought not to have the authority to make such a decision. It is a simple example conceding the particular prosecutor in question has such authority to act while disagreeing with the particular policy choice that is made. What is the cost to the prosecutorial institution, or the system as a whole, if there are active steps taken to curtail policy-based prosecution? Keeping in mind that the guiding principle which makes such a position possible, it seems nearly inevitable that governmental attempts to limit it—whether via the executive or the legislative—would almost certainly involve an assault on prosecutorial discretion.

At present, there is an interesting development that exemplifies a reaction to this approach to prosecution. In Philadelphia, the state legislature recently passed legislation which grants state law enforcement agencies concurrent jurisdiction over various criminal offenses involving firearms.[173] Many see this move as a direct legislative attempt to limit the discretion of Philadelphia District Attorney Larry Krasner.[174] Krasner had created

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173. *See* Akela Lacy & Ryan Grimm, *Pennsylvania Lawmakers Move to Strip Reformist Prosecutor Larry Krasner of Authority,* INTERCEPT (July 8, 2019), https://theintercept.com/2019/07/08/da-larry-krasner-pennsylvania-attorney-general/ [https://perma.cc/BA3T-SJBT] ("The maneuver by Pennsylvania lawmakers is the most significant legislative pushback to date against the new movement by criminal justice reformers to focus on seizing the power of the prosecutor . . . ."); *see also Undermining Voters: Targeting Philly DA is a Dangerous Precedent*, PITTSBURG POST-GAZETTE (July 25, 2019), https://www.post-gazette.com/opinion/editorials/2019/07/25/Larry-Krasner-Philadelphia-district-attorney-criminal-justice-Martina-White/stories/201907210020 [https://perma.cc/JJK8-3GXR] [hereinafter *Undermining Voters*] (announcing the passage of a state legislation which subverts the prosecutorial agenda of Philadelphia's District Attorney).

174. *See Undermining Voters*, *supra* note 173 ("That is exactly what happened with the passage of state legislation that singled out and punished Philadelphia District Attorney Larry Krasner.").

diversion programs for a variety of criminal offenses within his jurisdiction, including some offenses involving firearms.[175] A practical effect of this legislation, if not an outright goal, is that if and when Krasner chooses to forgo filing charges on such an offense, law enforcement could take the case to the appropriate state agency for criminal charges to be filed via the Attorney General's office. The fact that the new legislation targets only Philadelphia and is effective for two years, through the remainder of Krasner's term, indicates to many that this is a law which is, in effect, a reaction to his policies.[176]

Whereas some may find the concept of a policy-based approach to prosecution to be a slippery slope or even a misappropriation of power on the part of an elected prosecutor, the realities of the criminal justice system indicate that it does have some benefits. Issues such as funding, changing societal norms, and an already crowded justice system all point to significant benefits of such an approach.

However, at the end of the day, perhaps the strongest endorsement of such an approach is the preservation of discretion. The policy-based approach to prosecution rests firmly on the foundation of prosecutorial discretion. Any outside attempt to limit or constrain an approach would necessarily affect the discretion of the elected prosecutor in the execution of his duty. As we have discussed, the concept of an independent prosecutor is an integral aspect of the justice system, and any attempts to require the filing of criminal charges in a specific manner or a general set of circumstances would undermine the system.

V. CLOSING

The ethical issues highlighted in this article are just a few of the many and varied matters that prosecutors around the country encounter on a daily basis. In a free society, an individual's liberty should be carefully guarded and not taken for granted. The procedural and statutory safeguards that are in place to protect liberty are one of many lines of defense. These matters are important because they help instill confidence in the system by the

175. *See id.* ("Particularly controversial has been Mr. Krasner's decision to send more gun-possession cases through a court diversion program.").

176. *See id.* ("This amendment only affects cases in Philadelphia and has a two-year sunset clause, timed with the end of Mr. Krasner's first term. This is an affront to the voters who put Mr. Krasner in office.").

general public. It is incumbent upon prosecutors to remain thoughtful in their pursuit of justice and the execution of their duties.

Given that we have an adversarial system, many can erroneously view aspects of criminal prosecution in terms of victories or losses. With all of the work, the sacrifices, and diligence that goes into trials, it can be tempting to pat oneself on the back after a guilty verdict or to replay strategic decisions in the event of an acquittal. Inherently there is nothing wrong with enjoying one's role in securing a guilty verdict as long as it is framed by a sense that justice was served.[177] Everything that a prosecutor does—all the actions, thoughts, and motivations—must be stimulated by an overarching sense of justice. As Justice Robert Jackson stated in his 1940 speech, "[a]lthough the government technically loses its case, it has really won if justice has been done."[178]

Given that prosecution is a profession where justice is the guiding principle, it is incumbent on us to remember that justice is not only an abstract ideal. Justice is something that lives and breathes; it requires attention, thought, and nourishment. If ignored, it will atrophy and wither away, failing to maintain any semblance of its prior allure. When justice starves, it does not die. It remains alive but languishes in a state of decay. Ignored justice remains with us, and for those who are willing to look it in the face, it serves as a reminder of what we have lost and what we stand to gain if we choose to prioritize it. The vitality of justice depends not just on the consciences of a society but also the individual actions of many. Those who prosecute—whether just for a few years in order to gain some trial skills or for a career because of an invisible gravitational force—directly contribute to the sense of justice in our society. Through a thoughtful focus on matters of ethics, principles, and a continued thirst for knowledge the prosecutor can ensure that justice remains vibrant.

177. This makes sense as the author has not really known a prosecutor to proceed on a case that they were not convinced of the defendant's guilt.

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