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Disciplinary Regulation of Prosecutorial Discretion: What Would a Rule Look Like?

Samuel J. Levine*

Abstract

This Essay is the third part of a larger project examining the potential role of professional discipline in the regulation and supervision of prosecutors' charging decisions. The first two parts of the project argued that courts have both the authority and the ability to exercise effective disciplinary review of charging decisions through the adoption of ethics rules and their enforcement in the disciplinary process. This Essay takes the next step in the project, considering the nature of rules that courts might adopt, by exploring potential rules targeting two improprieties: arbitrary and capricious charging decisions, and discriminatory charging decisions.

I. INTRODUCTION

This Essay is the third part of a larger project exploring the possibility that disciplinary review of prosecutors' charging decisions—through both expansive judicial interpretation of current ethics rules and judicial enactment and enforcement of more extensive ethics rules—might serve as a viable and effective mechanism for meaningful regulation and supervision of prosecutorial discretion.¹

The first part of this project, developed in an article co-authored with Bruce Green, responded to a common assumption among scholars that professional

* Professor of Law and Director of the Jewish Law Institute, Touro Law Center. Earlier versions of this Essay were presented at the Criminal Justice Ethics Schmooze, hosted at New York Law School and at Brooklyn Law School. I thank the organizers and participants for helpful comments, and I thank Bruce Green for his thoughtful guidance and collaboration throughout this project. Finally, I thank Bruce, Ellen Yaroshefsky, and Peter Joy for inviting me to contribute to this symposium issue dedicated to Bennett Gershman. I appreciate Ben's pioneering scholarship and personal friendship, and I am honored to participate in this symposium.

¹ This project aims to contribute to the continuing efforts to identify and suggest remedies for various forms of prosecutorial misconduct, documented for decades by Ben Gershman and others. Ben's treatise, BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT, which he regularly updates, first appeared in 1985.

Much of the scholarship in this area focuses on the enormous power prosecutors wield in the charging decision, and the ongoing problem of abuse of charging discretion. See, e.g., BENNETT L. GERSHMAN, PROSECUTION STORIES (2017); Bennett L. Gershman, *Prosecutorial Decisionmaking and Discretion in the Charging Function*, 62 HASTINGS L.J. 1259, 1260 (2011) ("A prosecutor's charging decision is the heart of the prosecution function . . . [T]he prosecutor's charging decision involves an enormous exercise of power . . . [and] that power is virtually unreviewable."); Bennett L. Gershman, *Prosecutorial Ethics and Victims' Rights: The Prosecutor's Duty of Neutrality*, 9 LEWIS & CLARK L.

discipline is not a viable means of regulating prosecutors' charging discretion.² In particular, influenced by federal constitutional decisions, many scholars seem to accept the premise that principles of separation of powers preclude state courts from regulating prosecutors' charging decisions.³ Relying on a close examination of state

REV. 559, 563 (2005) (describing the "prosecutor's enormous power over people's lives, liberty, and reputations, as well as the limited checks on a prosecutor's discretion"); Bennett L. Gershman, *The Most Dangerous Power of the Prosecutor*, 29 PACE L. REV. 1, 27 (2008) [hereinafter Gershman, *The Most Dangerous Power*] ("I have used this lecture to examine the role of the prosecutor in the charging process. The cases I have discussed reveal an abuse of the prosecutor's charging power that, considered collectively, is unprecedented in U.S. criminal jurisprudence."); Bennett L. Gershman, *The Most Fundamental Change in the Criminal Justice System: The Role of the Prosecutor in Sentence Reduction*, 5 CRIM. JUST. Fall 1990, at 2, 3 ("As every lawyer knows, the prosecutor is the most powerful figure in the American criminal justice system In carrying out this broad decision-making power, the prosecutor enjoys considerable independence."); Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 393 (1992) ("The power and prestige of the American prosecutor have changed dramatically over the past twenty years First, prosecutors wield vastly more power than ever before. Second, prosecutors are more insulated from judicial control over their conduct. Third, prosecutors are increasingly immune to ethical restraints."); Bennett Gershman, *The Prosecutor's Duty of Silence*, 79 ALB. L. REV. 1183 (2016) [hereinafter Gershman, *The Prosecutor's Duty of Silence*].

See also ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 143–61 (2007) [hereinafter DAVIS, *ARBITRARY JUSTICE*]; KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (Louisiana State University Press) (1969); Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 408 (2001) [hereinafter Davis, *The American Prosecutor*] ("The charging decision is arguably the most important prosecutorial power and the strongest example of the influence and reach of prosecutorial discretion."); Peter A. Joy, *Prosecution Clinics: Dealing with Professional Role*, 74 MISS. L.J. 955, 956 (2005) ("Extensive power, largely uncontrolled discretion, and the need to reign in partisan advocacy are three overarching issues implicit in the role of prosecutors."); Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 408 (2006) ("Prosecutors wield enormous power in the criminal justice system. They decide whom to prosecute and what crimes to charge. They chart pretrial and trial strategies. And they decide, or at least greatly influence, what the sentence will be through charging decisions, plea-bargaining, or sentencing guideline choices."); Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. REV. 669, 678–82 (1992); Mitchell Stephens, *Ignoring Justice: Prosecutorial Discretion and the Ethics of Charging*, 35 N. KY. L. REV. 53 (2008); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1525 (1981) ("[T]here are good reasons to see prosecutors' virtually unlimited control over charging as inconsistent with a system of criminal procedure fair to defendants and to the public.").

² See Bruce A. Green & Samuel J. Levine, *Disciplinary Regulation of Prosecutors as a Remedy for Abuses of Prosecutorial Discretion: A Descriptive and Normative Analysis*, 14 OHIO ST. J. CRIM. L. 143 (2016). For some of Bruce Green's more recent thoughts on these issues, see, e.g., Bruce A. Green, *Prosecutorial Ethics in Retrospect*, 30 GEO. J. LEGAL ETHICS 461 (2017); Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51 (2016).

³ See, e.g., Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 977–78 (2009) ("Separation-of-powers concerns can also make bar authorities hesitate to intrude upon prosecutors' province."); Davis, *The American Prosecutor*, *supra* note 1, at 412–15; Ellen S. Podgor, *Race-ing Prosecutors' Ethics Codes*, 44 HARV. C.R.-C.L. L. REV. 461, 462–64 (2009); Anne Bowen Poulin, *Prosecutorial Discretion and Selective Prosecution: Enforcing Protection After United States v. Armstrong*, 34 AM. CRIM. L. REV. 1071, 1119 (1997); Vorenberg, *supra* note 1, at 1546 ("Courts often justify their refusal to review prosecutorial discretion on the ground

law, the article found that state courts often exercise broader authority than federal courts in setting and enforcing standards governing prosecutors' charging decisions.⁴ Indeed, as both a descriptive matter and a normative matter, in many states courts review prosecutors' charging decisions, through criminal adjudication as well as through the application and adoption of ethics rules.⁵

The second part of the project, developed in a brief essay,⁶ considered the potential utility of disciplinary regulation as a remedy for abuses of prosecutorial discretion. The essay analyzed whether, in comparison with other suggested approaches, disciplinary regulation might be a more appropriate response to the problem of abuse of prosecutorial power.⁷ The essay concluded that judicial supervision of prosecutors, through the disciplinary process, may not be vulnerable to some of the objections that have been leveled against other proposals, and thus may prove to be a preferable and more effective alternative.⁸

that separation-of-powers concerns prohibit such review.”); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 761 (2001) (“[A]uthorities may sense a real separation of powers issue On occasion, prosecutors have directly raised the claim that the application of particular professional rules to them violates the principle of separation of powers.”).

⁴ See Green & Levine, *supra* note 2, at 166–77. For other recent studies, *see, e.g.*, Valena E. Beety, *Judicial Dismissal in the Interest of Justice*, 80 MO. L. REV. 629 (2015); Darryl K. Brown, *Judicial Power to Regulate Plea Bargaining*, 57 WM. & MARY L. REV. 1225, 1234 (2016) (“sketch[ing] some of the history of executive authority over criminal charging to make the case that, especially in state criminal justice systems, a judicial power that is consistent with constitutional structure and historical practice could play a more meaningful role in regulating plea bargaining”); Darryl Brown, *The Judicial Role in Criminal Charging and Plea Bargaining*, 46 HOFSTRA L. REV. 63, 63–65 (2017) (noting that “[t]he standard answer to the question of what role judges have in determining the appropriateness of criminal charges is ‘virtually none’” and concluding “that this standard story misleads . . . [a]nd it is especially misleading with respect to state criminal justice systems, where the vast majority of prosecutions occur and some of which depart in notable ways from the judge’s role in the federal criminal justice system”); Darryl K. Brown, *What’s the Matter with Kansas—and Utah?: Explaining Judicial Interventions in Plea Bargaining*, 95 TEX. L. REV. 47 (2017); Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1364 (2018) (finding that “while thirteen states afford prosecutors the full range of flexibility in charge sliding, the majority (thirty-three) require judicial approval before charges can be amended or dismissed—with fifteen of those expressly granting judges the authority to reject charge bargains that they deem inappropriate” and that “[f]our other states . . . impose additional restraints”); Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325, 326 (2016) (finding that “judicial involvement in negotiations is now institutionalized and embedded in the very structure of many court systems in ways never dreamed of in the 1970s”); Anna Roberts, *Dismissals as Justice*, 69 ALA. L. REV. 327, 330 (2017) (finding that “[n]ineteen states have given trial courts the power to dismiss prosecutions for the sake of justice.”).

⁵ See Green & Levine, *supra* note 2, at 177–82.

⁶ See Samuel J. Levine, *The Potential Utility of Disciplinary Regulation as a Remedy for Abuses of Prosecutorial Discretion*, 12 DUKE J. CONST. L. & PUB. POL’Y 1 (2017).

⁷ See *id.* at 4–6.

⁸ See *id.* at 7–12.

The current Essay takes the next step in the project, considering the substance and form of potential rules that would regulate prosecutors' charging decisions.⁹ Specifically, drawing on the Ninth Circuit's decision in *United States v. Redondo-Lemos*,¹⁰ the Essay considers the possibility that courts should enact ethics rules targeted at two prosecutorial improprieties: arbitrary and capricious charging decisions, and discriminatory charging decisions.

II. ARBITRARY AND CAPRICIOUS CHARGING DECISIONS

A. *The Problem*

In *Redondo-Lemos*, the defendant pled guilty to an offense that carried a statutory minimum sentence of five years.¹¹ The district court found that, in plea bargaining with the defendant, the United States Attorney's office acted arbitrarily and discriminated against the defendant on the basis of gender.¹² As a remedy, the court sentenced the defendant to an 18 month sentence.¹³ On appeal, the Ninth Circuit framed the issue as "whether the district court may so second-guess the United States Attorney's exercise of prosecutorial discretion."¹⁴ Distinguishing

⁹ For critiques of current ethics rules, which are modeled on MODEL RULES OF PROF'L CONDUCT Rule 3.8(a) (AM. BAR ASS'N 2018) ("The prosecutor in a criminal case shall refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause."), see, e.g., Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 309 (2001) [hereinafter Gershman, *The Prosecutor's Duty to Truth*] ("[Y]ou never put a defendant to trial unless you [are] personally convinced of [the defendant's] guilt."); Bennett L. Gershman, *A Moral Standard for the Prosecutor's Exercise of the Charging Discretion*, 20 FORDHAM URB. L.J. 513, 530 (1993) (arguing that the proper standard for proceeding with a criminal case should be the prosecutor's "moral certainty" of the defendant's perpetration of the crime); Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1588 (2003) ("Rule 3.8(a) deals with only one aspect of prosecutorial discretion—the core decision whether to prosecute a criminal charge—and incorporates a standard that is both too low and incomplete."); *Id.* at 1589 ("[M]any would agree that charges should not be brought unless the prosecutor reasonably believes that the accused is guilty of the crimes charged."); *Id.* at 1589 n.79 (quoting MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 213 (1990)) ("[C]onscientious prosecutors do not put the destructive engine of the criminal process into motion unless they are satisfied beyond a reasonable doubt that the accused is guilty."); John Kaplan, *The Prosecutorial Discretion—A Comment*, 60 NW. U. L. REV. 174, 178–79 (1965); Melilli, *supra* note 1, at 700 ("Prosecutors do not serve the interests of society by pursuing cases where the prosecutors themselves have reasonable doubts as to the factual guilt of the defendants."). See also Niki Kuckes, *The State of Rule 3.8: Prosecutorial Ethics Reform Since Ethics 2000*, 22 GEO. J. LEGAL ETHICS 427 (2009); Samuel J. Levine, *Taking Prosecutorial Ethics Seriously: A Consideration of the Prosecutor's Ethical Obligation to "Seek Justice" in a Comparative Analytical Framework*, 41 HOUS. L. REV. 1337 (2004).

¹⁰ *United States v. Redondo-Lemos*, 955 F.2d 1296 (9th Cir. 1992), *as amended on denial of reh'g* (May 11, 1992), *overruled en banc on other grounds by United States v. Armstrong*, 48 F.3d 1508 (9th Cir.1995), *rev'd*, 517 U.S. 456 (1996).

¹¹ See *id.* at 1297.

¹² See *Id.* at 1297–98.

¹³ See *id.* at 1297.

¹⁴ *Id.*

between two kinds of abuses, arbitrary and capricious charging decisions, and discriminatory charging decisions, the opinion offered a cleverly phrased conclusion: “We answer unequivocally: yes and no.”¹⁵

The Ninth Circuit acknowledged that both arbitrary and capricious charging decisions and discriminatory charging decisions are forms of unethical conduct that violate a defendant’s constitutional rights.¹⁶ Further, the court noted that “[i]n most circumstances . . . to say that there is a constitutional right is also to say that there is a judicially enforceable remedy.”¹⁷ However, the opinion added—strikingly—that a judicial remedy is “not always” available.¹⁸ The opinion identified both practical and constitutional obstacles that would curtail a judge’s ability to enforce a remedy for unethical charging decisions and, according to the court, would preclude a judicially enforceable remedy for arbitrary and capricious prosecutions.¹⁹

First, raising practical considerations, the Ninth Circuit declared that “[p]rosecutorial charging and plea bargaining decisions are particularly ill-suited for broad judicial oversight [because] they involve exercises of judgment and discretion that are often difficult to articulate in a manner suitable for judicial evaluation . . . [including] careful professional judgment as to the strength of the evidence, the availability of resources, the visibility of the crime and the likely deterrent effect on the particular defendant and others similarly situated.”²⁰ In addition, “[e]ven were it able to collect, understand and balance all of these factors, a court would find it nearly impossible to lay down guidelines to be followed by prosecutors in future cases. We would be left with prosecutors not knowing when to prosecute and judges not having time to judge.”²¹

¹⁵ *Id.*

¹⁶ *See id.* at 1299–1300.

¹⁷ *Id.* at 1299 (emphasis added).

¹⁸ *Id.* Although this conclusion may be unsettling, as a descriptive matter, the Ninth Circuit was undoubtedly correct in asserting that constitutional rights are not always enforceable through judicial remedies. *See id.* at 1299 n.2 (citing *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 64–65 (1989); *Bush v. Lucas*, 462 U.S. 367, 388–90 (1983); *Baker v. Carr*, 369 U.S. 186, 217 (1962); *Goldwater v. Carter*, 444 U.S. 996, 1003–04 (1979) (Rehnquist, J. concurring)).

Indeed, as Justice Antonin Scalia’s once put it, “[t]he Court today continues its quixotic quest to right all wrongs and repair all imperfections through the Constitution. Alas, the quest cannot succeed—which is why some wrongs and imperfections have been called nonjusticiable.” *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 903 (2009) (Scalia, J., dissenting).

Justice Scalia contrasted the Constitution, in this regard, with “[a] Talmudic maxim instruct[ing] with respect to the Scripture: ‘Turn it over, and turn it over, for all is therein.’” *Id.* (citation omitted). In short, Justice Scalia concluded, “A Divinely inspired text may contain the answers to all earthly questions, but the Due Process Clause most assuredly does not.” *Id.* Notably, Jewish legal scholars have explored, in a very different context, a somewhat similar question as to the existence of legal problems that have no legal remedy. *See, e.g.,* RABBI ASHER WEISS, MINCHAS ASHER, BAMIDBAR 220–21 (2017).

¹⁹ *See Redondo-Lemos*, 955 F.2d at 1299–1300.

²⁰ *Id.* at 1299.

²¹ *Id.*

Second, the Ninth Circuit identified “an added constitutional consideration based on the peculiar relationship between the Office of the United States Attorney and the federal district courts.”²² Specifically, “[t]he very breadth of the inquiry—whether the prosecutor’s discretion was exercised in an arbitrary or capricious fashion—would require that the government divulge minute details about the process by which scores, perhaps hundreds, of charging decisions are made.”²³ Moreover, “[t]he court would also have to consider the validity of various rationales advanced for particular charging decisions, which would enmesh it deeply into the policies, practices and procedures of the United States Attorney’s Office.”²⁴ Finally, “the court would have to second-guess the prosecutor’s judgment in a variety of cases to determine whether the reasons advanced therefor are a subterfuge. Such judicial entanglement in the core decisions of another branch of government—especially as to those bearing directly and substantially on matters litigated in federal court—is inconsistent with the division of responsibilities assigned to each branch by the Constitution.”²⁵

Accordingly, the Ninth Circuit concluded, “[o]ur only available course is to deny the defendant a judicial remedy for what may be a violation of a constitutional right—not to have charging or plea bargaining decisions made in an arbitrary or capricious manner.”²⁶ Instead, “[w]e trust that the United States Attorney . . . and the Attorney General of the United States will . . . take whatever steps may be necessary to eliminate any constitutional infirmities in the charging process for this case and others.”²⁷

The Ninth Circuit’s analysis is susceptible to various responses and critiques, raising several important issues—some of which relate directly to the possibility of enacting ethics rules to regulate prosecutors’ charging decisions. For example, as documented in the first part of this larger project,²⁸ the opinion’s emphasis on separation of powers and the deference due to the executive branch may—not surprisingly—reflect an attitude that is more common among federal courts, such as the Ninth Circuit, than among state court judges.²⁹ This difference in attitudes is

²² *Id.* at 1299–1300.

²³ *Id.* at 1300.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ See Green & Levine, *supra* note 2.

²⁹ See *supra* note 4. Notably, in the past year, one federal judge rejected three proffered plea agreements, on the grounds that “the scales of justice tip in favor of rejecting plea bargains unless I am presented with a counterbalance of case-specific factors sufficiently compelling to overcome the people’s interest in participating in the criminal justice system.” *United States v. Stevenson*, No. 2:17-cr-00047, 2018 WL 1769371, at *1 (S.D.W. Va. Apr. 12, 2018); see *United States v. Walker*, No. 2:17-cr-00010, 2017 WL 2766452 (S.D.W. Va. June 26, 2017); *United States v. Wilmore*, 282 F.Supp.3d 937 (S.D.W. Va. Oct. 10, 2017). For a critique of this approach, see *Case Note, Criminal Law—Plea Bargains—District Court Denies Plea Bargain Due to the Public Interest in Understanding*

significant because state court judges have primary responsibility for the disciplinary regulation of lawyers.³⁰

Moreover, for a variety of reasons, as developed in the second part of this project, a number of the Ninth Circuit's practical objections regarding judicial entanglement and confidentiality may prove less problematic in the context of disciplinary proceedings than in the adjudicatory context.³¹ Finally, it is less than clear that prosecutors should be granted the trust that the court seemed to place in their willingness to "take whatever steps may be necessary to eliminate any constitutional infirmities in the charging process for this case and others."³²

In short, notwithstanding the Ninth Circuit's separation-of-powers concern, state court judges may have the authority to exercise disciplinary review of arbitrary and capricious charging decisions. Moreover, discipline may be a necessary response to a constitutional violation that appears resistant to an available adjudicatory remedy.³³ If so, the next—and potentially more challenging—question is: What would the rule look like?

the Opioid Epidemic—United States v. Walker, No. 2:17-cr-00010, 2017 WL 2766452 (S.D.W. Va. June 26, 2017), 131 HARV. L. REV. 2073 (2018).

³⁰ See Green & Levine, *supra* note 2, at 173–77.

³¹ See Levine, *supra* note 6, at 7–11.

³² *Redondo-Lemos*, 955 F.2d at 1300. Indeed, the breadth and depth of scholarship documenting and proposing remedies for prosecutorial indiscretion in charging decisions, *see sources cited supra* note 1, attest to the ongoing need to implement mechanisms that go beyond the Ninth Circuit's seemingly—and surprisingly—naïve trust and reliance on the sufficiency of prosecutors and prosecutorial offices, through their own initiatives, to remedy and work to prevent constitutional violations. Cf. Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 873, 917 (2009) (proposing to "look[] within the prosecutor's office itself to identify a viable corrective on prosecutorial overreaching[,] but acknowledging difficulty in trying to "prompt prosecutors to change the view they have of themselves"); Podgor, *supra* note 3, at 474–75 (proposing "better discretion" through a "multi-dimensional approach" to charging decisions, providing a "compassionate alternative," but acknowledging that "[i]t is difficult to ensure that a prosecutor . . . will make use of the guidance").

³³ Cf. Green & Levine, *supra* note 2, at 143 & nn.3–4 (citing several judicial opinions in support of the proposition that "courts favor professional discipline over adjudicatory remedies such as reversal of criminal convictions or suppression of evidence, which are often unavailable because of the harmless error doctrine and other limitations"); Levine, *supra* note 6, at 9–10 n.38 (quoting cases in which the United States Supreme Court identified the disciplinary process as an appropriate forum to remedy prosecutorial abuse of discretion in the absence of available adjudicatory remedies).

In addition, a rule addressing arbitrary and capricious charging decisions would respond to a problematic aspect of prosecutorial discretion that scholars have recognized for decades, *see, e.g.*, DAVIS, ARBITRARY JUSTICE, *supra* note 1; Vorenberg, *supra* note 1, at 1555 (concluding that "[g]iving prosecutors the power to invoke or deny punishment at their discretion raises the prospect that society's most fundamental sanctions will be imposed arbitrarily and capriciously"), which is likely exacerbated by the more recently recognized concern of cognitive bias among prosecutors. *See, e.g.*, Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587 (2006); Alafair Burke, *Neutralizing Cognitive Bias: An Invitation to Prosecutors*, 2 N.Y.U. J. L. & LIBERTY 512 (2007); Peter A. Joy, *The Criminal Discovery Problem: Is Legislation A Solution?*, 52 WASHBURN L.J. 37 (2012); Sofia Yakren, *Removing the Malice from Federal "Malicious Prosecution": What Cognitive Science Can Teach Lawyers About Reform*, 50 HARV. C.R.-C.L. L. REV.

B. A Possible Rule

The most direct rule might simply state: “A prosecutor in a criminal case shall not make charging decisions in an arbitrary and capricious manner.” However, such a rule may be criticized as too broad to serve as a basis for discipline. The issue of broad ethics provisions has been a matter of ongoing controversy at least since the drafting, and then adoption, of the Model Code of Professional Responsibility in 1969.³⁴ To be sure, unlike some broadly-worded ethics provisions,³⁵ a rule prohibiting arbitrary and capricious prosecution would specify the substantive grounds for discipline.³⁶ Moreover, one could envision cases involving unequivocal instances of arbitrary and capricious charging—such as making a charging decision on the basis of a coin flip.³⁷ Nevertheless, most instances of arbitrary and capricious charging would probably be more difficult to evaluate. As the Ninth Circuit suggested, a determination that a prosecutor acted in an arbitrary and capricious manner could often require an examination and assessment of both specific factual

359 (2015); Ellen Yaroshesky, *Why Do Brady Violations Happen?: Cognitive Bias and Beyond*, CHAMPION, May 2013, at 12.

³⁴ See, e.g., CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 86–87 (West Publishing Co.) (1986) (“[I]f anything is clear, it is that many provisions of the lawyer codes are plainly imprecise.”); *id.* at 87 (“Unnecessary breadth is to be regretted in professional rules that can be used to deprive a person of his or her means of livelihood through sanctions that are universally regarded as stigmatizing.”); Theodore J. Schneyer, *The Model Rules and Problems of Code Interpretation and Enforcement*, 1980 AM. B. FOUND. RES. J. 939, 940 (finding that “on some subjects that were dealt with in the [Disciplinary Rules], but in terms so general as to require heroic interpretive effort, the Model Rules are not appreciably more specific—better written and with fewer internal inconsistencies, but not more specific”); Serena Stier, *Legal Ethics: The Integrity Thesis*, 52 OHIO ST. L.J. 551, 593 (1991) (describing “the substantial indeterminacies left in the structure of professional ethics by both the Rules and the Code”); David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 480 (1990) (describing the ABA Model Code of Professional Responsibility as “rife with vague and ambiguous terms,” but finding that, while the Model Rules’ “self-conscious[] attempt to bring more determinacy to the field of professional responsibility by adopting a rule-like structure . . . has eliminated some of the more pervasive ambiguities, vagueness and open-endedness remain”). See generally, Samuel J. Levine, *Taking Ethics Codes Seriously: Broad Ethics Provisions and Unenumerated Ethical Obligations in a Comparative Hermeneutic Framework*, 77 TUL. L. REV. 527 (2003).

³⁵ See Levine, *supra* note 34, at 535–37.

³⁶ As such, relying on a new rule articulating arbitrary and capricious decision making as grounds for discipline may compare favorably to attempts by “aggressive or creative disciplinary authorities” to interpret current rules to address otherwise unenumerated abuses of prosecutorial discretion. See Green & Levine, *supra* note 2, at 153–54 (2016) (citing, e.g., MODEL RULES OF PROF’L CONDUCT 8.4(d) (AM. BAR ASS’N 2018) (prohibiting “conduct that is prejudicial to the administration of justice”)).

³⁷ See *Redondo-Lemos*, 955 F.2d at 1299.

details and broader prosecutorial policies and patterns across a range of cases.³⁸ Thus, in all likelihood, the rule may be rarely enforced, if not unenforceable.³⁹

Still, it might be worthwhile to enact such a rule, even if it is unlikely to be enforced. For example, the rule might serve to educate or remind prosecutors of their ethical duty not to act in an arbitrary and capricious manner. Indeed, a number of ethics rules appear unlikely to be enforced, on their face or in practice,⁴⁰ while some are altogether aspirational or otherwise unenforceable.⁴¹ In addition, the rule might serve an expressive purpose, demonstrating an ethical principle that is accepted by prosecutors and the collective bar, even in the absence of external enforcement.⁴²

³⁸ See *id.* at 1299–1300.

³⁹ For an example of case that arguably could have provided enforceable grounds for a finding that the prosecutor made an arbitrary charging decision, see Bruce A. Green & Alafair S. Burke, *The Community Prosecutor: Questions of Professional Discretion*, 47 WAKE FOREST L. REV. 285, 298–300 (2012) (analyzing *Commonwealth v. Agnew*, 600 A.2d 1265, 1266 (Pa. Super. Ct. 1991)).

⁴⁰ See, e.g., MODEL RULES OF PROF'L CONDUCT 1.1 (AM. BAR ASS'N 2018) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

⁴¹ See, e.g., MODEL RULES OF PROF'L CONDUCT 6.1 (AM. BAR ASS'N 2018) ("A lawyer *should* aspire to render at least (50) hours of pro bono public legal services per year.") (emphasis added); MODEL RULES OF PROF'L CONDUCT 1.5(b) (AM. BAR ASS'N 2018) ("The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, *preferably* in writing . . .") (emphasis added); MODEL RULES OF PROF'L CONDUCT 1.6(b) (AM. BAR ASS'N 2018) ("A lawyer *may* reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . .") (emphasis added). See generally Bruce A. Green & Fred C. Zacharias, *Permissive Rules of Professional Conduct*, 91 MINN. L. REV. 265 (2006); Samuel J. Levine, *Taking Ethical Discretion Seriously: Ethical Deliberation As Ethical Obligation*, 37 IND. L. REV. 21 (2003); Samuel J. Levine, *Taking Ethical Obligations Seriously: A Look at American Codes of Professional Responsibility Through a Perspective of Jewish Law and Ethics*, 57 CATH. U. L. REV. 165 (2007) [hereinafter Levine, *Taking Ethical Obligations Seriously*]; Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1 (2005).

See also David Luban, *Ethics and Malpractice*, 12 MISS. C. L. REV. 151, 152 (1991) (making the "routine observation that the codes are drastically underenforced"). Indeed, scholars have suggested that, in particular, disciplinary rules have been underenforced—if not largely unenforced—against prosecutors. See Green & Levine, *supra* note 2, at 155–56 nn.81–89 (documenting the "overwhelming consensus of opinion that ethics rules are underenforced against prosecutors").

⁴² Cf. MODEL RULES OF PROF'L CONDUCT 1.2(b) (AM. BAR ASS'N 2018) ("A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities").

For a discussion of the expressive function of unenforced ethics rules, see Anita Bernstein, *Sanctioning the Ambulance Chaser*, 41 LOY. L.A. L. REV. 1545, 1563–65 (2008). Cf. Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 667–68 (1981); Nelson P. Miller & Joan Vestrand, *Of Shining Knights and Cunning Pettifoggers: The Symbolic World of the Model Rules of Professional Conduct*, 110 PENN ST. L. REV. 853 (2006); see also Lawrence A. Hamermesh, *The ABA Task Force on Corporate Responsibility and the 2003 Changes to the Model Rules of Professional Conduct*, 17 GEO. J. LEGAL ETHICS 35, 56–57 (2003). See generally RICHARD H. MCADAMS, *THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS* (2015). But see, e.g., Ted Schneyer, *Policymaking and the Perils of Professionalism: The ABA's Ancillary Business Debate As A*

III. DISCRIMINATORY CHARGING DECISIONS

A. *The Problem*

According to the Ninth Circuit, in contrast to arbitrary and capricious charging, “[a] problem of a different order is presented by the district court’s observation that the United States Attorney’s Office discriminated on the basis of gender in exercising its prosecutorial discretion. A claim of sex discrimination (or discrimination based on race, religion, or a similar characteristic) raises not only due process but also equal protection concerns.”⁴³ As the court explained, “[t]roublesome as may be suspicions that prosecutorial discretion is being exercised in an arbitrary fashion, such concerns are heightened to an unacceptable level where there is an indication that the power to prosecute is being exercised to favor (or disfavor) particular classes of defendants on the basis of race, religion, gender, or similar suspect characteristics.”⁴⁴ In short, “[t]he use of governmental authority to divide the population along suspect lines is a much more serious matter than the capricious exercise of power standing alone.”⁴⁵

In addition, on both practical and constitutional grounds, the court found that “it is judicially far more manageable to determine whether prosecutorial discretion is being exercised in a discriminatory fashion than to determine whether prosecutions are being selected arbitrarily or capriciously.”⁴⁶ First, “[a]t a threshold level, whether or not there is a significant disparity in the treatment of classes of defendants can normally be determined on the basis of statistical evidence, without reference to the underlying facts of individual cases.”⁴⁷ Second, “[i]f a disparity is found, the district court may well be able to resolve the matter so as to minimize, or avoid altogether, any inquiry into the intricacies of particular charging decisions. The court’s entanglement with and supervision of the prosecutorial function can, in

Case Study, 35 ARIZ. L. REV. 363, 389 (1993) (“Adopting an ethics rule for purely expressive purposes jeopardizes the ABA’s role as lawgiver for the legal profession.”).

See also Bennett L. Gershman, *Subverting Brady v. Maryland and Denying A Fair Trial: Studying the Schuelke Report*, 64 MERCER L. REV. 683 (2013) [hereinafter Gershman, *Subverting Brady*] (“It may be that a prosecutor’s own personal integrity and sense of fair play are the only effective checks on a prosecutor’s crossing the ethical line.”); Gershman, *The Most Dangerous Power*, *supra* note 1, at 28 (“We want good prosecutors; we need good prosecutors. Despite internal and external controls, the most effective control over a prosecutor’s abuse of power may lie in a prosecutor’s own personal integrity, his or her commitment to the cause of justice, and in a prosecutorial culture that prizes justice and fair play over winning a case.”); Levine, *Taking Ethical Obligations Seriously*, *supra* note 41, at 202 (“[I]n place of a reluctant adherence to ethics rules out of a fear of possible enforcement, the community of lawyers must be willing to undertake a sincere commitment to ethical conduct, premised upon a shared sense of ethical values and principles.”).

⁴³ *Redondo-Lemos*, 955 F.2d at 1300.

⁴⁴ *Id.* at 1300.

⁴⁵ *Id.* at 1300–01.

⁴⁶ *Id.* at 1301.

⁴⁷ *Id.*

the exercise of sound judicial discretion, be kept to a minimum.”⁴⁸ The Ninth Circuit’s opinion went on to describe this preferred method of judicial inquiry into discriminatory charging, emphasizing that “[i]n exercising [its] authority, the district court must be ever mindful that it is intruding upon the workings of a coordinate branch of government and must take all appropriate steps to minimize the intrusion.”⁴⁹

As to an adjudicative remedy for such an ethical violation, the court approved of “giving the defendant the benefit of the plea bargain he would have received but for the discrimination,” but “caution[ed] . . . against broader, systemic remedies following a district court finding of selective prosecution. Systemic relief in this area threatens to involve the district courts in the type of prosecutorial oversight which is fraught with separation of powers pitfalls. We do not address whether such systemic remedies are ever appropriate.”⁵⁰

Notwithstanding the descriptive accuracy of many of the distinctions the Ninth’s Circuit’s opinion draws between arbitrary and capricious prosecution and discriminatory prosecution, in light of the acknowledgment that both involve violations of a defendant’s constitutional rights, it is not entirely clear why, in principle, the court insisted on the necessity of a remedy only in the case of discrimination. Nevertheless, as the court suggested, discriminatory prosecution may, indeed, prove more amenable to judicial review in the adjudicatory context, and therefore may likewise be more amenable to a disciplinary rule. If so, the question again arises: What would the rule look like?

B. A Possible Rule

The most direct rule might state: “A prosecutor in a criminal case shall not make charging decisions in a discriminatory manner, on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status.” In some ways, this rule might serve as a mirror image to a rule prohibiting arbitrary and capricious prosecution. For example, given the absence of an adjudicatory remedy for arbitrary and capricious prosecution, there seems to be a particular need for discipline to remedy such misconduct.⁵¹ In contrast, given that, according to the Ninth Circuit, discriminatory charging is a form of prosecutorial misconduct that is subject to judicial investigation, and for which there is an available adjudicatory remedy, it may be difficult to identify the need for, or purpose of, a disciplinary rule.⁵²

⁴⁸ *Id.*

⁴⁹ *Id.* at 1302.

⁵⁰ *Id.* at 1302–03.

⁵¹ *See id.* at 1299.

⁵² For scholarship addressing the problem of discriminatory prosecution, *see, e.g.*, Shelby A. Dickerson Moore, *Questioning the Autonomy of Prosecutorial Charging Decisions: Recognizing the Need to Exercise Discretion-Knowing There Will Be Consequences for Crossing the Line*, 60 LA. L.

It could be proposed that the possibility of discipline would have an additional deterrent effect on discriminatory charging, or that it would provide an additional enforcement mechanism, beyond the relatively modest adjudicatory remedy that the Ninth Circuit opinion allows for.⁵³ However, the apparent ineffectiveness of other ethics rules regulating prosecutors may indicate otherwise. For example, ABA Model Rule 3.8 (d),⁵⁴ requiring prosecutors to disclose information “that tends to negate the guilt of the accused,” might have been expected to reinforce prosecutors’ constitutional obligations to disclose material exculpatory evidence under *Brady v. Maryland*.⁵⁵ In fact, though, the problem of *Brady* violations persists,⁵⁶ and given

REV. 371 (2000); Podgor, *supra* note 3; Poulin, *supra* note 3. *See also* Vorenberg, *supra* note 1, at 1555 (concluding that “[g]iving prosecutors the power to invoke or deny punishment at their discretion raises the prospect that . . . the least favored members of the community—racial and ethnic minorities, social outcasts, the poor—will be treated most harshly”).

⁵³ Cf. Levine, *supra* note 6, at 8 (suggesting that “disciplinary rules may provide an incentive for prosecutors’ offices to undertake restructuring in an effort to comply with the rules and avoid the sanction of courts” and thus, “disciplinary rules might help provide an enforcement mechanism for some of the internal changes scholars have envisioned”).

⁵⁴ *See* MODEL RULES OF PROF’L CONDUCT 3.8(d) (AM. BAR ASS’N 2018):

The prosecutor in a criminal case shall make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

⁵⁵ *See* *Brady v. Maryland*, 373 U.S. 83 (1963). For a discussion of how, in the ABA’s view, the rule expands on prosecutors’ *Brady* obligations, *see* ABA Standing Comm. on Ethics & Prof’l Responsibility, Formal Op. 09-454 (2009).

⁵⁶ A large body of scholarship has addressed the ongoing problem of *Brady* violations. Here too, Ben Gershman’s work has been particularly notable. *See, e.g.,* Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531 (2007):

By any measure, *Brady v. Maryland* has not lived up to its expectations. *Brady*’s announcement of a constitutional duty on prosecutors to disclose exculpatory evidence to defendants embodies, more powerfully than any other constitutional rule, the core of the prosecutor’s ethical duty to seek justice rather than victory. Nevertheless, prosecutors over the years have not accorded *Brady* the respect it deserves. Prosecutors have violated its principles so often that it stands more as a landmark to prosecutorial indifference and abuse than a hallmark of justice.

Id. at 531. *See also* Bennett L. Gershman, *Educating Prosecutors and Supreme Court Justices About Brady v. Maryland*, 13 LOY. J. PUB. INT. L. 517 (2012); Bennett L. Gershman, *Reflections on Brady v. Maryland*, 47 S. TEX. L. REV. 685 (2006); Gershman, *Subverting Brady*, *supra* note 42; Cynthia E. Jones, *Here Comes the Judge: A Model for Judicial Oversight and Regulation of the Brady Disclosure Duty*, 46 HOFSTRA L. REV. 87, 87 (2017) (“Every year, there are numerous reported opinions where the court finds that a prosecutor has failed to disclose favorable information to the defense.”); Peter A. Joy, *Brady and Jailhouse Informants: Responding to Injustice*, 57 CASE W. RES. L. REV. 619 (2007); Joy, *supra* note 33; Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 697 (1987) (stating that there are “enough reported cases containing strong evidence of intentional prosecutorial withholding of exculpatory evidence and presentation of false evidence to demonstrate that this kind of misconduct occurs frequently enough”); Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 OKLA. CITY U. L. REV. 833 (1997); Ellen Yaroshefsky, *Prosecutorial*

how rarely Rule 3.8 (d) is enforced,⁵⁷ there is little reason to believe that the risk of discipline deters misconduct.

Conversely, to the extent that courts might be willing to exercise a more robust form of disciplinary review of discriminatory charging, given that such conduct is a blatant violation of the defendant's constitutional rights, perhaps a rule addressing discriminatory charging would not be necessary, as the prosecutor's conduct would be subject to discipline under a variety of other rules—*e.g.*, rules that prohibit “engag[ing] in conduct that is prejudicial to the administration of justice,”⁵⁸ or “engag[ing] in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.”⁵⁹ Yet again, however, even if a rule prohibiting discriminatory prosecution would not serve an enforcement function—either because it would likely remain unenforced or because it may prove unnecessary as an enforcement mechanism—perhaps such a rule would still serve an educational or expressive purpose.⁶⁰

Disclosure Obligations, 62 HASTINGS L.J. 1321, 1322 (2011) (“The subject of seemingly perpetual discussion, debate, scholarly articles, and conferences, prosecutorial disclosure obligations increasingly have become the focus in high publicity cases. Failure to disclose significant evidence to the defense in numerous cases has resulted in reversal, dismissal, and years of incarceration for the wrongfully convicted.”); Ellen Yaroshefsky & Bruce A. Green, *Prosecutors' Ethics in Context: Influences on Prosecutorial Disclosure*, in LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT 269–92 (Leslie C. Levin & Lynn Mather eds., 2012); Symposium, *New Perspectives on Brady and Other Disclosure Obligations: What Really Works?*, 31 CARDOZO L. REV. 1943 (2010).

⁵⁷ See Green & Levine, *supra* note 2, at 155–56 n.81–89.

⁵⁸ MODEL RULES OF PROF'L CONDUCT 8.4 (AM. BAR ASS'N 2018).

⁵⁹ MODEL RULES OF PROF'L CONDUCT 8.4(g) (AM. BAR ASS'N 2018) Cf. Green & Levine, *supra* note 2, at 153–54 (suggesting that “aggressive or creative disciplinary authorities might address perceived abuses of discretionary authority under at least three other rules”) (citing conflict of interest rules: (citing conflict of interest rules: MODEL RULES OF PROF'L CONDUCT 1.7, 1.9, 1.10 & 1.11 (AM. BAR ASS'N 2018); MODEL RULES OF PROF'L CONDUCT 4.4(a) (AM. BAR ASS'N 2018) (“In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.”); MODEL RULES OF PROF'L CONDUCT 8.4(d) (AM. BAR ASS'N 2018)).

⁶⁰ See *supra* notes 40–42 and accompanying text.

IV. CONCLUSION

Among the various elements of prosecutorial power, the charging decision may stand as the most significant, both because of its consequences⁶¹ and because of the discretionary, if not largely unfettered and often unreviewable, nature of the decision making process.⁶² In Bennett Gershman's memorable articulation:

[A]s the most powerful figure in the American criminal justice system, the prosecutor has the power to employ, lawfully, "the most terrible instruments of government" to deprive persons of their liberty, destroy their reputations, and even bring about their death. . . . And a prosecutor's discretion to exercise these powers is virtually unlimited, and rarely second-guessed by the courts. Indeed, the ability of courts, disciplinary bodies, and other investigative agencies to impose significant restraints on a prosecutor's use of his powers is so negligible that it makes the prosecutor accountable to himself alone.⁶³

In one of his final Supreme Court opinions, addressing a different form of executive power, Justice Anthony Kennedy recently observed that:

There are numerous instances in which the statements and actions of Government officials are not subject to judicial scrutiny or intervention. That does not mean those officials are free to disregard the Constitution and the rights it proclaims and protects. The oath that all officials take to adhere to the Constitution is not confined to those spheres in which the Judiciary can correct or even comment upon what those officials say or do.⁶⁴

In light of current limitations on implementing external mechanisms to impose meaningful limits on prosecutorial discretion and to deter and prevent the abuse of discretion, Gershman has concluded that "the most effective control over a prosecutor's abuse of power may lie in a prosecutor's own personal integrity, his or her commitment to the cause of justice, and in a prosecutorial culture that prizes justice and fair play over winning a case."⁶⁵ In a similar vein, Justice Kennedy declared, "the very fact that an official may have broad discretion, discretion free from judicial scrutiny, makes it all the more imperative for him or her to adhere to

⁶¹ See, e.g., Davis, *The American Prosecutor*, *supra* note 1; Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197 (2016).

⁶² See *supra* note 1.

⁶³ Gershman, *The Prosecutor's Duty of Silence*, *supra* note 1, at 1214 (quoting MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS' ETHICS* 286 (4th ed. 2010)).

⁶⁴ *Trump v. Hawaii*, 138 S. Ct. 2392, 2424 (2018) (Kennedy, J. concurring).

⁶⁵ See Gershman, *The Most Dangerous Power*, *supra* note 1, at 28.

the Constitution and to its meaning and its promise.”⁶⁶ As an alternative, or in addition to these suggestions, this Essay builds on earlier parts of a larger project⁶⁷ to propose that increased disciplinary review, predicated on the adoption and enforcement of new ethics rules, may provide an effective means of regulating the prosecutor’s exercise of charging discretion.

⁶⁶ *Trump*, 138 S. Ct. at 2424 (Kennedy, J. concurring).

⁶⁷ See Green & Levine, *supra* note 2; Levine, *supra* note 6.