The Power and Discretion of the American Prosecutor

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1 Prosecutors are the most powerful officials in the American criminal justice system. They control the direction and outcome of all criminal cases, particularly through their charging and plea-bargaining decisions. These decisions have greater impact and more serious consequences than those of any other criminal justice official. The prosecutor's charging and plea-bargaining decisions are totally discretionary and virtually unreviewable. Although most American prosecutors are elected officials, the democratic process does not effectively serve as a check on prosecutorial power because the charging and plea-bargaining decisions are made behind closed doors, shielded from public view.

2 In this paper, I discuss the charging and plea-bargaining functions of the American prosecutor and how they operate to give prosecutors more control over the criminal justice system than any other criminal justice official. I explain how the random and unfettered exercise of prosecutorial discretion in charging and plea-bargaining frequently produces race and class disparities in the criminal justice system. Finally, I argue that neither existing legal remedies nor the electoral process serve as effective controls on prosecutorial power and its abuse.

The Power to Charge

3 Of the many duties and responsibilities of the prosecutor, the charging power is the most important and is the essence of her control over the entire system. Prosecutors decide whether to charge an individual with a criminal offense, and what the charge should be. Although a police officer arrests an individual when he has probable cause to believe the individual has committed a criminal offense, he does not decide whether the individual will be charged formally. That decision is left to the prosecutor who has an almost unlimited amount of discretion in making this determination. The charging decision is critical, because it determines whether a person will face criminal charges and ultimately
risk the loss of liberty. The prosecutor is in control at this stage, even in jurisdictions where grand juries investigate and bring charges through the indictment process.\(^1\)

For example, if an individual is arrested because he was in possession of a quantity of cocaine, the prosecutor has many options. She can dismiss the case, even if there is evidence sufficient to prove the case beyond a reasonable doubt. Neither the judge nor any member of the community would have standing to challenge this decision. In fact, few individuals would be aware of a pre-charge dismissal, since typically these decisions are made in the privacy of the prosecutor’s office. Since there is never a formal charge before these dismissals, there is no case before the judge and no need to appoint a defense attorney.

Even if the prosecutor decides to formally charge the individual, she has a wide range of discretion in determining what charges to bring. If an individual is arrested in possession of a quantity of cocaine, the prosecutor’s arsenal of possible charges may include possession of cocaine, possession with intent to distribute cocaine, and distribution of cocaine, depending on the facts of the case. The significance of this decision cannot be overstated. In most states, possession of cocaine is a misdemeanor with a maximum penalty of one year in jail while possession with intent to distribute cocaine and distribution of cocaine are felonies with mandatory minimum terms of imprisonment.\(^3\) Depending on the statute, the mandatory prison term may be as much as five or ten years, or even more. If the defendant has prior convictions, the mandatory term may be longer. In the federal system, the drug laws carry even harsher penalties.

Most American drug statutes do not mandate that the defendant possess a particular amount of the drug before he can be charged with either possession or possession with intent to distribute. Even if the amount is large enough for a judge or jury to conclude that the defendant possessed the drug for the purpose of distribution, the prosecutor may decide to charge the person with simple possession of cocaine. Conversely, even if the amount seems relatively small, a prosecutor may charge the person with possession with intent to distribute if she believes she has evidence that would prove that the defendant intended to sell that amount. Otto Obermaier, a former prosecutor in the U.S. Attorney’s Office of the Southern District of New York, describes the charging power this way:

> If you push and pull a whole lot you can reach almost any conclusion you want about what you actually charge a person with ... And that’s the whole ballgame. You can call the same act by several names, and each one brings about a different result in prison time.\(^4\)

The charging decision is crucial, because if the defendant is convicted, it will determine the status of his liberty. Depending on the law and the existence of mandatory jail time, he may be eligible for probation if the charge is simple possession. If the charge is possession with intent to distribute or distribution, the judge may be required to sentence him to prison for a mandatory term of years, and that mandatory term may be lengthy.

The highly publicized case of Kemba Smith provides an example of the unfettered discretion prosecutors wield during the charging process. Kemba Smith’s boyfriend, Peter Hall, was one of the biggest cocaine dealers on the East Coast in the 1990s. Ms. Smith’s involvement with the drug trade was minimal, and by all accounts she acted under the direction and control of Hall, who ordered her to transport money across state lines and perform other tasks that did not directly involve distribution of the illegal drugs. Nonetheless, Ms. Smith was charged with numerous serious offenses in federal court.
After charging her with these offenses, the prosecutors attempted to make a deal that would involve dismissing most of the charges in exchange for her testimony, but Mr. Hall was murdered before any agreement was reached. Ms. Smith pled guilty to money and drug laundering, drug conspiracy, and lying to federal agents, in exchange for the government’s agreement to dismiss other offenses. Despite her minimal involvement in Mr. Hall’s drug cartel and substantiated accusations of his physical abuse and threats, the laws required the judge to sentence her to twenty-four and a half years in prison – more prison time than many murderers or rapists receive.

The prosecutor’s decision to charge Ms. Smith with these offenses was totally discretionary and not necessarily defensible. Her minimal, indirect involvement in Mr. Hall’s drug enterprise arguably warranted less serious charges or perhaps no criminal prosecution at all. But this critical decision was left totally to the prosecutor, whose discretion was almost boundless. The prosecutor had the power to dismiss some or all of the charges, with or without a plea bargain. His decision to go forward with the charges determined the outcome of the case because the sentencing laws did not permit the judge to exercise discretion, instead requiring a mandatory minimum term of imprisonment.

The problem of unbridled prosecutorial discretion has had a very unsettling effect on the operation of the criminal justice system since the establishment of mandatory minimum sentencing laws and longer prison terms. Although prosecutors always have wielded a disproportionate amount of power in the criminal justice system, mandatory minimum sentencing laws and the threat of long prison terms have shifted the balance of power in a way that dangerously threatens core principals of fairness and justice. Judges and defense attorneys have always been in reactive mode vis-à-vis prosecutors, but now the prosecutor’s disproportionate control over the prospect of extreme loss of liberty has resulted in a weakening of their respective roles in the adversarial system.

With mandatory minimum sentencing laws and sentencing guidelines that require judges to impose a specific sentence based on limited, charge-based information, prosecutors essentially predetermine the outcome of many cases. Unless the defendant exercises his right to trial and is acquitted of all of the offenses, the prosecutor’s charging decision will determine whether he will be incarcerated and how long the term of incarceration will be. Because the mandatory minimum sentencing laws require a specific term of imprisonment upon conviction, the judge has no power to show leniency at the sentencing hearing.

**Plea-Bargaining**

Although all criminal defendants have the right to a trial, very few exercise this right. Defendants plead guilty in 95 percent of all criminal cases through the plea-bargaining process, which is controlled entirely by the prosecutor. After the prosecutor has charged the defendant with one or more offenses, she may offer the defendant a “deal,” agreeing to drop one or more charges if the defendant agrees to plead guilty to one or more charges. Although the defendant may make a counter offer and attempt to negotiate the best deal possible, the prosecutor must agree to the final terms of the agreement.

The vast majority of criminal defendants engage in plea-bargaining because going to trial is risky business. If a defendant is charged with several offenses and each offense carries a lengthy term of imprisonment, the defendant faces the prospect of many years in prison.
if he is convicted of all charges. If one or more of the offenses carries a mandatory minimum term of imprisonment, that prospect becomes a guarantee. For many defendants, the possibility that a jury or judge may acquit him of the charges is too risky and uncertain. If he accepts a plea offer, he knows how much time he faces and how much time he avoids.

The increase in mandatory minimum sentences and longer prison terms has inflated the importance of the plea-bargaining process. The risks associated with exercising one’s constitutional right to a trial have become too high. Before the mandatory minimum phenomenon, even if a defendant were convicted of all charges, he would at least have the opportunity to try to convince the sentencing judge that he should be given a lenient sentence, or even probation. Mandatory minimum sentencing laws remove that possibility.

David Moe Robinson of Baltimore knows all too well about the risks of going to trial in a case involving mandatory minimum sentencing laws. Mr. Robinson was charged with a number of crack conspiracy and weapons charges. The prosecutors offered him a deal that would require him to tell them about his mother’s involvement in the drug ring. Mr. Robinson rejected the deal, which involved dismissal of some of the charges and would have exposed him to a maximum of twenty-four to twenty-seven years in prison. He went to trial, was convicted, and was sentenced to forty-five years in prison. The prosecutors argued that he should have received more.

Some prosecutors take advantage of the power they wield during the plea-bargaining process. Many prosecutors engage in “overcharging” – charging the defendant with the offense that carries the greatest penalty, even when she knows she may not be able to prove it at trial. The purpose of this practice is to goad the defendant into pleading guilty to a lesser offense. For example, a prosecutor may charge a defendant with Possession with Intent to Distribute Cocaine that may carry a mandatory minimum sentence of five years. Although she may have had enough evidence to convince a grand juror that there was probable cause to believe the defendant committed the offense, she may doubt whether the evidence is sufficient to prove guilt beyond a reasonable doubt at a jury trial. So the prosecutor may offer the defendant a plea to possession of cocaine, a misdemeanor offense that carries a maximum term of one year in jail with the possibility of probation. Even an innocent defendant with an absolute defense to the lesser possession charge might plead guilty to the misdemeanor to avoid the risk of being convicted of the higher charge after trial and facing a certain five years in prison. These decisions become even more difficult when the prosecutor requires the defendant to accept or reject the offer on the spot, leaving no time for substantial consultation with counsel or investigation of possible defenses. Some defendants feel compelled to accept the offer because the prospect of a certain and lengthy prison term is too frightening.

The prosecutor’s charging power and control over the plea bargaining process define her role as a law enforcement officer in the executive branch of government. However, she also serves a quasi-judicial role in that her primary duty is to see that justice is done. Various professional codes and standards and the United States Supreme Court have noted that the prosecutor’s duty is to seek justice, not merely convictions. However, the vagueness of this standard and the prosecutor’s unfettered discretion permit her to define justice as she sees fit, and many equate justice with convictions and incarceration, regardless of the circumstances of the case.
Prosecution and Race

In 1995, a study by the Sentencing Project found that almost one in three black males between the ages of 20 and 29 were under some form of criminal justice supervision – either in prison or jail, or on probation or parole\textsuperscript{10}. Others place the percentage of African-American men in prison at 50%\textsuperscript{11} and even slightly higher\textsuperscript{12}. A report released by the Bureau of Justice Statistics found that a black male had a 1 in 3 chance of being imprisoned during his lifetime, compared to a 1 in 6 chance for a Latino male and a 1 in 17 chance for a white male\textsuperscript{13}. These staggering statistics only begin to tell the story of the stark racial disparities that characterize the American criminal justice system.

The causes of racial disparity in the American criminal justice system are varied, complex, and many. They include socio-economic disadvantage and its consequences\textsuperscript{14}, disproportionate offending in certain categories of crime\textsuperscript{15}, and discriminatory treatment in the criminal justice system\textsuperscript{16}. Thus, the causes of and solutions to the problem lie both outside and within the criminal justice system.

Because prosecutors play such a dominant and controlling role in the criminal process through the exercise of broad, unchecked discretion, their role in the complexities of racial disparity in the criminal justice system is inextricable and profound. Few, if any, prosecutors intentionally or even consciously make decisions based on race. However, the many race neutral decisions that prosecutors make at the charging and plea bargaining stages of the process may be the result of unconscious and deeply internalized biases that have a racially disparate, and thus harmful, effect.

Prosecutors may legitimately consider any number of factors in making charging and plea-bargaining decisions. These factors include the strength of the evidence, the likelihood of conviction, the interest of the victim in prosecution, and the cost and complexity of the prosecution and trial\textsuperscript{17}. However, a prosecutor's personal biases may influence her consideration of these factors and taint the decision-making process.

For example, if a defendant in a case involving a white victim is charged with capital murder while a defendant in a similar case involving a black victim is charged with second-degree murder, questions arise about the value the prosecutors unconsciously placed on the lives of the respective victims. A prosecutor may unconsciously consider a case involving a white victim as more serious than a case involving a black victim. This unconscious view may influence not only the charging decision, but related decisions as well. If a prosecutor deems a particular case to be more serious than others, she will tend to invest more time and resources in that case, both investigating and preparing for trial. Such an increased investment would consequently yield more evidence and stiffen prosecutorial resolve. The likelihood of conviction is also obviously increased by the additional investment in investigation. Thus, although the strength of the evidence and the likelihood of conviction are facially race-neutral factors, they may be influenced by an unconsciously racist valuation of a case involving a white victim.

The victim's interest in prosecution is another legitimate factor that prosecutors consider in making charging and plea-bargaining decisions. If the victim of a crime informs the prosecutor that he has no interest in the prosecution of his case and no desire to see the defendant punished, the prosecutor may legitimately dismiss the case based on the victim's feelings, especially if she believes that the defendant does not pose a danger to
society and there are no other legitimate reasons for pursuing the prosecution. Few would question this decision, especially if the victim of the crime considered the prosecution process too onerous and difficult.

24 On the other hand, should a prosecutor pursue a prosecution in a case that she would otherwise dismiss for legitimate reasons simply because the victim wants to see the defendant punished? Or should a prosecutor assume that a victim is not interested in prosecution when the victim does not appear for witness conferences or respond to a subpoena? These questions demonstrate the significance of the intersection of class and race in the criminal process. African American crime victims who are poor and uneducated are less likely to attend meetings and communicate with prosecutors, often for reasons that do not reflect a lack of interest in the prosecution. These reasons may include lack of transportation, the inability to take time from work, or simple mistrust of the prosecutor and her role in the system. The prosecutor who is ignorant of or insensitive to these issues will cause and perpetuate racial disparity at this important stage of the criminal process.

25 The prior record of the defendant is another legitimate, seemingly race-neutral factor considered by prosecutors in the charging/plea bargaining process. Defendants with prior records are more likely to be charged and less likely to receive a favorable plea offer. Prosecutors consider both arrest and conviction records, and defendants with recidivist tendencies are arguably more deserving of prosecution. Race, however, may affect the existence of a prior criminal record even in the absence of recidivist tendencies on the part of the suspect because of the role that race plays in the decision to detain and/or arrest a suspect.

26 Police officers often inappropriately consider race or ethnicity in making the decision to stop and/or search an individual. In addition, policy decisions about where police officers should be deployed and what offenses they should investigate have racial ramifications. The fact that a white defendant has no criminal arrest or conviction record may not be a reflection of a lack of criminality on his part. If he lives in a neighborhood or attends a school that resolves certain criminal offenses (drug use, assault, etc.) without police intervention, he may be a recidivist without a record. Likewise, a black defendant who lives in a designated “high crime” area may have been detained and arrested on prior occasions when he has not committed a crime because of the pervasive practice of racial profiling. Thus, the existence or nonexistence of an arrest or conviction record may or may not reflect relative criminality in black and white defendants. A prosecutor without knowledge of or sensitivity to this issue may give prior arrests undue consideration in making charging and plea-bargaining decisions.

27 Another factor that prosecutors sometimes consider is the availability of alternative dispositions. For some less serious offenses, prosecutors may be willing to consider dismissing a case based on the existence of alternative resolutions that serve the overall interest of justice. For example, if a defendant who has stolen is able to make restitution and the victim is satisfied with this resolution and would be burdened by numerous court appearances, dismissal of the case may be the best disposition for all parties. If a defendant with a drug addiction has the resources to pay for a residential drug treatment program, this alternative might be a reasonable alternative to prosecution. These dismissals would also have the added benefit of eliminating the time and expense of trying another case for the prosecutor, the defense attorney, and the court. However, as with all of the otherwise legitimate factors prosecutors consider, there are often
unintended but significant class and racial ramifications. A poor, black defendant without the financial resources to make restitution or pay for drug treatment would not reap the benefits of a dismissal. Thus, racial disparities are perpetuated even though the differential treatment is not intentionally discriminatory.

28 The prosecutor’s race neutral decision-making process often plays an unintended yet significant role in the perpetuation of racial disparities in the criminal justice system. Although the racial disparity problem has many complex causes, prosecutors bear substantial responsibility because of their wide-ranging power and control over the criminal process. Thus, they should make efforts to discover the racial impact of their practices and policies and work to institute effective reforms.

The Inadequacy of Legal Remedies

29 Prosecutors are not required to justify their charging and plea-bargaining decisions to anyone beyond their immediate supervisors. Thus, there is no system of checks and balances to assure that these important decisions are made judiciously and without race or class bias. Because charging and plea-bargaining decisions are made in the privacy of prosecutors’ offices, it is difficult to discover arbitrary or racially biased decisions.

30 Even when biased decisions are discovered, the legal remedies are woefully inadequate. Federal civil rights claims are difficult to sustain because of onerous standing requirements and the need to prove intentional discrimination. Constitutional claims of selective prosecution are equally difficult, again because victims are required to prove intentional discrimination. Although unintentional, unconscious bias harms its victims as much as the purposeful type, there is no judicial remedy for discriminatory prosecutorial behavior unless the harmed party can prove that it was intentional.

31 The Armstrong case provides a stark example of the inadequacy of legal remedies for discriminatory prosecutorial behavior. The defendants in the case were charged with a number of crack cocaine and gun offenses in federal court in Los Angeles. They claimed unconstitutional selective prosecution based on race, alleging that the U.S. Attorney prosecuted virtually all African Americans charged with crack offenses in federal court and all similarly situated white crack defendants in state court. The significance of these allegations stemmed from the fact that the federal crack cocaine laws penalized crack trafficking much more harshly than the California state law. Although the defendants presented evidence to support their claim, the Supreme Court ultimately found the evidence insufficient to prevail, even in their efforts to obtain discovery of information from the prosecutor that may have helped them prove the ultimate claim. The Court required some proof that similarly situated whites could have been prosecuted, but were not – information that is almost impossible for a criminal defendant to obtain given the secret nature of prosecutorial decision-making.

32 Not all unjust prosecutorial decisions have racial effects. A prosecutor may treat similarly situated defendants or crime victims differently for reasons that appear arbitrary but that have nothing to do with race, ethnicity or class. However, the Supreme Court has held that selective prosecution violates the Constitution only if it is based on an unjustifiable standard such as race, religion, or some other arbitrary classification. Thus, individuals claiming unfair treatment in cases that do not involve such classifications have no constitutional remedy.
The legal remedies for discretionary prosecutorial practices that produce discriminatory results are either ineffective or nonexistent. Thus, there is a need to seek out other mechanisms that will hold prosecutors accountable for the decisions they make. One such mechanism is the electoral system, but it also fails to operate effectively because of the private nature of prosecutorial decision-making.

The Failure of the Electoral System

Under our system of government, the primary check against prosecutorial abuse is a political one. The prosecutors who exercise this awesome discretion are selected and can be removed by a President, whom the people have trusted enough to elect. Moreover, when crimes are not investigated and prosecuted fairly, nonselectively, with a reasonable sense of proportion, the President pays the cost in political damage to his administration. If federal prosecutors “pick people that [they] thin[k] [they] should get, rather than cases that need to be prosecuted,” if they amass many more resources against a particular prominent individual, or against a particular class of political protesters, or against members of a particular political party, than the gravity of the alleged offenses or the record of successful prosecutions seems to warrant, the unfairness will come home to roost in the Oval Office.

In this description of how federal prosecutors are held accountable, Justice Scalia argues that the electoral process is an effective check on prosecutorial abuse because the electorate will vote the President out of office if it is dissatisfied with the federal prosecutors he appoints. However, a closer examination of the how the electoral process functions in practice reveals that it fails as a mechanism of accountability for both federal and state prosecutors.

In the federal system, the President of the United States nominates the Attorney General and the United States Attorney for each federal district. The Senate must confirm these appointments. In theory, the voting public may provide input on these nominations by writing or calling their senators. In practice, such input is rarely provided, for a variety of reasons. Even an informed individual would be unable to provide meaningful input on the nomination of a U.S. Attorney who has no prior experience as a prosecutor. With no record of prosecutorial practices, the public has no way of judging how she would exercise her power and discretion as a U.S. Attorney. Even if the nominee had prior experience as a prosecutor, the public would have no knowledge of the policies and practices that inform her most important decisions – charging and plea-bargaining – because these policies and practices are not a part of the public record.

Justice Scalia’s suggestion that the public would vote a President out of office if the federal prosecutors he appointed abused their power and discretion is an unlikely scenario. The Supreme Court has protected the autonomy and discretion of prosecutors, even making it difficult for defendants to obtain discovery about their charging decisions in particular cases. In the unlikely event that the electorate took an independent interest in the performance of United States Attorneys, it would not be able to discover their day-to-day practices and policies. The public may be somewhat informed through the media’s reporting of high profile prosecutions, but even these cases do not provide a basis for determining whether there are race, class, or other disparities in a particular prosecutor’s practices. If by some chance this information did become available to the
public, it is implausible that the electorate would vote the President out of office based on its dissatisfaction with one or more federal prosecutors.

37 The electoral process operates more directly in the case of state prosecutors. Most state and local prosecutors are elected officials who run for office and serve for a set term of years. The electorate has the power to vote the prosecutor out of office. However, the state and local electoral process suffers from some of the same limitations as the federal system. The electorate is rarely, if ever, informed of the most important prosecutorial practices, namely charging and plea-bargaining. Few prosecutors volunteer this information, and the public is rarely informed or interested enough to ask for it.

38 As Kenneth Culp Davis explains:

The reality is that nearly all [the prosecutor’s] decisions to prosecute or not to prosecute... and nearly all his reasons for decisions are carefully kept secret, so that review by the electorate is nonexistent except for the occasional case that happens to be publicized. The plain fact is that more than nine-tenths of local prosecutors’ decisions are supervised or reviewed by no one.

Conclusion

39 American prosecutors enjoy wide, unfettered discretion that enables them to exert more power and control in the criminal process than any other criminal justice official. The decisions they make, particularly in the charging and plea-bargaining stages of the process, often determine the outcome of criminal cases and have monumental consequences for criminal defendants and crime victims alike. The random and arbitrary nature of prosecutorial decision-making and the lack of meaningful checks on prosecutorial power frequently result in the dissimilar treatment of similarly situated people. This dissimilar treatment, although unintentional, contributes to the race and class disparities that characterize the American criminal justice system.

40 Despite her vast power, the American prosecutor is subject to much less accountability than other criminal justice officials. The most important prosecutorial functions are performed in private, and legal remedies for victims of discriminatory treatment are inadequate. Furthermore, the electoral system does not operate as an effective mechanism of accountability.

41 The prosecution function is in great need of reform. Even though most prosecutors perform their duties legally and ethically, their practices and policies often produce unjust results. As elected officials and public servants, prosecutors should have a great interest in uncovering inequities and eliminating disparate treatment of similarly situated criminal defendants and crime victims. By creating more transparency in the charging and plea-bargaining processes, informing their constituents of their practices and policies, and taking steps to eliminate race and class inequities, prosecutors would go a long way towards restoring fairness and the balance of power in the American criminal justice system.
NOTES


2. Of course, if the prosecutor is an elected official, her constituents could vote her out of office at the end of her term. But since most members of the public ordinarily would be unaware of such a decision, it is highly unlikely that it would become a campaign issue. Id.


7. Flaherty & Biskupic supra note 4.

8. See Stephen A. Saltzburg & Daniel J. Capra, AmericanCriminalProcedure 831-32 (6th ed. 2000) (identifying the burden of proof for indictment as whether there is probable cause to believe the defendant committed the offense, a much lower standard than the proof beyond a reasonable doubt necessary for a criminal conviction).

9. SeeBerger v. United States, 295 U.S. 78, 88 (1935) ; ModelCodeofProf'lResponsibility EC 7-13 (1980) (“The responsibility of a public prosecutor differs from that of the usual advocate ; his duty is to seek justice, not merely to convict.”); ModelRulesofProf'lConduct R. 3.8 cmt. (1983) (describing a prosecutor’s responsibilities “to see that [a] defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence”); Standards Relating to the Admin. of Crim. Just. Stand. 3-1.2(c) (1992)(“The duty of the prosecutor is to seek justice, not merely to convict.”).


19. Id.
21. The Supreme Court has ruled that, in order to prove selective prosecution based on race, the defendant must prove that similarly situated whites could have been prosecuted, but were not. SeeWayte v. U.S., 470 U.S. 598, 609 (1985); U.S. v. Armstrong, 517 U.S. 456, 470 (1996).
22. Id.
23. Id.
26. The Attorney General is the chief prosecutor for the entire nation and the U.S. Attorneys are the chief prosecutors for each federal district. The Attorney General oversees each U.S. Attorney and the United States Department of Justice.

ABSTRACTS

Prosecutors are the most powerful officials in the American criminal justice system. The decisions they make, particularly the charging and plea-bargaining decisions, control the operation of the system and often predetermine the outcome of criminal cases. Prosecutorial power is vast and unrestrained, and the mechanisms that purport to hold prosecutors accountable are weak and often totally ineffective. In addition, the most important prosecutorial decisions are made behind closed doors – away from public scrutiny and thus immune from public accountability. The most remarkable feature of these important, sometimes life-and-death decisions is that they are totally discretionary. The deficiency of prosecutorial discretion lies not in its existence, but in the randomness and arbitrariness of its application. Even in prosecution offices that promulgate general policies for the prosecution of criminal cases, there is no effective mechanism for enforcement or public accountability. Self-regulation by prosecution offices is largely nonexistent or ineffective, and the United States Supreme Court has protected prosecutors from both public and judicial scrutiny. In this article, Professor Davis focuses on the exercise of prosecutorial discretion in charging and plea bargaining. She demonstrates how
prosecutors bear the brunt of the responsibility for the race and class disparities in the American criminal justice system. She also discusses why the current mechanisms of accountability for prosecutors in the American democratic system are ineffective. Finally, she suggests measures for reform.

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