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## Justice Department's Prosecution Guidelines of Little Value of State and Local Prosecutors

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# COMMENTS

## JUSTICE DEPARTMENT'S PROSECUTION GUIDELINES OF LITTLE VALUE TO STATE AND LOCAL PROSECUTORS

While it is overwhelmingly accepted that prosecutors need substantial discretion in order to properly carry out their jobs,<sup>1</sup> there is great potential for abuse in their inevitable<sup>2</sup> use of this decision-making

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<sup>1</sup> One definition of discretion is "the power to make decisions or to act according to one's own judgment." Cox, *Prosecutorial Discretion: An Overview*, 13 AM. CRIM. L. REV. 383, 385 (1976). Langbein defined prosecutorial discretion as "the power to decline to prosecute in cases of provable criminal liability." Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439, 440 (1974).

According to *Pugach v. Klein*, 193 F. Supp. 630, 634 (S.D.N.Y. 1961), "the United States Attorney is not a rubber stamp. His problems are not solved by the strict application of an inflexible formula." In *Newman v. United States*, 382 F.2d 479 (D.C. Cir. 1967), the court recognized and commended prosecutorial discretion, noting that while two persons may have committed what is exactly the same legal offense, the prosecutor is not required by law, duty, or tradition to treat them the same as to charges. *Id.* at 481-82. Several other justifications for discretion include the difficulty in drafting rules to incorporate all relevant specificities, the inability to adapt statutory law rapidly enough to match shifts in public opinion, and the need to test public reaction to changes which may lead to legislative reform in a particular area. Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 U.C.L.A. L. REV. 1, 3 (1971). See also *United States v. Batchelder*, 442 U.S. 114 (1979); *Moses v. Kennedy*, 219 F. Supp. 762 (D.D.C. 1963); K. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969); B. GROSSMAN, *THE PROSECUTOR: AN INQUIRY INTO THE EXERCISE OF DISCRETION* (1969); PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 133-34 (1967) [hereinafter cited as PRESIDENT'S COMM'N]; Cole, *The Decision to Prosecute*, 4 LAW & SOC'Y REV. 331 (1970).

Abolition of prosecutorial discretion would arguably result in never-ending review of decisions, overly rigid treatment of defendants and inability to put limited funds to use. Comment, *Duplicative Statutes, Prosecutorial Discretion, and the Illinois Armed Violence Statute*, 71 J. CRIM. L. & C. 226 (1980) [hereinafter cited as *Duplicative Statutes*].

<sup>2</sup> No society will tolerate a rule of compulsory prosecution requiring the prosecutor to institute criminal proceedings in every case, despite the inevitability of error in a discretionary system. Langbein, *supra* note 1, at 440. See also PRESIDENT'S COMM'N, *supra* note 1, at 133-34; H. HART, *THE CONCEPT OF LAW* (1961); Abrams, *supra* note 1, at 5; Breitel, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427 (1960); Bubany & Skillern, *Taming the Dragon: An Administrative Law for Prosecutorial Decision Making*, 13 AM. CRIM. L. REV. 473, 477

power.<sup>3</sup> Nobody disputes the desirability of consistent and evenhanded treatment of individuals within our criminal justice system,<sup>4</sup> yet commentators continue to regard as a serious problem unchecked prosecutors' disparate application of the criminal law.<sup>5</sup> Consequently, these commentators have called for issuance of detailed written prosecutorial

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(1976); Hermann, *The Rule of Compulsory Prosecution and the Scope of Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 468 (1974).

Although there are ways that the law can limit the inevitability of discretion, one commentator attributes the extension of discretion by statute and criminal codes to legislative inertia and public indifference. Cox, *supra* note 1, at 387.

<sup>3</sup> Earl J. Silbert, United States Attorney for the District of Columbia, warns that the "prosecutor's assuming more extensive responsibilities and exerting increased influence and power in order to control crime increases his potential and capacity for abuse." Silbert, *The Role of the Prosecutor in the Process of Criminal Justice*, 63 A.B.A.J. 1717, 1720 (1977). Silbert notes that "[t]o help control crime, prosecutors must necessarily have broad discretion," but then cautions that "[i]mproperly or unfairly exercised . . . this discretion can cause injustice and undermine public confidence in the administration of criminal justice." *Id.*

The National Institute of Law Enforcement and Criminal Justice expresses concern over the fact that "[m]atters of grave public concern, as well as matters of concern to the defendants most affected by the decisions, are the result of 'informal' policies and practices." NAT'L INST. OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, *THE NEW JUSTICE: ALTERNATIVES TO CONVENTIONAL CRIMINAL ADJUDICATION* 37 (1975) [hereinafter *THE NEW JUSTICE*].

The President's Commission found that more often than not, prosecutors exercise their discretion under circumstances and in ways that make unwise decisions highly probable. PRESIDENT'S COMM'N, *supra* note 1, at 130. See also H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968); Abrams, *supra* note 1, at 3; Rosett, *Discretion, Severity and Legality in Criminal Justice*, 46 S. CAL. L. REV. 12 (1972). Justice Jackson, then Attorney General, noted that, given his broad discretion,

The prosecutor has more control over life, liberty, and reputation than any other person in America . . . . While 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.

Jackson, *The Federal Prosecutor*, 31 J. AM. INST. CRIM. L. & CRIMINOLOGY 3 (1940). The courts also have recognized the potential for abuse of discretion and recent decisions "indicate an increased willingness on the part of judges to impose limits upon the prosecutor in his exercise of discretion." Cox, *supra* note 1, at 385. See, e.g., *Newman v. United States*, 382 F.2d 479, 482.

<sup>4</sup> Abrams, *supra* note 1, at 4.

<sup>5</sup> For example, Arthur Rosett states: "Modern criminal justice is a highly selective process in which severe punishment is meted out to a few, while many other individuals who appear similarly situated escape with little or no punishment." Rosett, *supra* note 3, at 14. "Much of the dissatisfaction with the operation of the criminal process relates to the disparity in treatment of the individual that results in his being treated one way or another because of slight and sometimes random variations in circumstance." *Id.* at 16. See also K. DAVIS, *supra* note 1, at 224; Breitel, *supra* note 2, at 429; Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246 (1980); Gross & Maloney, *Standards for U.S. Prosecutors May Fall Short of Their Targets*, NAT'L L.J., Aug. 18, 1980, at 27; Holderman, *Preindictment Prosecutorial Conduct in the Federal System*, 71 J. CRIM. L. & C. 1 (1980); LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532 (1970). But see Mellon, Jacoby & Brewer, *The Prosecutor Constrained by His Environment: A New Look at Discretionary Justice in the United States*, 72 J. CRIM. L. & C. 52 (1981) in which the authors of a comprehensive study of prosecutorial charging policy and practices in ten jurisdictions concluded that "prosecutors throughout the United States appear to operate consistently and with uniformity in distributing justice." *Id.* at 81.

standards,<sup>6</sup> particularly since the quality of a prosecutor's performance often improves when those with whom he deals are more aware of his policies and procedures.<sup>7</sup> Few guidelines are available to prosecutors at the state and local level,<sup>8</sup> however, and until recently, no formal set of principles existed to guide federal prosecutors on when and how to bring criminal charges.<sup>9</sup> Writers thus labelled the existing state of

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<sup>6</sup> See, e.g., The National Institute on Law Enforcement and Criminal Justice's proposal that the rule-making provisions of the Federal Administrative Procedure Act serve as a potential model. *THE NEW JUSTICE*, *supra* note 3. See also K. DAVIS, *supra* note 1, at 225-26 (Davis calls for written policies, public and open to comment and subject to regular consideration and change); Abrams, *supra* note 1, at 57; Bubany & Skillern, *supra* note 2, at 495-99; Cox, *supra* note 1, at 433; Vorenberg, *Narrowing the Discretion of Criminal Justice Officials*, 1976 DUKE L.J. 651, 681-83 (1976).

Prior to the Justice Department's release of the *Principles of Federal Prosecution* in 1980, the American Bar Association, the National District Attorneys Association, and the Illinois Bar Association all issued proposals to control prosecutorial discretion. See AMERICAN BAR ASS'N, PROJECT ON STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE (1974) [hereinafter cited as ABA STANDARDS]; ILLINOIS CODE OF PROFESSIONAL RESPONSIBILITY (1978) [hereinafter cited as ISBA STANDARDS]; NAT'L DISTRICT ATTORNEYS ASS'N NATIONAL PROSECUTION STANDARDS (1977) [hereinafter cited as NATIONAL PROSECUTION STANDARDS]. The National District Attorneys Association, although sensitive to the arguments that the broad discretion of the prosecutor allows for the abuse or unequal treatment of individuals before the law, noted that the preparation of written guidelines regularizes and structures discretion, limiting the possibility that it will be exercised in an arbitrary and discriminatory fashion. NATIONAL PROSECUTION STANDARDS, *supra* at 89.

<sup>7</sup> Cox, *supra* note 1, at 433. Guidelines tend to minimize the influence of non-objective factors, such as the attitudes of the arresting officer or complaining party, and facilitate informing the public. Bubany & Skillern, *supra* note 2, at 497-98.

<sup>8</sup> The President's Commission described prosecutors' discretionary decisions as "often . . . unguided by explicit statutes, judicial rules, or administrative policies, and are not subjected to public, or in most cases judicial, scrutiny." PRESIDENT'S COMM'N, *supra* note 1, at 130. As a rule, the courts have declined to formulate definite standards for the exercise of the charging discretion. Kavanaugh, *Representing the People of Illinois: Prosecutorial Power and its Limitations*, 27 DE PAUL L. REV. 625, 632 (1978). According to Professor Vorenberg, a few local prosecutors with large staffs have issued guidelines on charging policy and practices, including plea bargaining. Vorenberg, *supra* note 6, at 680 (citing, e.g., DISTRICT ATTORNEY OF HARRIS COUNTY, TEXAS, THE PROSECUTOR'S DISCRETION: A STATEMENT OF POLICY (1974); DISTRICT ATTORNEY OF KING COUNTY, WASHINGTON, GUIDELINES (1976)). However, he notes that the guidelines are drafted so broadly as to retain a great deal of flexibility. *Id.* See also Comment, *Prosecutorial Discretion—A Re-Evaluation of the Prosecutor's Unbridled Discretion and its Potential for Abuse*, 21 DE PAUL L. REV. 485, 492 (1971).

<sup>9</sup> Although Justice Department officials established national investigative and prosecutorial priorities from time to time in the interest of allocating their limited resources to achieve an effective nationwide law enforcement program, they have allowed individual United States attorneys to establish their own priorities within the national priorities. DEP'T OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION 8 (1980). See also Kaplan, *Prosecutorial Discretion—A Comment*, 60 NW. U.L. REV. 174, 177 (1965). This individualized approach may effectively eliminate the prosecution of a particular class of crimes that the Justice Department deems critical, if a United States Attorney determines that it would not be beneficial to prosecute such crimes in utilizing limited resources on a local or regional level.

In describing his experiences at the United States Attorney's office for the Northern District of California, Kaplan relates that when faced with the problem of making the most

prosecutorial policy "primitive."<sup>10</sup>

The Justice Department, on July 28, 1980, in an effort to correct this deficiency at the federal level issued a comprehensive listing of policies and practices to be followed by all prosecutors within the Justice Department and United States Attorneys' offices.<sup>11</sup> The new guidelines closely resemble proposals put forth by various professional organizations<sup>12</sup> with only a few notable deviations. This Comment's thesis is that the Justice Department's published rules, while a slight improvement over the previously inconsistent procedural and substantive decision-making process employed by federal prosecutors, are too general and permissive to achieve the desired level of consistency and evenhandedness in applying the criminal law to citizens at the state and local level.<sup>13</sup> Thus, they and the proposals upon which the guidelines are modeled should not serve as prototypes for much needed local prosecutorial guidelines.

United States Attorneys,<sup>14</sup> whose discretion is extraordinarily

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effective use of their limited time and energies, the assistants over the years had evolved a largely tacit but nonetheless real set of standards for making the prosecutorial decision. *Id.* at 178.

<sup>10</sup> Abrams, *supra* note 1, at 58. While several of the articles relied upon in this Comment deal primarily with state and local prosecutors and others focus solely on federal prosecutors, as a rule general criticisms are equally applicable to both levels of prosecution. For example, studies of charging procedures in United States Attorneys' offices and local prosecuting offices yield remarkably uniform results. Thomas & Fitch, *Prosecutorial Decision Making*, 13 AM. CRIM. L. REV. 507, 511 (1976). But see Kavanaugh, *supra* note 8, at 631, who argues that major differences exist between the federal and state prosecutorial systems.

<sup>11</sup> The document, entitled the *Principles of Federal Prosecution*, is the product of more than three years of work under Attorneys General Edward Levi, Griffin Bell, and Benjamin Civiletti. According to Civiletti, the publication represents the first time in the history of the Justice Department that "sound prosecutorial policies and practices" have been put together in one place. See J. HERALD, July 28, 1980, at 16, col. 1. The guidelines apply to all federal prosecutors including those employed in the Criminal Division in the Department of Justice in Washington.

<sup>12</sup> See note 6 *supra*.

<sup>13</sup> The preface to the *Principles of Federal Prosecution* cautions that the guidelines have deliberately been cast in general terms with a view toward providing guidance rather than mandating results. DEP'T OF JUSTICE, *supra* note 9, at i. This Comment argues that the generality has defeated the purposes of establishing such guidelines. Furthermore, the Department of Justice specifies that reference to the guidelines is not intended to require a particular prosecutorial decision in any given case. *Id.* at Part A(2), comment. Furthermore, the criticism that the practical value of such guidelines as the American Bar Association Standards, the National Prosecution Standards and the Illinois Code of Professional Responsibility is strictly limited as these standards do little more than condemn prosecutorial discretion not motivated toward the public purpose of the office is equally applicable to the *Principles of Federal Prosecution*. See Kavanaugh, *supra* note 8, at 632.

<sup>14</sup> United States Attorneys, whom the President appoints for four-year terms, are responsible for prosecution of federal criminal cases in each of the ninety-four judicial districts. 28 U.S.C. §§ 541(a)(b) (1976). In large offices, most of the prosecutorial decisions may be delegated to Assistant United States Attorneys. Kaplan, *supra* note 9, at 176. Throughout this

broad,<sup>15</sup> particularly in instituting criminal prosecution, have access to several sources of suggested standards of conduct in addition to the recently issued *Principles of Federal Prosecution*.<sup>16</sup> One example is the Justice Department's nine-part United States Attorneys' Manual providing "internal guidance [for] the U.S. Attorneys' Offices. . . ."<sup>17</sup> Additionally, the Code of Federal Regulations contains published standards of conduct for Department of Justice attorneys.<sup>18</sup> Prosecutors also learn of national law enforcement priorities guiding prosecutorial decisions from Department of Justice memoranda, bulletins and letters, United States Attorney's conferences, meetings with individual prosecutors and their staffs, and meetings with the United States Attorney's Advisory Committee.<sup>19</sup> United States Attorneys also benefit from the Department of Justice's "Memoranda of Understanding" with other federal agencies and departments regarding what offenses should be submitted to United States Attorneys for investigation or prosecution and which should be handled internally by the agencies or departments.<sup>20</sup> Used in conjunction with all these resources, the consolidation of general procedures in the *Principles of Federal Prosecution* may facilitate consistent treatment of individuals within the federal criminal justice system.<sup>21</sup> Unfortunately,

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Comment, the term United States Attorney will apply to all prosecutors within a United States Attorney's office unless otherwise stated.

<sup>15</sup> Professor Abrams notes that United States Attorneys have "relative autonomy in prosecution from the filing of the complaint up to and including the handling of the appeal through the United States Court of Appeals." Abrams, *supra* note 1, at 55 n.189. The preface to the *Principles of Federal Prosecution*, states that "[t]he manner in which federal prosecutors exercise their decision-making authority has far-reaching implications, both in terms of justice and effectiveness in law enforcement and in terms of the consequences for individual citizens." DEP'T OF JUSTICE, *supra* note 9.

<sup>16</sup> But see text accompanying notes 49-50 *infra*.

<sup>17</sup> 28 C.F.R. § 0.16(b) (1980). DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL (Aug. 31, 1976) (unpublished manual available from the Dep't of Justice). The nine-part Manual, prepared by the Executive Office of United States Attorneys, is available for purchase from the Executive Office of United States Attorneys, United States Department of Justice, Washington, D.C. 20530, under the disclosure requirements of the Freedom of Information Act at a per page fee. *Id.* § 1-1.400.

<sup>18</sup> Holderman, *supra* note 5, at 3-4.

<sup>19</sup> DEP'T OF JUSTICE, U.S. ATTORNEY'S WRITTEN GUIDELINES FOR THE DECLINATION OF ALLEGED VIOLATIONS OF FEDERAL CRIMINAL LAWS 29-30 (1979) [hereinafter cited as DECLINATION GUIDELINES].

<sup>20</sup> *Id.* at 30.

<sup>21</sup> It is certainly arguable that the *Principles of Federal Prosecution* do not strike the proper balance, however. See note 9 *supra*. Certainly, with the limited access the general public has to the supplemental resources supposedly available to United States attorneys, it is difficult to ascertain whether the apparent deficiencies of the new guidelines are rectified by other materials.

Use of prosecutorial discretion can result in inequitable application of the law in two ways at the federal level: statutes may be enforced with varying degrees of strictness from jurisdiction to jurisdiction, or they may be enforced in a discriminatory fashion against various offenders within a particular jurisdiction. As an example of the former, a person is likely

comparable resources seldom exist for state and local prosecutors;<sup>22</sup> therefore, general guidelines modeled after the *Principles of Federal Prosecution* would do little to solve prosecutorial abuse and misuse of discretion at this level.

Controlling prosecutorial discretion is feasible and can be compatible with a democratic system of justice. In Germany, for example, as in the United States, prosecutors necessarily have some discretion to select which crimes will be prosecuted. However, the German system of compulsory prosecution, with its limited provision for "restrained discretion,"<sup>23</sup> articulates much more clearly and explicitly the criteria of selection.<sup>24</sup> Despite its discretionary non-prosecution exception to the general rule of compulsory prosecution, with provisions similar to those outlined in the *Principles of Federal Prosecution*, the German system limits the discretion not to prosecute to misdemeanors.<sup>25</sup> This important limitation is not imposed upon, or in all cases desired for,<sup>26</sup> American prosecutors. However, without this limitation, American prosecutors have a much greater impact on the fate of an individual defendant since the magnitude of the crime and the severity of the sentence may be substantially greater than in a German misdemeanor case. An even more important distinction, however, is that German citizens, unlike United States citizens, have the right to departmental and judicial review of decisions not to prosecute.<sup>27</sup> The discretion of German prosecutors is not only subject to severe regulation, but citizens have recourse in the event of arbitrary decisions.

Controlling prosecutorial discretion in the United States involves a difficult balancing process. As the American Bar Association stated in its Project on Standards for Criminal Justice, "[t]here is need for caution

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to be prosecuted and jailed in the Northern District of Florida for selling five LSD tablets, while that same person might not be prosecuted in the Southern District of New York for the more serious crime of selling three ounces of cocaine. Gross & Maloney, *supra* note 5, at 27. Similarly, in money crimes such as theft and fraud, the amount of money triggering federal prosecution in one district may be 100 times greater than the threshold in another district. Lewin, *Justice: Guides Stay Sealed*, NAT'L L.J., June 16, 1980, at 6. This problem is not addressed in the guidelines. See text accompanying notes 66-68 *infra*. The latter form of inequitable application of the law is more clearly addressed by the guidelines although here, too, it is arguable that the new guidelines are inadequately detailed to solve the problem. See text accompanying notes 95-109, 138-40, 181, 188-92, 202-03.

<sup>22</sup> See generally Kavanaugh, *supra* note 8.

<sup>23</sup> Herrmann, *supra* note 2, at 504-05.

<sup>24</sup> See Langbein, *supra* note 1, at 467.

<sup>25</sup> In practice, the discretion is generally limited to trivial misdemeanors only. *Id.* at 460, citing Herrmann, *supra* note 2, at 481-89.

<sup>26</sup> The rule of compulsory prosecution may lead to absurd results in some cases. Langbein, *supra* note 1, at 474-75.

<sup>27</sup> However, not all citizens may claim these rights and they do not apply to all decisions. *Id.* at 463.

in formulating standards broad enough to encompass the wide variety of factual situations to which they must be applied and *narrow enough to be an explicit and specific guide on the subject*. . . .<sup>28</sup> The goal, according to Professor Kenneth C. Davis, is not to confine, structure, and check prosecutorial discretion to the maximum degree, but rather to find the "optimum degree" in each set of circumstances.<sup>29</sup> There is a fine line between providing answers and giving direction.<sup>30</sup> While strict rules designed to meet every conceivable situation would be impossible, detailed outlines, explicit hypotheticals, and mechanisms for accountability are feasible and needed. Without support materials and detailed supplements such as those provided federal prosecutors, the guidelines promulgated by the Justice Department are overbroad and provide little concrete guidance.

Public awareness that enforcement of criminal laws in many cases may depend on the sole judgment of the prosecutor has increased dramatically in recent years.<sup>31</sup> Concurrently, the United States Supreme Court has evinced a growing concern over the vast degree of discretion in the criminal justice system and has tended to require more specific standards for critical decision-making in criminal cases.<sup>32</sup> Presently,

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<sup>28</sup> ABA STANDARDS, *supra* note 6, at 60 (emphasis added). The ABA does qualify its standards by recognizing that "ambiguity is intrinsic in many of the problems with which they deal and which the advocate's conscience must guide." *Id.*

<sup>29</sup> K. DAVIS, *supra* note 1, at 4. The mere fact that discretion exists does not mean it should be abolished. *See* note 1 *supra*. Reasons cited to justify the need for discretionary decisions include the enormous number of cases that come into the criminal process, the limited amount of funding available to prosecutorial staffs, the necessity of individualizing application of the law to individual offenders, the limits in lawmakers' abilities to adequately enunciate exactly what conduct they wish to prohibit, the overcriminalization of conduct, the inherent limits of statutory language, the need to allow law enforcement to be directed and adapted to the needs of a locality, and the impossibility of reviewing every decision of every prosecutor in the United States. For elaboration on these various arguments, *see generally* Bubany & Skillern, *supra* note 2, at 492; Cox, *supra* note 1, at 386; LaFave, *supra* note 5, at 533; Langbein, *supra* note 1, at 451; Kaplan, *supra* note 9, at 188; PRESIDENT'S COMM'N, *supra* note 1, at 133-34; Rosett, *supra* note 3, at 20; and Comment, *Duplicative Statutes*, *supra* note 1.

<sup>30</sup> *See, e.g.*, Kavanaugh, *supra* note 8, at 649-50. Rules can take different forms, varying in their utility and effectiveness. According to the authors of a recent quantitative study of prosecutorial discretion, the continuum runs from mandatory rules, e.g., "all conspiracies to distribute heroin will be prosecuted if the evidence suggests a reasonable likelihood of conviction," to guidelines or factors, e.g., "a prior record for the same offense is a factor in favor of prosecution." Frase, *supra* note 5, at 298. In the middle of the continuum is the presumptive rule, e.g., "cases involving one ounce of heroin or less will normally not be prosecuted, absent unusual circumstances." *Id.*, citing Abrams, *supra* note 1, at 22-24. This Comment uses the term "guidelines" loosely to encompass rules and factors at different points along the continuum, depending upon the procedure at issue.

<sup>31</sup> Bubany & Skillern, *supra* note 2, at 473-74. Bubany and Skillern cite the "controversial and highly visible 'deal' between the Department of Justice and the former Vice-President, Spiro T. Agnew" as perhaps the most significant event leading to increased public awareness. *Id.* at 473 n.2.

<sup>32</sup> *Id.* at 474 (citing *e.g.*, Smith v. Goguen, 415 U.S. 566 (1974), a case involving flag abuse



there is no absolute protection from abuse of discretion<sup>33</sup> despite the numerous formal and informal controls which theoretically exist.<sup>34</sup>

With the great potential for abuse of prosecutorial discretion,<sup>35</sup> the range of relevant considerations along with the thinking of prosecuting attorneys within a particular system must be narrowed through explicitly formulated policy.<sup>36</sup> The President's Commission on Law Enforcement and Administration of Justice found that despite the presence of factors which tend to increase conformity in the decision-making process,<sup>37</sup> the lack of clearly stated standards to guide office personnel, par-

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in which the court concluded that "perhaps the most meaningful aspect of the vagueness doctrine is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimum guidelines to govern law enforcement." *Id.* at 574). *But see* United States v. Bachelder, 442 U.S. 114.

<sup>33</sup> *See, e.g.*, Cox, *supra* note 1, at 433. There are, however, factors which define and limit a prosecutor's legally absolute discretion, such as judicial review and the possibility of removal of prosecutors in cases of abuse of discretion. Proving discriminatory prosecution is very difficult, though. *See* note 137 *infra* for the two elements of proof necessary to convict a prosecutor of discriminatory prosecution. Some of the difficulties in proving disparate treatment were alleviated by United States v. Falk, 479 F.2d 616 (7th Cir. 1973), which held that if the defendant presented enough factual evidence to raise a reasonable doubt about prosecutorial motives, the burden shifted to the prosecutor to show otherwise. *Id.* at 620-21. This circuit court case represents the "leading case" on discriminatory prosecution. Amsterdam, *The One-Sided Sword: Selective Prosecution in Federal Courts*, 6 RUT.-CAM. L.J. 1, 10 (1974). However, absent a suspect criterion such as race or religion, it is unlikely that the defendant will be able to prove arbitrary action. Givelber, *The Application of Equal Protection Principles to Selective Enforcement of the Criminal Law*, 1973 ILL. L.F. 88, 115. *See generally* Note, *Reviewability of Prosecutorial Discretion: Failure to Prosecute*, 75 Colum. L. Rev. 130 (1975) [hereinafter cited as *Failure to Prosecute*], for an analysis of the applicability of judicial review of prosecutorial decisions.

Monitoring selective and discriminatory use of discretion becomes particularly compelling since removal is the only available remedy for a United States attorney's abuse of power. Seymour, *Let's Take Politics Out of Federal Law Enforcement*, 61 JUD. 119, 122 (1977). "The Attorney General can overrule a U.S. Attorney and direct the institution or discontinuance of a criminal proceeding, but he risks alienating public opinion." *Id.* Public recourse through the electoral process has been more illusory than effective as a remedy. Bubany & Skillern, *supra* note 2, at 492 (citing Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 HARV. L. REV. 1690 (1974)).

<sup>34</sup> Bubany & Skillern, *supra* note 2, at 483. They characterize the controls as "largely ineffective and reflective of a traditional judicial deference to prosecutorial judgment." *Id.* *See also* ABA STANDARDS, *supra* note 6, at 81.

<sup>35</sup> *See* note 3 *supra*.

<sup>36</sup> Abrams, *supra* note 1, at 57. Abrams cautions that while guidelines will not insure complete uniformity of decision, they should "move the prosecutorial system further along the road to 'tolerable consistency.'" *Id.*

Disparity in use of discretion results from a variety of internal and external pressures. Discretionary justice is often complicated—or simplified—by "pressures, personalities and politics." K. DAVIS, *supra* note 1, at 24. Specifically, judicial involvement, the news media, various individuals, interest groups and public opinion may affect prosecutorial discretion. *See generally* Bubany & Skillern, *supra* note 2. The discretionary decision alone may involve questions of "justice, law, facts, policy, politics, and ethics." K. DAVIS, *supra* note 1, at 24.

<sup>37</sup> The following factors induce conformity to general standards among prosecutors: caseload restraints, the desire to win, law enforcement considerations, the pressure of public

ticularly in large offices at the state and local levels, resulted in little likelihood of consistent charging and dismissing of cases.<sup>38</sup> The Commission found that many discretionary decisions were made "hastily and haphazardly,"<sup>39</sup> with insufficient information about the offense, the offender, his needs or the community and correctional treatment programs.<sup>40</sup> Expediency now appears to be the primary objective of the criminal justice system.<sup>41</sup>

The dual objectives of the Justice Department's *Principles of Federal Prosecution* apply equally to all prosecutorial offices: ensuring fair and effective responsibility by government attorneys "and promoting confidence on the part of the public and individual defendants that important prosecutorial decisions will be made rationally and objectively on the merits of each case."<sup>42</sup> The federal guidelines specifically aim at curbing abuses and inconsistencies in prosecutorial discretion in six areas: (1) initiating and declining prosecution; (2) selecting charges; (3) entering into plea agreements; (4) opposing offers to plead *nolo contendere*; (5) entering into non-prosecution agreements in return for cooperation; and (6) participating in sentencing.<sup>43</sup> While the guidelines may meet their twofold purpose at the federal level in each of these six areas, their practical utility at the state and local level is highly questionable.

#### PARAMETERS OF PUBLISHED PROSECUTORIAL GUIDELINES

Inherent in prosecutorial decision-making is an underlying tension between the related needs for consistency and certainty, and the contrary needs for flexibility and sensitivity.<sup>44</sup> In the United States, the specific facts and circumstances of each particular case determine the ultimate decision whether to prosecute. While written guidelines should not completely restrain the prosecutor from basing priorities and poli-

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opinion, and the constraints inherent in professional ethics. Cox, *supra* note 1, at 411, 413-17. See also LaFave, *supra* note 5, at 533.

Within an office, certain factors also encourage conformity. For example, assistant prosecutors often share a common perception of their role as each has learned the standards for prosecution by the tenured assistants. Kaplan, *supra* note 9, at 177. Another powerful factor inducing conformity to general standards is the possibility that the prosecutor who authorized prosecution might not be the attorney who tries the case; thus, another might carefully examine his decision to prosecute. *Id.*

<sup>38</sup> PRESIDENT'S COMM'N, *supra* note 1, at 133.

<sup>39</sup> *Id.* at 130.

<sup>40</sup> *Id.* The Commission stated that since prosecutors rarely arrive at decisions on the basis of carefully worked out policies or by the use of systematic procedures and policy-makers rarely review these decisions more than perfunctorily, one can safely assume that many mistakes occur. *Id.* See also Jackson, *supra* note 3.

<sup>41</sup> Bubany & Skillern, *supra* note 2, at 495.

<sup>42</sup> DEP'T OF JUSTICE, *supra* note 9, at i-ii.

<sup>43</sup> *Id.* at 1.

<sup>44</sup> Abrams, *supra* note 1, at 3.

cies on his or her personal view of the fair and efficient operation of the criminal justice system,<sup>45</sup> the advent of fragmented prosecutorial offices serving large geographic areas with populations of diverse characteristics highlights the problem of inconsistent use of discretion and a resulting need for more specific decision-making criteria. The issue is to what extent such priorities and policies should be delineated and how to determine appropriate methods of monitoring compliance.

One underlying assumption of this Comment is that written guidelines should be made public. When rules and policies are kept secret, defendants and third parties are unable to discover either arbitrary or inadvertent departures from them.<sup>46</sup> The prosecutor holds his office in trust<sup>47</sup> for the public good; hence, the prosecutor is and should be subject to public scrutiny.<sup>48</sup> Increased public awareness is essential to achieving the goals of the criminal justice system.<sup>49</sup> Unfortunately, this researcher's experience indicates that the resources and supplemental directives provided to federal prosecutors are difficult to obtain and expensive, if even available, to citizens not employed by the Justice Department.

Professor Abrams, former consultant to the President's Commission on Law Enforcement and Administration of Justice, lists the following factors in favor of publication of specific published guidelines: the desirability of establishing as free a flow of information about governmental activities as is consistent with national security interests, the benefits of outside scrutiny, evaluation and criticism of policy, and the fairness of making departmental policies known and available to all attorneys on

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<sup>45</sup> NATIONAL PROSECUTION STANDARDS, *supra* note 6, at 90. The National District Attorneys Association asserts that this power is equivalent to the rule-making power possessed by most administrative agencies. *Id.* See also Bubany & Skillern, *supra* note 2, at 496.

<sup>46</sup> K. DAVIS, *supra* note 1, at 98. Davis cites confidential instructions to staffs as maintaining and perpetuating a system in which abuse of discretion is difficult to identify and rectify. *Id.*

<sup>47</sup> Bubany & Skillern, *supra* note 2, at 498.

<sup>48</sup> The public seldom understands or sees prosecutorial discretion. The Wickersham Commission noted in 1931 that: "[t]he prosecutor [is] the real arbiter of what laws shall be enforced and against whom, while the attention of the public is drawn rather to the small percentage of offenders who go through the courts." NAT'L COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, NO. 4 REPORT ON PROSECUTION 19 (1931).

<sup>49</sup> In the area of plea bargaining, for example, the National Advisory Commission recommends that negotiation guidelines be publicized in their entirety. NAT'L ADVISORY COMM'N ON CRIM. JUST. STANDARDS AND GOALS, COURTS, STANDARD 3.3 (1973) [hereinafter NAC: COURTS]. The ABA, however, recommends confidentiality of the chief prosecutor's strategic directives. ABA STANDARDS, *supra* note 6, STANDARD 2.5(b). Other commentators take a middle-of-the-road approach and suggest publication of at least a fairly comprehensive statement of plea bargaining and charge reduction. See generally Thomas & Fitch, *supra* note 10, at 550. But see Rabin, *Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion*, 24 STAN. L. REV. 1036 (1972).

an equal basis.<sup>50</sup> He states that absent special circumstances, policy should be published clearly and concisely.<sup>51</sup> The prosecutors promulgating these policy statements should take affirmative action to disseminate them to the public rather than merely make them available upon request.<sup>52</sup> Although the stated purpose of the Justice Department guidelines includes better informing the public, ostensibly through publication of departmental policy, the *Principles of Federal Prosecution* do not go into adequate detail to assure the public that evenhanded administration of the criminal law will be safeguarded. The unavailability of the supplemental materials disseminated to federal prosecutors highlights the apparent inadequacy of the new guidelines.

Also implicit in this evaluation of prosecutorial guidelines is the necessity for making a record or report of all decisions, including results and rationales. This allows for monitoring and reviewing decisions as well as updating policies and procedures.<sup>53</sup> Such records prevent a prosecutor from making an "after-the-fact rationalization, based on apparently neutral principles"<sup>54</sup> of his or her decision.

Meaningful control of discretion is impossible without at least some form of internal administrative review.<sup>55</sup> Reduction in the number of decision-makers effectively controls discretion;<sup>56</sup> policy should therefore be established as high up the ladder of control as possible. In addition to policy statements, an outline of administrative controls is an essential component of prosecutorial guidelines.<sup>57</sup> The existence of published policy or guidelines, even when specific, will not alone result in consistent application of the law;<sup>58</sup> the important consideration is "whether the procedure established for the exercise of power furnishes adequate

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<sup>50</sup> Abrams, *supra* note 1, at 26-28. Additionally, internal regulation through published guidelines may preclude movement toward judicial review of all prosecutorial policy and decisions whether to prosecute. Professor Abrams notes that introduction of judicial review could interfere with increased development of internal controls. *Id.* at 52.

<sup>51</sup> Abrams concedes that legal memoranda, background analysis and manuals on tactics arguably should not be published. *Id.* at 34 n.110.

<sup>52</sup> *Id.* See also Thomas & Fitch, *supra* note 10, at 526; Kavanaugh, *supra* note 8, at 650. For a discussion of Congressional intent in including law enforcement manuals under the Freedom of Information Act, 5 U.S.C. § 552 (1976 & Supp. III 1979), see Comment, *The Status of Law Enforcement Manuals Under the Freedom of Information Act*, 75 NW. L. REV. 734 (1980).

<sup>53</sup> Thomas & Fitch, *supra* note 10, at 550.

<sup>54</sup> Note, *Failure to Prosecute*, *supra* note 33, at 140.

<sup>55</sup> Bubany & Skillern, *supra* note 2, at 503.

<sup>56</sup> Thomas & Fitch, *supra* note 10, at 551. See Merola, *Modern Prosecutorial Techniques*, 16 CRIM. L. BULL. 232, 256 (1980).

<sup>57</sup> Abrams describes administrative controls as necessary to ensure that "policy formulated by higher-ups will be applied by subordinates in the field." Abrams, *supra* note 1, at 53. A system of administrative controls is not an alternative to the explicit articulation of prosecutorial policy, however. *Id.* at 56.

<sup>58</sup> Bubany & Skillern, *supra* note 2, at 499.

*safeguards* to those who are affected by the administrative action.”<sup>59</sup> Administrative controls range from placing all authority for certain types of prosecution in one central authority to delegating almost all authority to the field with the invitation to seek advice from central authority if it has any doubts about prosecuting a particular category of cases.<sup>60</sup> A middle-of-the-road approach requires the field to notify central authority whenever it initiates prosecution of a particular kind of crime.<sup>61</sup>

The *Principles of Federal Prosecution* establish various United States Attorneys and responsible assistant attorneys general as the “central authority,”<sup>62</sup> with the dual purpose of assuring *inter-office* consistency and providing appropriate remedies for serious, unjustified departures from the guidelines.<sup>63</sup> The document directs these officers to establish supplementary internal procedure guidelines appropriate to their individual offices.<sup>64</sup> This scant provision for the promotion of *inter-office* consistency is inadequate, however. In fact, the guidelines explicitly authorize each United States attorney to modify or depart from the *Principles of Federal Prosecution*.<sup>65</sup> Admittedly, while policies theoretically should be equally appropriate throughout a prosecutorial system, reality mandates an inevitable adjustment to meet the varying needs of the individual offices.<sup>66</sup> However, while the *Principles of Federal Prosecution* require the approval of the appropriate assistant attorney general and the deputy attorney general at least in those situations in which “a modification or departure is contemplated as a matter of policy or regular practice,”<sup>67</sup> this important advancement toward uniformity in the decision-making process at the federal level becomes meaningless when the guidelines are so general as to make it virtually impossible to identify departures from “policy.”

Unlike the federal guidelines which regulate ninety-five separate offices across the country, state and local policy statements generally need only encompass prosecutors in a limited geographic area. Consequently, inter-office consistency is less a consideration at the state and local level than intra-office uniformity, particularly in the larger offices. In this compacted situation, it is less necessary to accommodate departures from policy as the guidelines can be tailored to meet the needs of the

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<sup>59</sup> *Id.* (citing *Warren v. Marion County*, 222 Ore. 307, 314, 353 P.2d 257, 261 (1960)).

<sup>60</sup> *Abrams*, *supra* note 1, at 54-55.

<sup>61</sup> *Id.* at 55.

<sup>62</sup> DEP'T OF JUSTICE, *supra* note 9, Part A(3).

<sup>63</sup> *Id.* at Part A(3), comment.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at Part A(4).

<sup>66</sup> *Abrams* cites differences in the relative autonomy of various United States Attorney's offices, caused by differences in size, workload, quality of staff, tradition, and other factors, as an example of why one administrative control may not apply equally in practice to all offices. *Abrams*, *supra* note 1, at 56.

<sup>67</sup> DEP'T OF JUSTICE, *supra* note 9, at Part A(4), comment.

jurisdiction in question. Therefore, state and local prosecutors require more detailed guidelines as well as a stricter procedure for obtaining permission to depart from office policy, particularly including input from the chief policy-maker in the jurisdiction to ensure uniformity of decision.

#### SELECTING CHARGES, INITIATING, AND DECLINING TO PROSECUTE

One of the most powerful controls a prosecuting attorney has at his or her disposal is the ability to choose *not* to act on a given case.<sup>68</sup> The prosecutor's decisions on whether or not to prosecute in effect determine which laws will be enforced.<sup>69</sup> There is no question that the decision to prosecute lies within the scope of the prosecutor's discretionary power,<sup>70</sup> or that the extent to which the attorneys take advantage of their freedom to decline prosecution is very great. A recent study showed that less than one-fourth of the complaints received by the ninety-five United

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<sup>68</sup> K. DAVIS, *supra* note 1, at 22. The prosecutor has absolute discretion to bring or drop charges in a given case. *See, e.g.*, Powell v. Katzenbach, 359 F.2d 234 (D.C. Cir. 1965), *cert. denied*, 384 U.S. 906 (1966), *reh. denied*, 384 U.S. 967 (1968). *See also* Vorenberg, *supra* note 6, at 678.

<sup>69</sup> Poe v. Ullman, 367 U.S. 497 (1961). Also known as "screening," this process has been defined as "the unconditional exclusion of a person from the criminal process prior to trial or plea." Bubany & Skillern, *supra* note 2, at 499 (citing NAC: COURTS, *supra* note 49, at 17).

<sup>70</sup> In Bordenkircher v. Hayes, 434 U.S. 359, 364 (1978), the Court stated that "In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute and what charges to file or bring before a grand jury, generally rests entirely within his discretion." *See also* Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375 (2d Cir. 1973), which represents an unsuccessful attempt to challenge a prosecutor's decision not to charge.

Courts have regularly refused to interfere with voluntary dismissals of prosecution as an incident of the constitutional separation of powers, and although Federal Rule of Criminal Procedure 48(a) permits United States attorneys to dismiss an indictment, information, or complaint only by leave of court, the courts have interpreted their own role restrictively. Bubany & Skillern, *supra* note 2, at 485-86. *See, e.g.*, Newman v. United States, 382 F.2d 479, 480; Powell v. Katzenbach, 359 F.2d 234; United States v. Cox, 342 F.2d 167 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965); Pugach v. Klein, 193 F. Supp. 630 (S.D.N.Y. 1961). At any rate, judicial review may be an ineffective method of checking prosecutorial abuse. Cox, *supra* note 1, at 391. Cox states that the judicial branch's review of all prosecutorial decisions would create the same evil which the separation of powers doctrine originally sought to prevent; i.e., the concentration of unreviewable unchecked power in a single branch of government. *Id.* at 395. *But see* K. DAVIS, *supra* note 1, at 188-91, 225.

Although a trial may provide a review of a prosecutor's decision to prosecute, most criminal cases never reach trial, largely due to the fact that most prosecutors rely heavily on the leverage provided by their flexibility to manipulate the charges and to influence the ultimate disposition of individual cases. Bubany & Skillern, *supra* note 2, at 481 (citing Note, *Pretrial Diversion From the Criminal Process*, 83 YALE L.J. 827, 838 n.59 (1974)). If a substantial percentage of cases were not dropped or carried to administratively negotiated conclusions, justice would, in the words of the President's Commission, not merely be slowed down, but stopped. PRESIDENT'S COMM'N, *supra* note 1, at 130.

States Attorneys resulted in filing of formal charges.<sup>71</sup> The prosecution rates in state systems for which published data are available are somewhat higher than the federal system, but do not rise much above the fifty percent mark.<sup>72</sup> Yet virtually no procedure exists at the local, state, or federal level to determine if the decisions to decline prosecution are consistent or fairly made over time. Although the central authority in Washington must approve the dismissal of a federal prosecution already initiated in the field, the Department of Justice has not maintained routine administrative control over decisions to forego prosecution.<sup>73</sup> And, in state and local offices, there is seldom any control over the decision not to prosecute.<sup>74</sup> All levels of government therefore need a comprehensive declination policy to govern which cases the prosecutor may or may not decline.

The local or federal prosecutor must determine not only whether he can convict, but whether he should convict.<sup>75</sup> There are a number of reasons for a prosecutor to forego prosecution on a particular case.<sup>76</sup> No

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<sup>71</sup> Frase, *supra* note 5, at 251. The National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, U.S. Department of Justice, Grant No. 75-N1-99-0114, supported the study.

<sup>72</sup> *Id.*

<sup>73</sup> Abrams, *supra* note 2, at 54, note 188. Although eighty-three of the ninety-four United States Attorney's offices have developed their own specific written declination guidelines, there is little cohesive national policy beyond the *Principles of Federal Prosecution*. The remaining eleven offices not only have no written guidelines, but admit to making all declination decisions on a case-by-case basis. DECLINATION GUIDELINES, *supra* note 19. In this 1979 report, the Department of Justice demonstrated "both notable similarities and striking differences across the various United States Attorney's offices with respect to written declination policies." *Id.* at 4-5. The Justice Department dealt with the issue whether the existing degree of uniformity or diversity is proper only by requiring "a careful and thorough analysis of the circumstances confronting each United States Attorney's office and of the various national policy interests." *Id.* at 5. These differences result in inconsistencies between prosecutorial and investigative staffs, as well as between offices in different parts of the country. Consequently, in some instances, written guidelines are the result of requests by investigative agencies for more clarity regarding prosecutorial priorities. *Id.* at 26-27.

<sup>74</sup> Bubany & Skillern, *supra* note 2, at 483; Brakel, *Diversion from the Criminal Process: Informal Discretion, Motivation and Formalization*, 48 DEN. L.J. 211 (1971); see also PRESIDENT'S COMM'N, *supra* note 1, at 133-34.

<sup>75</sup> Bubany & Skillern, *supra* note 2, at 479.

<sup>76</sup> LaFave lists eight reasons why a prosecutor may not pursue a case: (1) if harm done by the offender can be corrected without prosecution; (2) when the offender, if not prosecuted, will be likely to aid in achieving other enforcement goals; (3) when the mere fact of prosecution would cause undue harm to the offender; (4) when the costs of prosecution would be excessive considering the nature of the violation; (5) when the victim has expressed a desire that the offender not be prosecuted; (6) if there are constraints in available enforcement resources; (7) when the prosecutor feels compelled to individualize justice; or (8) if the legislature has overcriminalized the act in question. LaFave, *supra* note 5, at 533. "Overcriminalized" activities refer to those which tend to be sanctioned by society and law enforcement officers, and include gambling, drug use, and prostitution. Cox, *supra* note 1, at 387 (referring to Breitell, *supra* note 2, at 429). Prosecutors consequently have wide discretion

prosecutor has enough funds to prosecute all offenders,<sup>77</sup> particularly in the overburdened District Attorneys' offices.<sup>78</sup> Additionally, the low potential for successfully trying a politically sensitive or highly publicized case frequently results in dismissal.<sup>79</sup> This calculation necessarily includes recognition that certain crimes, by their nature, demand a higher quantum of proof than others to obtain a conviction.<sup>80</sup>

The discretion available to prosecutors in the arrest and screening stages preceding the filing of formal charges is even broader than the more visible forms of discretion occurring at later stages in the criminal process.<sup>81</sup> This particular facet of discretion is for the most part "unreviewed and unreviewable,"<sup>82</sup> increasing the potential for abuse. Historically, prosecutors have made such decisions largely in secret.<sup>83</sup> Consequently, commentators have called for uniform screening and non-prosecution policies to help solve the problems of disparate treatment under the law.<sup>84</sup>

The *Principles of Federal Prosecution* set forth the following courses of action available to the government attorney once he has probable cause to believe that a person has committed a federal offense within his jurisdiction: (a) request or conduct further investigation; (b) commence or recommend prosecution; (c) decline prosecution and refer the matter for prosecutorial consideration in another jurisdiction; (d) decline prosecution and initiate or recommend pre-trial diversion or other non-criminal disposition; or (e) decline prosecution without taking other action.<sup>85</sup>

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as to investigating or pursuing these "victimless" or "complaintless" crimes. *Id.* See generally Cole, *supra* note 1.

<sup>77</sup> LaFave, *supra* note 5, at 533.

<sup>78</sup> See generally Merola, *supra* note 56.

<sup>79</sup> Kaplan, *supra* note 9, at 181.

<sup>80</sup> *Id.* at 184.

<sup>81</sup> Frase, *supra* note 5, at 246-47.

According to the President's Commission, the prosecutor "wields almost undisputed sway over the pretrial progress of most cases." PRESIDENT'S COMM'N, *supra* note 1, at 77. Additionally, at the federal level, the prosecutor's exercise of discretion in charging is not subject to control by investigating agencies whose cases he prosecutes. Cox, *supra* note 1, at 418 (citing *Dear Wing Jung v. United States*, 312 F.2d 73 (9th Cir. 1963)).

<sup>82</sup> Cox, *supra* note 1, at 392. See also Bubany & Skillern, *supra* note 2, at 483-84.

<sup>83</sup> Holderman, *supra* note 5, at 1.

<sup>84</sup> The National Institute of Law Enforcement and Criminal Justice, for example, sees such guidelines as a necessary component of an overall program to correct the disparity of treatment between rich and poor defendants. THE NEW JUSTICE, *supra* note 3, at 15. For a discussion of the barriers to specific guidelines for initiating and declining prosecution and selecting charges, see Brakel, *supra* note 74.

<sup>85</sup> DEP'T OF JUSTICE, *supra* note 9, at Part B(1). The goal of never charging an innocent person, a common element in the ABA Standards and Code of Professional Responsibility, the National Prosecution standards, and the ISBA standards, is ethically satisfied if the prosecutor has available a quantum of evidence equalling "probable cause." Kavanaugh, *supra* note 8, at 634. For example, Standard 3.9 of the ABA standards suggests that it is "unprofessional conduct for a prosecutor to institute or cause to be instituted criminal charges when he



The probable cause standard is the same standard as that required for the issuance of an arrest warrant or a summons upon a complaint,<sup>86</sup> or for a magistrate's decision to hold a defendant to answer in the district court,<sup>87</sup> and is the minimal requirement for indictment by a grand jury.<sup>88</sup> According to the official comment to the *Principles of Federal Prosecution*, it is a threshold consideration only.<sup>89</sup> The guidelines prescribe commencement of federal prosecution if the prosecutor believes that the "person's conduct constitutes a federal offense and that the admissible evidence will *probably* be sufficient to obtain and sustain a conviction."<sup>90</sup> The guidelines temper this mandate by permitting the prosecutor to decline prosecution even when this standard is met if the prosecution would serve no substantial federal interest, the defendant is subject to effective prosecution in another jurisdiction, or there exists an adequate non-criminal alternative to prosecution.<sup>91</sup> The prosecutor need not obtain all the evidence upon which he intends to rely at trial; rather, it is sufficient that he reasonably believes that such evidence will be available and admissible at trial.<sup>92</sup> Furthermore, "the potential that . . . the fact-finder is likely to acquit the defendant because of the unpopularity of . . . the prosecution or because of the overwhelming popularity of the defendant or his or her cause should not discourage continuation of a

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knows that the charges are not supported by probable cause." ABA STANDARDS, *supra* note 6, The Prosecution Function, Standard 3.9. See also ISBA STANDARDS, *supra* note 6; NATIONAL PROSECUTION STANDARDS, *supra* note 6, at 131; ABA CANONS OF PROFESSIONAL ETHICS D.R. 7-103(A). A former Assistant United States Attorney notes that there is general agreement that, regardless of the strength of the case, a prosecutor has no business going forward with the case without an actual belief in the guilt of the accused. This is a question of morality as much as prosecutorial policy. Kaplan, *supra* note 9, at 178.

The prosecutor is in a unique position to harass defendants despite the fact that decisions to charge are theoretically reviewed during the pre-trial preliminary hearing and the grand jury proceedings. The effectiveness of these proceedings as checking devices is doubtful. Bubany & Skillern, *supra* note 2, at 843, 492-93.

<sup>86</sup> See FED. R. CRIM. P. 4(a).

<sup>87</sup> See FED. R. CRIM. P. 5.1(a).

<sup>88</sup> See *Branzburg v. Hayes*, 408 U.S. 665 (1972).

<sup>89</sup> DEP'T OF JUSTICE, *supra* note 9, Part B(1) comment.

<sup>90</sup> *Id.* at Part B(2) (emphasis added). Several commentators suggest that a standard of probable cause is inadequate because the amount of evidence sufficient to demonstrate probable cause may be inadequate to defeat a defendant's motion for directed verdict. Kavanaugh, *supra* note 8, at 634; Kaplan, *supra* note 9, at 182. Kaplan noted that if the government's evidence did not seem sufficient to escape a directed verdict, all of the Assistant United States Attorneys in his office agreed that the prosecution should, of course, not be undertaken. *Id.* A more stringent standard for guiding the prosecutor in the exercise of the charging discretion has been suggested as an alternative: "[C]harge those defendants with those crimes for which there exists sufficient evidence to prove every element of the crime charged, unless there is a substantial doubt that evidence needed to prove the elements of a prima facie case will either not be admitted or not be believed." Kavanaugh, *supra* note 8, at 635.

<sup>91</sup> DEP'T OF JUSTICE, *supra* note 9, Part B(2).

<sup>92</sup> *Id.* at Part B(2), comment.

sound case.<sup>93</sup>

Although the guidelines include these elaborations in the official comment, they fail to include specific benchmarks for the prosecutor to follow and thus, without further elaboration, fail to solve the disparity in application problem.<sup>94</sup> They certainly fail to meet the President's Commission on Law Enforcement's recommendation that policy-makers establish *explicit* policies for the dismissal or informal disposition of the cases of certain marginal offenders.<sup>95</sup> Such factors can, however, be quantified. For example, the Bronx County, New York District Attorney's office employs a numerical case evaluation system that assigns numerically weighted values to certain criteria that reflect the policies and priorities of the office.<sup>96</sup> This system evaluates a case in four essential respects: the nature of the crime charged, determined by the grade of felony involved; the gravity of the particular offense, primarily determined by the extent of personal injury and property loss or damage; the propensity of the defendant to commit crimes of violence, primarily determined by the nature of his background and prior criminal record; and the strength of the case, primarily determined by the facts, circumstances and available evidence.<sup>97</sup> Any prosecutor's office can adapt the case evaluation system, and according to the Bronx County District Attorney, the system represents an effective method for screening out those cases in which selective prosecution might be appropriate.<sup>98</sup> Additionally, by focusing a great deal of attention on the case at the precise moment it becomes part of the system, the prosecutor acquires and

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<sup>93</sup> *Id.*

<sup>94</sup> *See* Gross & Maloney, *supra* note 5, at 27. Gross and Maloney cite the following example:

[I]t is likely that the U.S. attorney for the Northern District of Florida believes that prosecution of a first offender for forging a U.S. Treasury check would serve a "federal interest," while the U.S. attorney for the Southern District of New York probably believes that same forger should be placed in a deferred prosecution program. As a result, while the Florida forger may receive a federal prison term, the New York forger will not even be prosecuted.

*Id.* Gross and Maloney suggest a more specific guideline to combat evasion of the evenhanded administration of the federal criminal laws; e.g., placing a person who forges one U.S. Treasury check in a deferred prosecution program unless he has a prior criminal record. *Id.*

The guidelines issued by the ABA, National District Attorneys Association and ISBA also fail to adequately direct the prosecuting attorney as to which cases, as a rule, should be pursued and which should be forgone, although all "implicitly recognize the impossibility of prosecuting all criminals, and explicitly reject any obligation to refrain from prosecuting an individual who might possibly be found innocent at a trial." Kavanaugh, *supra* note 8, at 632.

<sup>95</sup> PRESIDENT'S COMM'N, *supra* note 1, at 134.

<sup>96</sup> Merola, *supra* note 56, at 237.

<sup>97</sup> *Id.* at 237-38. For a more complete summary of this process, Merola cites to the NATIONAL CENTER FOR PROSECUTION MANAGEMENT, REPORT TO THE BRONX COUNTY DISTRICT ATTORNEY ON THE CASE EVALUATION SYSTEM (Nov. 30, 1974).

<sup>98</sup> *Id.* at 238.

maintains full control over all aspects of the case through final disposition, thereby ensuring the integrity and consistency of office policy.<sup>99</sup>

Although the *Principles of Federal Prosecution* direct the prosecutor to consider the particular offender's culpability in connection with the offense,<sup>100</sup> the past record of criminal activity,<sup>101</sup> the willingness to cooperate in the investigation or prosecution of others,<sup>102</sup> and the probable sentence or other consequences of conviction,<sup>103</sup> they also instruct the prosecutor to weigh federal law enforcement priorities,<sup>104</sup> the nature and seriousness of the offense,<sup>105</sup> and the deterrent effect of prosecution<sup>106</sup> in determining whether to decline prosecution for want of substantial federal interest.<sup>107</sup> Without more elaboration, prosecutors at the state and local level attempting to adhere to similar guidelines would not know what constituted an enforcement priority other than perhaps by a "gut feeling" as to which crimes occurred most frequently or posed the greatest problem to the community. An individual public prosecutor without further direction cannot determine what impact a crime will have on a community or how serious it actually is relative to all other crimes prosecuted in the particular jurisdiction. The Justice Department's rather weak admonition that "some offenses, although seemingly not of great importance by themselves, if commonly committed would have a sub-

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<sup>99</sup> *Id.* at 238-39.

<sup>100</sup> DEP'T OF JUSTICE, *supra* note 9, at Part B(3)(d).

<sup>101</sup> *Id.* at Part B(3)(e).

<sup>102</sup> *Id.* at Part B(3)(f).

<sup>103</sup> *Id.* at Part B(3)(g). The influence of the court, i.e., the sentencing history of a particular judge, cannot be underestimated. Cole, *supra* note 1, at 337.

<sup>104</sup> DEP'T OF JUSTICE, *supra* note 9, at Part B(3)(a).

<sup>105</sup> *Id.* at Part B(3)(b).

<sup>106</sup> *Id.* at Part B(3)(c).

<sup>107</sup> *Id.* These factors roughly correspond to those proposed by the National Advisory Commission, although the Commission recommends that where possible, such guidelines should identify even more specifically where those factors considered in the decision to take the accused into custody or pursue formal proceedings. NAC: COURTS, *supra* note 49, Standard 1.2.

These latter considerations, when made on an individual basis, are precisely the sort of factors which may lead to disparity and inconsistency in application of the law on a jurisdiction to jurisdiction basis, however, and may be inadequate at the federal level, also. While there may be a tendency for prosecutors within a particular office to form a general consensus as to which cases should or should not be prosecuted, it is highly unlikely that without further elaboration, prosecutors between offices can make consistent judgements as to the latter three considerations. See Kaplan, *supra* note 9, at 177. Although some data indicate that those United States Attorneys who developed their own written guidelines are influenced by "national law enforcement priorities," these priorities are communicated haphazardly to the prosecutors through a hodge-podge of sources. See text accompanying notes 16-20 *supra*. It is difficult to conceive of consistent application of the law on a national basis under these circumstances, particularly when national declination guidelines are feasible and preferable. DECLINATION GUIDELINES, *supra* note 19. The guidelines should constitute revisions to the *Principles of Federal Prosecution*, and be uniformly and regularly disseminated as such.

stantial cumulative impact on the community"<sup>108</sup> does not provide such direction.

Finally, while a prosecutor may be in a fairly good position to determine the deterrent effect of prosecution on a specific defendant, the lack of a cohesive and unified program to guide the entire prosecutorial force as a unit decreases the likelihood of consistent prosecution following commission of a particular offense. This in turn decreases the deterrence factor generally on other potential offenders in the community.

Other American organizations' proposed guidelines on the decision to prosecute do not differ markedly from the *Principles of Federal Prosecution*. For example, the American Bar Association Standards state in part:

(a) It is unprofessional conduct for a prosecutor to institute or cause to be instituted criminal charges when he knows that the charges are not supported by probable cause.

(b) 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 evidence may exist which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his 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 of the offender;

(iv) possible improper motives of a complainant;

(v) reluctance of the victim to testify;

(vi) cooperation of the accused in the apprehension and conviction of others;

(vii) availability and likelihood of prosecution by another jurisdiction.<sup>109</sup>

While factors (i), (ii), (iii) and (vi) roughly correspond to guidelines B(3)(d), B(3)(b), B(3)(g) and B(3)(f)<sup>110</sup> respectively, they do not require individual prosecutors to determine such nebulous policy considerations as law enforcement priorities or the deterrent effect of prosecution.<sup>111</sup> The upper echelons of the policy-making body should establish priorities and determine the deterrent effect of prosecution and then disseminate this information to individual prosecutors as concrete guidelines.

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<sup>108</sup> DEP'T OF JUSTICE, *supra* note 9, at Part B(3)(c).

<sup>109</sup> ABA STANDARDS, *supra* note 6, The Prosecution Function Standard 3.9.

<sup>110</sup> See DEP'T OF JUSTICE, *supra* note 9.

<sup>111</sup> The possible deterrent value of prosecution is, however, a listed consideration in the National District Attorney Association's standards. NATIONAL PROSECUTION STANDARDS, *supra* note 6, Standard 9.3.

These considerations should not be made subconsciously or without guidance. For example, although the prosecutor's caseload is a valid consideration in the charging decision, its inclusion creates a number of problems in establishing a uniform charging policy.<sup>112</sup> Among proposed solutions are: (1) preventing the prosecutor from declining to file otherwise justified charges solely on the basis of caseload considerations; (2) enumerating various offenses for which the prosecutor may decline to charge solely because of caseload factors, and additional designated offenses for which the prosecutor must consult with his superiors before deciding not to charge; and (3) limiting the prosecutor to considering his caseload only for offenses in which there is already a high dismissal rate or informal noncharging policy.<sup>113</sup>

Neither the American Bar Association guidelines nor the Justice Department principles focus upon the individual type or category of decision; i.e. the guidelines are not "situation-specific."<sup>114</sup> Yet the nature of the alleged offense is an easily codified factor.<sup>115</sup> Use of hypotheticals can accomplish much more than a mere listing of broad generalizations characterized as "guiding principles."<sup>116</sup> One commentator gave the following example:

It is the policy of this office that charges arising out of domestic disputes shall be *nolled* where discussion with the complaining spouse indicates that (i) the spouse does not wish to press charges; (ii) there is no indicated history of prior incidents of a similar nature; (iii) no physical injury or serious threat thereof occurred or no weapon was involved; and (iv) the case is otherwise not serious enough to warrant referral to Family Relations.<sup>117</sup>

Consideration of personal characteristics is often very subjective, but writers have formulated policies providing more concrete guidance than the American Bar Association guidelines or the *Principles of Federal Prosecution*, for example:

Prosecutions shall not be undertaken by this office in cases where the defendant has no previous record and the charging assistant is reasonably sure that the alleged criminal behaviour was induced by extreme but non-recurring emotional distress, *except* that charges will be filed in such instances in which the alleged criminal activity constitutes a felony (or a certain class of felonies) unless the chief prosecutor (or designated senior assistant) approves the application of this policy in the particular case.

Prosecutions shall be deferred by this office, except in (certain felonies) where the defendant is addicted to narcotics (or mentally retarded, or a

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<sup>112</sup> Thomas & Fitch, *supra* note 10, at 521.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 518 (citing W. Davis, *Nolle Prosequi in the Sixth Circuit Court: Prosecutor Discretion to Dispend with Charge 91* (1974) (unpublished thesis in Yale Law School Library)).

<sup>115</sup> *Id.*

<sup>116</sup> K. DAVIS, *supra* note 1, at 63.

<sup>117</sup> Thomas & Fitch, *supra* note 10, at 518 (citing W. Davis, *supra* note 114, at 89-90).

mentally retarded juvenile) if the defendant voluntarily enters a treatment program previously approved by this office, successfully completes a — day program of treatment, and during that period is not charged with another crime.<sup>118</sup>

In the *Principles of Federal Prosecution*, the Justice Department suggests evaluating the nature and seriousness of the offense in terms of the economic, physical and psychological impact on the victim, but cautions against the impression that an offender can escape prosecution merely by returning the spoils of his crime.<sup>119</sup> However, firm guidelines as to which criminal offenses are negotiable based upon the victim's plight and which are not would do more to alleviate this undesirable impression and are essential at the local level. For example, prosecutors often feel that non-criminal processes can better deal with the medical, mental, or social problems of many first offenders.<sup>120</sup> Those crimes in which such diversion is appropriate for first or repeat offenders must be set out.

There is considerable room for abuse of the government's directive that federal prosecutors decline to prosecute if an adequate non-criminal alternative to prosecution exists<sup>121</sup> because such alternatives sacrifice the formality and visibility generally associated with conventional court procedures.<sup>122</sup> Consequently, these alternatives, which rely heavily upon unregulated and broad discretionary exercises of power by prosecutors and others,<sup>123</sup> may deny the values inherent in constitutional equal protection and due process.<sup>124</sup>

Although the discretion to divert may constitute a valid exercise of discretion,<sup>125</sup> pre-trial diversion is justifiable only if it results in an allocation of resources more likely to achieve the goals of criminal justice than the traditional system.<sup>126</sup> Despite its importance, the use of this

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<sup>118</sup> *Id.* at 520-21.

<sup>119</sup> DEP'T OF JUSTICE, *supra* note 9, at Part B(3)(b), comment.

<sup>120</sup> PRESIDENT'S COMM'N, *supra* note 1, at 133.

<sup>121</sup> DEP'T OF JUSTICE, *supra* note 9, at Part B(5). See generally Note, *Pretrial Diversion From the Criminal Process*, *supra* note 70.

<sup>122</sup> D.E. AARONSON, ALTERNATIVES TO CONVENTIONAL CRIMINAL ADJUDICATION: GUIDEBOOK FOR PLANNERS AND PRACTITIONERS 5 (Nat'l Inst. of Law Enforcement and Crim. Just. 1975).

<sup>123</sup> Cox, *supra* note 1, at 432; D.E. AARONSON, *supra* note 122, at 5.

<sup>124</sup> THE NEW JUSTICE, *supra* note 3, at xi.

<sup>125</sup> Cox, *supra* note 1, at 432. Several suits challenging the prosecutor's role in the initial decision to divert failed. *Id.* (citing *Sledge v. Superior Court of San Diego*, 11 Cal. 3d 70, 520 P.2d 412, 113 Cal. Rptr. 28 (1974) (en banc); *People v. Superior Court at San Mateo County*, 11 Cal. 3d 59, 520 P.2d 405, 113 Cal. Rptr. 21 (1974)). For a general discussion of the need for pre-trial diversion, see PRESIDENT'S COMM'N, *supra* note 1, at 133-34.

<sup>126</sup> Thomas & Fitch, *supra* note 10, at 532. The objectives of pre-trial diversion are to reduce recidivism, relieve overburdened court dockets, avoid the expense of criminal proceedings and incarceration, and provide to appropriate persons services which more directly address the causes of their criminal behavior than would imprisonment. *Id.* at 530.

power has proceeded largely without standards or articulated goals at the local and federal levels.<sup>127</sup> While society should vest some discretion in the prosecutor to compensate for certain laws written in an attempt to apply criminal sanctions as social controls over problems which might be more appropriately handled administratively or through other means,<sup>128</sup> the potential that a prosecutor may "extort from defendants agreement to potentially onerous conditions"<sup>129</sup> mandates that standards be developed establishing the types of cases for which diversion is appropriate and procedures for approval of the diversion decision.<sup>130</sup> Frequently, these decisions are unreviewable.<sup>131</sup> In determining who will be conventionally processed and who will be diverted, the prosecutor needs guidelines to limit unchecked discretion.<sup>132</sup>

The *Principles of Federal Prosecution*, rather than setting out offenses appropriate for pre-trial diversion, deal only in generalities. At the very least, policy-makers must define the class of offenders to be diverted, the goals of diversion and the services best suited to meeting these goals.<sup>133</sup> While the federal guidelines supply broad criteria concerning the defendant in general,<sup>134</sup> they do not set out specific factors pertaining solely to diversion. The National Advisory Commission took a different approach by suggesting the following criteria as indicators that diversion not be used: any history of the use of physical violence toward others, involvement with syndicated crime, a history of antisocial conduct indicating that such conduct has become an ingrained part of the defendant's lifestyle and would be particularly resistant to change, and any special need to pursue criminal prosecution as a means of discouraging others from committing similar offenses.<sup>135</sup> The Commission also listed seven more detailed administrative control policies applicable to cases where the diversion program involves significant deprivation of an offender's liberty: (1) The offender's right to be represented by counsel

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<sup>127</sup> Cox, *supra* note 1, at 431. See also Comment, *Pretrial Diversion: The Threat of Expanding Social Control*, 10 HARV. C.R.-C.L. L. REV. 180, 183 (1975).

<sup>128</sup> Cox, *supra* note 1, at 388.

<sup>129</sup> Bubany & Skillern, *supra* note 2, at 501.

<sup>130</sup> *Id.*

<sup>131</sup> THE NEW JUSTICE, *supra* note 3, at 37.

<sup>132</sup> D.E. AARONSON, *supra* note 122, at 5. Arguably, the ultimate success of the diversionary process will turn on the quality of the decision-makers themselves. *Id.* See generally *State v. Leonardis*, 71 N.J. 85, 363 A.2d 321 (1976) for an overview of a statewide pre-trial intervention program. The court in this case called for uniform guidelines to be promulgated by the Court in the implementation of the program, condemning prosecutors. *Id.* at 340.

<sup>133</sup> *Id.*

<sup>134</sup> See text accompanying notes 100-102 *supra*.

<sup>135</sup> NAC: COURTS, *supra* note 49, Standard 2.1. One additional factor to be considered in evaluating the cost to society is that the limited contact a diverted offender has with the criminal justice system may have the desired deterrent effect. *Id.* This is an important consideration in evaluating the goal of specific deterrence.

during negotiations for diversion deserves emphasis; (2) Administrators should not permit suspension of criminal prosecution for longer than one year; (3) Administrators should not approve an agreement that provides for a substantial period of institutionalization unless the court specifically finds that the defendant is subject to nonvoluntary detention in the institution under noncriminal statutory authorizations for such institutionalization; (4) The court must receive an agreement containing a full statement of those things expected of the defendant and the reason for diverting him; (5) The court should approve an offered agreement only if approvable under the applicable criteria for a negotiated plea of guilty; (6) Upon expiration of the agreement, the court should dismiss the prosecution and permit no future prosecution based on the conduct underlying the initial charge; and (7) For the duration of the agreement, the discretionary authority to determine whether the offender is performing his duties adequately under the agreement must vest in the prosecutor, and if he determines that the offender is not performing properly, he must have the ability to reinstate the prosecution.<sup>136</sup> A comprehensive set of guidelines should include such explicit directives. The promulgator of local guidelines must keep abreast of alternative civil and administrative remedies provided by various state legislatures and local authorities and inform prosecutors of these alternatives on an on-going basis.

In an effort to avoid discriminatory application of the law such as that evidenced in *Yick Wo v. Hopkins*,<sup>137</sup> the federal guidelines prohibit consideration of the prosecutor's personal feelings and motivations in determining whether to commence or recommend prosecution,<sup>138</sup> and also condemn the influence of the offender's race, religion, sex, national

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<sup>136</sup> *Id.* at Standard 2.2.

<sup>137</sup> *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) was the first case involving a successful defense of discriminatory prosecution. The Court held the administration of a municipal ordinance to regulate public laundries violative of equal protection because it was systematically arbitrary and unjustly discriminatory on the basis of race. While this case involved administrative activity as opposed to prosecutorial action, it appears applicable to prosecutorial decision-making because of the law enforcement nature of the administration action with which it deals. Cox, *supra* note 1, at 403.

The Supreme Court has also held, however, that the "conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." *Oyler v. Boles*, 368 U.S. 448 (1962). In *Oyler*, the Supreme Court upheld a state recidivist statute despite the fact that only a selected few to whom the statute applied had the heavier penalty enforced against them. *Id.* *Oyler* has resulted in two requirements of proof in an action for discriminatory prosecution: a showing that others in the same or similar position have not been prosecuted, and that the knowing discrimination was based on an unjustifiable standard. *Id.* at 456. However, according to one commentator, cases have illustrated that it is very difficult to prove an unjustifiable or impermissible standard. Comment, *Duplicative Statutes*, *supra* note 1, at 231-32.

<sup>138</sup> DEP'T OF JUSTICE, *supra* note 9, at Part B(6).



origin, political associations, activities, or beliefs on the prosecutor's decisions.<sup>139</sup> Still, without more adequate guidelines for making such determinations, it becomes virtually impossible to know how much influence any of the above factors may have had upon the prosecutor.

If state and local prosecutors' offices adopted the *Principles of Federal Prosecution* without change, prosecutors failing to adhere to these ambiguous guidelines could become subject to remedial procedures after making decisions.<sup>140</sup> However, as the guidelines do not provide for either an internal or external reviewing authority,<sup>141</sup> chief prosecutors probably could not rectify or discover mistakes or abuse. The requirement of explicitly stating the reasons for declining prosecution and placing them on file<sup>142</sup> becomes virtually meaningless for this purpose although it helps alleviate some difficulties in penetrating the prosecutor's shield against liability in a charge of discriminatory prosecution.<sup>143</sup>

Rule C(1) of the *Principles of Federal Prosecution* directs the prosecutor to charge, or recommend that the grand jury charge, the most serious offense consistent with the nature of the defendant's conduct and which is most likely to result in a sustainable conviction.<sup>144</sup> According to the Justice Department, this principle provides the framework for guaranteeing that every defendant will start from the same position charged with the most serious criminal act he commits.<sup>145</sup> The official comment tempers this flat rule, however, by stating that in many instances unusually mitigating circumstances may make the specified penalty appear so out of proportion to the seriousness of the defendant's conduct that the attorney for the government should consider charging a different of-

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<sup>139</sup> *Id.* One commentator argues that while case law, without exception, holds only *intentional* discrimination violative of the equal protection clause of the United States Constitution, significant reasons exist for extending the right to certain forms of *unintentional* discrimination as well. Comment, *Prosecutorial Discretion in the Initiation of Criminal Complaints*, 42 SO. CAL. L. REV. 519, 543 (1969).

<sup>140</sup> DEP'T OF JUSTICE, *supra* note 9, at Part B(7).

<sup>141</sup> Review of decisions at the federal level, often made by assistant United States Attorneys, seldom occurs unless a dispute arises either at the time of the decision or afterward. Kaplan, *supra* note 9, at 176. The same is true at the state and local level. See generally Cox, *supra* note 1, at 393.

<sup>142</sup> DEP'T OF JUSTICE, *supra* note 9, at Part B(7). Davis advocates recording reasons for declining prosecution in the interest of evenhandedness and openness. K. DAVIS, *supra* note 1, at 225, 226. See also ABA STANDARDS, The Prosecution Function, *supra* note 6, Standard 4.4., which states: "Whenever felony criminal charges are dismissed by way of *nolle prosequi* (or its equivalent), the prosecutor should make a record of the reasons for the action."

<sup>143</sup> The challenger, to formulate a claim, must show that a prosecution was brought in a knowingly discriminatory fashion based on an unjustifiable standard. See also note 137 *supra*.

<sup>144</sup> DEP'T OF JUSTICE, *supra* note 9, at Part C(1). Typically, a defendant will have committed more than one criminal act and his conduct may be prosecuted under more than one statute. *Id.* See also *Duplicative Statutes*, *supra* note 1.

<sup>145</sup> DEP'T OF JUSTICE, *supra* note 9, at Part C(1) comment.

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The rules further direct government attorneys to bring additional charges only when such charges are necessary to ensure that the indictment will reflect the nature and extent of the defendant's criminal conduct or will provide the basis for an appropriate sentence given all the circumstances of a particular case.<sup>147</sup> Additionally, government attorneys may bring such charges if they will significantly enhance the strength of the government's case against the defendant or a codefendant.<sup>148</sup> These directives are apparently designed to ensure that a prosecutor does not add charges for which evidence is weak to acquire additional leverage in the plea bargaining process.<sup>149</sup>

#### ENTERING INTO PLEA AGREEMENTS AND NON-PROSECUTION AGREEMENTS

The prosecutor's ability to plea bargain<sup>150</sup> encompasses a very broad range of options.<sup>151</sup> By its very nature, plea bargaining is impossible without wide prosecutorial discretion.<sup>152</sup> The law recognizes plea bargaining as a necessary and legitimate component of the American criminal justice system;<sup>153</sup> Rule 11(e)(1) of the Federal Rules of Criminal Procedure explicitly sanctions negotiated plea dispositions.<sup>154</sup> The Supreme Court has not wholeheartedly endorsed plea bargaining,

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<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at Part C(2)(a).

<sup>148</sup> *Id.* at Part C(2)(b).

<sup>149</sup> Bubany & Skillern, *supra* note 2, at 480-82. See also LaFave, *supra* note 5, at 541.

<sup>150</sup> "Plea bargaining" involves active negotiation whereby the defendant offers to exchange a guilty plea, thereby forfeiting his right to trial, for a charge reduction or sentence recommendation from the prosecutor. LaGoy, Senna & Siegal, *An Empirical Study on Information Usage for Prosecutorial Decision Making in Plea Negotiations*, 13 AM. CRIM. L. REV. 435, 436 (1976). The plea of guilty is probably the most frequent method of conviction in all jurisdictions. ABA STANDARDS, Pleas of Guilty, *supra* note 6, at 299.

<sup>151</sup> The plea bargaining process is a critical stage of the criminal justice system at which discretionary decisions affecting the majority of defendants and the entire system occur. LaGoy, Senna & Siegal, *supra* note 150, at 436. According to Cox, the prosecutor is generally free to (1) prosecute on less than the full number of charges; (2) prosecute on a lesser charge which one or more of the given charges includes; (3) drop the present charges and bring less severe ones; (4) drop one or more cases filed against any one defendant and prosecute less than the full number; (5) drop subsidiary charges which he could bring against the defendant as a release offender, or repeat offender, or for any offenses against bail laws, gun laws or drug laws; or (6) promise to make no sentencing recommendation. Cox, *supra* note 2, at 426. Of course, the absolute right to trial provides a constant limit on the prosecutor's bargaining power in plea discussions. ABA STANDARDS, The Prosecution Function, *supra* note 6, at 80.

<sup>152</sup> Herrmann, *supra* note 2, at 474.

<sup>153</sup> See, e.g., *Santobello v. New York*, 404 U.S. 257, 261 (1971) in which the court said Plea bargaining, "properly administered, . . . is to be encouraged." *Id.* at 260 (emphasis added). See also LaGoy, Senna & Siegal, *supra* note 150, ABA STANDARDS, *supra* note 6, Plea of Guilty Standard 1.8; Thomas & Fitch, *supra* note 10, at 545.

<sup>154</sup> Rule 11(e)(1) provides that:

though,<sup>155</sup> in part because plea bargaining entails great potential for the unequal exercise of discretion.<sup>156</sup> Some commentators suggest abolition of plea bargaining in the belief that reforms are incapable of correcting the deficiencies of the process.<sup>157</sup> Others merely note that reform is necessary because plea bargaining frequently results in unequal treatment of similarly situated defendants with a detrimental impact on the adversary process.<sup>158</sup> This is particularly true since the process is typically informal and private.<sup>159</sup>

Plea bargaining generally depends to a large degree on the prosecutor's discretion to determine whether or not to grant a defendant charging or sentencing concessions.<sup>160</sup> The court has no control over the

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The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

- (A) move for dismissal of other charges; or
- (B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or
- (C) agree that a specific sentence is the appropriate disposition of the case.

FED. R. CRIM. P. 11(e)(1).

<sup>155</sup> Bubany & Skillern, *supra* note 2, at 482.

<sup>156</sup> For example, in one study, prosecutors in low population density jurisdictions used more information and seemed more likely to accept bargains than their metropolitan counterparts. LaGoy, Senna & Siegal, *supra* note 150, at 435-37. The Bronx County District Attorney noted that:

Rather than being in accord with office wide policies which reflect the district attorney's priorities, the plea bargain is often motivated by desperation at the collapse of a case which has been unreasonably delayed, the existence of a backlog of cases, the inclination of a particular assistant, or the philosophy of a particular judge, compounded by pressure from the court administration to dispose of cases as quickly as possible.

Merola, *supra* note 56, at 256. *See also* K. DAVIS, *supra* note 1, at 167-70 (discussing selective enforcement in general); White, *A Proposal for Reform of the Plea Bargaining Process*, 118 U. PA. L. REV. 439, 449 (1971). *But see* Kavanaugh, *supra* note 8, at 644-45, arguing that the role of the prosecutor in the plea bargaining process must be put in perspective as it is the court which ultimately determines the defendant's fate.

<sup>157</sup> D.E. AARONSON, *supra* note 122, at 70-71. The National Advisory Commission on Criminal Justice Standards and Goals suggests total elimination on the grounds that it will remove incentives to overcharge, will not substantially increase the number of trials, and will increase the rationality of the system. *Id.* The National District Attorneys Association, on the other hand, voted to reject the NAC's proposal. *Id.* (citing 16 CRIM. L. REP. 2427 (1974)).

<sup>158</sup> *See, e.g.*, Thomas & Fitch, *supra* note 10, at 546; Note, *Plea Bargaining: The Case for Reform*, 6 U. RICH. L. REV. 325 (1972). One commentator suggests, in addition to requiring the promulgation of specific guidelines by individual offices, that state legislatures might also take action to limit prosecutorial discretion in this area. He suggests, for example, that a legislature might find plea bargaining permissible only when the prosecutor determines that he needs information and testimony from one defendant against others whose conviction is more important. Vorenberg, *supra* note 6, at 682. He further calls for public reports on each use of this grant of bargaining authority to enable the legislature to determine whether further legislative action need be taken. *Id.*

<sup>159</sup> *See generally* K. KIPNIS, PHILOSOPHICAL ISSUES IN LAW 280-96 (1977).

<sup>160</sup> LaGoy, Senna & Siegal, *supra* note 150, at 436-37.

initial charge brought by the prosecutor, so in cases where a bargain is struck before any charges are filed, there is no judicial supervisor preventing undesirable reduction of a charge.<sup>161</sup> The authors of one major study concluded:

[T]he major impression with which one is left is that of prosecutorial individuality. This is certainly consistent with traditional predictions of wide prosecutorial discretion. But the degree to which information selection, sorting and weighing vary even within the same office tends to confirm the worse fears of critics—that equal defendants will receive unequal treatment from prosecutors seated at opposite sides of the same desk.<sup>162</sup>

Furthermore, prosecutorial misconduct in this process will frequently go undetected and unpunished, much as in the diversion decisions.<sup>163</sup> In many cases, the bargained plea, and not the process, becomes an end in itself, defeating the goal of individualized justice in the name of expediency.<sup>164</sup> Critics have charged that permitting prosecutors to engage in plea bargaining has certain inherent dangers and problems: (1) misunderstandings between the prosecutor and the defendant which are dangerous and difficult to prove and rectify;<sup>165</sup> (2) secret bargaining talks which hamper public awareness of the justice system;<sup>166</sup> (3) contempt on the part of criminals for a system of justice in which they can negotiate and get off easily;<sup>167</sup> (4) a chilling effect which makes innocent defendants fear trial because judges are more lenient in sentencing those who plead guilty in comparison to those who were found guilty;<sup>168</sup> (5) overcharging defendants with the intent of bargaining down to the crime prosecutors feel is really at issue;<sup>169</sup> and (6) coercion of guilty pleas.<sup>170</sup> Moreover, nobody knows the actual manner in which the prosecutor comes to a decision about disposing of a case.<sup>171</sup>

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<sup>161</sup> K. KIPNIS, *supra* note 159, at 281.

<sup>162</sup> See generally Thomas, *supra* note 10.

<sup>163</sup> Cox, *supra* note 1, at 428.

<sup>164</sup> Bubany & Skillern, *supra* note 2, at 482.

<sup>165</sup> Cox, *supra* note 1, at 429. See also Note, *Legitimation of Plea Bargaining: Remedies for Broken Promises*, 11 AM. CRIM. L. REV. 771, 780-82 (1973).

<sup>166</sup> Cox, *supra* note 1, at 429; see also Note, *Plea Bargaining: The Case for Reform*, *supra* note 158, at 328.

<sup>167</sup> Cox, *supra* note 1, at 429.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* See also LeFave, *supra* note 5, at 535-36; Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 111 (1968).

<sup>170</sup> LaGoy, Senna & Siegel, *supra* note 150, at 435. See also *People v. Byrd*, 12 Mich. App. 186, 162 N.W.2d 777 (1968) (Levin, J., concurring). The arguments in favor of permitting the practice correspond to the arguments put forth to justify prosecutorial discretion generally, with the additional considerations that rehabilitative goals are furthered by the defendant's admission of guilt and that deterrence and respect for the criminal justice system are enhanced by the certainty and promptness of punishment associated with plea bargaining. ABA STANDARDS, *supra* note 6, at 299-301.

<sup>171</sup> LaGoy, Senna & Siegel, *supra* note 150, at 437. The amount, type and quality of infor-

Few guidelines were available to federal prosecutors prior to the issuance of the *Principles of Federal Prosecution*,<sup>172</sup> and virtually none exist for local and state prosecutors.<sup>173</sup>

The Justice Department guidelines provide that the prosecutor may, in an "appropriate" case, enter into an agreement conditioned upon the defendant's plea of guilty or *nolo contendere* to a charged offense; i.e. the prosecutor may agree to move for dismissal of other charges or take a certain position with respect to the sentence to be imposed.<sup>174</sup> The American Bar Association Standards define "appropriate" as "cases in which it appears that the interest of the public in the effective administration of criminal justice would thereby be served . . . ."<sup>175</sup>

The *Principles of Federal Prosecution* suggest in more detail eleven considerations to be weighed by the prosecutor in determining whether to enter into a plea agreement. Rule D(2) provides:

In determining whether it would be appropriate to enter into a plea agreement, the attorney for the government should weigh all relevant considerations, including:

- (a) the defendant's willingness to cooperate in the investigation or prosecution of others;
- (b) the defendant's history with respect to criminal activity;

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mation used to reach the agreement is seldom analyzed; furthermore, it is unclear whether differences exist between jurisdictions or among prosecutors within a single jurisdiction. *Id.* The President's Commission called plea bargaining an "invisible procedure," and stated that "neither the dignity of the law, nor the quality of justice, nor the protection of society from dangerous criminals is enhanced by it being conducted covertly." PRESIDENT'S COMM'N, *supra* note 1, at 78. Another commentator noted that

The defendant's interest in receiving as low a sentence as possible and the prosecutor's interest in maintaining a steady flow of guilty pleas . . . can easily merge into agreement upon a guilty plea in return for a sentence that is meaningless in terms of the defendant's offense and his need for treatment or control.

K. KIPNIS, *supra* note 159, at 285.

For comprehensive studies on what factors influence prosecutorial decision-making, see D. NEWMAN, *CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL* 8 (1966); Kaplan, *supra* note 9; LaGoy, Senna & Siegel, *supra* note 150.

<sup>172</sup> See Kaplan, *supra* note 9; White, *supra* note 156, at 465. White concluded that the lack of any concrete policy as to how prosecutorial decisions are made in U.S. Attorney's offices tends to produce differential handling of similarly charged defendants, and called for the early development of clearly defined plea bargaining policies.

<sup>173</sup> One notable exception is the development of standardized procedures in Bronx County, New York. See generally Merola, *supra* note 56, at 255-58.

<sup>174</sup> DEP'T OF JUSTICE, *supra* note 9, at Part D(1) (emphasis added). The function of a prosecutor's discretion to charge and to dismiss includes his discretion to engage in plea bargaining. Cox, *supra* note 1, at 425. The Supreme Court declared this particular discretion power both constitutional, citing *Brady v. United States*, 397 U.S. 742 (1970), and desirable.

The Department of Justice distinguished such negotiated dispositions from situations in which a defendant pleads guilty or *nolo contendere* to fewer than all counts of an information or indictment in the absence of any agreement with the government. DEP'T OF JUSTICE, *supra* note 9, at Part D(1) comment.

<sup>175</sup> ABA STANDARDS, *supra* note 6, Pleas of Guilty Standard 3.1.

- (c) the nature and seriousness of the offense or offenses charged;
- (d) the defendant's remorse or contrition and his willingness to assume responsibility for his conduct;
- (e) the desirability of prompt and certain disposition of the case;
- (f) the likelihood of obtaining a conviction at trial;
- (g) the probable effect on witnesses;
- (h) the probable sentence or other consequences if the defendant is convicted;
- (i) the public interest in having the case tried rather than disposed of by a guilty plea;
- (j) the expense of trial and appeal; and
- (k) the need to avoid delay in the disposition of other pending cases.<sup>176</sup>

The government then adds that this provision does not suggest the desirability or lack of desirability of a plea agreement in any particular case.<sup>177</sup> Nor does the listing of considerations reflect the merits of any plea agreement that actually may be reached;<sup>178</sup> its purpose is "solely to assist attorneys for the government in exercising their judgment as to whether some sort of plea agreement would be appropriate in a particular case."<sup>179</sup>

No directive for uniformity exists in this watered-down assistance guideline. Without supplemental guidelines, standardization of the plea bargaining process is virtually impossible. Measurable criteria and sanctions for deviating from these criteria are mandatory. Although flexibility is a necessary component of the process, perhaps to a greater extent than in any other facet of prosecutorial decision-making, the Justice Department refuses to even suggest the desirability or lack thereof of situations based upon these eleven criteria.<sup>180</sup> State and local guidelines must avoid hedging on the critical issue of inconsistent and improper

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<sup>176</sup> DEP'T OF JUSTICE, *supra* note 9, at Part D(2).

<sup>177</sup> *Id.* at Part D(2) comment. According to Cox, there are a number of additional factors which encourage rather than limit the use of plea bargaining techniques by prosecutors, making a plea bargain more desirable in a given case. She lists the pressure of a heavy case load, the desire to win; i.e., to get some kind of conviction even if for a lesser offense, the prosecutor's need to get along with other members of the criminal justice system, and the desire to mitigate penalties considered too harsh for a particular crime, defendant, or set of circumstances. Cox, *supra* note 1, at 425-26.

<sup>178</sup> DEP'T OF JUSTICE, *supra* note 9, at Part D(2) comment.

<sup>179</sup> *Id.*

<sup>180</sup> The Bronx County District Attorney's office departed completely from traditional plea bargaining procedures to ensure internal consistency and decrease external pressures on the individual prosecutors. Whenever an indictment is secured in Bronx County, the entire case is sent directly to an innovative Plea Recommendation Board. The Board consists of experienced prosecutors who control the key functions which occur at each of the critical stages in the development of a case; thus, each case is scrutinized by specialists who consider every aspect of the case and assign the appropriate weight to every fact and circumstance relevant to the crime. Merola, *supra* note 56, at 256.

bargains and address the problem through comprehensive and detailed guidelines.

Section 1.8 of the American Bar Association Standards provides the following more elaborate considerations in determining the public interest:

(i) that the defendant by his plea has aided in ensuring the prompt and certain application of correctional measures to him;

(ii) that the defendant has acknowledged his guilt and shown a willingness [to] assume responsibility for his conduct;

(iii) that the concessions will make possible alternative correctional measures which are better adapted to achieving rehabilitative, protective, deterrent or other purposes of correctional treatment, or will prevent undue harm to the defendant from the form of conviction;

(iv) that the defendant has made public trial unnecessary when there are good reasons for not having the case dealt with in a public trial;

(v) that the defendant has given or offered cooperation when such cooperation has resulted or may result in the successful prosecution of other offenders engaged in equally serious or more serious criminal conduct;

(vi) that the defendant by his plea has aided in avoiding delay (including delay due to crowded dockets) in the disposition of other cases and thereby certain application of correctional measures to other offenders.<sup>181</sup>

Unlike the American Bar Association Standards above and the *Principles of Federal Prosecution*, the National Advisory Commission's recommendation specifically says that the statement of policies should provide that a prosecutor may not consider weaknesses in his case in determining whether to permit a defendant to plead guilty to any offense other than that charged.<sup>182</sup> Despite its antagonism to the plea bargaining process in general, the Commission recommends that attorneys engaged in plea negotiations consider the following:

(1) The impact that a formal trial would have on the offender and those close to him, especially the likelihood and seriousness of financial hardship and family disruption;

(2) The role that a plea and negotiated agreement may play in rehabilitating the offender;

(3) The value of a trial in fostering the community's sense of security and confidence in law enforcement agencies; and

(4) The assistance rendered by the offender;

(a) in the apprehension or conviction of other offenders;

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<sup>181</sup> ABA STANDARDS, *supra* note 6, Pleas of Guilty Standard 1.8.

<sup>182</sup> NAC: COURTS, *supra* note 49, Standard 3.3.

- (b) in the prevention of crimes by others;
- (c) in the reduction of the impact of the offense on the victim; or
- (d) in any other socially beneficial activity.<sup>183</sup>

In evaluating whether a particular plea agreement should be concluded, the *Principles of Federal Prosecution* provide the prosecutor with four criteria to guide his decision. These include whether the charge which the defendant will plead bears a reasonable relationship to the nature and extent of his criminal conduct, has an adequate factual basis, makes likely the imposition of an appropriate sentence under all the circumstances of the case, and does not adversely affect the investigation or prosecution of others.<sup>184</sup> The *Principles* further caution the government attorney to avoid "Alford" pleas, i.e. guilty pleas entered by defendants who nevertheless claim to be innocent,<sup>185</sup> stating that the attorney should avoid such pleas except in the most unusual circumstances despite their constitutional validity.<sup>186</sup>

The guidelines put forth by the Justice Department, like the American Bar Association Standards,<sup>187</sup> fail to raise the visibility of the plea negotiation process and the administrative decisions made within it.<sup>188</sup> To meet this deficiency, guidelines must recognize the factors underlying decisions and set these factors out. The Justice Department guidelines fail to lay down such explicit standards. The *Principles of Federal Prosecution* do not specify the alleged crimes in which charge reductions or sentence concessions may follow in return for the defendant's assistance, a necessary component of a comprehensive policy statement.<sup>189</sup> The guidelines also fail to standardize the permissible reduced charges or reduced sentence recommendations.<sup>190</sup> Local office policy, as expli-

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<sup>183</sup> *Id.*

<sup>184</sup> DEP'T OF JUSTICE, *supra* note 9, at 27.

<sup>185</sup> In *North Carolina v. Alford*, 400 U.S. 25 (1970), the Supreme Court held that the Constitution does not prohibit a court from accepting a guilty plea accompanied by a claim of innocence from a defendant so long as the plea is entered voluntarily and intelligently and there is a strong factual basis for it.

<sup>186</sup> DEP'T OF JUSTICE, *supra* note 9, at Part D(4) comment. The guidelines require the approval of the responsible assistant attorney general for *Alford* plea agreements. The Justice Department cites the court in *United States v. Bednarski*, 445 F.2d 364, 366 (1st Cir. 1971), saying "the public might well not understand or accept the fact that a defendant who denied his guilt was nonetheless placed in a position of pleading guilty and going to jail." However, at least one court has concluded that it is an abuse of discretion to refuse to accept a guilty plea solely because the defendant does not admit the alleged facts of the crime. *United States v. Gaskins*, 485 F.2d 1046, 1048 (D.C. Cir. 1973), and the guidelines note that consequently, apart from refusing to enter into a plea agreement, the degree to which the Department can express its opposition to *Alford* pleas may be limited. DEP'T OF JUSTICE, *supra* note 9, at 31.

<sup>187</sup> LaGoy, Senna & Siegel, *supra* note 150, at 463.

<sup>188</sup> *Id.*

<sup>189</sup> Thomas & Fitch, *supra* note 10, at 549.

<sup>190</sup> *Id.*



cated in the guidelines, should designate those charges which will not be reduced or negotiated under any circumstances.<sup>191</sup>

Furthermore, the federal guidelines lack adequate sanctions and quality control mechanisms to provide consistency in discretionary decision-making. For example, one controversial<sup>192</sup> proposal suggests the need for additional procedures to ensure that disposition of negotiated pleas is in fact the joint effort of prosecutor and judge.<sup>193</sup>

Finally, if a prosecution is to be terminated pursuant to a plea agreement, the *Principles of Federal Prosecution* instruct prosecutors to see that the case file contains a record of the agreed disposition, signed by the defendant or his attorney.<sup>194</sup> Unlike Standard 1.7 of the American Bar Association Standards for Plea Bargaining,<sup>195</sup> the guidelines do not require a verbatim record of the proceedings on file where the defendant enters such a plea.<sup>196</sup> Nor do the guidelines require general disclosure of the plea arrangements before acceptance of the plea.<sup>197</sup>

With certain enumerated exceptions, the guidelines permit the government prosecutor to enter into a non-prosecution agreement in exchange for a person's cooperation when, in his judgment, the person's timely cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would be ineffective.<sup>198</sup> The guidelines list three considerations in determining whether the public interest requires a person's cooperation: the importance of the investigation or prosecution to an effective program of law enforcement, the value of the person's cooperation to the investigation or prosecution, and the person's relative culpability in connection with the offense or offenses being investigated or prosecuted along with his history with respect to criminal activity.<sup>199</sup>

Although the latter two considerations appear to require greater

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<sup>191</sup> *Id.*

<sup>192</sup> Bubany & Skillern, *supra* note 2, at 502.

<sup>193</sup> *Id.* Additionally a complete file expounding upon all bases of consideration, should be available to the court upon request. *Id.*

<sup>194</sup> DEP'T OF JUSTICE, *supra* note 9, at Part D(4) comment. This is to facilitate compliance with Rule 11 of the Federal Rules of Criminal Procedure which requires that a plea agreement be disclosed in open court and that the disposition provided for in the agreement be embodied in the judgment and sentence.

<sup>195</sup> ABA STANDARDS, *supra* note 6, Pleas of Guilty Standard 1.7.

<sup>196</sup> DEP'T OF JUSTICE, *supra* note 9.

<sup>197</sup> Cox lists a number of circuits which demand general disclosure of the plea arrangements before accepting the plea, but notes that the disclosure is limited and the unfettered discretionary powers of the prosecutor remain untouched. Cox, *supra* note 1, at 429 n.263.

<sup>198</sup> DEP'T OF JUSTICE, *supra* note 9, at Part F(1). The prosecutor must obtain approval from the United States Attorney or a supervisory assistant United States Attorney. *Id.* at Part F(1) comment.

<sup>199</sup> *Id.* at Part F(2). The listed considerations, however, are not intended to be all-inclusive or to require a particular decision in a particular case.

prosecutorial individualization in decision-making, the first consideration clearly requires more stringent direction by a state or local policymaker.<sup>200</sup> The guidelines recognize that the primary function of a prosecutor is to enforce the criminal law, and therefore the prosecutor should not routinely or indiscriminately enter into agreements not to enforce the law under particular conditions, but they fail to outline precisely what the conditions are.<sup>201</sup>

Again, the guidelines direct the prosecutor to place a memorandum or other written record of the non-prosecution agreement in the case file.<sup>202</sup> While one of the purposes of this record is to facilitate identification by government attorneys of persons whom the government has agreed not to prosecute,<sup>203</sup> this does not eliminate disparity in decisions unless all the attorneys in a particular jurisdiction inform themselves on acceptable practices and general policy decisions.

#### PARTICIPATING IN SENTENCING

The prosecutor has discretion to make bail and sentence recommendations to the judge, who may ignore the recommendations in reaching the ultimate decision.<sup>204</sup> According to the National District Attorneys Association, the prosecutor's greatest impact on sentencing lies in the area of plea negotiation.<sup>205</sup> Although the distinction between plea or sentence negotiation and sentence recommendation after trial is significant, the former may be viewed as a legitimate precedent to the latter.<sup>206</sup> The Association notes that plea negotiation carries benefits beyond mere expediency in that it allows some control over excessive or inappropriate sentencing limitations,<sup>207</sup> such as narcotics laws.<sup>208</sup> The American Bar Association Standards also recognize the effect of plea negotiation on sentencing and find that "it is generally appropriate for

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<sup>200</sup> See text accompanying note 108 *supra*.

<sup>201</sup> DEP'T OF JUSTICE, *supra* note 9, at Part F(2) comment. The Department merely notes that the relative importance or unimportance of the contemplated case is a significant threshold consideration. *Id.*

<sup>202</sup> *Id.* at Part F(5). "The memorandum or record should be signed or initialed by the person with whom the agreement is made or his attorney, and a copy should be forwarded to the Witness Record Unit of the Criminal Division." *Id.*

<sup>203</sup> *Id.* at Part F(5) comment.

<sup>204</sup> Cox, *supra* note 1, at 430.

<sup>205</sup> NATIONAL PROSECUTION STANDARDS, *supra* note 6, at 290. These studies include prosecutors at all levels of government. See also Teitelbaum, *The Prosecutor's Role in the Sentencing Process: A National Survey*, 1 AM. J. CRIM. L. 75 (1972).

<sup>206</sup> NATIONAL PROSECUTION STANDARDS, *supra* note 6, at 290.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* The Association notes, for example, that a twenty year mandatory minimum sentence for narcotic sales is uniformly considered too severe by judges and prosecutors, resulting in a reduction of sales offenses to possession or use of narcotics.

the prosecutor to make a recommendation . . . where he has committed himself to the defendant as a part of negotiations leading to a plea,' because 'the existence and terms of an agreement are highly relevant to the sentencing decision.'"<sup>209</sup>

The *Principles of Federal Prosecution*, which, like the American Bar Association Standards, generally discourage prosecutorial sentencing recommendations, direct the prosecuting attorney to recommend the sentence imposed when the terms of a plea agreement require him to do so or when doing so is in the "public interest."<sup>210</sup> In considering the public interest question, the guidelines instruct the prosecutor to bear in mind the attitude of the court toward government sentencing recommendations, and to weigh the desirability of maintaining a clear separation of judicial and prosecutorial responsibilities against the value of prosecutorial input into the decision.<sup>211</sup> The National Advisory Commission, on the other hand, states that in making sentence recommendations, a prosecutor should not consider whether a defendant entered a plea of guilty to the charge or to a lesser offense than that initially charged.<sup>212</sup> The Justice Department only tells the attorneys to be "guided by the circumstances of the case and the wishes of the court concerning the manner and form in which sentencing recommendations are made."<sup>213</sup> There is little concrete guidance as to when the public interest warrants such an expression of what the government's view may be, stating merely that it is a matter "to be determined with care, preferably after consultation between the prosecutor handling the case and his supervisor."<sup>214</sup>

The Justice Department warns the prosecutor that "by offering a recommendation, he shares with the court the responsibility for avoiding unwarranted sentence disparities among defendants with similar backgrounds who have been found guilty of similar conduct."<sup>215</sup> Nowhere do the guidelines outline such patterns, though; a ranking of prosecutorial priorities for various crimes generally does not appear.

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<sup>209</sup> *Id.* (citing ABA STANDARDS, *supra* note 6, at 245).

<sup>210</sup> DEP'T OF JUSTICE, *supra* note 9, at Part G(3). The guidelines do require the prosecutor to cooperate with the Probation Service in its preparation of the presentence investigation report, review material in the presentence investigation report that is disclosed by the court to the defendant or his attorney, and make a factual presentation to the court when: (i) sentence is imposed without a presentence investigation and report; (ii) it is necessary to supplement or correct the presentence investigation report; (iii) it is necessary in light of the defense presentation to the court; or (iv) the court requests it, and be prepared to substantiate significant factual allegations disputed by the defense. *Id.*

<sup>211</sup> *Id.* at Part G(3) comment.

<sup>212</sup> NAC: COURTS, *supra* note 49, Standard 3.8.

<sup>213</sup> DEP'T OF JUSTICE, *supra* note 9, at Part G(3) comment.

<sup>214</sup> *Id.*

<sup>215</sup> DEP'T OF JUSTICE, *supra* note 9, at Part G(4) comment.

While it is essential to bear in mind that an overly rigid sentencing structure, particularly one which attempts to set the sentence prior to the commission of the crime, may go too far in meeting this problem,<sup>216</sup> the individual factors necessary to a rational decision can still be accounted for with a more specific and elaborate guideline. This is particularly true at the local level. Consideration of individual factors with no standardization of the value of each characteristic ignores not only the interests of equality under the law, but may also result in discrimination against those defendants from the lowest socio-economic levels of society.<sup>217</sup> The Department of Justice's guidelines do not contain any criteria for comparability of sentencing, nor do they provide guidance as to what should be recommended.<sup>218</sup> For example, one commentator suggests establishing two permutations of burglary, providing a one-year sentence for simple burglary, and two years for aggravated burglary (weapons, night, etc.). He further suggests adding a one-year increase for each previous serious felony of which a defendant had been convicted and graduated reductions, based upon certain personal factors such as age or mental condition, or pressure of circumstances.<sup>219</sup>

The National District Attorneys Association contends that the prosecutor's participation in sentence recommendation benefits both the court and the public. The prosecutor reflects the victim's point of view, thereby equalizing the defense counsels' recommendations,<sup>220</sup> and bringing about more informed sentencing. However, the Association concedes that "[t]hose who oppose the prosecutor's participation in sentence recommendation are rightfully concerned with the potential threat of distortion resulting from his adversary role and his invasion

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<sup>216</sup> ABA STANDARDS, *supra* note 6, at 339-40. An overly rigid framework leads to nullification of the law in that prosecutors, judges, and juries will consequently ignore the law to ensure a just result. The Model Sentencing Act explicitly rejects sentencing according to the particular offense, for example. NATIONAL COUNCIL ON CRIME AND DELINQUENCY, ADVISORY COUNCIL OF JUDGES, MODEL SENTENCING ACT 2 (2d ed. 1972). See also Kaplan, *supra* note 9, at 188.

<sup>217</sup> Bayley, *Good Intentions Gone Awry—A Proposal for Fundamental Change in Criminal Sentencing*, 51 WASH. L. REV. 529, 537 (1976).

<sup>218</sup> See generally D.E. AARONSON, *supra* note 122, at 117. One commentator hopelessly concluded that it is "impossible to arrive at an objectively 'correct' and consistent system for sentencing recommendations, charging that even the thirty-five specific criteria set forth in the NATIONAL PROSECUTION STANDARDS, *supra* note 6, provide little practical assistance in assigning weights to all of the factors and their infinite numbers of combinations. Kavanaugh, *supra* note 8, at 646.

<sup>219</sup> Vorenberg, *supra* note 6, at 662-63. Although the example as given applies to judges, the criteria are equally applicable to prosecution recommendations. So does the author's warning that the "practical difficulties of making rules in advance for each of these situations does not lead to the conclusion that judges should be given authority to weigh all the facts and fix the punishment between the least and most serious variations." *Id.* at 662.

<sup>220</sup> NATIONAL PROSECUTION STANDARDS, *supra* note 6, at 291.

upon the judicial prerogative."<sup>221</sup> A prosecutor should avoid pretending greater power than he possesses to influence the disposition of a case,<sup>222</sup> and the American Bar Association Standards additionally caution the prosecutor that "the severity of the sentence is not necessarily an indication of the effectiveness or the efficiency of his office."<sup>223</sup>

Although there is scant evidence that prosecutorial sentence recommendation directly contributes to sentencing's major goal of rehabilitation,<sup>224</sup> the Association justifies its Standard 18.1 on the prosecutor's role in sentencing<sup>225</sup> as a reflection of "prosecutors' desires to continue to exercise their discretionary power and to be able to participate as effectively as possible in the criminal justice system,"<sup>226</sup> adding that "[t]o those who fear distortion or invasion or imbalance, there remains the assurance of the judge's correlative discretion and the prosecutor's option to refrain from recommendation altogether."<sup>227</sup>

According to one commentator, there is no simple way to restore significance and accountability to the decisions of a prosecutor to either make recommendations or promise not to say anything to the judge.<sup>228</sup> However, she suggests that development of reasoned guidelines to provide consistency in similar factual situations might help to "bring . . . rationality and accountability to such decision-making processes."<sup>229</sup> The Justice Department guidelines, which direct the prosecutor to weigh "all relevant considerations," including the seriousness of the defendant's conduct, the defendant's background and personal circumstances, the purpose or purposes of sentencing applicable to the case and the extent to which a particular sentence would serve such purpose or purposes,<sup>230</sup> do not go far enough to provide this necessary and desirable consistency. The examples provided in the official comment to Rule G(3) of the *Principles of Federal Prosecution* allow the prosecutor to proceed with recommendations for leniency or harshness, with or without an invitation or request by the court to do so.<sup>231</sup> The two hypothetical examples, void of specific factual background, do not provide the "reasoned"

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<sup>221</sup> *Id.*

<sup>222</sup> See generally *id.* at Sentencing Alternatives and Procedures.

<sup>223</sup> *Id.* at Sentencing Alternatives & Procedures, Standard 5.3.

<sup>224</sup> *Id.* See also Teitelbaum, *supra* note 205, at 82-83.

<sup>225</sup> NATIONAL PROSECUTION STANDARDS, *supra* note 6, at Standard 18.1. The standard basically upholds the prosecution's option to make sentence recommendations.

<sup>226</sup> *Id.* at 292.

<sup>227</sup> *Id.*

<sup>228</sup> Cox, *supra* note 1, at 431.

<sup>229</sup> *Id.*

<sup>230</sup> DEP'T OF JUSTICE, *supra* note 9, at Part G(4).

<sup>231</sup> *Id.* This is qualified by the statement that the primary responsibility for sentencing lies with the judiciary, and government attorneys should therefore avoid routinely taking positions with respect to sentencing.

guidelines necessary for the evenhanded application of justice by local prosecutors.

#### CONCLUSION

Local prosecutors undoubtedly have extensive opportunity to abuse their far reaching discretion. Ultimately, of course, the individual integrity of each prosecutor determines the quality of criminal justice as applied to American citizens. While it is hoped that the media, the public, and administrative safeguards within each prosecutorial system monitor deliberate deviations from standardized forms of procedure and acceptable conduct, the achievement of this goal is unfortunately still debated. It is less debatable that the inadvertent deviations, those which result from inadequate direction and a lack of understanding as to what is viewed as appropriate by other prosecutors within the system, permeate local and state prosecutorial offices. The formulation and issuance of detailed and comprehensive guidelines can correct unintentional discrepancies in the treatment of defendants. As once commentator noted, "[n]arrowing the scope of discretion so that it is no broader than the ability to make intelligent individualized judgments would provide a setting in which major improvements in criminal administration could take place."<sup>232</sup> While each community must develop policies and procedures designed to meet the specific goals and needs of a unique locality or state, a general model would avoid needless duplication of effort if every community had to start from scratch. Unfortunately, the *Principles of Federal Prosecution* do not provide such a model and serve only as a very limited starting point for the development of much needed state and local guidelines.

While the guidelines proposed by the different professional organizations, which were promulgated prior to the release of the federal guidelines, contain many of the same deficiencies as the *Principles of Federal Prosecution*, the Justice Department had a unique opportunity to benefit from the hours of experience and discussion behind earlier proposals, to overcome their deficiencies, and to issue an innovative and comprehensive set of rules. The guidelines fail to meet this challenge because they provide inadequate sanctions, overbroad generalizations and non-specific hypotheticals. Authors of the rules may feel that the supplementary direction provided to federal prosecutors compensate for these deficiencies. Yet these additional resources are generally unpublicized and generally unavailable. While the title of the guidelines implies that it only includes broad and sweeping principles of basic prosecutorial considerations and is therefore technically not deceiving,

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<sup>232</sup> Vorenberg, *supra* note 6, at 652.

the government bypassed an excellent opportunity to issue explicit concrete rules and priorities and thus quell criticisms of prosecutorial abuse of discretion. Unfortunately, the guidelines alone do not further the evenhanded administration of justice and thus are not useful. At most, they merely advise the novice of basic criteria to take into account in prosecuting crimes.

Many commentators attribute state and local prosecutors' reluctance to develop internal guidelines to the fear that courts will require prosecutors to actually adhere to the rules.<sup>233</sup> The federal prosecutors are no exception. The *Principles of Federal Prosecution* state, for example,

This statement of principles has been developed purely as a matter of internal Departmental policy and is being provided to federal prosecutors solely for their own guidance in performing their duties. Neither this statement of principles nor any internal procedures adopted by individual offices pursuant hereto creates any rights or benefits.<sup>234</sup>

It does not seem unreasonable, however, for administrators to want their agencies to follow internally promulgated rules.<sup>235</sup>

The stated purpose of the Justice Department guidelines<sup>236</sup> is met only in part. Although the publication of the guidelines is commendable for formalizing previously unpublicized practices and policies, it alone does not come close to ensuring fair and effective responsibility by prosecuting attorneys. Too many gaps remain to foreclose disparate treatment of similarly situated defendants, and these gaps should not be duplicated by state, county, and city prosecutors formulating their own guidelines. While the guidelines may promote confidence on the part of the public and individual defendants that decisions will be made rationally on the merits of each case, they provide no assurance of objectivity. Safeguards and accountability are essential and must be added to ensure credibility and practicality at the state and local levels.

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<sup>233</sup> For example, in *Billiteri v. United States Bd. of Parole*, 400 F. Supp. 402 (W.D.N.Y. 1975), the court interpreted and forced the Board to adhere to the Parole Board Guidelines.

<sup>234</sup> DEP'T OF JUSTICE, *supra* note 9, at Part A(5) comment.

<sup>235</sup> Bayley, *supra* note 217, at 560 n.109.

<sup>236</sup> See text accompanying note 42 *supra*.