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THE POTENTIAL UTILITY OF DISCIPLINARY REGULATION AS A REMEDY FOR ABUSES OF PROSECUTORIAL DISCRETION

SAMUEL J. LEVINE*

INTRODUCTION

This Essay is part of a larger project exploring the possibility that, contrary to much of the prevailing scholarship, judicial supervision of the prosecutor's charging decision—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 review and regulation. In a forthcoming article,¹ Bruce Green and I identify and respond to some of the reasons scholars have generally steered clear of considering the option that judges might play a more robust role in supervising prosecutors' charging discretion by implementing enhanced disciplinary rules addressing charging decisions.² Specifically, we suggest that much of the leading scholarship seems to be built on the

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* Professor of Law and Director of the Jewish Law Institute, Touro Law Center. I presented previous versions of this Essay at the Criminal Ethics Schmooze at Stanford Law School, the Criminal Justice Ethics Schmooze at Fordham Law School, the Criminal Justice Ethics Schmooze at Cardozo Law School, and a Faculty Colloquium at Albany Law School. I thank the participants at these events for helpful comments, and I thank Bruce Green for his thoughtful guidance and collaboration throughout this project.

1. 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. (forthcoming 2016).

2. See, e.g., Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959 (2009):

Bar disciplinary rules understandably limit themselves to clear, gross, and discrete misconduct, such as lying, withholding evidence, fraud, and embezzlement. Bar rules cannot capture the myriad complex factors that rightly or wrongly influence patterns of prosecutorial discretion across cases. Writing and policing rules from the outside will not work any better for bar authorities than it has for courts, so bar authorities have not even tried to do so.

Id. at 978.

premise that, as a descriptive matter, as part of the doctrine of separation of powers, and for practical reasons, courts lack the authority and ability to review the prosecutorial charging decision.³ We argue, however, that the nearly categorical assumption among many scholars that courts do not have the authority to review charging decisions reflects an undue attention to federal law and federal courts, and as a result, reveals only part of the story.

Based on an examination of the state court experience, we find that, contrary to the assumptions of many scholars,⁴ both as a descriptive matter and a normative matter, in many states and in a variety of contexts, courts have exercised both adjudicatory and disciplinary review of charging decisions.⁵ In so doing, state courts have sometimes

3. For example, Angela Davis cites a number of ways in which the law insulates prosecutors' abuse of discretion from effective judicial review, including the harmless error doctrine, which precludes reversal of a conviction as a remedy for many forms of prosecutorial indiscretion, obstacles to discovery necessary to demonstrate prosecutorial abuse of power, immunity from civil liability for prosecutors, and a general reluctance among courts to exercise their supervisory power out of concern for the separation of powers. See Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 412–15 (2001).

See also Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 872 (2009) (finding that “federal judges continue to rubber stamp cooperation, charging, and plea decisions”); 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); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1546 (1981) (“Courts often justify their refusal to review prosecutorial discretion on the ground that separation-of-powers concerns prohibit such review.”); *id.* (finding that courts are reluctant to “regulat[e]” the prosecutor’s charging power, “for example, by preventing him from using the threat of a charge under a ‘three-time loser’ statute to obtain guilty pleas, or by requiring him to justify charging decisions with reasons that are subject to judicial review”); *id.* (“The hands-off approach of the courts seems to reflect their view . . . that it would be unwise to interfere with prosecutors’ ability to manage the business of criminal justice.”).

4. See, e.g., Bibas, *supra* note 2, at 970 (“The separation of powers, courts hold, forbids judicial interference with prosecutorial discretion to decline to file charges.”); Davis, *supra* note 3, at 410 (stating that “the decision to forego charges is entirely within the discretion of the prosecutor”); Vorenberg, *supra* note 3, at 1546 (“These considerations have prevented courts from forcing a prosecutor to initiate criminal proceedings.”).

5. For examples of scholarship acknowledging and, at times, critiquing the more active role many state courts play in reviewing prosecutors’ charging decisions, see, e.g., Valena E. Beety, *Judicial Dismissal in the Interest of Justice*, 80 MO. L. REV. 629 (2015); Bibas, *supra* note 2, at 970 n.43; Beth A. Brown, *The Constitutional Validity of Pennsylvania Rule of Criminal Procedure 133(b)(2) and the Traditional Role of the Pennsylvania Courts in the Prosecution Function*, 52 U. PITT L. REV. 269 (1990); Darryl K. Brown, *Judicial Power to Regulate Plea Bargaining*, 57 WM. & MARY L. REV. 1225 (2016); Peter Krug, *Prosecutorial Discretion and Its Limits*, 50 AM. J. COMP. L. 643 (2002); Wayne A. Logan, *A Proposed Check on the Charging Discretion of Wisconsin Prosecutors*, 1990 WIS. L. REV. 1695 (1990); Gary E. O’Connor, *Rule(Make)r and Judge: Minnesota Courts and the Supervisory Power*, 23 WM. MITCHELL L. REV. 605 (1997); Frank

deemed separation of powers arguments less compelling in the face of judicial responsibility and authority to insure the fair administration of justice.⁶ Moreover, even to the extent that most courts remain reluctant to review charging decisions through the adjudicatory process, the courts in every state exercise the inherent authority to regulate the practice of law in their own jurisdiction, through which they enact and implement ethics rules that regulate the practice of law and, at times, subject lawyers to discipline. Thus, we conclude that, in further exercise of this inherent authority, courts have the ability to play a more active role in reviewing charging decisions by interpreting current rules and adopting enhanced rules regulating the charging decision.⁷

Building on these observations and arguments, this Essay briefly considers the potential utility of disciplinary regulation as a remedy for abuses of prosecutorial discretion. Toward that goal, the Essay explores whether, in comparison with other approaches, disciplinary rules might provide a more appropriate and effective mechanism for responding to the problem of abuse of prosecutorial power. Part I of the Essay briefly documents concerns over actual and perceived abuses of prosecutors' charging power. Part II then summarizes and critiques a number of leading proposals for reform of prosecutors' charging discretion. Finally, Part III analyzes the potential utility of disciplinary review as an alternative avenue of reform. On the basis of this analysis, the Essay concludes 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.

J. Remington & Wayne A. Logan, *Frank Miller and the Decision to Prosecute*, 69 WASH. U. L.Q. 159 (1991); Ronald F. Wright, *Prosecutorial Guidelines and the New Terrain in New Jersey*, 109 PENN ST. L. REV. 1087 (2005).

See also Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433 (1984); Amy R. Mashburn, *A Clockwork Orange Approach to Legal Ethics: A Conflicts Perspective on the Regulation of Lawyers by Federal Courts*, 8 GEO. J. LEGAL ETHICS 473 (1995); Brandon K. Crase, Note, *When Doing Justice Isn't Enough: Reinventing the Guidelines for Prosecutorial Discretion*, 20 GEO. J. LEGAL ETHICS 475 (2007); Robert Heller, Comment, *Selective Prosecution and the Federalization of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion*, 145 U. PA. L. REV. 1309 (1997).

6. See Green & Levine, *supra* note 1, at Part III.A.

7. See *id.* at Part III.B.

I. BACKGROUND—THE PROBLEM: ABUSE OF PROSECUTORIAL DISCRETION

The wide scope of prosecutorial discretion has long been the subject of discussion and, at times, considerable criticism and concern, among courts, scholars, bar associations, and law reform organizations.⁸ Of the various ways prosecutors exercise discretion, commentators have often focused on charging decisions as the most significant, both in importance and in the degree to which, many scholars maintain, these decisions remain largely unchecked.⁹ Indeed, through the decision whether or not to file charges, the prosecutor determines if a particular individual will face the machinery of the criminal justice system, while other discretionary decisions, such as those relating to what charges to file and the terms of a plea bargain, have a substantial—and often determinative—effect on the outcome of a case.

The enormous power that prosecutors wield through charging decisions has led to claims and concerns revolving around actual and perceived abuses of power, including political favoritism,¹⁰ personal self-interest,¹¹ undercharging,¹² overcharging,¹³ arbitrariness,¹⁴ and bias.¹⁵ The titles of leading works in this area illustrate both the range and the level of alarm among leading scholars: some have decried the current state of “arbitrary justice”¹⁶ and “the threat of tyranny.”¹⁷ Others have gone “in search of the virtuous prosecutor”¹⁸ or have

8. The literature on these issues is far too voluminous to list here. Early works of note include KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE* (1969), and Vorenberg, *supra* note 3.

9. See, e.g., Davis, *supra* note 3, at 408 (“The charging decision is arguably the most important prosecutorial power and the strongest example of the influence and reach of prosecutorial discretion.”); Vorenberg, *supra* note 3, at 1525 (“There 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.”). See also Mitchell Stephens, *Ignoring Justice: Prosecutorial Discretion and the Ethics of Charging*, 35 N. KY. L. REV. 53 (2008).

10. See, e.g., Anthony S. Barkow & Beth George, *Prosecuting Political Defendants*, 44 GA. L. REV. 953 (2010); Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 847–48 (2004); Note, *Prosecutor’s Discretion*, 103 U. PA. L. REV. 1057 (1955).

11. See, e.g., Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2470–73 (2004).

12. See, e.g., Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29 (2002).

13. See, e.g., Kyle Graham, *Overcharging*, 11 OHIO STATE J. CRIM. L. 701 (2014).

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

15. See, e.g., Podgor, *supra* note 3; Poulin, *supra* note 3.

16. DAVIS, *supra* note 14.

17. Davis, *supra* note 3.

18. Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM J. CRIM. LAW 197 (1988).

called for “prosecutorial accountability”¹⁹ and “policing of prosecutors.”²⁰ And others have suggested mechanisms for “decent restraint of prosecutorial power”²¹ and “meaningful review of prosecutorial discretion.”²² In turn, many have responded with proposals to rein in the scope of the prosecutor’s charging discretion, with the aim of curbing some of the claimed and documented abuses committed by prosecutors in the exercise of their discretion. The next Part of this Essay summarizes and critiques a number of leading proposals for reform.

II. PROPOSALS FOR REFORM

One common avenue of reform looks to the legislature as a source of restraint on the prosecutor’s charging discretion. For example, one leading scholar proposes legislative action to limit the discretion of prosecutors in plea bargains, through requirements that prosecutors issue “guidelines indicating how they will make charging and bargaining decisions,”²³ legislative oversight of prosecutors’ policy judgments in the plea bargaining process,²⁴ and criminal code revision to effect “the reassertion of legislative authority over policymaking on crime and punishment.”²⁵

However, as others have argued, legislatures are not likely to take the lead in such reform efforts. In the words of one commentator, “hoping for legislatures to rein in prosecutorial discretion is a pipe dream” because “[b]y and large . . . legislatures broaden prosecutorial power to burnish their tough-on-crime credentials. They lack incentives to regulate prosecutors systematically.”²⁶ As another scholar put it, in the context of the federal system, “[t]he political process overwhelmingly favors prosecutors. Any oversight by Congress would serve largely to make sure that prosecutors are being sufficiently tough [I]t is hard to imagine a scenario where Congress would put in place an oversight scheme that would offer greater protections for defendants.”²⁷

19. Bibas, *supra* note 2.

20. Barkow, *supra* note 3.

21. Vorenberg, *supra* note 3.

22. Heller, *supra* note 5.

23. Vorenberg, *supra* note 3, at 1562.

24. *See id.* at 1566–67.

25. *Id.* at 1568.

26. Bibas, *supra* note 2, at 966.

27. Barkow, *supra* note 3, at 911. Similar obstacles would seem to impede other proposals

Alternatively, a number of scholars have proposed that, in place of external forces such as legislative action, a more promising avenue for reform of prosecutorial discretion would grow out of internal efforts to structure the prosecutor's office in a way that institutionalizes internal checks on prosecutors' charging decisions.²⁸ However, such proposals may face significant obstacles to effective implementation, as they appear to lack enforcement mechanisms necessary to require prosecutors' offices to comply with a restructuring of their operations.²⁹

for legislative reform. For example, Davis introduces mechanisms such as "strengthening the electoral and appointments process" for prosecutors, through "public information campaigns," "prosecution review boards," and "racial disparity studies." See DAVIS, *supra* note 14, at 183–89; Davis, *supra* note 3, at 462–63. Davis acknowledges, however, that many of these reforms will require legislative action because, rather than voluntarily accepting these provisions, prosecutors would likely resist many elements of her proposals. See DAVIS, *supra* note 14, at 189–91; Davis, *supra* note 3, at 463. Cf. Poulin, *supra* note 3, at 1119–22 (suggesting that Congress impose mandatory record-keeping for prosecutors).

In place of enacting legislation, which he finds both unlikely and unworkable, Bibas suggests that legislatures might hold oversight hearings, through which they and their staffs could have an opportunity to investigate and question prosecutors regarding their offices' policies and actions. See Bibas, *supra* note 2, at 967–68. Here too, though, Bibas argues that legislatures would not have full access to information and data necessary for adequate review and recommendations, and in any event, he concludes, they would find difficulty devising meaningful and efficient guidelines for prosecutors to follow. See *id.* at 968–69.

28. See, e.g., Barkow, *supra* note 3, at 873 (proposing to "look[] within the prosecutor's office itself to identify a viable corrective on prosecutorial overreaching[] . . . through separation-of-"); Poulin, *supra* note 3, at 1122–24 (proposing internal reforms).

29. For example, Barkow proposes no less than a "redesign of the prosecutor's office," requiring that prosecutors implement a form of "structural separation" modeled after the practices of administrative agencies. Barkow, *supra* note 3, at 895–97. In particular, she aims to "redefine those tasks that occur in a prosecutor's office that instead should be labeled as adjudicative and performed by someone not otherwise involved in the case." *Id.* at 897. Thus, "[t]he fundamental aim is to prevent people who develop a will to win or who will be exposed to legally irrelevant information about a defendant from making key determinations about the defendant's guilt and what punishment he or she deserves." *Id.* In short, "prosecutors who are involved with the investigation of a case . . . should be prevented from making adjudicative decisions." *Id.* at 898. Classifying both charging and plea determinations as adjudicative, Barkow suggests that this model will help provide internal checks on prosecutorial abuses of discretion. *Id.*

However, Barkow does not provide an enforcement mechanism that would require prosecutors' offices to comply with a major restructuring of their operations, which, Barkow concedes, would entail a "reject[ion]" of vertical prosecution, among other prevailing models. *Id.* at 897 n.157. Indeed, Barkow acknowledges that her proposal would face resistance among many prosecutors' offices, and she recognizes the difficulty in trying to "prompt prosecutors to change the view they have of themselves." *Id.* at 917. In response, she suggested that "a new administration with a new outlook on prosecutorial power might lead to a rethinking of how prosecutors do their job," and that "Congress and certain defense interests could also play a role." *Id.* However, in light of the absence of any such rethinking by the administration, coupled with Barkow's own rejection of the likelihood that Congress will play a strong role in prosecutorial reform, questions remain as to the implementation of her proposals.

Similarly, Bibas proposes a number of structural reforms to the internal governance of prosecutors' offices that he sees as improving the way prosecutors exercise their discretionary

In light of the challenges confronting many of these proposals, the next Part of this Essay considers the potential utility of disciplinary regulation as an alternative avenue of reform.

III. THE POTENTIAL UTILITY OF DISCIPLINARY REGULATION

Notably, among the various reforms that have been suggested in response to abuses of the prosecutor's discretionary power, relatively few proposals have looked to a judicial role in reviewing and regulating the prosecutor's charging decisions.³⁰ Moreover, although many scholars have lamented the lack of attention to prosecutors' charging decisions in codes of professional conduct,³¹ scholarship in this area has largely ignored the potential role ethics rules might play as a meaningful check on prosecutors' charging discretion.³²

For example, critics of proposals for a legislative response find it untenable to expect elected officials to enact legislation that will be perceived as hindering prosecutors' ability to fight crime.³³ Judges, in contrast, who do not face the same political pressures as legislatures, are less likely to be deterred by this kind of negative public opinion.

power. *See* Bibas, *supra* note 2, at 468–69. Like Barkow, however, having rejected the role of legislatures and judges in enacting reforms, Bibas does not explain how and why prosecutors' offices would be inclined to adopt these proposals for change. *Cf.* 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 prosecutor will make use of this guidance”).

30. In addition, many of these proposals are limited in the role they envision for judges and ethics rules in reform efforts. For example, in the context of proposing a legislative requirement that prosecutors issue guidelines for charging decisions, Vorenberg suggested that as part of a preliminary hearing, courts should review whether an individual charge was “a substantial and unjustified deviation from the prosecutor's own stated policy and practice.” Vorenberg, *supra* note 3, at 1570. Yet, Vorenberg ultimately limited judicial review to “merely requir[ing] prosecutors to state how they will employ their judgment and hold[ing] them to those statements.” *Id.* at 1571. *Cf.* Heller, *supra* note 5 (calling for meaningful judicial review of federal charging decision through discovery modeled after exceptions to privilege in cases of fiduciary relationship).

31. *See, e.g.,* DAVIS, *supra* note 14, at 143–61; Kenneth J. Mellili, *Prosecutorial Discretion in an Adversary System*, 1992 B.Y. U. L. REV. 669, 678–82 (1992); Bruce A. Green, *Prosecutorial Ethics As Usual*, 2003 U. ILL. L. REV. 1573, 1587–90 (2003); Samuel J. Levine, *The Yale L. Rosenberg Memorial Lecture: 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, 1341–42 & n.10 (2004).

32. For example, Davis briefly suggests “strengthening the disciplinary process” and perhaps modifying ethics rules as a possible response to prosecutorial abuse. DAVIS, *supra* note 14, at 181–83. However, she does not offer a detailed description of any such changes to the rules. *Cf.* Crase, *supra* note 5 (proposing a rule providing a balancing test for the prosecutor to decide whether charges are justified in a given situation, weighing factors of the motivation of prosecutor, the degree of harm to the defendant, and the impact on society).

33. *See supra* notes 26–27 and accompanying text.

Many judges are appointed, but even those judges who are elected are generally not subject to the same form or degree of political electioneering and public scrutiny that would tend to chill their willingness or ability to review the conduct of prosecutors. Indeed, judges serve both adjudicatory and disciplinary functions that entail substantial oversight of prosecutors, including, when necessary, issuing decisions and orders that favor criminal defendants and thwart the efforts of prosecutors. Similarly, judges are more likely than legislators to curtail prosecutorial discretion, as they deem necessary, through the enactment and implementation of disciplinary rules.

Other common proposals, calling for internal reform of the structure or policies of prosecutors' offices, are often challenged on the basis that, absent a mechanism of outside enforcement, prosecutors will lack an incentive to undertake meaningful change.³⁴ Reforms based on disciplinary rules may not face these obstacles. Judges would rely on their inherent authority to supervise and, when necessary, discipline prosecutors, rather than requiring legislative action or hoping that prosecutors will recognize for themselves the benefits of changing their longstanding policies, structures, and underlying attitudes. At the same time, to the extent that internal reforms proposed by scholars may play an integral role in preventing discretionary abuse by prosecutors, 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. Thus, disciplinary rules might help provide an enforcement mechanism for some of the internal changes scholars have envisioned.

Perhaps most significantly, relying on the disciplinary approach empowers judges to recognize and respond to abuses of prosecutorial discretion in a way that is not possible within the adjudicative process. As courts and scholars have noted, legal principles such as the harmless error doctrine,³⁵ obstacles to discovery, and civil immunity for prosecutors,³⁶ among others, place considerable limitations on adjudicative remedies available in response to a prosecutor's abuse of discretion.³⁷ In fact, when courts—including the United States Supreme Court—invoke these legal principles, they sometimes lament their inability to craft appropriate remedies for prosecutorial abuse of

34. See *supra* note 29 and accompanying text.

35. See, e.g., *United States v. Hasting*, 461 U.S. 499 (1983).

36. See, e.g., *Imbler v. Pachtman*, 424 U.S. 409 (1976).

37. See, e.g., *Davis*, *supra* note 3, at 412–15.

discretion by means of the tools of adjudication. Not infrequently, they call for action through other mechanisms, often identifying the disciplinary process as an appropriate forum.³⁸ Doctrines such as

38. For example, in the landmark 1976 case *Imbler*, the United States Supreme Court held that prosecutors acting in the scope of their duties in initiating and pursuing a criminal prosecution are entitled to absolute immunity from damages under a civil rights suit. 424 U.S. at 409. At the same time, the Court “emphasize[d] that the immunity of prosecutors from liability . . . does not leave the public powerless to deter misconduct or to punish that which occurs.” *Id.* at 428–29. Specifically, in addition to noting the potential applicability of criminal punishment for some forms of willful prosecutorial misconduct, the Court relied on the availability of discipline as a significant “check[] undermin[ing] the argument that the imposition of civil liability is the only way to insure that prosecutors are mindful of the constitutional rights of persons accused of crime.” *Id.* at 429. In the words of the Court, “a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers.” *Id.*

The Court expressed a similar approach in a 1983 opinion affirming the doctrine of harmless error. In *Hasting*, reviewing allegations that the prosecutor’s comments at trial violated the defendant’s constitutional rights, the Court referred to the “exercise of supervisory powers” through which federal courts have the authority “within limits” to “formulate procedural rules not specifically required by the Constitution or the Congress.” 461 U.S. at 505. Specifically, the Court delineated three “purposes underlying use of the supervisory powers . . . : to implement a remedy for violation of recognized rights; to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury; and finally, as a remedy designed to deter illegal conduct.” *Id.* (citations omitted). The Court found that because any violations of the defendant’s rights were harmless, there was no need for judicial exercise of supervisory power to fashion an adjudicatory remedy. According to the Court, the presence of harmless error at trial neither requires a remedy of reversal nor significantly implicates the integrity of the adjudicatory process. *See id.* at 506.

Finally, addressing the purpose of exercising supervisory power to deter improper conduct by prosecutors, the Court concluded that “deterrence is an inappropriate basis for reversal” in the face of harmless error. *Id.* Instead, the Court found, “means more narrowly tailored to deter objectionable prosecutorial conduct are available.” *Id.* In particular, the Court suggested that “the court could have dealt with the offending argument by directing the District Court to order the prosecutor to show cause why he should not be disciplined, or by asking the Department of Justice to initiate a disciplinary proceeding against him The court could have publically chastised the prosecutor by identifying him in its opinion.” *Id.* at 506 n.5.

In a 1988 case, the Court addressed similar issues in the context of a trial court’s supervisory authority over prosecutorial conduct in a grand jury. In *Bank v. Nova Scotia*, 487 U.S. 250 (1988), the Court reviewed an appeal of a district court decision dismissing an indictment as a remedy for prosecutorial misconduct in a grand jury proceeding. Among other findings, the district court concluded that “[t]he supervisory authority of the court must be used in circumstances such as those presented in this case to declare with unmistakable intention that such conduct is neither ‘silly’ nor ‘frivolous’ and that it will not be tolerated.” *United States v. Kilpatrick*, 594 F. Supp. 1324, 1353 (1984).

The Supreme Court reversed, holding that a trial court’s supervisory authority does not include the power to dismiss an indictment when prosecutorial misconduct during grand jury proceedings constituted harmless error. Alternatively, the Court noted, “[e]rrors of the kind alleged in these cases can be remedied adequately by means other than dismissal.” *Bank*, 487 U.S. at 263. As in *Hasting*, the Court identified a number of disciplinary remedies: “the court may direct a prosecutor to show cause why he should not be disciplined and request the bar or the Department of Justice to initiate disciplinary proceedings against him. The court may also chastise the prosecutor in a published opinion.” *Id.* As the Court explained, “[s]uch remedies allow the court to focus on the culpable individual rather than granting a windfall to the unprejudiced

harmless error and immunity are inapplicable to disciplinary decisions, in which the issue of prosecutorial ethics can be examined independent of questions of the availability of criminal or civil remedies.

Similarly, because the question of discipline turns on the conduct of the prosecutor rather than on the outcome of the case, the disciplinary process provides a forum for reviewing the ethics of prosecutorial charging discretion in scenarios generally not subject to adjudicatory review. For example, judges might exercise disciplinary review, as appropriate, when a prosecutor declines to file charges, when a defendant is found not guilty, or when the prosecutor's decision to file charges against a particular defendant is supported by probable cause but is the product of an arbitrary, capricious, or discriminatory decision-making process. In short, because the disciplinary process is not susceptible to many of the doctrinal and procedural limitations facing the adjudicatory process, enhanced disciplinary rules will fill the current gap in judges'—and the legal system's—ability to respond effectively to instances of abuse of prosecutorial discretion.

In addition to doctrinal limitations, judges can be reluctant to engage in a detailed examination of prosecutors' charging decisions out of concern for the confidentiality of information in prosecutors' files.³⁹ Accordingly, some argue, judges are simply not equipped to respond adequately to systemic abuses, including arbitrary and selective prosecution, overcharging, and discriminatory plea bargain policies.⁴⁰

defendant." *Id.*

39. See, e.g., Bibas, *supra* note 2, at 970 (finding that judges are concerned that "revealing prosecutorial information could 'chill law enforcement . . . [and] undermine prosecutorial effectiveness.'"); *id.* at 962 ("Ex post, case-by-case review is no answer, particularly review by outsiders without access to confidential police and prosecutor files."). See also Barkow, *supra* note 3, at 908–09 (noting the volume of cases that courts would be required to review and the need for secrecy in many prosecutorial charging decisions).

40. Bibas cites a number of rationales that courts have invoked for the hands off approach to reviewing prosecutors' charging decisions. For example, Bibas observes that courts place obstacles in the way of possible discovery of prosecutorial abuse of discretion, and that judges "are hesitant to review decisions about whether to prosecute because they are less competent to weigh all the relevant factors." Bibas, *supra* note 2, at 970. In addition, "[t]he separation of powers, courts hold, forbids judicial interference with prosecutorial discretion to decline to file charges." *Id.*

Moreover, Bibas argues that even if "[j]udges may have some tools with which to check prosecutorial discretion in individual cases, . . . these tools miss deeper problems. The most important problems of prosecutorial discretion are systemic ones." *Id.* at 972. According to Bibas:

Individual trial judges are limited by the confines of particular cases and controversies. They are not well suited to take the synoptic, bird's-eye view needed to police systemic concerns about equality, arbitrariness, leniency, and overcharging. They lack statistical training and expertise, as well as detailed information from prosecutors' files. Their choices *ex post* are often crude and binary, requiring them either to find statistical

Again, however, these constraints may not be present in the context of the disciplinary process.

First, because the proceedings will be confidential rather than adversarial, disciplinary proceedings may allow for broader discovery and investigation of the prosecutor's actions and policies, without the necessary participation and access of defendants. Second, because the focus of inquiry will be the ethical conduct—and possible discipline—of a prosecutor or an office, rather than considering an adjudicatory remedy to protect the substantive or procedural rights of a particular defendant, judges will expand the scope of examination, as necessary, to uncover broader patterns of behavior. Third, in exercising their inherent authority, judges will be less concerned about the kinds of separation of powers issues that arise in the adjudicatory setting.⁴¹ Thus, with greater access to information about prosecutors' charging decisions, a wider range of cases to evaluate, and a stronger sense of authority, judges will be better positioned to determine whether these decisions constituted an ethical violation, both in individual cases and on a systemic level.

CONCLUSION

Among lawyers in the American legal system, prosecutors stand out in having a duty to seek justice.⁴² Although this duty applies to all aspects of the prosecutorial role, the extent to which prosecutors exercise discretion in carrying out their charging function arguably

disparities unconstitutional or to put their imprimatur on them.

Id. at 973. In short, “[j]udicially enforceable models of equality are poorly suited to balance the myriad practical and policy considerations that prosecutors legitimately take into account.” *Id.* Therefore, he concludes, “[i]f judicial oversight is to mean anything, it will have to be coupled with some other measure to generate more concrete rules that judges can enforce.” *Id.* at 974.

41. See Green & Levine, *supra* note 1, at Part III.A.

42. See *Berger v. United States*, 295 U.S. 78 (1935):

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Id. at 88.

See also, e.g., *United States v. Koyajan*, 8 F.3d 1315, 1323 (9th Cir. 1993) (“Prosecutors are subject to constraints and responsibilities that don’t apply to other lawyers. While lawyers representing private parties may—indeed, must—do everything ethically permissible to advance their clients’ interests, lawyers representing the government in criminal cases serve truth and justice first.”); Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 *FORDHAM URB. L.J.* 607 (1999); Samuel J. Levine, *Judicial Rhetoric and Lawyers’ Roles*, 90 *NOTRE DAME L. REV.* 1989 (2015); Levine, *supra* note 31; Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 *VAND. L. REV.* 45 (1991).

entails a corresponding degree of obligation on their part to ensure that justice is served in the process of charging decisions. Nevertheless, in practice, commentators have raised substantial concerns over perceived and documented instances of prosecutorial abuse of the charging power, prompting various models for reform.⁴³

Building on my previous work with Bruce Green,⁴⁴ this Essay observes that these proposals typically focus on legislative action or internal restructuring of prosecutorial offices, with relatively little discussion of a judicial response premised upon the authority of judges to regulate the work of prosecutors through the enactment and application of disciplinary rules. Yet, as leading scholars have noted, there are various obstacles that render the implementation of legislative responses or internal restrictions somewhat difficult to envision, if not altogether unlikely. Accordingly, the Essay explores the possible utility of disciplinary regulation as an avenue of reform, finding that a judicial response compares favorably with other proposals as a potential alternative that, as a practical matter, does not face many of the drawbacks of other models.⁴⁵

43. *See supra* notes 10–15 and accompanying text.

44. *See Green & Levine, supra* note 1.

45. Though beyond the scope of this Essay, this form of disciplinary review might be implemented through interpretation and application of current ethics rules or through the enactment of new ethics rules regulating the work of prosecutors. For a descriptive and normative analysis of the implementation of disciplinary review, see Green & Levine, *supra* note 1.