

Race-ing Prosecutors' Ethics Codes

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"The question we need to press, however, is whether this role for compassion is regarded by the legal tradition as reasonable and good. One can easily imagine arguments against allowing it to play this role: people's sympathies are unpredictable and inconstant; they may have antecedent biases against certain types of defendants and in favor of others that will influence the way in which they hear the defendant's story."

Martha C. Nussbaum¹

I. INTRODUCTION

Discretion plays an integral role in whether or not prosecutors will designate conduct criminal, who they will charge, and what charges they will present. The latitude afforded to prosecutors can result in a decision making process with many flaws, including racial bias. A backdrop in the decision making process is the ethical mandates and considerations that should direct the choices made by prosecutors.

The Jena Six incident offers a sad commentary on prosecutorial decision making. The prosecutor, District Attorney Reed Walters, expressed the position that he was "bound to enforce the laws."² The omission of a statute results in non-prosecution for some, while the existence of statutes for another's alleged conduct is met with harsh prosecution.³ In the abstract this approach may appear principled, but the reality presents a harsh injustice.

The prosecutor omitted two considerations in the Jena Six case. First, prosecutors should examine cases globally instead of making prosecutorial decisions using a one-dimensional process.⁴ Looking only at whether specific facts support a particular charge fails to account for promoting justice in situations that might be threaded to a particular theme. The theme might be a function of consistent players, a specific setting, the conduct involved, or whether that conduct is responsive to conduct by other parties in this general population. Merely matching facts to elements of a statute fails to

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¹ MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW 49 (2004).

² Reed Walters, Op-Ed., *Justice in Jena*, N.Y. TIMES, Sept. 26, 2007, at A27.

³ See *infra* Part III.

⁴ See *infra* Part IV.A.

provide a thoughtful consideration of what is in fact a “just” resolution. Second, prosecutors should be vocal when an injustice warrants correction.⁵ The affirmative duty of a prosecutor to promote justice has both symbolic and practical implications.

This Article examines the discretionary decision making process from the perspective of legal and ethical mandates that are intended to guide prosecutors in their choices.⁶ In looking at the hortatory guidance provided to prosecutors, it considers the role of compassion and how compassion can be used to ensure fairness in prosecutorial decision making. While individual prosecutors’ personalities can clearly influence a charging decision, it is important to make certain that the decisions are not made by a one-dimensional process. Rather, it is necessary that the decision making process examines all factors and circumstances in order to make certain that the prosecutor acts as a true “minister of justice.”⁷

II. PROSECUTORIAL DISCRETION—LEGALLY AND ETHICALLY

A. *Legal Restrictions*

Prosecutorial discretion is an accepted component of our criminal justice system. Although the Court in *Yick Wo v. Hopkins*⁸ reminded us that it is improper to apply the law with “an evil eye and an unequal hand,”⁹ there are few restraints on prosecutorial charging. In *Wayte v. United States*,¹⁰ the Supreme Court endorsed the view that “[i]n our criminal justice system, the Government retains ‘broad discretion’ as to whom to prosecute.”¹¹ Absent a showing of a discriminatory purpose,¹² claims of prosecutorial charging abuses are left on the sidelines¹³ because the judiciary feels it is not the proper institution to review these matters.¹⁴ After all, the judiciary does not

⁵ See *infra* Part IV.B.

⁶ See *infra* Part II.

⁷ MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. (2007) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”).

⁸ 118 U.S. 356 (1886).

⁹ *Id.* at 373-74; see also Liam D. Scully, Comment, *Constitutional Law—Defendants Must Make a Credible Showing of Selective Prosecution in Order to Obtain Discovery—United States v. Armstrong*, 116 S. Ct. 1480 (1996), 31 SUFFOLK U. L. REV. 553, 556 (1997) (“[T]he Court held that the selective prosecution of laws against a particular race of persons violated the Fourteenth Amendment.”).

¹⁰ 470 U.S. 598 (1985).

¹¹ *Id.* at 607.

¹² See *Oyler v. Boles*, 368 U.S. 448, 456 (1962) (noting that, in order to find a discriminatory purpose in the decision of whom to prosecute, “the selection [must be] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification”).

¹³ See, e.g., *United States v. Batchelder*, 442 U.S. 114, 123-24 (1979) (stating that when prosecutors can file charges under multiple statutes, they may choose the statute they prefer to use); *Bodenkircher v. Hayes*, 434 U.S. 357, 364-65 (1978) (finding no due process violation when a prosecutor threatens re-indictment on more serious charges during plea negotiations).

¹⁴ See *Wayte*, 470 U.S. at 607.

have the breadth of factual information that is possessed by prosecutors. As noted by Justice Powell, prosecutors are in a superior position to assess the “strength of the case, the prosecution’s general deterrence value, the Government’s enforcement priorities, and the case’s relationship to the Government’s overall enforcement plan.”¹⁵

Equally unsatisfying for the defense, who may be faced with an improper charging decision, are court reactions to claims of selective prosecution.¹⁶ Although the prosecutor does not have “unfettered” discretion, a selective prosecution allegation must rise to being a constitutional challenge to receive scrutiny.¹⁷ Although race provides a basis for a selective prosecution argument, courts often find that constitutional sufficiency has not been met.¹⁸ Historical evidence of discrimination proves insignificant absent a showing by the defendant of “current intent”¹⁹ of a “discriminatory purpose.”²⁰ In this regard, defense counsel can face the dilemma of neither having ample discovery to prove “current intent” to discriminate nor being able to make a prima facie case warranting the release of this discovery.²¹ It is not surprising with this strict legal barrier that few cases successfully prove selective prosecution on the part of the prosecutor.²²

The power of prosecutorial discretion can be seen when prosecutors deliberately overcharge to obtain a desirable plea agreement.²³ Likewise, there are ample examples of “pretextual” prosecutions on extraneous charges when prosecutors believe the accused individuals are inherently evil.²⁴ Most recently, we see prosecutors proceeding with “shortcut” offenses, like false statements, perjury, and obstruction of justice, instead of

¹⁵ *Id.*

¹⁶ See generally Melissa L. Jampol, *Goodbye to the Defense of Selective Prosecution*, 87 J. CRIM. L. & CRIMINOLOGY 932 (1997) (asserting that the decision of the Supreme Court in *United States v. Armstrong* makes the claim of race-based selective prosecution essentially impossible for the defendant to prove by setting a high threshold for discovery).

¹⁷ *Batchelder*, 442 U.S. at 124-25.

¹⁸ However, studies support claims of racial bias in the charging process. See *Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1520, 1525-32 (1988) (discussing empirical studies of race and prosecutorial charging decisions). “One reason that the judicial system has been unreceptive to claims of racially selective prosecution is that it has failed to consider the special features of racial selective prosecution cases.” *Id.* at 1545.

¹⁹ *McCleskey v. Kemp*, 481 U.S. 279, 298 n.20 (1987).

²⁰ *Id.* at 298; see also Ellen S. Podgor & Jeffrey S. Weiner, *Prosecutorial Misconduct: Alive and Well and Living in Indiana?*, 3 GEO. J. LEGAL ETHICS 657, 659-61 (1990) (discussing the standard for a selective prosecution claim).

²¹ See *United States v. Armstrong*, 517 U.S. 456, 470 (1996) (finding that the accused must present “a credible showing of different treatment of similarly situated persons”).

²² Podgor & Weiner, *supra* note 20, at 661 (discussing defendants’ lack of success in bringing selective prosecution claims).

²³ See Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining With Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1254-56 (2008) (discussing how prosecutors overcharge to secure plea-bargaining leverage).

²⁴ See Harry Litman, *Pretextual Prosecution*, 92 GEO. L.J. 1135, 1135 (2005) (discussing the “Al Capone approach to federal prosecution”).

conducting thorough investigations in cases involving white collar activities.²⁵

The Court's refusal to condemn a prosecutor who provided limited materials to a grand jury amplifies the exclusive power of the prosecutor in making charging decisions. In *United States v. Williams*,²⁶ the Court held that the failure "to disclose to the grand jury 'substantial exculpatory evidence' in its possession" will not be the basis for a dismissal.²⁷ The grand jury was held to be an "institution separate from the courts."²⁸

Courts seldom use supervisory powers to usurp the prosecutorial charging decision. Although courts may mention improper conduct on the part of the prosecutor when dismissing charges, the prosecutorial conduct is seldom the exclusive basis for the dismissal of the charges.²⁹ Most often one finds the prosecutorial misconduct incorporated into a constitutional violation, such as double jeopardy or due process, with these serving as the the basis for the dismissal.³⁰

Thus, there are few legal restrictions to prosecutors in their decisions of whom to charge, what charges to use, and when to proceed or not proceed against an individual. The statutes merely provide the outer restraints in the charging process. Balancing the role of serving a constituency and yet also not falling prey to political decision making can be difficult for the local or state prosecutor who may be subject to re-election.³¹

B. Ethical Guidance

In addition to legal mandates that set the outer boundaries of prosecutorial discretion, albeit one that provides few restrictions on the prosecutorial charging process, ethics rules can also influence the conduct of

²⁵ See Ellen S. Podgor, *Arthur Andersen LLP and Martha Stewart: Should Materiality Be an Element of Obstruction of Justice?*, 44 WASHBURN L.J. 583, 583-84 (2005) (discussing the use of obstruction of justice charges as a shortcut to obtain a conviction).

²⁶ 504 U.S. 36 (1992).

²⁷ *Id.* at 55.

²⁸ *Id.* at 47.

²⁹ See, e.g., *United States v. Stein*, 541 F.3d 130, 136 (2d Cir. 2008) (upholding dismissal of case for threatening accounting firm with indictment if it continued to pay legal fees of defendant employees, impinging on the Sixth Amendment right to counsel); *United States v. Scrushy*, 366 F. Supp. 2d 1134, 1137-40 (N.D. Ala. 2005) (discussing the eventual dismissal of perjury counts as a result of suppressed deposition testimony).

³⁰ See, e.g., *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-75 (1977) (finding double jeopardy as bar to government action); *United States v. Vasquez-Villegas*, No. CR-06-6021, 2006 WL 2546714, at *2 (E.D. Wash. Sept. 1, 2006) (dismissing indictment because of due process violation).

³¹ The ABA Prosecution Function Standards explicitly state that "[i]n making the decision to prosecute, the prosecutor should give no weight to the personal or political advantages or disadvantages which might be involved or to a desire to enhance his or her record of convictions." STANDARDS FOR CRIMINAL JUSTICE § 3-3.9(d) (1993).

prosecutors. Mandatory ethics rules, however, offer little assistance in guiding prosecutors through the charging process.³²

Rule 3.8(a) of the American Bar Association Model Rules of Professional Conduct prohibits charges that are “not supported by probable cause.”³³ The prohibition is watered down to some extent in that it is limited to situations that the prosecutor *knows* that probable cause is lacking. There is no requirement in this specific rule for a prosecutor to affirmatively expand his or her knowledge. Although “knowledge may be inferred from circumstances,” the word *knowledge* “denotes actual knowledge of the fact in question.”³⁴ Thus a prosecutor may rely on limited information from police and investigators for probable cause support without knowing that it may not exist or be tenuous at best.³⁵

Standards, such as those provided by the American Bar Association and the National District Attorneys Association,³⁶ provide more descriptive guidance³⁷ although they have no force of law.³⁸ In the American Bar Association Criminal Justice Prosecution Function Standards, prosecutors are instructed that they “should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction.”³⁹ The ABA Prosecution Function Standards, standards adopted “as a guide to professional conduct and performance,”⁴⁰ tell the prosecutor to be measured in bringing charges. Standard 3-3.9(b) explicitly states, “[t]he prosecutor is not obliged to present all charges which the evidence might support.”⁴¹ A declination is warranted when there is a “good cause” for not prosecuting, and that good cause

³² Each state provides ethics mandates that are controlling for its jurisdiction. For example, Louisiana, the site of the Jena Six case, has the Louisiana Rules of Professional Conduct that serve as the defining standard for prosecutors in the state. See Anthony V. Alfieri, *Prosecuting the Jena Six*, 93 CORNELL L. REV. 1285, 1294-96 (2008) (discussing the Louisiana ethics rules as applied to District Attorney Walters).

³³ MODEL RULES OF PROF'L CONDUCT R. 3.8(a) (2007).

³⁴ MODEL RULES OF PROF'L CONDUCT R. 1.0(f) (2007).

³⁵ See Morgan Cloud, *Judges, "Testilying," and the Constitution*, 69 S. CAL. L. REV. 1341, 1344-57 (1996) (discussing police lying); Deborah Young, *Unnecessary Evil: Police Lying in Interrogations*, 28 CONN. L. REV. 425, 426 (1996) (discussing police lying that induces a confession).

³⁶ The National District Attorneys Association also has standards that offer guidance to prosecutors in their charging decisions. See Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 285 (2007) (suggesting that these standards establish a higher bar for charging than the Model Rules).

³⁷ See ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 148 (2007).

³⁸ The ABA Prosecution Function Standards explicitly state that these Standards “are intended to be used as a guide to professional conduct and performance.” STANDARDS FOR CRIMINAL JUSTICE § 4-1.1 (1993). Additionally, they provide that “[t]hey are not intended to be used as criteria for the judicial evaluation of alleged misconduct of the prosecutor to determine the validity of a conviction.” *Id.* at § 3-1.1.

³⁹ STANDARDS FOR CRIMINAL JUSTICE § 3-3.9(a) (1993).

⁴⁰ STANDARDS FOR CRIMINAL JUSTICE § 3-1.1 (1993).

⁴¹ STANDARDS FOR CRIMINAL JUSTICE § 3-3.9(b) (1993).

would be in accord with “public interest” goals.⁴² The Standards provide an array of different examples that may apply here, such as “the disproportion of the authorized punishment in relation to the particular offense or the offender.”⁴³

Commentary to the ABA Prosecution Function Standards offers additional education for the prosecutor engaged in a charging decision. The Standards tell prosecutors that “[t]he breadth of criminal legislation necessarily means that much conduct that falls within its literal terms should not always lead to criminal prosecution.”⁴⁴ Just because a law exists does not mean that a prosecutor should always file criminal charges. Nor is it incumbent on a prosecutor to proceed with the highest of possible criminal charges. Using a lesser offense may be more appropriate to the situation.⁴⁵ In considering whether overcharging has occurred on the part of the prosecutor, the Commentary to the Standards provides that “the key consideration is the prosecutor’s commitment to the interests of justice.”⁴⁶

Although the ethics mandates and hortatory standards provide some guidance, they are extremely vague when it comes to best practices in the prosecutor’s use of his or her discretion in the charging process.⁴⁷ Ethics rules and guidelines fail to provide safeguards when bias and prejudice cor-

⁴² *Id.* (“The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction.”).

⁴³ STANDARDS FOR CRIMINAL JUSTICE § 3-3.9(b)(iii) (1993). Standard 3-3.9(b) provides:

The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his or her discretion are:

- (i) the prosecutor’s reasonable doubt that the accused is in fact guilty;
- (ii) the extent of the harm caused by the offense;
- (iii) the disproportion of the authorized punishment in relation to the particular offense or the offender;
- (iv) possible improper motives of a complainant;
- (v) reluctance of the victim to testify;
- (vi) cooperation of the accused in the apprehension or conviction of others; and
- (vii) availability and likelihood of prosecution by another jurisdiction.

Id.

⁴⁴ STANDARDS FOR CRIMINAL JUSTICE § 3-3.9(b) cmt. (1993).

⁴⁵ *Id.*

⁴⁶ *Id.* The Commentary provides:

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

Id.

⁴⁷ In larger prosecutors’ offices, one may find written standards on charging procedures. The ABA Prosecution Function Standards suggest that “[t]he prosecutor should establish standards and procedures for evaluating complaints to determine whether criminal proceedings should be instituted.” STANDARDS FOR CRIMINAL JUSTICE § 3-3.4(c) (1993).

rupt the prosecutor's decision. As aptly noted by Professor Angela Davis, "even if prosecutors were referred to disciplinary authorities more regularly, the legal profession may not hold them accountable if the rules do not prohibit their offending behavior."⁴⁸

Prosecutorial discretion not only provides broad authority to bring or not bring criminal charges, it can also serve to mask racial bias. There is no specific guidance in the language of Rule 3.8 of the Model Rules of Professional Conduct or Standard 3-3.9 of the ABA Prosecution Function on how race can distort the charging process or the need to consider inherent bias in the system in determining what charges to levy and against whom. As eloquently stated by Professor Anthony V. Alfieri, "the race neutral stance pervades long-standing prosecutorial norms and practice traditions permitting the colorblind, and alternatively color-coded, tolerance of postbellum segregation to continue unabated."⁴⁹

III. THE JENA SIX

The prosecutor in the Jena Six case operated as a strict constructionist in stating that no law existed to bring charges against white students who placed nooses on a schoolyard tree.⁵⁰ For him, the conduct was "stupid and abhorrent but broke no law."⁵¹ He saw the state hate crimes statute⁵² as a basis for a sentencing enhancement, but absent an underlying offense said that it did "not cover what happened in Jena."⁵³ These students were not prosecuted.⁵⁴

On the same page, the prosecutor is seen justifying his charging of Mychal Bell and five others, all African Americans.⁵⁵ Mychal Bell was initially charged with attempted second degree murder, a charge that allowed

⁴⁸ Davis, *supra* note 36, at 303. Professor Davis also discusses whether statements by the prosecutor in the Jena Six case may have violated the Louisiana Rules of Professional Conduct. *Id.* at 308-09.

⁴⁹ Alfieri, *supra* note 32, at 1296.

⁵⁰ The nooses appeared after a black student sat under the tree. Students referred to this tree as "the white tree." See Matthew Solis et al., *Jena Six Events Reveal Racial Inequality in U.S. Criminal Justice System*, 15 HUM. RTS. BRIEF 30, 30 (2007).

⁵¹ Walters, *supra* note 2.

⁵² The Louisiana hate crimes statute makes it "unlawful for any person to select the victim" based upon a host of different characteristics such as "race, age, gender, religion, color, creed, disability, [and] sexual orientation." The statute applies to a limited set of crimes. See LA. REV. STAT. ANN. § 14:107.2(A) (2007).

⁵³ Walters, *supra* note 2.

⁵⁴ Commentators disagree on whether individuals could have been properly charged with a crime for the noose incident. Compare David Luban, *The Inevitability of Conscience: A Response to My Critics*, 93 CORNELL L. REV. 1437, 1464 (2008) (arguing that there was no statute that permitted prosecution of this incident) with Tamara F. Lawson, "Whites Only Tree," *Hanging Nooses, No Crime?: Limiting the Prosecutorial Veto for Hate Crimes in Louisiana and Across America*, 8 U. MD. L.J. RACE, RELIGION, GENDER & CLASS (forthcoming Feb. 2009) at 25-35, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1342086 (discussing the different criminal charges that might apply to these facts).

⁵⁵ Walters, *supra* note 2.

waiver and trial in adult court. The prosecutor later deleted this charge and substituted in its place aggravated second degree battery and conspiracy to commit second degree battery, charges that did not permit trial in adult court for those who were facing such charges for the first time.⁵⁶ The prosecutor failed in his *New York Times* op-ed explanation of his charging choices to justify his initial charge of attempted second degree murder,⁵⁷ a charge that far exceeds the alleged conduct.⁵⁸ He likewise did not justify his failure to remove the case from the adult system when the case was no longer an attempted second degree murder charge and therefore was lacking the jurisdictional basis for adult court.⁵⁹ The prosecutor instead attempted to respond to criticisms of his charging decision by providing characterizations of the alleged conduct. He even goes so far as to ask the readers of his op-ed⁶⁰ to “imagine” themselves being attacked on “a city street”⁶¹ in justifying the charges he levied in this case, despite the fact that the alleged conduct did not occur in that setting.⁶² Commentators note that other incidents in the community during this same period of time involving white student perpetrators and black victims also went without prosecution.⁶³ The one exception is that the prosecutor brought one misdemeanor charge against a white student.⁶⁴

⁵⁶ See Memorandum in Support of Second Motion for Arrest of Judgment at 6, *Louisiana v. Bell*, No. 82112 (La. Dist. Ct. Aug. 2, 2007).

⁵⁷ Walters, *supra* note 2. By initially charging attempted second degree murder, he was able to place this case in an adult court. See *id.*

⁵⁸ LA. REV. STAT. ANN. § 14:30.1 (2007).

⁵⁹ Bell was convicted following a jury trial of aggravated second-degree battery. An appellate court in Louisiana vacated this conviction holding that there was no jurisdiction in adult court, and that jurisdiction remained “exclusively in juvenile court.” See *State v. Bell*, No. 07-1106, 2007 La. App. Unpub. LEXIS 59, at *1 (La. App. 3d Cir. Sept. 14, 2007). Bell eventually pled guilty to a juvenile charge of second-degree battery. See Mary Foster, *Jena Six Teen Pleads Guilty*, WASH. POST, Dec. 4, 2007, at A8.

⁶⁰ This Article does not discuss the appropriateness of a prosecutor writing an op-ed piece on a pending case to refute criticism levied against him. See generally STANDARDS FOR CRIMINAL JUSTICE § 3-1.4 (1993). This Essay also does not discuss other pertinent events, such as comments made by the prosecutor at a school assembly. See generally Davis, *supra* note 36, at 307 (“[W]ith one stroke of this pen—I can make your life disappear.”). Professor Anthony V. Alfieri states, “Walters’s actions and comments surrounding the prosecution of the Jena Six challenge the ethical bounds of Rule 3.8.” Alfieri, *supra* note 32, at 1294.

⁶¹ Walters, *supra* note 2.

⁶² If this had been a trial, asking jurors to consider themselves in the shoes of the victim would be a violation of the “golden rule.” See *Braithwaite v. State*, 572 S.E.2d 612, 615 (Ga. 2002) (discussing the impropriety of a golden rule argument—one which “asks the jurors to place themselves in a victim’s position”); see also *Witter v. State*, 921 P.2d 886, 899 (Nev. 1996) (describing the unacceptability of requesting a jury “to stand in the shoes of the victim”). Additionally, the incident was never alleged to have occurred on a city street.

⁶³ See Solis et al., *supra* note 50.

⁶⁴ See Davis, *supra* note 36, at 275 (discussing the Jena Six incident and applicable ethical rules). There was also a later indictment of a Louisiana man for a federal hate crime and conspiracy. See Press Release, U.S. Dep’t of Justice, Louisiana Man Indicted for Federal Civil Rights Violations for Nooses Targeting “Jena Six” Marchers (Jan. 24, 2008), available at http://www.usdoj.gov/opa/pr/2008/January/08_crt_054.html.

The school authorities were left to decide the punishment for the white students who placed nooses on the tree. The students received a “nine day suspension, during which time they attended an alternative school . . . an additional two weeks of in-school suspension . . . several Saturday detentions . . . an order to attend a discipline court . . . and a referral to a family counseling program.”⁶⁵ Not surprisingly, the disparity between no criminal punishment for the white students and heavy charges for the black students led to community and national protests.⁶⁶

IV. MULTI-DIMENSIONAL ASSESSMENT OF CRIMINALITY AND PROMOTING JUSTICE

Two influencing principles might have changed the dynamics of this decision making process. First, prosecutors should consider charges from a multi-dimensional approach. Second, prosecutors should reflect on whether the charges have them in a role of promoting justice. The lopsided presentation to charge some individuals while not charging others when the activities are threaded together—even loosely—defeats the goal of fostering an equitable legal system. Inconsistency in both the process and result generates suspicion.

A. *A Multi-Dimensional Assessment of Criminality*

Serious concerns as to fair treatment are raised when examining the individual decisions in the Jena Six case. Even if one argues that the prosecutor acted in good faith in matching the conduct to the applicable law,⁶⁷ prosecutorial discretion is meaningless when the decision to proceed rests solely on the basis of a statute existing in one case and not existing in another. It sends the message that the prosecutor applies mechanical criteria to determine who should be charged and for what crimes. There is no need for prosecutorial discretion if the sole task of the prosecutor is merely to align evidence with a statute.

⁶⁵ *Jena Six and the Role of Federal Intervention in Hate Crimes and Race-Related Violence in Public Schools: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. 5-6 (2007) (joint statement of Lisa M. Krigsten, Counsel to the Assistant Att’y Gen., Civil Rights Div., Dep’t of Justice & Donald Washington, U.S. Att’y for the W. Dist. of La.), available at <http://judiciary.house.gov/hearings/pdf/Krigsten071016.pdf>.

⁶⁶ See, e.g., Audie Cornish, *Protesters Call for Justice for Jena 6* (NPR radio broadcast Sept. 21, 2007); see also Lawson, *supra* note 54, at 17 (discussing how the Jena events reached national recognition); *Protests Support Jena 6 Struggle*, PSLWEB.ORG, Oct. 11, 2007, <http://www.pslweb.org/site/News2?page=NewsArticle&id=7461> (discussing a September 2007 march that “drew at least 50,000 protesters”).

⁶⁷ One can of course argue that the personality of the decision-maker ultimately affects the process and that a result-oriented prosecutor could achieve any desired result. Although there may be truth to such a view, this Article proceeds from the view that a prosecutor is not acting with a corrupt intent or with a predisposition to a specific outcome.

Allowing broad prosecutorial discretion seems unnecessary if a prosecutor feels compelled to construe strictly the statutes and limit the decision making powers exclusively to whether a statute exists. This approach flies in the face of the language in the Commentary to the ABA Standards, which explicitly states that “[t]he public interest is best served and evenhanded justice best dispensed, not by the unseeing or mechanical application of the ‘letter of the law,’ but by flexible and individualized application of its norms through the exercise of a prosecutor’s thoughtful discretion.”⁶⁸

More importantly, a “letter of the law” approach presents a prosecutor making decisions on individual cases without considering all the surrounding events. In this regard, ethical guidance is deficient. Although the Standards provide that a “prosecutor is not obliged to present all charges which the evidence might support,”⁶⁹ it fails to provide explicit guidance on the need to look at conduct beyond an examination of a specific set of facts applicable to one incident. Ethics rules for the most part approach the charging process from a one-dimensional consideration of a single case.⁷⁰ Saying that a “flexible and individualized application” is warranted is not the same as saying that prosecutors should avoid examining threaded cases in a vacuum, and that a multi-dimensional approach is warranted to assure equal treatment of all parties.

There are no clear lines to determine what makes events threaded, to warrant the multi-dimensional approach suggested in this Article. Some factors, however, such as when the parties and their ages are consistent, or when the location is the same, are strong indicators of relationship. The close timing of the events in Jena, as well as the racial tension felt in this high school community, present strong signals of connection. Perhaps another argument to support these events as threaded is the fact that the alleged conduct of the Jena Six can be seen as a reaction to the failure by the school administration and the prosecutor to address adequately the conduct of the white students who placed nooses on a schoolyard tree.

B. Promotion of Legal Reform

In addition to using a composite approach in prosecutorial decision making, it is also important that a prosecutor factor into the constellation the need to promote legal reform. It was this recognition of a need for legal reform that served as the impetus for twenty-two attorneys general to file an amicus brief in support of Clarence Earl Gideon, in his request to obtain

⁶⁸ STANDARDS FOR CRIMINAL JUSTICE § 3-3.9 cmt. (1993).

⁶⁹ STANDARDS FOR CRIMINAL JUSTICE § 3-3.9 (1993).

⁷⁰ The statement that the “prosecutor should establish standards and procedures for evaluating complaints to determine whether criminal proceedings should be instituted” also fails to consider the need to look beyond a one-dimensional approach to prosecution. STANDARDS FOR CRIMINAL JUSTICE § 3-3.4(c) (1993).

counsel.⁷¹ Despite taking a contrary position to the Florida Attorney General in *Gideon v. Wainwright*, these twenty-two attorneys general recognized the injustice of a criminal defendant facing felony charges without legal representation. Prosecutors such as these who advocate for necessary legal reform send a powerful message that can assist in changing the law.

The ABA Prosecution Standards provide that “[i]t is an important function of the prosecutor to seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to the prosecutor’s attention, he or she should stimulate efforts for remedial action.”⁷² The Commentary further emphasizes the need for prosecutorial participation in legal reform when it states, “[r]eforms and improvements in the criminal law will more readily gain the approval of legislative bodies and the public if they are the joint work product of both prosecutors and defense lawyers.”⁷³

Although the ethics rules and standards applicable to the charging process omit explicit reference to the need for prosecutors to factor in legal reform in deciding who to charge and with what crimes, this should be accommodated in the prosecutors’ charging decisions. Recognition of bias in the system and bias by participants within the system helps to correct existing injustices. A prosecutor should refuse to bring a charge when she believes that the police officer’s arrest was racially biased. Likewise, a prosecutor who sees that the law fails to prohibit “abhorrent”⁷⁴ conduct should be reluctant to bring charges against the victims of this conduct when she cannot prosecute the individuals who may have a causal connection to these activities.⁷⁵ Clearly prosecutorial discretion cannot exceed the boundaries of the explicit legislative directives of the statute. This is not to say, however, that a prosecutor who believes that there is an omission in the law needs to then prosecute threaded conduct that does have applicable legislation. It is with respect to this conduct that the prosecutor should consider whether an injustice would occur to some party if the prosecution were to proceed.

Some may contend that factoring legal reform advocacy in the charging decision will result in inconsistency and allow for individual prosecutorial agendas to be advanced. There is truth to the fact that any time one moves from a strict rule to allow a flexible application, there is a possibility that the decision-maker’s voice may influence the process. But broad prosecutorial powers already allow “discretionary justice”⁷⁶ to fall prey to such unrecognized bias. The key here is that mechanically applying matching statutes to

⁷¹ See Brief for the State Government as Amici Curiae Supporting Petitioner at 1-3, *Gideon v. Wainwright*, 372 U.S. 335 (1963) (No. 155).

⁷² STANDARDS FOR CRIMINAL JUSTICE § 3-1.2(d) (1993).

⁷³ *Id.* cmt.

⁷⁴ Walters, *supra* note 2.

⁷⁵ Even if a prosecutor is initially blind to an obvious causal connection, public recognition of the events being threaded should trigger immediate review.

⁷⁶ KENNETH CULP DAVIS, DISCRETIONARY JUSTICE 4-12 (1969).

conduct can have just as much bias and inconsistency as that which consciously moves to promote justice.⁷⁷ More importantly, factoring in a justice agenda eliminates the excuse of a prosecutor who seeks to hide behind a statutory construct in saying that whether conduct can be prosecuted is limited to the decision of whether it matches a statute. Just because a statute exists does not mean that individuals should be prosecuted.

Including the promotion of legal reform as an aspect of the charging process requires that the prosecutor stay within the legislative enactment. Thus, a haphazard charge that seeks to punish individuals for a crime greater than allowed by the statute should not be tolerated. But recognizing racial bias in the law and considering the law's imperfections in the charging process is also warranted. This can be accomplished through the use of compassion.

V. COMPASSION

When speaking of compassion, it is more common to examine its role in sentencing or in what role it should play in a justification of the accused's conduct.⁷⁸ Compassion, however, is an emotion that should also have influence in charging individuals with crimes. Compassion should influence the prosecutor's decision of whether criminal charges will be brought and who will face those charges. Compassion should also influence the specific charges that the accused might face. Finally, the prosecutor's decision to dismiss charges or offer a cooperating role and reduction in sentence to someone accused of criminal conduct, may in fact be resulting from an influence of compassion for the accused individual. Some might argue that compassion for victims or society as a whole needs to also be factored into this discussion.

Compassion extends beyond pity, a passive emotion that empathizes with a person or situation.⁷⁹ In contrast to pity, compassion has a more active component in that it includes a "desire to alleviate" the situation or "aid or spare" the suffering party.⁸⁰ Martha Nussbaum finds three elements of compassion that she draws from a long line of scholarly theory.⁸¹ Three

⁷⁷ Prosecutors have a fundamental duty to seek or do justice. Cf. Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to "Do Justice,"* 76 *FORDHAM L. REV.* 1337, 1365-79 (2007) (discussing these duties as applied to the Duke lacrosse case).

⁷⁸ See, e.g., NUSSBAUM, *supra* note 1, at 20-22, 48-56.

⁷⁹ See MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 887 (10th ed. 1996). Aristotle used the term "pity" in his *Rhetoric*. See ARISTOTLE, *RHETORIC* (c. 322 B.C.), reprinted in ARISTOTLE, *THE RHETORIC AND THE POETICS OF ARISTOTLE* 113-15 (W. Rhys Roberts & Ingram Bywater trans., The Modern Library 1954).

⁸⁰ See MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, *supra* note 79.

⁸¹ See generally MARTHA C. NUSSBAUM, *UPHEAVALS OF THOUGHT* 304-27 (2001) (discussing the "cognitive structure of compassion" from Aristotle, Adam Smith, Rousseau, and including Nussbaum's additional contributions). Although Aristotle uses the term "pity" in his

factors, namely, “size,” “nondesert,” and “eudaimonistic judgment,”⁸² allow for reflection on whether compassion is an emotion that should be associated with prosecutorial decision making.⁸³ First, one needs to examine whether the Jena Six suffered a “judgment of *size*.” The question focuses on whether “a serious bad event has befallen” them.⁸⁴ In this regard, the Jena Six were subjected to racial intolerance of enormous magnitude. This is best evidenced by nooses on a tree in the schoolyard.⁸⁵ The pain they suffered warrants compassion.

Second, one looks at the “judgment of nondesert,” or whether the Jena Six brought on the suffering they experienced.⁸⁶ The focus here is not on the criminal act that they are accused of committing, but rather a predicament that may serve to explain their role in the alleged crime. Clearly the Jena Six did not ask for nooses to be hung on the trees or for authorities to react to this racial activity in the way they did. Even if one attributes some blame to the Jena Six, it does not negate the fact that they deserve compassion by the prosecutor who found no legal basis to charge others.⁸⁷

Finally, Nussbaum considers the “eudaimonistic judgment”—“the thought that the person in question is important to the person who has the emotion.”⁸⁸ Clearly a prosecutor who is administering justice for everyone should consider the accused important. This is especially important when those accused of crimes are constituents of the prosecutor’s society, and the size of the community is relatively small. Ethics rules explicitly provide that prosecutors have certain responsibilities to make certain that the rights of the accused are guaranteed.⁸⁹

Arguably, compassion would not be applicable in this context because the prosecutor failed to understand the significance of the racial suffering experienced by the Jena Six. He also failed to acknowledge any relation between the nooses and subsequent events.⁹⁰ This, however, should not preclude compassion as part of the charging process, as the prosecutor should

Rhetoric, like Martha Nussbaum I use the more appropriate term, compassion. See Aristotle, *supra* note 79, at 113-15; NUSSBAUM, *supra*, at 306 n.17.

⁸² NUSSBAUM, *supra* note 81, at 321.

⁸³ There are also arguments that can be made that may qualify this application.

⁸⁴ NUSSBAUM, *supra* note 81, at 321.

⁸⁵ See generally Kathryn M. Caretti & N. Pieter M. O’Leary, *The Story of the Jena Six: The Interplay of History, Hate Crimes, Racial Inequality, and Legal Justice in Jena, Louisiana*, 1 HUM. RTS. & GLOBALIZATION L. REV. 3, 21-27 (2008) (discussing the symbolism expressed by a hanging noose).

⁸⁶ NUSSBAUM, *supra* note 81, at 321.

⁸⁷ As stated by Nussbaum, “[t]here may be some blame, but, insofar as we feel compassion, we are judging that the predicament is out of proportion to the blame.” NUSSBAUM, *supra* note 1, at 50.

⁸⁸ NUSSBAUM, *supra* note 1, at 51; see also NUSSBAUM, *supra* note 81, at 321.

⁸⁹ See, e.g., MODEL RULES OF PROF’L CONDUCT R. 3.8(b) (2007) (providing that a prosecutor shall “make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel”).

⁹⁰ See Walters, *supra* note 2 (claiming that the assault victim was not involved with the noose incident three months prior).

be evaluating circumstances from a partially subjective approach that examines the events from the shoes of the accused individual. In this light, the prosecutor uses a multi-dimensional approach in the charging process.

Compassion offers a means to promote justice and yet stay within the confines of the law. As prosecutors have the discretion to bring or not bring criminal charges, the prosecutor who looks at the conduct from a multi-dimensional approach and with an ear to legal reform can reduce charges or not charge individuals when doing so would create an injustice. Compassion can be particularly useful in situations of disparate impact discrimination that may be caught in the gap of being unrecognized to rise to a level of being afforded a constitutional remedy.

VI. CONCLUSION

Commentary to the ABA Model Rules of Professional Conduct provides that “[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”⁹¹ In seeking justice, a prosecutor needs to examine all facets of a case and its surrounding circumstances. Broad prosecutorial discretion provides prosecutors with the ability to move beyond merely matching conduct with statutes. It allows prosecutors to correct bias within our legal system. When prosecutors recognize an injustice in the law, they should approach the situation with compassion to make certain that justice is served for all with threaded experiences.

Achieving “better discretion” is nearly impossible as the voice of the prosecutor remains constant. Asking a prosecutor to realign his or her perceptions of a case in the discretionary decision making process is likely to be unsuccessful. The prosecutor who sees no racial bias or who is “color-blind”⁹² may be incapable of correction. As aptly noted by Nussbaum, “antecedent biases against certain types of defendants and in favor of others [can] influence the way” in which prosecutors “hear the defendant’s story.”⁹³

This Article, however, is a step beyond seeking to achieve “better discretion,” and calls for discretion that considers more variables; in particular, it asks that prosecutors look beyond the facts of one specific case. Whether a multi-dimensional approach can erase the way the story may be heard can certainly be questioned, as it is difficult to say that approaching conduct in a multi-dimensional manner, or from a perspective of encouraging legal reform, would have produced a different result with the Jena Six prosecutor. But offering a hortatory approach that rejects merely matching conduct to statutes and allows prosecutors to consider all events would not have al-

⁹¹ MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. (2007).

⁹² Alfieri, *supra* note 32, at 1291-1302 (discussing District Attorney Walters’s “colorblind conception”).

⁹³ NUSSBAUM, *supra* note 1, at 49.

lowed for the prosecutor's excuse that he could not charge one group because no law existed, while overcharging others with crimes that if proven may have been motivated in part by those escaping the criminal process. A threaded view of the Jena Six events emphasizes the injustice of having some individuals charged with a crime while others escape criminal penalty.

It is difficult to ensure that a prosecutor who is given a compassionate alternative will make use of the guidance. In the Jena Six case it can be argued that the prosecutor is capable of compassion in that he chose not to prosecute the white students who placed nooses on the schoolyard tree. But irrespective of whether one believes that this conduct met the language of criminal statutes, there is still no excuse for not only failing to consider compassion for the Jena Six, but taking a reverse and aggressive course in proceeding with charges that amplified the injustice.

Even though the prosecutor may not avail herself of a compassionate approach to prosecution, it is important to at least stress the availability of this factor in the charging evaluation process. What may be accomplished with this paradigm is to educate prosecutors of the need to expand their analysis in determining what charges should be brought and to emphasize the importance of taking a stance to promote legal reform.

