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## The Independent Counsel Investigation, the Impeachment Proceedings, and President Clinton's Defense: Inquiries into the Role and Responsibilities of Lawyers, Symposium, Proportionality as an Ethical Precept for Prosecutors in Their Investigative Role

Rory K. Little

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## The Independent Counsel Investigation, the Impeachment Proceedings, and President Clinton's Defense: Inquiries into the Role and Responsibilities of Lawyers, Symposium, Proportionality as an Ethical Precept for Prosecutors in Their Investigative Role

### Cover Page Footnote

Associate Professor, Hastings College of the Law, University of California; federal prosecutor, 1987-94, Associate Deputy Attorney General, U.S. Department of Justice, 1996-97. I wish to thank Bruce Green, who extended the invitation to participate in a panel at the 25th ABA National Conference on Professional Responsibility in May 1999, where a draft of this paper was first presented; Academic Dean Leo Martinez and Hastings College of the Law for research support; and John Barrett, Kate Bloch, George Harris, William Simon, Gordon Van Kessel, William K.S. Wang, and Fred Zacharias for their helpful thoughts along the way. Stephen Brundage and Michael Pulliam provided excellent research assistance, and Leah Wilson did the yeoman's clerical job. Finally, the staff of the Hastings Law Library has been unfailingly patient, polite, and productive.

# PROPORTIONALITY AS AN ETHICAL PRECEPT FOR PROSECUTORS IN THEIR INVESTIGATIVE ROLE

*Rory K. Little\**

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*"Starr Takes Over, Will Investigate Role of First Lady."*<sup>1</sup>

*"Starr Subpoenas Two Arkansas PIs."*<sup>2</sup>

*"Ken Starr Continues to Investigate the Clintons."*<sup>3</sup>

#### INTRODUCTION

**S**URPRISE! Prosecutors investigate. This is, of course, not really news. Public prosecutors in this country have increasingly become involved in the investigative stages of criminal matters during the 20th century. But the extraordinarily public and microscopic focus directed to the investigation conducted by Independent Counsel ("IC") Kenneth Starr into the affairs (pun acknowledged) of a sitting president from 1994 through 1999 has brought the realities of the modern prosecutor's investigative role to the attention of the general public.

Similarly, while courts and scholars have recognized the emerging investigative role of prosecutors for some time,<sup>4</sup> if you read only the

1. Robert L. Jackson, *Travel Office Inquiry is Expanded; Starr Takes Over, Will Investigate Role of First Lady*, Houston Chron., Mar. 23, 1996, at A15.

2. William Douglas, *Starr Subpoenas Two Arkansas PIs/Investigate Possible Smear Campaign*, Newsday (New York), Feb. 28, 1998, at A4.

3. CBS News Transcripts, *The Osgood File*, June 14, 1999, available in LEXIS, News Library, Transcripts File.

4. See *Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976) (noting that prosecutors sometimes act in an investigative role); see also *Burns v. Reed*, 500 U.S. 478, 487-96 (1991) (addressing the immunity contours of this role). In a 1965 predecessor case to *Burns*, the Ninth Circuit noted that the prosecuting attorney may have numerous roles, including acts which are ordinarily related to police activity. See *Robichaud v. Ronan*, 351 F.2d 533, 537 (9th Cir. 1965). In his famous 1940 speech "The Federal Prosecutor," then-Attorney General Robert Jackson noted that one component of the prosecutor's powerful role in our society is that "[h]e can have citizens investigated." 31 J. Amer. Inst. Crim. L. & Criminology 3 (1940). Professor John Langbein also noted in his well-known 1973 essay that "[t]he public prosecutor in Anglo-American criminal procedure performs two primary functions. One is

standard promulgations of ethical rules for lawyers, you would think it was news too. Other than providing a few obvious standards that are almost certainly already required by other sources,<sup>5</sup> the ABA's 1969 Model Code,<sup>6</sup> 1983 Model Rules,<sup>7</sup> and even the more specific ABA Criminal Justice Standards ("Standards") for prosecutors, last revised in 1992,<sup>8</sup> say virtually nothing specific to guide the ethics of the investigating prosecutor.

This Article is designed to provoke examination of that lacuna. Is there a need for ethical rules in the investigative stage? If so, what form should they take? Specific, prohibitory? General, exhortative? What effect, if any, would such rules have? A word of caution up front: while this Article proposes specific language for such a rule<sup>9</sup> at which critics may shoot, it does not purport to analyze, or even to identify, every aspect or consequence of such a rule. Nor does the author necessarily endorse the rule.<sup>10</sup> The Article is designed to begin debate and analysis, not to end it. It may well be that no general rule can capture the specific nuances between "good" and "bad" investigative decisions with sufficient clarity to be of any positive use. Or perhaps the negative consequences—for example, chilling effective criminal law enforcement and exposing prosecutors to distracting "sideshow" ethical charges and litigation; or conversely, providing an ethical "cover" for investigating prosecutors of little practical effect—outweigh even possible benefits. Or perhaps there is not even a problem worth "fixing" with rules.

Still, the Starr investigation, its critics, and its defenders (who argue in the vein of, "but all prosecutors do this"<sup>11</sup>) demonstrate that the

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*investigatorial . . .*" John H. Langbein, *The Origins of Public Prosecution at Common Law*, 17 *Am. J. of Legal Hist.* 313, 313 (1973).

5. See Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 *Fordham Urb. L.J.* 607, 616 (1999) ("For the most part, the standards of conduct established by the disciplinary provisions relating to prosecutors are derived from constitutional decisions . . . and, thus, would apply independently of the ethical rules."); Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 *BYU L. Rev.* 669, 678-80.

6. Model Code of Professional Responsibility (1980). The ABA originally adopted the Model Code in 1969. See Stephen Gillers & Roy D. Simon, *Regulation of Lawyers* 447 (1999).

7. Model Rules of Professional Conduct (1983).

8. ABA Standards for Criminal Justice, Prosecution Function and Defense Function (3d ed. 1993) [hereinafter *Standards*, 3d ed. (unless otherwise indicated, references are to Prosecution Function Standards)]. The 1993 edition of the Standards includes the most recent standards governing prosecutors and a full Commentary. See *id.* Introduction, at xi-xiv.

9. See *infra* Part III.A; Proposed Criminal Justice Standard, *infra* app. (reprinting the proposed rule).

10. Moreover, the author's own prosecutorial experience has been exclusively federal. Different realities, resources and workload pressures that confront state prosecutors might lead to different conclusions. A valuable critique of this Article would come from persons with state and local experience.

11. See, e.g., Arnold I. Burns, *What By-the-Book Prosecutors Can Get Away With*,

debate must, at least, be had. Providing a specific stimulus is all that this Article seeks to accomplish.

This Article responds to various scholars who call for specific ethical guidelines for prosecutors.<sup>12</sup> Scholars themselves tend to avoid proposing specific language,<sup>13</sup> perhaps because important theoretical work needs to be done first, perhaps because the details of rule-writing are perceived not to be for the academy, and perhaps because specific language is always easily criticized.<sup>14</sup> This Article, however, proposes specific language, for a new rule of ethical standards to guide prosecutors in exercising their discretion when deciding whether, and how, to implement investigative techniques. In so proposing, it necessarily also argues that the exercise of publishing written standards that attempt to guide prosecutorial discretion ethically is not a meaningless exercise, even if the standards are largely

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Wall St. J., Mar. 23, 1998, at A23 (“Many of the so-called hardball tactics that the media and the general public are now seeing up close for the first time . . . are not only ‘by the book,’ but actually reflect greater restraint than the actions of many prosecutors around the country.”).

12. See Roberta K. Flowers, *A Code of Their Own: Updating the Ethics Codes to Include the Non-Adversarial Roles of Federal Prosecutors*, 37 B.C. L. Rev. 923, 966 (1996); David A. Sklansky, *Starr, Singleton, and the Prosecutor's Role*, 26 Fordham Urb. L.J. 509, 511, 538 (1999); see also Fred C. Zacharias, *Reconceptualizing Ethical Roles*, 65 Geo. Wash. L. Rev. 169, 209 (1997) [hereinafter Zacharias, *Ethical Roles*] (advocating that “particular proposals to redefine lawyers’ roles and conduct [be] put on the table”); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 Vand. L. Rev. 45, 48 (1991) [hereinafter Zacharias, *Do Justice*] (“This vagueness [of existing ethical codes] also undermines professional discipline of prosecutorial misconduct.”); cf. David Aaron, Note, *Ethics, Law Enforcement, and Fair Dealing: A Prosecutor's Duty to Disclose Nonevidentiary Information*, 67 Fordham L. Rev. 3005, 3027 (1999) (advocating “specific ethical guidance” for prosecutors in the plea bargaining context). Professor Laurie Levenson, while recognizing the investigative role as one of a prosecutor’s undefined responsibilities, might be read to suggest that more rules are not needed (or, in contrast, while helpful, will never be sufficient). See Laurie L. Levenson, *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors*, 26 Fordham Urb. L.J. 553, 569-70 (1999). While one might well agree with the latter reading, the alternative suggestion—that greater rule specificity is undesirable—is obviously at odds with this Article.

13. See, e.g., Green, *supra* note 5, at 611-12 (“Rather than focusing on any particular area of conduct, this Article examines the overarching concept.”); Zacharias, *Do Justice*, *supra* note 12, at 50, 114 (stating that the Article “highlights a need for precise ethical directives” and provides “a blueprint for writing specific provisions”). This point is made not to criticize Professors Green and Zacharias, both of whom are theoretical leaders in our shared field, but merely to point out that specific language proposals are not often found in law reviews.

14. This point comes from experience. The author recently served a term on the ABA’s Standing Committee on Ethics and Professional Responsibility, which is charged *inter alia* with proposing language changes to the Model Rules. No specific proposal made by any member of the Committee survived long in its initial form, and even after thorough working-over by the Committee, no specific proposal ever avoided further critique and amendment before it was adopted, if ever. It should be noted, however, that such editing and reediting almost always *improved* the content of the final language.

aspirational and contextual, rather than prohibitory, in form.

In brief, this Article proposes that the ABA adopt a specific ethical standard that directs prosecutors to invoke a conscious analysis of proportionality when deciding whether to issue a grand jury subpoena, seek a search warrant,<sup>15</sup> or take any other investigative step.<sup>16</sup> Certain investigative steps are, of course, routine and necessary in virtually every case—interviewing percipient witnesses to a crime, for example, or searching the residence of a drug dealer—so that specific proportionate balancing is normally unnecessary or entirely implicit. In a sense, for routine matters and techniques, the proportionality analysis should be considered already to have been performed—but not to have been dispensed with. The proposal would therefore not require prospective proportionality review for routine investigative steps in routine cases.

When considering investigative steps in any large, complicated, or high-profile matter, however, or when considering *unusual* investigative steps in any matter, prosecutors should consciously consider the costs of the technique prospectively. Prosecutors' analyses should account for the costs not only to the government, but also to the targets and other affected third parties. Prosecutors should consider not just monetary costs, but also significant intangible costs such as privacy intrusions, emotional stress, and stigma. They should balance such costs against factors such as the gravity of the offense, the likely benefit from the proposed investigative step, and whether any less costly (including less intrusive) steps might suffice.

The proposed rule is primarily contextual rather than categorical, in the sense advocated most clearly by Professor William Simon.<sup>17</sup> The rule would not direct a particular result in specific categories of cases, but rather would simply mandate that contextual analysis of fairness and proportionality be undertaken. Finally, prosecutors would be

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15. Of course, it is the grand jury that technically issues subpoenas, and judges who actually issue search warrants, and it is often an investigative agent, rather than a prosecutor, who first proposes such steps. But even the uncynical must admit that in the modern world of law enforcement, it is often the prosecutor's decision or advice to seek such investigative tools that is the primary "causal" step in the chain, since in many instances a search warrant or grand jury subpoena cannot be obtained without a prosecutor's approval. *See, e.g., In re Grand Jury Subpoena: Subpoena Duces Tecum*, 829 F.2d 1291, 1296-97 (4th Cir. 1987) ("[Grand jury subpoenas] are issued pro forma with no prior court approval. As such they are instrumentalities of the United States Attorney's office although issued under the district court's name and for the grand jury.").

16. To skip directly to the proposal, turn to this Article's appendix.

17. *See* William H. Simon, *The Practice of Justice* 9, 138-69 (1998). Professor Simon advocates the "Contextual View," of which the "basic maxim is that the lawyer should take such actions as, considering the relevant circumstances of the particular case, seem likely to promote justice." *Id.* at 9. This is counterpoised to what Simon styles the "Dominant and Public Interest views," which prefer "rigid rule[s]" that "dictate[ ] a particular response in the presence of a small number of factors." *Id.*

directed not to implement any investigative step that would reasonably be perceived as grossly disproportionate after group consideration.<sup>18</sup>

For any such investigative rule to be effective, prosecutorial duties of supervision, reporting, and training are also essential. These concepts encompass not only a prosecutorial duty to provide supervision, but also to *seek* supervision.<sup>19</sup> Reporting of discretionary investigative decisions and training on the ethical exercise of discretion should also be required for all prosecutors. These additional duties (to seek supervision, to report, and to provide ethics training) should be expressly placed on prosecutors not only in the investigative stage, but generally.

### I. THE PROSECUTOR'S INVESTIGATIVE ROLE TODAY

Although it may well be a 20th-century development, much of the modern-day prosecutor's time is spent making investigative decisions. The prosecution of complicated matters such as organized crime, public corruption, or business fraud, often requires investigative strategy and action before any criminal charges are filed. Prosecutors today are centrally involved in such proactive criminal investigations.<sup>20</sup> Even in reactive prosecutive settings, where the crime is identified and the perpetrator is in custody, prosecutors often have to take further investigative steps to ready the case for amended charging or for trial. While prosecutors may not play an investigative role in all or even most criminal cases (the majority of which are probably reactive as well as routine<sup>21</sup>), the importance of the investigative role lies not in

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18. There is a danger of a chilling effect that "sideshow" litigation—state bar disciplinary charges or § 1983 suits filed against prosecutors—could have on good-faith prosecutors often operating under significant time and resource pressures. See *infra* note 182 and accompanying text. Yet an entirely unenforceable ethical standard is useless or worse. See *infra* Part III.C. Some standard of mandatory duty, one with substance and not purely process, is therefore required. Thus, the proposed rule provides that an "enforceable" violation would require a finding of "gross" disproportionality, and thus (hopefully) be rare. The "grossly disproportionate" standard is not entirely a satisfactory compromise, and I urge further thinking to develop better language.

19. This is not an entirely novel idea, as the ABA's Model Rules do address the ethical obligations of supervisory and subordinate lawyers. See Model Rules of Professional Conduct Rules 5.1, 5.2 (1998). But the proposal goes significantly further: it would require prosecuting attorneys to *seek out* supervisory review and approval in some circumstances, as an ethical duty necessary to fair implementation of the prosecutorial role. See *infra* Part IV.A; cf. Model Rules of Professional Conduct Rule 5.2 (not requiring "subordinate lawyers" to seek supervisory advice).

20. Indeed, one experienced supervisory Assistant U.S. Attorney in the Southern District of New York recommends more "strategic" investigative thinking by prosecutors to combat other sorts of more "traditional" crime. See Elizabeth Glazer, *Thinking Strategically: How Federal Prosecutors Can Reduce Violent Crime*, 26 Fordham Urb. L.J. 573, 575 (1999).

21. See Joan E. Jacoby, *The American Prosecutor: A Search For Identity* 107



the number of cases it affects, but in the significance of the role in the matters where it arises.

The Supreme Court has noted the investigative prosecutorial role in its immunity decisions.<sup>22</sup> The involvement of prosecuting attorneys in the investigative function is valuable, because intrusive investigative decisions are not left solely to law enforcement personnel. Prosecutors, due to their training, experience, and temperament, can provide a healthy brake on non-lawyer enforcement personnel. Moreover, as lawyers, prosecutors are subject to ethical regulation and bar discipline, checks on discretion that are unavailable for regulating non-lawyers law enforcement agents. This Article presumes that the prosecutorial investigative role is here to stay, and that on balance it is a "good thing."<sup>23</sup>

A. *What the Starr Investigation Revealed:  
The Specific and the General*

The recent Independent Counsel investigation of President Clinton, supervised by former D.C. Circuit Judge and U.S. Solicitor General Kenneth Starr, brought to front-page public attention acts of prosecutorial investigative discretion. A number of the IC's investigative decisions were publicly criticized. None of the criticized investigative techniques, however, were unprecedented. Nor do they appear to have been illegal or unethical under current rules.<sup>24</sup>

Three investigative acts that received criticism in the popular press provide useful examples: (1) the decision to conduct the initial surprise interview of Monica Lewinsky incommunicado for as long as she would allow;<sup>25</sup> (2) the decision to subpoena Ms. Lewinsky's

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(1980) (excluding from discussion of the "intake process" "grand jury-originated and prosecutor-initiated investigations" as "constituting a relatively small proportion of the total intake"); Levenson, *supra* note 12, at 560.

22. See *supra* note 4.

23. It should be noted that in many European countries, prosecutorial authority over criminal investigations is even more clear and direct. That is, investigators operate directly under the full authority of prosecutors or prosecuting magistrates. See Rudolf B. Schlesinger, *Comparative Criminal Procedure: A Plea For Utilizing Foreign Experience*, 26 *Buff. L. Rev.* 361, 364-65 (1977); Ekaterina Panayotova Trendafilova-Batchvarova, *The New Legal Status of the Bulgarian Prosecutor's Office*, 4 *Ann. Survey Int'l & Comp. L.* 132, 136-45 (1997); Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 *Notre Dame L. Rev.* 403, 421-22 (1992).

24. Indeed, the D.C. Circuit recently reversed the supervising District Judge's referral of one of Starr's alleged "illegal" acts—leaking of matters occurring before the grand jury in violation of Rule 6(e). See *In re Sealed Case*, No. 99-3091, 1999 WL 709977, at \*1 (D.C. Cir. Sept. 7, 1999). There may be other such referrals yet unsealed as well as continuing Department of Justice investigation. The investigation of the investigators is not yet closed.

25. It has been reported that the IC prosecutors present during that interview discouraged Ms. Lewinsky from contacting her attorney. See Andrew Morton, *Monica's Story 177-78* (1999); Susan Schmidt, *Starr Team Cleared of Blocking Call By*

mother to the grand jury to inquire about, among other subjects, her daughter's sex life;<sup>26</sup> and (3) the decision to issue broad grand jury subpoenas for records to bookstores in the Washington, D.C. area in order to prove that Ms. Lewinsky had, in fact, purchased a particular book which she claimed to have given to the President (itself merely one link in the effort to prove the relationship between Ms. Lewinsky and the President).<sup>27</sup>

In light of the President's subsequent admission that he indeed had had a relationship with Ms. Lewinsky that was not appropriate,<sup>28</sup> as well as his subsequent trial and acquittal by the Senate on impeachment charges,<sup>29</sup> these prosecutorial investigative decisions have faded from the public consciousness.<sup>30</sup> But at the time—it seems longer than just over a year ago—they were criticized as excessive,<sup>31</sup> and as the product of a prosecutorial office free of budgetary constraints and healthy political oversight and thereby “out of

*Lewinsky*, Wash. Post, Dec. 5, 1998, at A16. This, it must be said, appears to have been a violation of settled ethical norms, and is not encompassed within this Article's assertion that the IC's criticized investigative steps were generally not uncommon and not illegal or unethical per se. See, e.g., 28 C.F.R. § 77.9 (1998) (stating that even in the pre-charge investigative stage, federal attorneys may not “seek to induce [a] person to forego representation or . . . [o]therwise improperly seek to disrupt the relationship between the represented person . . . and counsel”). Part 77 of 28 C.F.R. was substantially revised in 1999 after the passage of the “McDade Act,” codified at 28 U.S.C. § 530B (Supp. 1999). Ironically, this resulted in the *removal* of some ethical restrictions, such as the quoted portion of the former § 77.9.

26. See Stuart Taylor Jr., *Must a Parent Testify?*, Newsweek, Feb. 23, 1998, at 33, 33; Vikram David Amar & Akhil Reed Amar, *Justice: 10 Things We Learned From Starr*, L.A. Times, Oct. 24, 1999, at M1, available in LEXIS, News Library, L.A. Times File.

27. See David Streitfeld, *Lewinsky Defuses a Privacy Dispute; She Will Tell Starr of Book Buys*, Int'l Herald-Trib., June 24, 1998, at 3. A separate critique of the Starr investigation, that the investigation of the Lewinsky affair was far afield, and improperly so, of the IC's original “Whitewater” financial investigation, is also far afield of the focus of this Article. See, e.g., Naftali Bendavid & Jan Crawford Greenburg, *Independent Prosecutor Treading Unexplored Legal Ground: Starr's Expansion of His Investigation Raises New Questions*, Chi. Trib., Jan. 22, 1998, at 13, available in 1998 WL 2817106 (describing criticism of the scope of the Starr investigation).

28. See *Before Hours* (CNNfn television broadcast, Aug. 18, 1998), available in 1998 WL 29689081.

29. See Richard A. Posner, *An Affair of State* xi (1999); Eric Schmitt, *In the End, Senate Passes No Harsh Judgment on Clinton*, N.Y. Times, Feb. 13, 1999, at A8.

30. They may well not have been irrelevant, however, in that they built up pressure on the President to make his public admission, as proof of the relationship by other means began to seem inevitable. A semen-stained dress subject to DNA testing, derived from the very pressures placed upon Ms. Lewinsky and her family that have been criticized, appears to have been the most undeniable item of evidence. See Matthew Cooper & Evan Thomas, *Extracting a Confession*, Newsweek, Aug. 31, 1998, at 30 (describing how Starr's subpoena and the semen-stained dress “cornered” the President).

31. See *Democrats, Some Republicans, Criticize Starr's Reach*, Chi. Trib., Mar. 2, 1998, at 6. The bookstore subpoena was described as “gross prosecutorial overreaching” by an ACLU Attorney, see Streitfeld, *supra* note 27, at 3.

control.”<sup>32</sup> The Independent Counsel statute has now been permitted to expire (as of June 30, 1999),<sup>33</sup> and for the foreseeable future investigations of the President will be conducted by a Justice Department that must choose among myriad budgetary pressures and suffer the oversight of a presidentially-appointed Attorney General (“AG”).<sup>34</sup> All to the better, in the view of many.<sup>35</sup>

But the specific criticism of Kenneth Starr’s investigative decisions,<sup>36</sup> now largely forgotten in the far larger wake of congressional impeachment and trial, leaves behind lingering general questions: are there any ethical constraints (as opposed to constitutional limits) on the prosecutor’s exercise of discretion in the investigative stage? Should there be? If so, how should they be formulated? Can any enforceable precision be achieved in this discretionary and necessarily secret arena? How does one give meaningful content to the idea that a prosecutor’s exercise of investigative discretion should be ethically bounded?

A central point that must be noted about these three criticized investigative decisions made by the Starr IC team is that they were not unprecedented.<sup>37</sup> The bookstore subpoenas were upheld by the

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32. See *id.*; Dan Balz, *Focus Shifts from Lewinsky to Starr’s Aim*, Wash. Post, Mar. 1, 1998, at A1. See generally Deborah L. Rhode, *Conflicts of Commitment: Legal Ethics in Political Context*, 52 Stan. L. Rev. (forthcoming Jan. 2000) (manuscript at 66, on file with author) (stating that the IC’s “conduct raised a host of ethical concerns”).

33. See 28 U.S.C. § 599 (1994); *Independent Counsel Law Expires Today*, L.A. Times, June 30, 1999, at A14, available in 1999 WL 2173013.

34. Of course, the IC was also subject to AG oversight, in that the statute permitted the AG to dismiss the IC for good cause. See 28 U.S.C. § 596(a)(1) (1994); *Morrison v. Olson*, 487 U.S. 654, 696 (1988); *cf. id.* at 707 (Scalia, J., dissenting) (praising “the ‘good cause’ limitation as ‘protecting the independent counsel’s ability to act independently of the President’s direct control,’ since it permits removal only for ‘misconduct’”). Moreover, there is always Congressional oversight, over both the IC and the AG. See 28 U.S.C. § 595(a)(1) (1994); *Olson*, 487 U.S. at 664. The Independent Counsel was thus not, in fact, entirely independent. *But cf.* John P. McKenzie, *Reno’s Dependent Counsel*, *The Nation*, June 28, 1999, at 6, 6 (criticizing proposed Department of Justice regulations that would permit the AG to dismiss future special counsels “at will”).

35. But not all. See, e.g., *Keep It, But Fix It*, Raleigh News & Observer, Mar. 1, 1999, at A10 (suggesting changes to the Independent Counsel statute and opposing its elimination); Martin T. Meehan, *Don’t Kill the Independent Counsel Law—Fix It*, *Boston Globe*, Feb. 27, 1999, at A19 (same).

36. The decisions were, of course, not all Starr’s personally. With no actual prosecutorial experience, Judge Starr understandably hired experienced prosecutors to advise him. See Mary McGrory, *Here’s Dirt in Your Eye, Mr. Starr*, Wash. Post, June 29, 1997, at C1, available in LEXIS, News Library, Wash. Post File. Some observers have charged that the aggressive nature of these prosecutors in particular helps explain the aggressive conduct of the Starr investigation. See, e.g., Amar & Amar, *supra* note 26, at M1 (noting the “zeal and partisanship” of the Starr team prosecutors).

37. See Burns, *supra* note 11, at A23; see also Jay Croft, *Local Lawyers Know Starr’s Challenges*, Atl.-J. Const., Aug. 30, 1998, at A10 (“Prosecutors do that every single day. . . . [T]he law is a little bit different than people think it is.” (quoting interview with Craig Gillen, former Assistant U.S. Attorney)).

district judge supervising the Starr grand jury.<sup>38</sup> Surprise interrogations of central witnesses combined with pressure to cooperate, and grand jury subpoenas to innocent third party record holders and close relatives are, in fact, not uncommon in high pressure criminal investigations such as organized crime, significant violent crimes (imagine the World Trade Center or Oklahoma Federal Building bombings), public corruption cases, and large-scale drug conspiracies.<sup>39</sup> Any former federal prosecutor with a reasonable amount of experience and a degree of candor can report at least one such similar “hardball” anecdote.<sup>40</sup> Indeed, it has been reported that a decade earlier a different IC investigating a different Administration subpoenaed Oliver North’s wife as well as his minister to testify, and obtained the veterinary records for North’s dog; and that different federal prosecutors subpoenaed book receipts of the religious fanatic David Koresh when investigating the Waco, Texas mass killings.<sup>41</sup>

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38. See *Books Could Point to Crime, Judge Rules*, Minnesota Star-Trib., June 5, 1998, at 10A.

39. See, e.g., Kathleen Kenna, *Starr Chamber: Success Dims Starr’s Hopes*, Toronto Star, Aug. 1, 1998, at B1 (“Such tactics are common in other criminal cases—such as suspected drug trafficking—and non-partisan legal experts say Starr’s arsenal of investigative techniques is no different than that used by federal prosecutors tracking ordinary Americans.”); Taylor, *supra* note 26, at 33 (“I thought it was extraordinary . . . because it’s not an organized-crime case, it’s not a drug case.” (quoting interview with Professor Steven A. Saltzburg, George Washington Law School)).

Professors Vikram and Akhil Amar contend, however, that “[h]ardball tactics appropriate when pursuing violent criminals seem outrageous when pursuing the head of the federal executive branch.” Amar & Amar, *supra* note 26, at M1. This contention implicitly rests upon some conception of proportionality, as proposed in this Article.

40. Some prosecutors thus privately reverse the classic *Berger* aphorism, to provide that “[w]hile prosecutors must strike fair blows, they may also strike hard ones.” See *Berger v. United States*, 295 U.S. 78, 88 (1935) (“[W]hile he may strike hard blows, he is not at liberty to strike foul ones.”). You will have to ask other former prosecutors for their honest and non-specific (due to grand jury secrecy constraints as well as simple prudence) recollections. In conversation with other prosecutors, I find such anecdotes to be common. For example, I can remember bringing a hoped-for witness to tears when it was suggested that the witness’s father might be prosecuted—entirely and undisputedly legitimately—and receive jail time absent the witness’s cooperation. Both men had been subpoenaed to the grand jury. This was not a proud moment for me, and frankly it was driven somewhat unexpectedly by an experienced and hard-nosed law enforcement agent working with a relatively inexperienced prosecutor. Yet the threat of prosecution was entirely legitimate and sincere, and the result—bringing about a successful prosecution of the main organized crime target of the investigation—was viewed not only as legitimate but entirely just. Was the means proportionate to the goal? It is arguable, and thus not violative of any concrete ethical standard I have been able to formulate. But I do not recall performing any prospective proportionality analysis of the technique at the time.

41. See Kenna, *supra* note 39, at B1. I must note that lawyers formally involved in IC Walsh’s investigation of North have told me that they do not recall North’s minister being subpoenaed and do not believe that it happened. His wife apparently was subpoenaed. The grand jury record itself is, of course, secret.

The issue, therefore, regarding the investigative decisions made in the Starr investigation, is not whether the tactics were either legal or novel. Rather, the question was, and is, purely one of prosecutorial discretion: were the tactical decisions that were made fair and justified? This Article recasts this question as an inquiry into whether they were proportionate to the crime(s) under investigation.<sup>42</sup>

How does one go about answering this question? Analysis is necessarily imprecise and, consequently, debatable. Short of substantively banning specific investigative techniques—an undesirable tack if one wishes to preserve the full arsenal of lawful techniques for use in the really important cases—the best that an ethical rule can accomplish is: (1) cause prosecutors to at least pause and prospectively consciously consider effects on third parties and the proportionality of their actions; and (2) suggest some concrete factors that ought to enter into the prosecutors' analyses of investigative proportionality.<sup>43</sup>

If an ethical duty to seek supervision is also imposed, it can produce the further benefit of subjecting the proportionality analysis to consideration by a group, some of whom may have more experience and less stake in the particular matter under investigation. The day of the solo cowboy prosecutor should firmly be declared at an end. Imposing a prosecutorial duty of seeking, and providing, supervisory review of significant decisions should help avoid the occasional warped judgment of the single isolated prosecutor.

### B. *The Twentieth-Century Emergence of the Prosecutor's Investigative Role*

The term "investigative role" is used here to include not only when a prosecutor directs law enforcement agents to take certain investigative steps (such as subpoenas, search warrants, and witness interviews), but also when agents seek prosecutorial advice about, or approval for, implementing investigative steps that the agents are independently considering.

Such an investigative role for prosecutors is a relatively recent development, arising prominently only in the mid to late 20th century. One reason for this is that the position of public prosecutor is itself a relatively recent and uniquely American phenomenon, dating back no more than three centuries and not gaining complete acceptance in this

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42. See, e.g., Anthony Lewis, *Abroad at Home: Sense of Proportion*, N.Y. Times, Apr. 20, 1998, at A19 ("Mr. Starr . . . has lost his sense of proportion.").

43. Cf. Simon, *supra* note 17, at 10 (noting that we "are so accustomed to associating contextual judgement with judges and prosecutors and other government lawyers").

country until the early 19th century.<sup>44</sup>

Meanwhile, the concept of public law enforcement investigators in the form of police departments did not emerge until 1829 in London and even later in American jurisdictions.<sup>45</sup> Moreover, for the periods between the criminal act, arrest, and trial, the criminal justice process in this era was unencumbered by legal procedures.<sup>46</sup> There was little need for police to seek legal advice or supervision, as there were few legal restraints on what the police could do. Nor were there many particularly intrusive or sophisticated investigative tools available, other than physical searches. Thus the norm through the 19th century was that the police investigated and arrested, and sometimes even initially advocated their cases in court. At most they turned their cases over to prosecutors only when it was time to go to trial.<sup>47</sup> As a series of reports edited by Roscoe Pound and Felix Frankfurter noted in 1922, “[i]n general, the prosecuting attorney . . . take[s] no part in the investigation of the crime or the molding of the proof.”<sup>48</sup> Similarly in 1948, Professor Louis Schwartz described the federal prosecutor’s role primarily as “decid[ing] whether and in what manner to prosecute,” while other agencies “investigate and refer cases.”<sup>49</sup>

The 20th century has seen dramatic changes in this picture, during (at least) two significant eras. First, in the 1920s and 1930s, Prohibition and the advent of speedy motor and air transportation and a reliable interstate telephone system gave rise to organized

44. There is a wealth of literature on the topic, all produced only in the past 26 years. See, e.g., Jacoby, *supra* note 21, at 4-19 (discussing the development of public prosecution in the United States); Jack M. Kress, *Progress and Prosecution*, 423 *Annals of the Am. Acad. Pol. & Soc. Sci.* 99, 108-09 (1976) (comparing the development of American and European prosecutors); Langbein, *supra* note 4, at 313 (describing the public prosecutor as a “historical latecomer”); William F. McDonald, *The Prosecutor’s Domain*, in *The Prosecutor* 15, 20-24 (William F. McDonald ed., 1979) (discussing the historical evolution of prosecutors’ domain).

45. See McDonald, *supra* note 44, at 22. Langbein notes in passing that justices of the peace acted in an investigatorial role in late 16th century England. See Langbein, *supra* note 4, at 330. But this was a *judicial* inquiry; regarding a concept of investigating prosecutors, “[t]here is no evidence that the English gave it any thought.” *Id.* at 335. As Jacoby explains, it was not until 1879 in the Public Prosecutions Act that the British adopted the concept of public prosecutors, which had earlier developed uniquely in America from various colonial influences including the French and Dutch. See Jacoby, *supra* note 21, at 4-11.

46. See McDonald, *supra* note 44, at 22.

47. As McDonald notes, at the turn of this century “[t]he early stages of the criminal justice process were dominated by the police[,]” not lawyers. *Id.* at 27.

48. *Criminal Justice In Cleveland* 169 (Roscoe Pound & Felix Frankfurter eds., 1922). The times they were a changin’, however (or maybe Cleveland was simply atypical), and eight years later Pound wrote that “the prosecutor may or may not take a hand in criminal investigation . . . . His duties in this respect are not clearly defined and the responsibilities as between . . . police and prosecutor [are], as usual, divided or diffused.” Roscoe Pound, *Criminal Justice in America* 185 (1930).

49. Louis B. Schwartz, *Federal Criminal Jurisdiction and Prosecutors’ Discretion*, 13 *Law & Contemp. Probs.* 64, 84 (1948) (quoting Exec. Order No. 6166, 1933)).

criminal gangs spanning jurisdictional lines.<sup>50</sup> In response, in the 1930s, the Federal Bureau of Investigation developed into a group of especially well-trained investigators who could operate nationally without regard to state jurisdictional restrictions. Significantly, the FBI was placed within the Department of Justice, rather than as an independent agency, and thus was immediately subject to supervision, at least in theory, by a lawyer, the Attorney General.<sup>51</sup>

Yet even in the 1950s, prosecutors were far from intimately involved in the investigative stage. The 1954 film *Dragnet* provides a dramatic portrait of the uninvolved prosecuting attorney, receiving and reviewing evidence only as developed by the non-lawyer investigating officers.<sup>52</sup>

In the 1950s and 1960s, however, the American public became aware of, and concerned about, secret law enforcement investigative techniques. Unsupervised tapping of telephones and incognito interrogations became the subject of legislation and judicial attention, and McCarthyism in the 1950s as well as investigation of the mafia and anti-war groups during the 1960s led to court-imposed standards in the investigative process.<sup>53</sup> In 1968, Congress placed prosecutors squarely in the investigative arena by requiring their review and approval before investigative wiretaps could be implemented.<sup>54</sup> Prosecutors also came to dominate the plea negotiation process, which increasingly dominated the disposition of criminal cases, and investigating agents learned they had to satisfy the prosecutor in order

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50. See Pound, *supra* note 48, at 18 (lamenting "the new tasks thrown upon criminal law by the invention and development of the motor vehicle").

51. See 28 U.S.C. § 531 (1994). Originally Exec. Order No. 6166 (June 10, 1933), the statute provides that "[t]he Federal Bureau of Investigation is in the Department of Justice." Whether the FBI Director and his agents have been, in fact, well-supervised by the AG is the topic for a different debate. The long tenure of J. Edgar Hoover (as well as some of his tactics, such as keeping files on friends) as opposed to the relatively short tenure of various AGs helped create an aura of independence for the FBI vis-a-vis the Attorney General. See generally Richard Gid Powers, *Secrecy and Power: The Life of J. Edgar Hoover* (1988).

52. See *Dragnet* (Universal Studios 1954). The focus of the film's creators on the Los Angeles Police Department rather than the District Attorney's office may have tilted their perspective. However, the film purports to show the reality of crime investigation at the time and there is no reason to think its characterizations were grossly inaccurate. Excerpts of the film are worth showing in any criminal procedure or federal criminal law class today, especially for contrast with the post-Warren-Court era.

53. See, e.g., *Katz v. United States*, 389 U.S. 347, 353 (1967) (subjecting surreptitious wiretaps to Fourth Amendment scrutiny); *Stovall v. Denno*, 388 U.S. 293, 302 (1967) (subjecting investigative identification procedures to due process limitations); *Miranda v. Arizona*, 384 U.S. 436, 473 (1965) (regulating custodial interrogations); *Mallory v. United States*, 354 U.S. 449, 456 (1957) (requiring that arrests be supported promptly by probable cause).

54. See Pub. L. No. 90-351, 82 Stat. 212 (1968) (codified as amended at 18 U.S.C. §§ 2510-2520 (1994)).

to successfully file the case.<sup>55</sup> Finally, in 1971, the Supreme Court ruled that investigative agents could be sued for using excessive investigative measures.<sup>56</sup>

Thus by the 1970s, prosecutors were intimately involved in many criminal investigations (at least the non-routine ones) as a matter of legislative directive or simple expediency and self-protection for law enforcement agents. The prosecutor's advice was needed to forestall later attacks on filed criminal cases, as well as on the investigating agents themselves.<sup>57</sup>

Yet even in Professor McDonald's comprehensive 1979 survey of prosecutorial roles, the investigative function of prosecutors is seldom mentioned and not at all central.<sup>58</sup> The Supreme Court did not find it necessary to settle the scope of immunity for prosecutors acting as investigators until 1990.<sup>59</sup> While references to the reality of prosecutors acting as investigators can be found in older sources,<sup>60</sup> broad acceptance of the prosecutor's investigative role may easily be perceived as a phenomenon of only the past two or three decades. Even today, as Professor Daniel Richman has noted, investigative agencies have "a considerable degree of independence" from prosecutors: "the relationship between federal investigative agencies and federal prosecutors is coordinate, not hierarchical."<sup>61</sup>

Nevertheless, the concept that prosecutors do and should play some

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55. See Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *Fordham L. Rev.* 2117, 2120 (1998) (describing the growth of plea negotiation as the most common method of plea disposition); McDonald, *supra* note 44, at 28-31. In 1931 the Wickersham Commission (formally known as the National Commission on Law Observance and Enforcement), tasked with evaluating the effects of Prohibition, criticized independent law enforcement investigation, noting "the slipshod way in which cases are initiated by the police or other investigating agencies." *Id.* at 33. Yet the Commission declined to recommend that prosecutors be placed in charge of the plea-bargaining process. *See id.* at 34. Practice, however, quickly outpaced this official reluctance, and by 1971 the ABA's Criminal Justice Standards made it clear that the authority to commence criminal proceedings should be vested in the prosecutor's office. *See* ABA Standards Relating to the Prosecution Function and Defense Function, Prosecution Function Standard 3.4 (1971) [hereinafter 1971 Standards (references are to Prosecution Function Standards unless otherwise indicated)].

56. *See* *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 389 (1971).

57. *See* McDonald, *supra* note 44, at 41-42; *see also* John S. Edwards, *Professional Responsibilities of the Federal Prosecutor*, 17 *U. Rich. L. Rev.* 511, 517 (1983) ("The federal interest in investigating and prosecuting crime has grown considerably as a result of [various forces] over the last fifty years.").

58. *See, e.g.*, McDonald, *supra* note 44, at 41 (discussing conflicts over domain between police and prosecutors yet focussing on the prosecutor's screening function and not even mentioning prosecutorial involvement in investigative decisions).

59. *See* *Burns v. Reed*, 500 U.S. 478, 492-96 (1991) (holding that prosecutors receive qualified good-faith, though not absolute, immunity for their investigative actions).

60. *See supra* notes 4, 48 and accompanying text.

61. Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 *UCLA L. Rev.* 757, 780 (1999).



role, and often a critical one, in investigative decisionmaking now seems to be embedded and well-accepted. A 1983 article addressing the professional responsibilities of federal prosecutors straightforwardly included a section on Investigations.<sup>62</sup> The public and members of Congress appeared to be quite willing to hold Kenneth Starr responsible for the fairness of investigative steps taken in the Clinton-Lewinsky investigation. It is time that our published ethical authorities determine whether, and if so how, they should expressly address this significant and now-accepted prosecutorial role.

C. *Investigative Techniques Used with Prosecutorial Involvement Today*

Not all criminal investigative techniques require, or even involve, prosecutors. Law enforcement agents may and often do, for example, interview witnesses, obtain public records, and conduct covert surveillance, without ever consulting a prosecutor.

The most significant investigative techniques available today, however, generally involve or require a prosecutorial role. To what techniques would an ethical rule governing prosecutors' discretionary decision to invoke "investigative measures" refer? A brief catalogue may prove helpful.

Prosecutors have grand jury subpoenas for testimony and for documents or other physical items at their disposal.<sup>63</sup> They may seek search warrants and various forms of electronic surveillance orders.<sup>64</sup> They may authorize and oversee secretive undercover investigations.<sup>65</sup> They may order physical surveillance of targets or witnesses. They may send agents to interview witnesses overtly, at the witness's home or business. They may direct persons to provide fingerprints, voice exemplars, or other non-testimonial items of physical evidence.<sup>66</sup> Finally, they may plea bargain with criminal actors, offering leniency or even immunity, in return for undercover assistance against other criminal targets and testimony later if requested.<sup>67</sup>

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62. See Edwards, *supra* note 57, at 514-21. Notably, however, while positing that a prosecutor has an ethical responsibility to "investigate his case thoroughly," Edwards did not address at all the discretionary decision to implement investigative steps. See *id.* at 519.

63. See Fed. R. Crim. P. 6; *supra* note 15.

64. See, e.g., 18 U.S.C. § 2518 (1994) (governing the use of wiretaps).

65. See Bennett L. Gershman, *Prosecutorial Misconduct* § 1.1, at 1-3 (1998) (noting cases in which "prosecutors participated directly and actively in the criminal investigation").

66. See *Schmerber v. California*, 384 U.S. 757, 764-65 (1965).

67. See 18 U.S.C. §§ 6001-6004 (federal immunity statute).

## II. WHAT THE ETHICAL CODES DO AND DO NOT SAY ABOUT THE PROSECUTOR'S INVESTIGATIVE ROLE

Despite the significant investigative role that prosecutors often play in a criminal case, and the opportunity for ethical regulation that it provides, there is remarkably little reference to the prosecutor's investigative function in ethical codes.<sup>68</sup> Yet prosecutors can exercise significant and broad discretion in the period between suspecting a criminal offense or offender and deciding to charge. When then-Attorney General Robert Jackson explained to his assembled U.S. Attorneys almost 60 years ago that “[t]he prosecutor has more control over life, liberty, and reputation than any other person in America,” his talk focused almost entirely on investigative discretion.<sup>69</sup> Noted Jackson, “[h]is discretion is tremendous. He can have citizens investigated . . . .”<sup>70</sup> Federal prosecutors in particular, bound as they are to the constitutional grand jury process,<sup>71</sup> often may make investigative decisions that can dramatically affect both the course of the investigation and the lives of third parties, including the lives of mere witnesses as well as those suspected of committing crime. For example, grand jury subpoenas are governed by strict and in some cases unique rules,<sup>72</sup> and can cause significant disruption to businesses and individuals. Failure to comply with them can lead to criminal sanctions for perjury and obstruction of justice. Despite such significant effects and consequences, the prosecutorial investigative stage is little addressed by current ethical authorities.

### A. Current Ethical Authorities

Of course, ethical rules of general application apply to prosecutors as a subset of all lawyers.<sup>73</sup> Thus standard ethical rules that address

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68. See Flowers, *supra* note 12, at 974; Green, *supra* note 5, at 616-23; Levenson, *supra* note 12, at 556; see also Lesley E. Williams, Note, *The Civil Regulation of Prosecutors*, 67 Fordham L. Rev. 3441, 3464 (1999) (“Prosecutor-specific rules cover only a fraction of prosecutorial actions.”).

69. Jackson, *supra* note 4, at 3.

70. *Id.* Any gender bias this statement might suggest may be explained by its descriptively accurate use in the overwhelmingly male-dominated prosecutorial world of that time.

71. See U.S. Const. amend. V (providing that for any “infamous” federal crime, the charge must be made by a Grand Jury, not the prosecutor alone). This is one of the few provisions in the Bill of Rights that has not been “incorporated” against the States. See Stephen A. Saltzburg & Daniel J. Capra, *American Criminal Procedure* 695 (5th ed. 1996).

72. For example, while Model Rule 4.2 generally prohibits lawyers from communicating directly with persons they know to be represented by counsel, see Model Rules of Professional Conduct Rule 4.2 (1998), grand jury rules protect the time-honored practice of allowing prosecutors to interrogate represented witnesses in the grand jury without their attorneys in the room. See Fed. R. Crim. P. 6; *United States v. Mandujano*, 425 U.S. 564, 579-81 (1976).

73. See Rory K. Little, *Who Should Regulate the Ethics of Federal Prosecutors?*, 65

general topics such as confidentiality, diligence, and candor govern the prosecutor's practice (contextually applied, of course).<sup>74</sup> It is important to note that those generally stated ethical rules appear to apply, by lack of express limitation, to the investigative stage as well as during litigation. Thus prosecutors in their investigative role may be limited, sometimes severely, by the general ethical rules.

In addition, while various sources provide slightly more specific guidance to prosecutors in their investigative role, perhaps the most prominent is the ABA's "Prosecution Function" guidelines.<sup>75</sup> First published in 1971 as part of the ABA's Standards for Criminal Justice project,<sup>76</sup> the Prosecution Function standards were last amended in 1992.<sup>77</sup> Standard 3-3.1 expressly addresses the "Investigative Function of [the] Prosecutor,"<sup>78</sup> but it says virtually nothing to limit prosecutorial investigative discretion.

### 1. ABA Model Rules and Code

The ABA's 1983 *Model Rules of Professional Conduct* have been extremely influential, as approximately forty states have adopted some form of the Model Rules.<sup>79</sup> As the Tenth Circuit recently noted, "[t]he federal courts in analyzing conduct unbecoming to a member of the bar turn invariably to the Model Rules."<sup>80</sup>

Yet while rules of general application may implicitly apply to prosecutors as a subclass of all lawyers, only one Model Rule in the ABA's influential assemblage, Rule 3.8, addresses the "Special Responsibilities of a Prosecutor" as a distinct category.<sup>81</sup> Moreover,

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Fordham L. Rev. 355, 388, 419 (1996) [hereinafter Little, *Federal Prosecutors*]. This was recently made clear for federal prosecutors by the McDade Act, 28 U.S.C. § 530B (Supp. 1999).

74. See, e.g., Model Rules of Professional Conduct Rule 1.3 (requiring diligence); *id.* Rule 1.6 (imposing a duty of confidentiality); *id.* Rule 3.3 (mandating candor toward a tribunal). The debate regarding the proper application of Rule 4.2 ("Communication With Persons Represented by Counsel") to criminal prosecutors is an example of the need for contextual application. See Little, *Federal Prosecutors*, *supra* note 73, at 369-75.

75. See Standards, 3d ed., *supra* note 8, at 1-116. The Standards are also reprinted, without their Commentary, in Gillers & Simon, *supra* note 6, at 527-60.

76. See 1971 Standards, *supra* note 55, at 17-139. The ABA's Standards for the Administration of Criminal Justice project was initiated in 1964 by then-ABA President Lewis F. Powell, Jr., and resulted in formal adoption of 17 sets of Standards addressing various aspects of the criminal justice system by 1973. See Gillers & Simon, *supra* note 6, at 527. The Prosecution Function and Defense Function Standards are just two of these. An annotated compilation of the second edition of all 17 Standards was published as a looseleaf set in 1980.

77. See Gillers & Simon, *supra* note 6, at 527.

78. Standards, 3d ed., *supra* note 8, Standard 3-3.1.

79. See Gillers & Simon, *supra* note 6, at 3.

80. United States v. Colorado Supreme Court, No. 98-1081, 1999 WL 679678, at \*2 (10th Cir. Sept. 1, 1999).

81. Model Rule 3.8 provides in full that:

although the official Comment to Rule 3.8 states broadly that “[a] prosecutor has the responsibility of a minister of justice,”<sup>82</sup> this seven-part rule says nothing about the investigator’s role, other than to limit the discretion to subpoena lawyers to the grand jury in subsection (f).<sup>83</sup> On this point, some might argue that providing lawyers with special protection from subpoenas in an ethical rule drafted by lawyers reflects something other than high-minded objectivity. Regardless, Rule 3.8(f) is the only ABA Model Rule directed specifically and independently to the investigative stage.

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The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (d) 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;
- (e) exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6;
- (f) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
  - (1) the information sought is not protected from disclosure by any applicable privilege;
  - (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
  - (3) there is no other feasible alternative to obtain the information.
- (g) except for statements that are necessary to inform the public of the nature and extent of the prosecutor’s action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused.

Model Rules of Professional Conduct Rule 3.8 (1998).

82. *Id.* Rule 3.8 cmt. 1. See generally Green, *supra* note 5 (discussing the prosecutor’s duty to seek justice); Zacharias, *Do Justice*, *supra* note 12 (same).

83. See *supra* note 81. Subsection (f) has been the object of repeated attacks, as impinging too greatly on prosecutorial investigative discretion. The Third Circuit has struck it down as beyond the district court’s rulemaking authority. See *Baylson v. Disciplinary Bd.*, 975 F.2d 102, 104 (3d Cir. 1992). But the First Circuit has upheld it, see *Whitehouse v. United States Dist. Court*, 53 F.3d 1349, 1357-59 (1st Cir. 1995), although it noted that the same issue had evenly divided the Circuit sitting *en banc* in *United States v. Klublock*, 832 F.2d 664, 665 (1st Cir. 1987). The Tenth Circuit has upheld the subsection if modified so as not to apply to grand jury subpoenas. See *Colorado Supreme Court*, 1999 WL 679678, at \*2; *supra* note 80 and accompanying text; see also *supra* note 15 (discussing the respective investigative roles of the grand jury and prosecutor).

The 1969 predecessor to the Model Rules, the ABA's Model Code of Professional Responsibility, is no different. Only one binding Disciplinary Rule (DR 7-103) and one aspirational Ethical Consideration (EC 7-13) in the Code are directed specifically to prosecutors.<sup>84</sup> Although neither source addressed the affirmative investigative role of prosecutors with any specificity, EC 7-13 did note that "a prosecutor should not intentionally *avoid* pursuit of evidence merely because he believes it will damage the prosecutor's case or aid the accused."<sup>85</sup> Like the Comment to Model Rule 3.8, EC 7-13 also generally stated that a prosecutor's duty is "to seek justice, not merely to convict."<sup>86</sup> This, of course, echoed the only provision directed to prosecutors in the ABA's first model code, the 1908 Canons of Professional Ethics: "The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done."<sup>87</sup>

Notably, the 1969 Code contains an additional Ethical Consideration, which is not expressly found in the later 1983 Model Rules, that speaks more directly to the proposal of this Article. EC 7-14 directed that "[a] government lawyer who has discretionary power *relative to litigation* should refrain from instituting or continuing litigation that is *obviously unfair*."<sup>88</sup> Limited as it was to litigation, this EC ignored the investigative stage. Yet a concept of limiting a prosecutor's discretionary power by reference to the "obvious unfairness" of a tactic resonates strongly with the proportionality limitation proposed in this Article.

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84. See Model Code of Professional Responsibility DR 7-103 (1970) (describing the duties of prosecutors and other government attorneys); *id.* EC 7-13. EC 7-14 also addressed the government lawyer generally, although not prosecutors specifically. See *id.* EC 7-14. The Preamble to the 1970 Code explained that the Disciplinary Rules were mandatory while the Ethical Considerations were aspirational in character. See *id.* Preamble.

85. *Id.* EC 7-13 (emphasis added). Drafted soon after the Supreme Court's exhortation to timely disclose exculpatory evidence, see *Brady v. Maryland*, 373 U.S. 83, 87 (1963), it seems clear that the purpose of EC 7-13 was not to limit prosecutorial discretion in the affirmative pursuit of evidence, but rather to ensure that investigating prosecutors do not "sandbag" when they think the evidence will help rather than incriminate their target. Cf. *Branzburg v. Hayes*, 408 U.S. 665, 701 (1972) ("A grand jury investigation 'is not fully carried out until every available clue has been run down and all witnesses examined in every proper way' . . . ." (quoting *United States v. Stone*, 429 F.2d 138, 140 (2d Cir. 1970)); Edwards, *supra* note 57, at 519 ("[A] prosecutor has a professional responsibility to investigate his case thoroughly in order to diminish the chance that an innocent person will be charged or that a guilty one will be acquitted.").

86. Model Code of Professional Responsibility EC 7-13.

87. ABA Canons of Professional Ethics Canon 5, para. 2 (1908).

88. See Model Code of Professional Responsibility EC 7-14 (emphasis added). The Model Rules direct prosecutors not to file charges they know are not supported by probable cause, see Model Rules of Professional Conduct Rule 3.8(a), but do not include reference to any general standard of unfairness.

## 2. The ABA's Standards for Criminal Justice, Prosecution Function

As noted above, the ABA Standards for Criminal Justice contain a section expressly titled "Investigative Function of the Prosecutor."<sup>89</sup> According to the 1993 edition of the Standards, their purpose is to provide the criminal justice community's conception of "what good, professional practice is and should be."<sup>90</sup> As the introduction to the 1971 Standards made clear, with the exception of some specific practices condemned as "unprofessional" and thereby patently disciplinable, the Standards were not intended to serve as enforceable rules but rather as "guides to honorable practice."<sup>91</sup>

Nevertheless, as Professors Gillers and Simon have noted, "[t]he Standards [generally] . . . have been enormously influential. More than 40 states have revised their criminal codes on the basis of the ABA Standards and the Standards are cited dozens of times in each volume of federal court opinions."<sup>92</sup> Indeed, a search of the largest Lexis case law library reveals that the Standards have been cited over 1550 times by various federal and states courts.<sup>93</sup> The United States Supreme Court noted in *Strickland v. Washington*<sup>94</sup> that when courts address the performance of criminal defense attorneys, "[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable" for constitutional purposes.<sup>95</sup>

The "Prosecution Function" Standards alone, while yielding fewer citations,<sup>96</sup> are similarly influential. The opinions of lower courts

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89. See *supra* note 78 and accompanying text.

90. Standards, 3d ed., *supra* note 8, at xiv; *accord*, 1971 Standards, *supra* note 55, General Introduction, at 8-10.

91. 1971 Standards, *supra* note 55, at 8-10.

92. Gillers & Simon, *supra* note 6, at 430. This despite the caution that the Standards are not to "be used as criteria for the judicial evaluation of alleged misconduct of the prosecutor to determine the validity of a conviction." Standards, 3d ed., *supra* note 8, Standard 3-1.1. The same cautionary language was found in the original 1971 Standards, which also provided language making the distinction between use as a disciplinary standard versus a substantive measure of a conviction's legitimacy. See 1971 Standards, *supra* note 55, Standard 1-1.1(e) ("These standards are intended as guides for the conduct of lawyers and as the basis for disciplinary action, not as [substantive] criteria . . ."). The ABA has always been careful to stress the difference between its Model Rules being used for disciplinary purposes, as opposed to being used as substantive legal clubs. See Model Rules of Professional Conduct Scope.

93. The search terms on Lexis-Nexis were "ABA Standards For Criminal Justice."

94. 466 U.S. 668 (1984).

95. *Id.* at 688. The *Strickland* Court went on to note that the Standards are "only guides[.]" *id.*, and that attorney performance must be examined contextually, "on the facts of the particular case." *Id.* at 691. Lower courts are in accord regarding the guiding-but-not-dispositive effect of the ABA Standards. See, e.g., *Jeffries v. Blodgett*, 5 F.3d 1180, 1198 (9th Cir. 1993) ("ABA Standards serve only as a 'guide' for determining whether an attorney's performance is adequate.").

96. Restricting the same LEXIS search to cases that also mention Prosecution

suggest that the same *Strickland* use is true with regard to the role that the Prosecution Functions standards play in evaluating prosecutorial misconduct.<sup>97</sup> Indeed, the United States Attorney's Manual notes for all federal prosecutors that "since lower courts utilize the standards in determining issues . . . it is recommended that all United States Attorneys familiarize themselves with them."<sup>98</sup>

The pendency of the ABA's Prosecution Function project in 1969 may explain the absence of more specific prosecutorial guidance in the ABA's Model Code.<sup>99</sup> But even the ABA Prosecution Function Standard that addresses the Investigative Function provides virtually no specific guidance regarding the use of investigative techniques. In fact, the current edition of the Standards begins with a statement that "[a] prosecutor ordinarily relies on police and other investigative agencies for investigation of alleged criminal acts."<sup>100</sup> This may be true for a majority of cases, and is literally true in all cases, as a prosecutor should avoid the role of the actual investigator to preserve the distinction between witness and advocate.<sup>101</sup> As suggested above,<sup>102</sup> however, this initial statement ignores the influential role that modern prosecutors often play as investigative advisors, and even directors, with respect to many investigative steps in important or complicated criminal matters.

More specifically, the Standard governing investigation provides only that prosecutors should (a) fully investigate all cases; (b) not invidiously or improperly discriminate; (c) not use or encourage others to use illegal means to obtain evidence; (d) not interfere with communications between witnesses and defense counsel; (e) not use misleading documents to secure witness interviews;<sup>103</sup> (f) not

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Function yields 193 case citations. See *supra* note 93.

97. See, e.g., *Morgan v. Perry*, 142 F.3d 670, 684 (3d Cir. 1998) (applying Prosecutorial Function Standards to a military prosecutor); *Harris v. Colorado*, 888 P.2d 259, 264 (Colo. 1995) ("[G]uidelines for appropriate prosecutorial conduct are contained in the ABA Standards for Criminal Justice, Prosecution Function . . . which have frequently been acknowledged by this court.").

98. United States Dep't of Justice, U.S. Attorney's Manual § 9-2.101 (1999), reprinted in 3 Department of Justice Manual (2d ed., Aspen 1999) and available on <<http://www.usdoj.gov/usao/eousa/foiareadingroom/usam/>>.

99. See 1971 Standards, *supra* note 55, Proposed Revisions of Standards, Introduction, at 1 (stating that the Tentative Draft, proposed in 1970, was revised to conform to the then-new Model Code of Professional Responsibility).

100. Standards, 3d ed., *supra* note 8, Standard 3-3.1(a). The commentary to this Standard has noted, however, since 1971 that "in some circumstances the prosecutor [should] take the initiative to investigate . . ." 1971 Standards, *supra* note 55, Standard 3-3.1 cmt. a.

101. The need to preserve this dichotomy is recognized in the Standards for Criminal Justice, which direct that "a prosecutor should avoid interviewing a prospective witness except in the presence of a third person." Standards, 3d ed., *supra* note 8, Standard 3-3.1(g).

102. See *supra* Part I.

103. This standard was in the original 1971 Standards, see 1971 Standards, *supra* note 55, Standard 3-3.1(d), which makes the prosecutor's actions in *United States v.*

unofficially grant immunity from prosecution; and (g) not normally<sup>104</sup> interview prospective witnesses alone.<sup>105</sup> Note the absence of positive drafting: all but one of the Standard's subsections is phrased in the negative ("A prosecutor should not") rather than providing affirmative ethical guidance. Telling prosecutors what they should not do is certainly worthwhile. But providing them guidance regarding what they should do in the broad discretionary areas that remain would seem an equally worthwhile, if more difficult, project. The ABA Standards do not, on the whole, attempt this.

### 3. Other Sources

Other discrete, hard-to-find sources also provide some ethical guidance to prosecutors in their investigative role. These sources tend to merge substantive legal standards with ethical guidance, without express separation and in manuals directed to specific investigative contexts. For example, in furtherance of (or perhaps to forestall application of) Model Rule 3.8(f), the U.S. Attorney's Manual provides guidelines to regulate the issuance of grand jury subpoenas to criminal defense lawyers.<sup>106</sup> Similarly, in 1990, the ABA issued Guidelines for the Issuance of Search Warrants which, while addressed largely to issuing judges, contains some provisions applicable to prosecutors.<sup>107</sup>

In fact, the 1997 revised U.S. Attorney's Manual now has an entire chapter entitled "Obtaining Evidence."<sup>108</sup> This chapter provides a

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*Hammad*, 846 F.2d 854 (2d Cir.), *modified*, 858 F.2d 834, 836 (2d Cir. 1988), *aff'd after remand*, 902 F.2d 1062 (1990), in which the prosecutor used a phony grand jury subpoena to induce a target to provide an interview at the prosecutor's office, more difficult to defend. *See also* *United States v. Thomas*, 320 F. Supp. 527, 530 (D.D.C. 1970) (ordering a prosecutor to cease such a practice).

104. The Commentary to Standard 3-3.1(g) suggests that a distinction might rationally be made between solo interviews of "friendly," as opposed to adverse, witnesses, as well as regarding trial preparation re-interviews of witnesses whose statements have already been memorialized by investigators. *See* Standards, 3d ed., *supra* note 8, Standard 3-3.1 cmt.

105. The summaries in the text correspond to the subsections of Standard 3-3.1. Standard 3-3.1(b) was added to the Standards in 1992; the other Standards were original to the 1971 draft, but for "stylistic changes." Standards, 3d ed., *supra* note 8, Standard 3-3.1 (History of the Standard).

106. *See* United States Dep't of Justice, U.S. Attorney's Manual § 9-2.101 (1999), reprinted in 3 Department of Justice Manual (2d ed., Aspen 1999) and available on <<http://www.usdoj.gov/usao/eousa/foiareadingroom/usam/>>. The Manual's provisions do not create enforceable legal rights for third parties, but they do provide standards for internal disciplinary actions against federal prosecutors. *See* Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 Fordham Urb. L.J. 347, 407 n.322 (1999) [hereinafter Little, *Federal Death Penalty*].

107. *See generally* Thomas F. Liotti, *Guidelines for the Issuance of Search Warrants—The American Bar Association Initiative*, N.Y. St. B. J., Dec. 1991, at 28 (describing and discussing the ABA guidelines).

108. U.S. Attorney's Manual § 9-13.000.



wealth of guidance for federal prosecutors. Yet it is very specific and addresses only discrete areas that have caused problems in the past. There is no general guidance regarding the exercise of prosecutorial investigative discretion in the U.S. Attorney's Manual.

Various associations that address state and local prosecution offices have also issued ethical manuals for prosecutors, which contain various degrees of general provisions directed to the investigative role. Most prominently, in 1977 the National District Attorneys Association ("NDAA") issued its *national prosecution standards*, in which chapter seven addresses "the investigative function."<sup>109</sup> This chapter, consisting of four Standards, begins by advocating that "[a]mong the many duties of prosecution, the responsibility to investigate deserves . . . prominence and focus."<sup>110</sup> Yet this entire chapter is primarily a pro-prosecution advocacy piece rather than an useful ethics code. Its first Standard advocates that "funds should be provided" to prosecutors' offices for complete investigative competence<sup>111</sup>—not a bad idea, but hardly an ethical standard. The second NDAA investigative standard advocates for strong prosecutorial immunity.<sup>112</sup> The remaining two NDAA standards advocate for prosecutorial involvement in, and adequate funding for, search warrant and subpoena powers and review.<sup>113</sup> Thus, without exception, the 1977 NDAA standards represent arguments for expansion of the prosecutorial role in investigation, and do not suggest ethical limitations on such expanded discretionary authority.

There are other sources that purport to address the prosecutor's investigative role. In 1973, a National Advisory Commission on Criminal Justice Standards and Goals published six reports, one of which contained a section entitled "The Prosecutor's Investigative Role."<sup>114</sup> This three-paragraph section, however, simply noted that prosecutors should have adequate investigative resources, as well as subpoena power and search warrant review authority.<sup>115</sup> It suggested no ethical standards for governance of these prosecutorial powers, and was in effect simply a less detailed predecessor to the NDAA standards issued four years later.

The American Trial Lawyers Association's Code of Conduct also provides some advice for public prosecutors, including: "In exercising

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109. National District Attorneys Association, *national prosecution standards*, ch. 7, at 108-23 (1977). Perhaps in keeping with the ethos of the time, the lower case letters for the title are in the original.

110. *Id.* Standard 7.1 cmt., at 109.

111. *Id.* Standard 7.1(A).

112. *See id.* Standard 7.2, at 112.

113. *See id.* Standard 7.3, at 115; *id.* Standard 7.4, at 121.

114. *See* American Bar Association, *Comparative Analysis of Standards and Goals of the National Advisory Commission on Criminal Justice Standards and Goals with Standards for Criminal Justice of the American Bar Association* vii, 293 (1973).

115. *See id.* at 293.

discretion to investigate . . . a [prosecutor] shall not show favoritism for, or invidiously discriminate against, one person among others similarly situated."<sup>116</sup> Again, this advice, while certainly appropriate, is general and likely already required by constitutional and other rules.<sup>117</sup> Likewise, because it is not contained in the ABA's Model provisions, which have been adopted by most states in the Union,<sup>118</sup> the advice is not currently in most enforceable ethical codes.<sup>119</sup>

There are many other sources purporting to address the prosecutor's investigative role.<sup>120</sup> None that I have found, however, attempt to provide any positive guidance for the fair, ethical *limitation* of the prosecutor's discretionary power to investigate. This uniform absence might suggest uniform agreement that no ethical guidance is necessary or useful in this area. I speculate briefly below about other possible explanations for the absence. In any case, the fact is that no matter how poorly drafted the reader may find this Article's proposal, it has the advantage of competing in a heretofore open field.

### B. *Why Don't Current Authorities Address the Investigative Stage, and Why Should They?*

As explained above, the American prosecutor's investigative role is a relatively recent phenomenon, and not the primary focus of ethical

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116. American Trial Lawyer's Association, Code of Conduct (1988), ch. 9 (Responsibilities of Government Lawyers), sec. 9.2, *reprinted in* Gillers & Simon, *supra* note 6, at 265-66. This is predictive, of course, of Standard 3-3.1(b), which was added in the 1992 edition. *See* Standards, 3d ed., *supra* note 8, Standard 3-3.1(b).

117. *See, e.g.*, United States v. Armstrong, 517 U.S. 456, 464-65 (1996) (holding that while the standard for discovery may be high, invidious discrimination by prosecutors is prohibited under the Due Process clause).

118. *See* Gillers & Simon, *supra* note 6, at 3 ("[A]bout forty jurisdictions have adopted substantial portions of the [ABA] Model Rules."). In the 1999 edition of its *Compendium*, the ABA represents that 43 states have adopted the Model Rules, another three have adopted the predecessor 1969 Model Code, and two others are considering adopting the Model Rules. *See* ABA Compendium 525-26 (1999).

119. In 1998, however, the ABA added a comment to its general "Misconduct" Rule, Model Rule 8.4, which expressly identified race and other discrimination as disciplinable "conduct that is prejudicial to the administration of justice." Model Rules of Professional Conduct Rule 8.4(d) (1998); *see* ABA Compendium, *supra* note 118, at 118 (noting the amendment). The extent of state adoption of this model commentary remains to be seen.

120. *See, e.g.*, California District Attorneys Association, Ethics and Responsibility for the California Prosecutor § 3.1 (1992) (noting that when acting in their investigative role, "prosecutors are governed by the same ethical considerations applicable to other prosecutorial functions"); California District Attorneys Association, Uniform Charging Standards Standard I.B (1974) (detailing prosecutors' investigative responsibilities). In 1988, Professor John Jay Douglas published a comprehensive overview entitled *Ethical Issues in Prosecution* (1988). In a section entitled "Investigation and Discovery" that covers over 60 typescript pages, Professor Douglas canvasses a great deal of current case law and ethical code authorities. *See id.* at 157-219. He does not, however, offer ethical guidance beyond that extant in the sources he cites. *See id.*

attention even in 1970, for example, when the Prosecution Function Standards were first adopted.<sup>121</sup> Moreover, the exercise of prosecutorial discretion has traditionally been considered to be appropriately beyond all but the most forgiving judicial review,<sup>122</sup> and ethical authorities may share this hesitancy. The virtually unreviewable status of prosecutorial discretion may have led ethicists to avoid proposing concrete non-statutory restrictions. As for development of such standards by prosecutors themselves, it is certainly conceivable that, having previously been free of even gentle regulation in their investigative role, they would oppose an attempt to promulgate ethical standards that would limit this discretion while exposing prosecutors to professional attack.

One can also speculate that the absence of express ethical guidance addressing the exercise of prosecutorial investigative discretion may flow from an "all's fair" attitude toward the investigative pursuit of criminal offenders. As the Supreme Court has made clear, many specific constitutional protections for suspected criminal offenders do not apply until the investigative stage has ended and the defendant has been formally charged.<sup>123</sup> Prior to beginning the formal prosecutive stage, societal forces and means brought to bear on identifying and apprehending criminal violators may be viewed as appropriately unregulated, aside from very general constitutional constraints. Yet others have suggested that the vacuum left in the investigative stage ought to be filled by some contextual ethical guidance.<sup>124</sup> Why do existing ethical codes not attempt this?

Perhaps a necessary preliminary question is, why *should* ethical codes attempt this? If the exercise of investigative authority by prosecutors is not viewed as a problem, attempts to "fix" it are at best unnecessary, and, worse, impediments to justice. Indeed, many investigative techniques (for example, search warrants and custodial interrogations) are bounded by specific Constitutional authority,<sup>125</sup> and all are presumably bounded by the fundamental fairness component of the Due Process clauses.<sup>126</sup> For the latter half of this

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121. See *supra* notes 81-87 and accompanying text.

122. See *Armstrong*, 517 U.S. at 464.

123. See, e.g., *Kirby v. Illinois*, 406 U.S. 682, 689-90 (1972) (holding that a defendant has no right to have counsel present at an identification procedure prior to the initiation of formal prosecutorial proceedings).

124. See, e.g., *Lynch*, *supra* note 55, at 2126 ("[A] host of . . . investigative decisions . . . appear to be solely matters of prosecutorial prerogative."); Sklansky, *supra* note 12, at 538 ("We want prosecutors to be bound by something other than politics. . . . [I]f that something else is not the normal ethical rules of the legal profession, what is it?").

125. See U.S. Const. amends. IV, V; see, e.g., *Miranda v. Arizona*, 384 U.S. 436, 471 (1966) (discussing a suspect's Fifth Amendment rights during a custodial interrogation).

126. See, e.g., U.S. Const. amends. V, XIV; *Jacobson v. United States* 503 U.S. 540, 548-54 (1992) (holding that the police may not induce an individual to commit a

century, incorporation of the Due Process Clause has operated to provide a constitutional floor of "fundamental fairness" to restrict particularly gross exercises of executive investigative harassment. As the original introduction to the Standards noted in 1971, "[t]he Constitution forbids various investigatory mechanisms which would be highly efficient, the General Warrant being only one of these."<sup>127</sup> It can plausibly be argued that beyond these constitutional boundaries, executive discretion as to how to investigate crime should be untrammelled, lest significant criminal offenders escape identification, capture, or successful prosecution. This argument might continue that, given the scrutiny afforded these days to modern public prosecutors by media, citizens, and legislatures, and the increasingly high hiring standards of prosecutors' offices, prosecutors can be trusted to be fair most of the time.<sup>128</sup> The metaphor of a "war on crime" completes this "all's fair" analogy: criminals who have broken basic social rules deserve no extra quarter in society's investigative response. They have forfeited any right to ethical treatment by their highly unethical decision to make war against their fellow citizens.

The response to the argument that specific ethical standards addressing prosecutors in the investigative stage are unnecessary is multi-faceted, and I do not claim it to be overwhelming. Indeed, after a debate which this Article hopes to stimulate, policymakers might conclude that no additional ethical standards are needed. A brief theoretical counterargument thus suffices for present purposes.

First, one can certainly find cases in which prosecutorial decisions regarding how to investigate are strongly criticized.<sup>129</sup> In addition, scholars as well as the popular media have vocally criticized modern

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crime); *Stovall v. Denno*, 388 U.S. 293, 301-02 (1967) (applying due process analysis to police identification procedures); *Rochin v. California*, 342 U.S. 165, 174 (1952) (subjecting physical searches to due process analysis).

127. 1971 Standards, *supra* note 55, at 3.

128. An early statement of this "trust the prosecutors" argument appears in *United States v. Dotterweich*, 320 U.S. 277, 285 (1943) ("[T]he good sense of prosecutors . . . must be trusted."). See also *Lynch*, *supra* note 55, at 2139 (characterizing prosecutorial discretion as "a choice made with the understanding that specialized agencies will, subject to political control, allocate priorities in a sensible way.") Justice Stewart, among others, criticized this view. See, e.g., *Scarborough v. United States*, 431 U.S. 563, 579 n.1 (1977) (Stewart, J., dissenting) ("Proper construction of a criminal statute . . . cannot depend upon the good will of those who must enforce it.").

129. See, e.g., *Jacobson*, 503 U.S. at 553-54 (finding entrapment "[w]hen the Government's quest for convictions leads to the apprehension of an otherwise law-abiding citizen who, if left to his own devices, likely would never have run afoul of the law"); *United States v. Boyd*, 55 F.3d 239, 243-44 (7th Cir. 1995) (affirming grant of new trial based in part on government's provision of excessive benefits to cooperating criminals); *Washington v. Lively*, 921 P.2d 1035, 1048-49 (Wash. 1996) (finding outrageous governmental misconduct in violation of a defendant's due process rights when the government sent an informant to substance abuse group counseling meetings to lure recovering alcoholics into committing illegal acts).

day prosecutors as excessive and unethical in their investigative roles.<sup>130</sup> Some observers, at least, appear to believe that limitations on criminal investigations are needed.

Moreover, little citational proof is necessary to support the propositions that: (1) investigations can harm innocent third parties; (2) even targets of good faith criminal investigations can be innocent; and (3) an express directive to prosecutors that they should consider, and subject to group analysis, the proportionate value of their discretionary decisions, could have an improving (if perhaps modest) effect on the overall fairness of criminal investigations.

Even putting aside the point that the visceral "all's fair" response presumes the guilt of investigative targets, the argument ignores the significant adverse effects that aggressive investigative techniques can have on innocent third parties. For example, compliance with subpoenas directed at record-holders carries a financial cost, and can expose mere custodians to the sometimes unpredictable consequences of prosecutorial focus. Searches directed at third parties can be intrusive and disruptive.<sup>131</sup> Undercover investigations can entrap the unwary or naive.<sup>132</sup> Stigma can flow simply from being investigated or being associated with a criminal investigation, even if no criminal case results. Witnesses, by mere chance association with a target, can have their privacy destroyed and their lives immutably altered. Wiretaps monitor and record the innocent as well as the guilty. Surveillance can turn casual lunch partners into investigative subjects. As Judge John Gleeson has noted, "[t]he impact of these [investigative] powers . . . cannot be overstated. The service of a single grand jury subpoena can ruin a person's livelihood and, on occasion, even jeopardize a person's life."<sup>133</sup> Surely the independent rights of third parties are not forfeited by the criminal acts even of legitimate investigative targets. One can imagine, then, a rationale for incorporating ethical restraints on at least those investigative techniques which are not focused directly and exclusively on a suspected criminal actor.

Moreover, the investigative stage of a criminal case generally precedes the decision to charge, and its very purpose is to discover

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130. See, e.g., Bennett L. Gershman, *The New Prosecutors*, 53 U. Pitt. L. Rev. 393 *passim* (1992) (arguing that prosecutors have become less bound by ethical constraints); Bill Moushey, *Win at All Costs* (pts. 1-10), Pittsburgh Post-Gazette, Nov. 22-Dec. 13, 1998, at A1 (recounting incidents of prosecutorial excesses), available in LEXIS, News Library, Pittsburgh Post-Gazette File.

131. See, e.g., *Zurcher v. Stanford Daily*, 436 U.S. 547, 573 (1978) (Stewart, J., dissenting) (discussing the intrusions that search warrants permit into the privacy of third parties).

132. See, e.g., *Jacobson*, 503 U.S. at 551-54 (condemning government ploy to induce an individual to commit a crime).

133. John Gleeson, *Supervising Criminal Investigations: The Proper Scope of the Supervisory Power of Federal Judges*, 5 J.L. & Pol'y 423, 425 (1997).

persuasive evidence not yet known. By definition, the low quantum of evidence necessary to demonstrate probable cause to charge has not yet been assembled.<sup>134</sup> At this early stage, the constitutional presumption of innocence ought to operate most forcefully. It may result that, upon investigation, the putative “target” is not charged, thereby standing innocent in the eyes of all but the most cynical in our constitutional system. Indeed, if the innocent can sometimes be convicted despite the utmost precautions,<sup>135</sup> can one hesitate to say that the innocent may also, and perhaps more frequently, become the targets of even good faith criminal investigation? If this proposition is not offensive, then one can responsibly advocate some ethical fairness restraints on investigative discretion, even as to those techniques that affect only the targets.

Finally, prosecutors already routinely exercise their discretion to limit investigative measures. Although the Supreme Court has stated that “[a] grand jury investigation ‘is not fully carried out until every available clue has been run down and all witnesses examined in every proper way,’”<sup>136</sup> it is simply not accurate to say that prosecutors currently use every investigative tool and take every possible step in every case.<sup>137</sup> Limited resources that must be spread among many competing investigations already place a “reality check” on most investigators’ investigative discretion. In fact, the perceived absence of such resource limitations on the IC was one of the chief criticisms of the Starr investigation.<sup>138</sup> By necessity, investigative discretion is already limited by prosecutors in most cases by a cost-benefit analysis, conscious or otherwise. Formalizing an investigative ethical standard that requires conscious evaluation of proportionality would therefore not impose unprecedented limits on heretofore unlimited investigations. In fact, while the proposal in this Article hopes to broaden the range of interests consciously considered, in many prosecutorial offices it would merely formalize, as an ethical matter, a style of limiting prosecutorial analysis which is already in play.

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134. It is true, of course, that some investigation can and usually does continue after the charging decision. Such pretrial investigation is supported by a higher initial quantum of evidence (probable cause), but the presumption of innocence still operates.

135. See Adam Cohen, *Innocent, After Proven Guilty: More Inmates are Being Set Free Thanks to DNA Test—and a Pioneering Law Clinic*, *Time*, Sept. 13, 1999, at 26.

136. *Branzburg v. Hayes*, 408 U.S. 665, 701 (1972), (quoting *United States v. Stone*, 429 F.2d 138, 140 (2d Cir. 1970)).

137. See Lynch, *supra* note 55, at 2136 (“Limited resources inexorably require prosecutorial triage.”); *id.* at 2140 (noting the impact of “the amount . . . society is willing to expend to investigate”). Rare exceptions where investigative measures have truly been exhaustive might include the Unabomber, World Trade Center, or Oklahoma City Federal Building mass murder cases.

138. See William Michael Treanor, *Independent Counsel and Vigorous Investigation and Prosecution*, 61 *L. & Contemp. Probs.* 149, 149 (1998).

### III. GUIDING THE INVESTIGATING PROSECUTOR'S DISCRETION: REQUIRING A PROPORTIONATE EVALUATION

In the recent past, the concept of "guided discretion" has been perceived as useful for the judicial branch.<sup>139</sup> The concept might also be useful if applied to prosecutors. This Article proposes the concept of proportionality as a manageable ethical precept for prosecutors to guide their exercise of investigative discretion.<sup>140</sup> The concept is not a precise one, yet it is usefully applied in a number of domestic and international legal contexts. The basic proposition is simple: prosecutors should be directed to consciously engage in a proportionality analysis when deciding what investigative steps to take in any given case. In non-routine cases, such analysis should be subjected to prospective supervisory review unless exigencies intervene.

Yet while easy to proclaim, the proposal is immediately daunting to implement. As the ABA itself has said about its own Prosecution and Defense Standards, such propositions may easily become mere "glittering generalities," full of moral pomp yet bereft of enforcement or real-world respect.<sup>141</sup> While wary of this critique, this Article comes down solidly on the side of those who believe that some attempt at ethical guidance is better than none, and that ethical rules do have positive effects on lawyers' real-world conduct.<sup>142</sup>

Having asserted this, however, avoiding specifics might be called the coward's way out. This Article aims to provide "realists" with something concrete to criticize. Specific language is therefore proposed below, intended to be added either as a new Standard to the

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139. The federal sentencing guidelines are based on a concept of "guided discretion." See Lisa M. Rebell, Note, *Sentencing Under the Federal Sentencing Guidelines: Five Years of "Guided Discretion,"* 26 Suffolk U. L. Rev. 1031, 1037 (1992). So, too, is our current capital punishment regime. See *Gregg v. Georgia*, 428 U.S. 153, 189 (1976). Even critics of the current sentencing guidelines system support some theoretical structure to constrain extreme exercises of judicial discretion. See Kate Stith & Jose Cabranes, *Fear of Judging* 167-68 (1998).

140. Indeed, a concept of proportionality would seem to be generally applicable in any area in which prosecutorial discretion is permitted to operate, for example, in charging, plea negotiation, trial tactics, and sentencing recommendations.

141. See 1971 Standards, *supra* note 55, General Introduction, at 6 ("It may be said that the results are doomed either to be a series of glittering generalities or a list of prohibitions so obvious in content as not to require statement or so restrictive as to inhibit effective advocacy.").

142. See Simon, *supra* note 17, at 11, 195-96; Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 Tex. L. Rev. 689, 707 (1981); Zacharias, *Do Justice*, *supra* note 12, at 108-09; Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 Notre Dame L. Rev. 223, 233-37 (1993) [hereinafter Zacharias, *Specificity*]; see also Russell G. Pearce, *Teaching Ethics Seriously: Legal Ethics as the Most Important Subject in Law School*, 29 Loy. U. Chi. L.J. 719, 726 (1998) (arguing that teaching ethics in law school will promote ethical conduct among future lawyers).

ABA's Prosecution Function Standards, or (better) to be incorporated into the ABA's forthcoming new Model Rules (the goal of the ongoing "Ethics 2000" project).<sup>143</sup> At this early stage, identifying the best vehicle is less important than stimulating the debate. The goal is to generate discussion regarding whether, and how, to specify and improve ethical standards for prosecutors in their investigative roles.

A. *The Proposed New Ethical Rule for Investigating Prosecutors*

Without further ado, let the debate begin. Here is proposed specific language that could be added to the ABA's next set of model ethical rules for lawyers:

Proportionality in Investigation

1. A prosecutor is not obligated to take every possible step in the investigation of a suspected criminal offense. Rather, the prosecutor should consciously engage in an analysis of proportionality in choosing which investigative steps to pursue, and how aggressively to pursue them.<sup>144</sup>
2. At a minimum, a proportionate investigative decision should consider:
  - (a) the monetary cost of the step, not just for the prosecutor's office, but also for any witnesses who must comply with investigative demands;
  - (b) nonmonetary costs of the step, such as intrusions on privacy, potential harm to innocent third parties, potential for violence or destructive harm, damage to the prosecution office's own credibility or community standing, and any unnecessary interference with witness's ongoing lives;
  - (c) the potential benefits of the step, and whether those benefits could be achieved by less intrusive or costly means.
3. These costs and considerations should be balanced against the gravity of the offense and any exigent time constraints.
4. A prosecutor should not approve a particular investigative step or strategy that reasonably seems grossly disproportionate after

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143. See Center for Professional Responsibility, *Ethics 2000—Commission on the Evaluation of the Rules of Professional Conduct* (visited Oct. 20, 1999) <<http://www.abanet.org/cpr/ethics2k.html>>.

144. It should go without saying that all investigative techniques should be invoked initially only in good faith and to further a bona fide criminal investigation. It is the general rule, for example, that a grand jury subpoena may not be issued "for the sole purpose of harassment [or] intimidation." *In Re Grand Jury Subpoena: Subpoena Duces Tecum*, 829 F.2d 1291, 1305 (4th Cir. 1987) (Wilkenson, J., concurring).



evaluation, including supervisory evaluation as required below.

5. *Duty to Seek Supervision.* In any non-routine or high-profile matter, or for non-routine investigative techniques, the investigating prosecutor should seek supervisory review and approval of his or her proportionate evaluation before proceeding.

6. *Reporting and Training.* In all cases, a prosecutor's office should implement a system of reporting and supervisory review of investigative steps taken in all cases. In addition, training of all prosecutors on the ethics of investigative proportionality should be available, required, and periodically repeated.

### B. *Explication of the Proposed Rule*

"Proportionality" is a thread that runs throughout our conception of the law and the philosophy of ethics. Whether express or implicit, the concept plays a role in other areas of the law,<sup>145</sup> for example, international administrative law,<sup>146</sup> Fourth Amendment assessment of reasonableness,<sup>147</sup> and Eighth Amendment analysis of criminal punishments.<sup>148</sup> Federal Rule of Civil Procedure 26 seems plainly to depend upon a proportionality evaluation, by lawyers as well as judges, to regulate discovery—a form of fact investigation—in civil cases.<sup>149</sup>

More generally, in the ethics context Professor Mark Aaronson has expressly identified a sense of proportionality—also called

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145. As Professor Charles Black has argued, "the idea of proportionality is seen several times in the first eight [constitutional] amendments: 'excessive bail,' ['excessive fines,' 'unreasonable searches and seizures.'" Charles L. Black Jr., *On Reading and Using the Ninth Amendment*, in *The Humane Imagination* 186, 196 (1986).

146. See Jeffrey Lowell & Anthony Lester, *Proportionality: Neither Novel Nor Dangerous*, in *New Directions in Judicial Review: Current Legal Problems* 51 *passim* (J.L. Lowell & D. Oliver eds., 1988).

147. See Akhil Reed Amar, *Terry and Fourth Amendment First Principles*, 72 *St. John's L. Rev.* 1097, 1098 (1998) (arguing that "[r]easonable intrusions must be proportionate to legitimate governmental purposes—more intrusive government action requires more justification").

148. See *Harmelin v. Michigan*, 501 U.S. 957, 997 (1991) (Kennedy, J., concurring in part) ("Our decisions recognize that the Cruel and Unusual Punishments Clause encompasses a narrow proportionality principle."); *Pulley v. Harris*, 465 U.S. 37, 43-44 (1984) (noting that the Court has occasionally struck down punishments as inherently disproportionate, although holding that individual case proportionality review is not required in capital cases); Leigh B. Bienen, *The Proportionality Review of Capital Cases by State High Courts After Gregg: Only "the Appearance of Justice"?*, 87 *J. Crim. L. & Criminology* 130 *passim* (1996).

149. See Fed. R. Civ. P. 26(b)(1)(iii) (allowing the court to limit discovery upon a determination that "the discovery is unduly burdensome or expensive, taking into account" various factors), 26(g)(3) (requiring attorneys to certify that their discovery requests are "not unreasonable or unduly burdensome or expensive" under the factors set forth in Rule 26(b)(1)).

moderation or temperance—as a central ethical precept, one of the “four cardinal civic virtues” necessary for all lawyers to practice fully as representatives of a public profession.<sup>150</sup> Similarly, Professor Fred Zacharias has identified “objectivity” as a “core” ethical theme: “the ability to distance oneself . . . in order to evaluate the effect of potential actions on clients, third parties, and the legal system.”<sup>151</sup>

By its very definition, proportionality is a fact-dependant, contextual concept. Although it is not specific, I believe that most lawyers have some intuitive sense of what it means. The uniform principle underlying the concept is one of balance, of equitable relationship between parts or interests which are, in some sense, competing. Webster's Dictionary defines “proportion” as a “harmonious relation of parts to each other or to the whole . . . a reasonable or desirable estimation or assignment of relative value.”<sup>152</sup> Authorities as diverse as Aristotle<sup>153</sup> and Max Weber<sup>154</sup> endorse the concept of proportionality. In their detailed article tracing the concept throughout European legal systems as well as British common law, Professors Lowell and Lester note the following principle of proportionality, adopted by a 41-member international group in 1980: “[Member nations should] maintain a proper balance between any adverse effects which its decision may have on the rights, liberties or interests of persons and the purpose which it pursues.”<sup>155</sup> This statement embodies precisely the sort of balancing in which this Article envisions prosecutors engaging as a matter of investigative ethics.

The idea that discretion need not always be exercised to its absolute limit—found in the proposed rule's first sentence—is a common one. Some might even argue that prosecutors already engage in the suggested sort of proportionality evaluation in their criminal

150. See Mark Neal Aaronson, *Be Just to One Another: Preliminary Thoughts on Civility, Moral Character, and Professionalism*, 8 St. Thomas L. Rev. 113, 117 & n.14 (1995). Professor Aaronson notes that “[b]oth courage [another of the cardinal virtues] and moderation involve having a sense of proportion about when and how to act.” *Id.* at 147. Similarly, Phillip Selznick has noted that proportionality is a recurrent theme in theories of the allocation of social justice. See Philip Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community* 431-32 (1992).

151. Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 Wm. & Mary L. Rev. 1303, 1307 (1995).

152. Webster's Third New International Dictionary of the English Language 1819 (unabr. 1986). The concept is therefore linked directly to “reasonableness,” a concept applied in many legal tests.

153. See Aristotle, *The Nicomachean Ethics* Book III, chs. 10-12, at 102-08 (J.A.K. Thomson trans., Penguin 1959) (4th cent. B.C.E.). In the American tradition, we speak admiringly of the proverb, “moderation in all things.” See *A Dictionary of Proverbs* 414 (1992) (attributing the phrase to a half-dozen sources).

154. See Max Weber, *Politics as a Vocation*, in *From Max Weber: Essays in Sociology* 77, 115 (H.H. Gerth & C. Wright Mills ed. & trans., 1958).

155. Lowell & Lester, *supra* note 146, at 52 (citing a resolution adopted by the Committee of Ministers of the Council of Europe on March 11, 1980).

investigations. My anecdotal experience, however, indicates that this is not always so: routine investigative steps are often taken without regard to their proportionality in light of the particular facts of the matter at issue. Moreover, while prosecutors routinely consider the costs of investigation to their own budgets, they often fail to consider, or take seriously, the costs of the investigative steps to the targets or third-party recipients. For example, how often in practice do prosecutors issue subpoenas for documents to business enterprises that are almost without bounds, such as a demand for “all documents created by the XYZ component from 1994-99” (the entire statute of limitations period), or “all emails sent or received by the following 15 persons?” We can hardly know the answer, because prosecutors, having routinely issued such broad subpoenas, just as routinely narrow them in response to calls from savvy defense counsel or negative judicial indications at initial hearings. Consequently, few decisions are reported.<sup>156</sup> But such an “issue now, limit later” approach demonstrates an absence of proportionality analysis *ab initio*.

Similarly, prosecutors often authorize search warrants merely upon approving probable cause and specificity of the search-objects, without considering the extent of the intrusion or the impact on the target or on other, innocent, occupants of the space to be searched.<sup>157</sup> Unannounced “surprise” witness interviews are also often authorized despite, or even because of, the *in terrorem* effect that they will have on the targets of the investigation (which may be fair) or innocent third parties such as family members (which seems less so). Similarly, undercover investigations are established and wiretaps are sought with evaluation primarily of the cost of such techniques to the government—they are not inexpensive—but less, or no, consideration of the toll such steps may exact from the targets and innocent third parties.

It is more the evaluation of such investigative steps, rather than the use of the techniques themselves, that this Article seeks to influence by the language of the rule presented above. Such evaluation may or may not reduce the actual use of various investigative techniques. While this Article briefly speculates below as to how such a rule might operate in practice, it is just speculation. Interested criminal litigators and ethicists should engage in more detailed evaluation. The current project is focused instead on suggesting some specific content for a

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156. See *infra* notes 170, 176 and accompanying text.

157. This is not to say that all such searches are unethical; they obviously are not and many would continue to be authorized even after the express proportionality evaluation that the rule proposed here would require. The purpose of this proposal is not to substantively alter the use of any investigative technique, except perhaps at the margins. Hopefully, however, the rule would centrally alter the way in which prosecutors evaluate their use of such techniques.

new rule that might enable enforcement of the concept as a usable ethical norm, and avoiding the creation of just one more “glittering generality” with no force and little heed.

This Article suggests that, at the very least, prosecutors should be directed by the ethical codes to consider the proportionality of their discretionary investigative decisions. A prosecutor’s decisions often operate on multiple axes, so that a simple dual concept of proportionality, involving merely the balance of one factor against another, is too simplistic. A multifaceted, contextual evaluation is required, in any case in which it might matter. Roughly speaking, however, “proportionality” as an ethical precept for prosecutors involves balancing the costs or adverse impacts of any particular investigative step against the severity of the offense under investigation and the likelihood that the proposed step will produce useful information.<sup>158</sup>

### C. *Evaluation of the Proposal: What Effects Might It Have in Practice?*

The first point to be made is that the proposed rule does not really break new substantive ground. Instead, it merely formalizes as an ethical rule the standards that many prosecutors might agree are already applied in practice, and which already can be found in other sources.

For example, the first sentence of the proposal (which might be criticized as perhaps too obvious to require express statement) is simply analogous to the existing Criminal Justice Prosecution Function Standard 3-3.9 regarding “Discretion in the Charging Decision:” “[t]he prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute . . . .”<sup>159</sup>

The second paragraph of the rule also tracks the existing “Charging Decision” standard in some sense: “[i]llustrative of the factors which the prosecutor may properly consider in exercising his or her

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158. Some might suggest that the identity of the offender should also be taken into account. Even if appropriate, however, this factor ultimately collapses into an evaluation of the gravity of the offense itself. Thus, for example, perjury committed by a testifying low-level drug dealer who is attempting to avoid an inevitable conviction may be evaluated as a less serious offense than perjury committed by a high-ranking executive official who has a public duty to enforce the law. Similarly, tax evasion committed by a likely murderer such as Al Capone can be viewed as a more serious offense than tax evasion committed by otherwise law-abiding citizens. This is not to say that any of these offenders should not be investigated or prosecuted. Proportionately speaking, however, Al Capone’s case, or the President’s, might reasonably be evaluated to merit more investigative effort and attention. *See also supra* note 39 (quoting Amar & Amar).

159. Standards, 3d ed., *supra* note 8, Standard 3-3.9(b).

discretion are . . . (iii) *the disproportion of the authorized punishment in relation to the particular offense or the offender.*"<sup>160</sup>

The official Commentary to this already-approved Standard notes that "in exercising discretion in this way, the prosecutor is not neglecting his or her public duty or discriminating among offenders. The public interest is best served and evenhanded justice best dispensed . . . by a flexible and individualized application of its norms through the exercise of a prosecutor's thoughtful discretion."<sup>161</sup>

Notably, the Charging Decision Standard and its Commentary have remained the same since the ABA Standards were first promulgated almost 30 years ago in 1971.<sup>162</sup> Since the form and substance of this Standard have apparently satisfied interested lawyers for three decades, one may ask what reason there is to not extend it to the investigative stage.<sup>163</sup>

Similarly, Rule 17(c) of the Federal Rules of Criminal Procedure already provides that a court may quash or modify a subpoena "if compliance would be unreasonable or oppressive."<sup>164</sup> The Supreme Court has endorsed this standard, and directed that it be applied contextually in grand jury investigations.<sup>165</sup> Federal judges have found the standard of Rule 17(c) manageable enough to quash certain governmental subpoenas.<sup>166</sup> In fact, courts plainly perform what appears to be a proportionate evaluation in such cases, comparing compliance costs to the gravity of the investigation.<sup>167</sup> One court has

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160. *Id.* (emphasis added).

161. *Id.* cmt.

162. *Compare id.* Standard 3-3.9, with 1971 Standards, *supra* note 55, Standard 3.9 (maintaining the same language). The function of the Commentary to the Standards is not spelled out, but such commentary is common in the promulgation of ethical codes. The purpose of such commentary is to provide helpful citations to relevant judicial or other authorities, and at times to elucidate the rationale underlying the formal standard. Such commentary is routinely said to neither expand upon nor control the meaning of the standard to which it speaks. *See, e.g.*, Model Rules of Professional Conduct Scope, in ABA Compendium, *supra* note 118, at 16. Whether this is really so in application may be doubted, but the intent of the drafters to explain rather than to interpret seems clear.

163. Of course, an alternative argument might be that the Prosecution Function Standards are not actually enforced, so the thirty-year existence of this Standard proves nothing. Courts, however, do use the Standards from time to time. *See supra* notes 93, 96 and accompanying text. Ineffective use of ethical standards is a separate problem that can be addressed after they express the substantive norms we desire.

164. Fed. R. Crim. P. 17(c); *accord*, United States v. Calandra, 414 U.S. 338, 346 (1974) ("A grand jury's subpoena . . . will be disallowed if it is 'far too sweeping in its terms to be regarded as reasonable' under the Fourth Amendment." (quoting *Hale v. Henkel*, 201 U.S. 43, 76 (1906))).

165. *See* United States v. R. Enterprises, Inc., 498 U.S. 292, 299 (1991) (observing that "what is reasonable" depends "on context").

166. *See, e.g.*, *In re* Subpoena to Testify Before Grand Jury, 630 F. Supp. 235, 237 (N.D. Ind. 1986) (quashing a subpoena under Rule 17(c)); *In re* Grand Jury Subpoena, 626 F. Supp. 1057, 1061 (D.P.R. 1986) (same).

167. *See, e.g.*, *In re* August, 1993 Regular Grand Jury, 854 F. Supp. 1392, 1401 (S.D. Ind. 1993) (finding a broad grand jury subpoena "not unreasonable in light of the

even stated a "least-intrusive-means" test for certain grand jury subpoenas.<sup>168</sup>

As noted, federal civil practitioners are also required to certify the proportionality of their fact-investigation discovery requests, under Federal Rule of Civil Procedure 26.<sup>169</sup> There is no reason to believe that government prosecutors cannot apply a similar standard as an internal ethical matter. Indeed, reported cases reflect the common practice of prosecutors agreeing, in their investigative discretion, to limit the scope of already-issued grand jury subpoenas upon objection from recipients regarding oppressive compliance.<sup>170</sup> These cases indicate that prosecutors can recognize investigative disproportion when it is called to their attention by opposing lawyers or judges. It does not seem overburdensome to ask prosecutors to exercise such discretion in advance rather than in hindsight.<sup>171</sup> Indeed, such prospective fairness analysis might be said to be the goal of many legal ethics rules.

What would the proposed ethical standard mean in practice? First, and perhaps most important, the general ethical standard could lead prosecutors' offices to draft and implement internal ethical guidelines for specific investigative measures and contexts.<sup>172</sup> Professor Fred Zacharias has advocated development of the general "do justice" maxim for prosecutors for this very reason.<sup>173</sup> Professor Gerard Lynch has similarly advocated for more articulated standards in prosecutors' offices.<sup>174</sup> If adoption of a general ethical rule stimulates prosecutors to think more consciously and self-critically about their own actions, and to make explicit for all the ethical proportionality precepts that many of them already share, that effect alone would be beneficial.<sup>175</sup>

Second, by directing prosecutors to consider the extra-governmental costs of their investigative decisions, the rule would be consciousness-raising. It would compel prosecutors to be explicit and

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subjects of investigation—wire and mail fraud, money laundering, and medicare and medicaid fraud").

168. See *In re Grand Jury Subpoena: Subpoena Duces Tecum*, 829 F.2d 1291, 1302 (4th Cir. 1987).

169. See *supra* note 149 and accompanying text.

170. See *In re Grand Jury Subpoena*, 920 F.2d 235, 244 n.10 (4th Cir. 1990); *In re August 1993 Regular Grand Jury*, 854 F. Supp. 1392, 1401 (S.D. Ind. 1993); *In re Grand Jury Proceedings Witness Bardier*, 486 F. Supp. 1203, 1214 (D. Nev. 1980).

171. Of course, in some cases a prosecutor will not know of, or be able to appreciate, the burdens that a particular subpoena will create until it is issued and a party explains particular compliance difficulties. The proposed ethical rule would neither prevent such situations nor open them up to hindsight attack.

172. Almost 30 years ago, Professor Norman Abrahms discussed the development and value of internal prosecutorial policies. See Norman Abrahms, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. Rev. 1 (1971).

173. See Zacharias, *Do Justice*, *supra* note 12, at 50, 109.

174. See Lynch, *supra* note 55, at 2143, 2147.

175. See Zacharias, *Specificity*, *supra* note 142, at 231, 237.

think more broadly in their assumptions, goals, and cost assessments. Public prosecutors should, after all, be considering the costs of their actions to *all* members of the public they serve. Moreover, it could lead prosecutors to compel investigating agents also to consciously consider and discuss such costs. Finally, regarding non-routine matters or investigative steps, the rule would require group decision-making through supervisory review, *before* the investigative step is initiated. If two heads really are better than one, such group evaluation with experienced personnel should prevent the odd, disproportionate investigative step from occurring.

The realist, however, asks what investigative steps that prosecutors currently employ would actually be blocked by this rule? Any at all? It is, of course, impossible to know. But, having ventured out onto the limb of specificity in language, let us proceed all the way to the teetering end. Perhaps the new rule would eliminate indiscriminate use of the phrase "including, but not limited to" from grand jury subpoenas. That phrase is frowned upon by courts,<sup>176</sup> with good reason: it often serves as a lazy substitute for precision in description.<sup>177</sup> It is disproportionate for prosecutors to demand that witnesses bear the costs of producing "all documents" (which is what the phrase may effectively require), when the actual targets of their investigations are known and describable subsets of that universe.

Similarly, perhaps the rule would provide an additional check on bad deals that prosecutors sometimes make with criminals: providing immunity, leniency, or large reward sums to crooks for their assistance in an investigation. Courts have recently expressed their concern about immunity decisions that seem to cost more than they are worth.<sup>178</sup> Of course, not all or even most such cooperation deals are disproportionate to the goals of the criminal investigation. But some are.<sup>179</sup> Prosecutors should consciously confront all predictable costs of

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176. See, e.g., *In re Subpoena to Testify Before Grand Jury*, 630 F. Supp. 235, 237-38 (N.D. Ind. 1986) (granting motion to quash by eliminating the "including but not limited to" phrase).

177. This is not always the case, however. Compare the following descriptions of documents from hypothetical subpoenas for documents: "all corporate documents, including *but not limited to* the following precise descriptions" versus "all documents relating to target Bill Smith, including but not limited to . . ." Because the latter language first focuses on a specific target, its subsequent description is not necessarily overbroad, unreasonable, or disproportionate. Again, contextual evaluations are required.

178. See *United States v. Singleton*, 144 F.3d 1343, 1358 (10th Cir. 1998), *rev'd en banc*, 165 F.3d 1297 (10th Cir.), *cert. denied*, 119 S. Ct. 2371 (1999); Sklansky, *supra* note 12, at 516 (noting the underlying concerns of policy in *Singleton*). This is not a new concern. See, e.g., *Ramirez v. United States*, 363 F.2d 33, 33-35 (9th Cir. 1966) (vacating conviction of aider and abetter who received a five-year sentence, by a debatable application of legal aiding and abetting principles, where the facts revealed that the lead drug buyer had received probation in return for testimony).

179. For example, in its case against California defense attorney Patrick Hallinan, the federal prosecutor granted immunity and rewards totaling \$4,600,000 to a major

immunity deals—to victims of the intended cooperator, to their own long-term credibility and reputation, and to the criminal justice system as a whole—before consummating such deals. If the target of the investigation seems plainly less culpable than the cooperator, or if the government does not know their respective levels of culpability, or if the target's offenses are less serious than the cooperator's, the deal may well be disproportionate. The rule should at least force these considerations into the open for discussion, and block the grossly disproportionate bargain.

In the search warrant context, perhaps the rule would constrain some searches of non-targets' residences. The case law burgeons with instances of highly intrusive searches of innocent parties' homes pursuant to warrants, without finding the target individual, at some cost to the government (in terms of money as well as public credibility) and to the innocent parties involved.<sup>180</sup> Such potential costs should be considered by prosecutors in advance, and sometimes additional traditional investigative work should be ordered—for example, more personal surveillance—before such intrusive investigative steps are taken.

Interested ethicists can doubtless come up with more concrete examples in which an express proportionality test might alter the result. At the very least such a test could stimulate prosecutors in their own thinking and development of internal norms.<sup>181</sup> These possible benefits counsel at least thoughtful consideration of a proportionality rule.

#### D. *Objections and Limitations*

Despite this Article's apparent enthusiasm, some objections and limitations regarding the proposed ethical rule are immediately apparent. Others are sure to be identified by thoughtful critics; that effort should be encouraged and supported. The goal is to determine whether specific ethical rules are necessary for the investigative stage and, if so, to make them as effective as possible without overwhelming already-stressed good faith prosecutors or chilling important investigations of criminal violators.

Immediate objections to the proposed rule tend to come from both

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marijuana importer for cooperation against the attorney, who had no prior criminal record and was never suspected of direct criminal involvement in narcotics importation or distribution. *See generally* Howard Mintz, *Fort Reno's Obsession*, *Am. Law.*, May 1995, at 54 (describing the Hallinan case). Hallinan was acquitted on all counts after a lengthy and expensive trial. *See id.*

180. *See Wilson v. Layne*, 119 S. Ct. 1692, 1695-96 (1999). Although the officers in *Wilson* were ultimately granted immunity, defending a suit all the way to the Supreme Court is expensive, and such future searches will not receive immunity.

181. *See Zacharias, Do Justice*, *supra* note 12, at 50; *see id.* at 109 (“[C]hange in orientation by supervisors and other staff members, in turn, could create pressure toward voluntary improvements in conduct.”).



ends of the criminal practice perspective. The prosecution-minded are horrified at the thought of important criminal investigations being chilled by threat of bar disciplinary charges and § 1983 suits<sup>182</sup> being filed against prosecutors who approve any effective investigative step. Meanwhile, some prosecutors also contend that the rule would not really alter current investigative practices; the concrete examples offered are already recognized as bad prosecutorial decisions (strategically if not also ethically) and they can be prevented without shackling prosecutors with new rules that will inevitably be used as clubs.

Meanwhile, the defense-minded are not optimistic that the proposed rule will do any good at all. Authorities rarely discipline prosecutors, and civil suits are generally fruitless given the generous qualified immunity standard as well as normal jury sympathies.<sup>183</sup> Furthermore, these critics might contend that prosecutors never internalize ethical norms to the disadvantage of effective law enforcement, absent some more compelling external force such as a statute, constitutional provision, or well-publicized and successful lawsuit.

There is substantial merit to each of these positions. Moreover, they share a disturbing common thread: that the rule will not actually improve the ethics of a prosecutor's office. If that is true, from either perspective, then the rule is simply not worth the negative side-effects that might result. Aspirational ethical rules that do not actually improve conduct, and yet cause deleterious consequences, are the sort of glittering generalities we can do without.

Yet if one shares the belief that most prosecutors actually do want to act fairly, seek justice, and obey the ethical rules as closely as possible,<sup>184</sup> this somewhat discounts the defense objection that the

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182. 42 U.S.C. § 1983 (1994). Section 1983 expressly countenances only those lawsuits that allege deprivation of rights that the United States Constitution and laws guarantee. The spectre of civil suits based solely upon violations of ethical rules therefore might initially be viewed as a red herring. In 1998, however, Congress directed by statute that federal prosecutors abide by state ethical rules. See 28 U.S.C. § 530B. The impact that this statutory incorporation-by-reference of ethics rules will have on § 1983 litigation remains to be seen.

183. For qualified immunity not to apply, a prosecutor's conduct must violate clearly established norms. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Indeed, the protective umbrella of qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Burns v. Reed*, 500 U.S. 478, 495 (1991) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). Moreover, even if qualified immunity fails to get prosecutors out of a suit at the summary judgment stage, a jury must be persuaded to rule against them. If the defendant has been convicted of, or even just involved in, criminal activity, this is quite unlikely absent a gross prosecutorial act. Even where innocent third parties are plaintiffs, juries may on the whole be disinclined to rule against law enforcement officers.

184. See Little, *Federal Death Penalty*, *supra* note 106, at 460 n.524, 467 n.550 (arguing that internal policies "deeply influence" prosecutorial behavior); see also Stephen D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. Cal.

proposed rule would make no difference, though the absence of effective prosecutorial discipline is distressing.<sup>185</sup> Moreover, if nonenforcement of prosecutorial ethical norms is an objection, the answer is greater enforcement, not an absence of norms.

On the other hand, I take quite seriously the threat of chilling affirmative use of the proposed rule as a litigation “club” against prosecutors. In general, such affirmative use of ethical rules to gain strategic advantages in litigation is a practice to be condemned. The Model Rules counsel against such a practice.<sup>186</sup> They also strongly caution that even the imposition of state bar disciplinary sanctions should not be considered in “20/20 hindsight,” and should recognize “that a lawyer often has to act upon uncertain or incomplete evidence.”<sup>187</sup> Surely this applies most commonly in the prosecutorial context.

In order to guard against the long-term chilling effect that unconsidered discipline or litigation can have on the development of progressive ethical policies for prosecutors, courts and disciplinary authorities must take their responsibilities in this area very seriously, and not allow the use of ethical rules as clubs against prosecutors unless clearly warranted.<sup>188</sup> Moreover, to forestall chilling, affirmative uses of the proposed rule, it has been drafted to make only the prosecutorial approval of “grossly disproportionate” investigative steps subject to discipline.<sup>189</sup> Furthermore, the proposal employs “should” rather than “shall” to describe the prosecutor’s ethical duties in the investigative stage. Hopefully, this language, while clarifying the rule’s aspirational goals and providing structure for the development of internal policies, would minimize the use of the rule as a strategic litigation device. The deliberate choice of largely “nonenforceable” phraseology reflects a desire to put Professor Simon’s vision of “institutionalizing” the contextual view of legal ethics to the test.<sup>190</sup>

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L. Rev. 643, 708-17 (1997) (same).

185. Civil suits against prosecutors do, though infrequently, sometimes go forward. Just this past Term, the Supreme Court remanded such a case for trial, in which a prosecutor ordered a defense attorney physically searched while the attorney was in the courthouse representing a client before the grand jury. *See Conn v. Gabbert*, 119 S. Ct. 1292, 1293 (1999).

186. *See* Model Rules of Professional Conduct Scope, para. 18 (“Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules . . . are not designed to be a basis for civil liability.”)

187. *Id.* para. 17.

188. *See* Little, *Federal Prosecutors*, *supra* note 73, at 426-27.

189. *See* Proposed Criminal Justice Standard, *infra* app. para. 4. (reprinting the proposed rule).

190. *See* Simon, *supra* note 17, at 196 (“An enforcement structure inspired by the Contextual View would have two main features: a disciplinary regime consisting largely of contextual norms, and a set of rules designed to encourage voluntary ethical commitments . . .”).

In the end, any ethical regime will only be as effective as its institutional implementors allow it to be. The drafters of ethical rules must assume the general good faith and common sense of all participants. They must also endorse swift sanctions for those who misuse or misapply the rules, no less than for those who do not follow them. Prosecutors' offices generally enjoy strong community support and lobbying leverage; if the proposed rule were enacted and then used to chill effective and fair law enforcement, it would not long survive.

#### IV. INVESTIGATIVE SUPERVISION, REPORTING, AND ETHICS TRAINING

The tail end of an article is not the place to fully develop the contours of a new ethical duty to seek supervision. Such a duty, however, not currently recognized in any ethical code, is a basic premise of this Article. Prosecutors, if not all lawyers, should be required to seek supervision before making significant investigative decisions. The proposal also makes explicit a duty for prosecutors' offices to provide training on the exercise of investigative discretion. These concepts are briefly outlined below, with anticipation of further development and critique from interested ethicists.

##### A. *The Duty to Seek Supervision and to Report Investigative Decisions*

Current ethics rules implicitly recognize the importance of supervision for lawyers. For example, ABA Model Rule 5.1 describes the ethical duties of "supervisory lawyers."<sup>191</sup> Rule 5.2 also recognizes that some lawyers will function in the role of supervisees, although it says nothing about an ethical responsibility to seek supervision.<sup>192</sup> The ABA's Ethics Committee has recognized that it is often valuable for lawyers to seek the advice of other, more experienced attorneys.<sup>193</sup>

This Article contends, however, that these existing ethical authorities do not go far enough. None of the existing authorities posit that there is sometimes an ethical duty to seek out advice and supervisory review. Yet significant investigative decisions made by a

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191. See Model Rules of Professional Conduct Rule 5.1(b) (1998) ("A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct."); see generally Irwin D. Miller, *Preventing Misconduct by Promoting the Ethics of Attorneys' Supervisory Duties*, 70 Notre Dame L. Rev. 259 (1994) (discussing the importance of enforcing Model Rule 5.1). Professor Miller notes that even prior to the 1983 Model Rules, an ethical duty of reasonable supervision could be found in some case decisions. *Id.* at 275-76.

192. See Model Rules of Professional Responsibility Rule 5.2.

193. See ABA Formal Op. 98-411 at 2 & n.2 (Aug. 30, 1998).

prosecutor often have too large an impact to appropriately be the province of any single lawyer. The rule proposed here would require (1) that prosecutors report all investigative decisions to a supervisor for at least hindsight review, and (2) that non-routine investigative steps, or steps taken in non-routine investigations, be submitted for supervisory review and group discussion before they are implemented, unless valid time pressures ("exigent circumstances," in the vernacular of the criminal law) excuse it.<sup>194</sup>

The goal of any ethics-rule structure for attorneys is to ensure, so far as practicable, fairness in the practice of law.<sup>195</sup> When it comes to significant exercises of prosecutorial discretion, the consideration of a single lawyer may sometimes be insufficient to assure the fair exercise of discretion. This may be due to many variables, including overall inexperience, unfamiliarity with the particular decision at issue, lack of knowledge regarding new developments in the law, or a particular insensitivity to certain public interests. Where investigative decisions are at issue, this latter condition of myopic insensitivity can occur for, in turn, myriad reasons: inexperience, over-commitment to a particular investigation or pursuit of a particular target, lack of training or knowledge regarding a particular investigative technique, lack of regular contact with representatives of other, non-prosecutorial views, or simple insensitivity in a particular situation.

This Article asserts that when it comes to significant exercises of prosecutorial investigative discretion, group consideration will more consistently lead to fair, proportionate decisions. This will not always be true, of course, particularly if an entire prosecutorial office has become isolated from the community which it serves or insulated from competing views. Even in an insulated prosecutorial office, however, experienced attorneys can check excesses born simply of inexperience or lack of training or knowledge. Similarly, if a particular prosecutor (even an experienced one) has developed a myopic enthusiasm regarding any particular matter, supervisory review can provide healthy cautions or, at least, a broader consideration of competing concerns.

Ethics rules, however, have historically been based upon the image of sole practitioners, or solo operators functioning autonomously even within a firm or practice group.<sup>196</sup> Even the Model Rules, which were

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194. Cf. Levenson, *supra* note 12, at 569 ("[T]here must be a constant review of the decisions young prosecutors make."). This Article would extend this advice to all prosecutors, not just the young or inexperienced.

195. Some might dispute this or at least posit other, sometimes competing, goals. However, goals such as client satisfaction, loyalty, truth-seeking, or zealous advocacy, can be made to fit an overall fairness model. See, e.g., Monroe Freedman, *Lawyers' Ethics in an Adversary System* 9-24 (1975).

196. See, e.g., Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* § 5:101, at 765 (2d ed. 1990) ("[A] 'single lawyer, simple client' assumption . . . animated the [1969] Code, an

promulgated in 1983 to self-consciously address the 1969 Code's lack of focus on the group practice context,<sup>197</sup> do not expressly advert to the group practice context of prosecutors' offices.<sup>198</sup>

Yet while perhaps recognizing an exception for small, rural communities, the image of the solo "cowboy" prosecutor is badly (and unhealthily) out-of-date regarding modern prosecutors' offices.<sup>199</sup> Without performing an exhaustive empirical survey, let us assume that most prosecutors today practice within offices larger than ten lawyers.<sup>200</sup> When the prosecutor's office is of this size or larger, an ethical rule requiring proportionate investigative steps should also mandate that attorneys making significant investigative decisions have a duty to seek out, prospectively, advice and supervisory review.

It must be emphasized that the duty of prospective supervision would not apply to all investigative steps. It is difficult to imagine how it could, realistically, given the time and resource constraints under which most prosecutors' offices operate and the routine (and therefore, *ex hypothesis*, proportionate) nature of many of their investigative decisions. Even if prospective review of all investigative decisions might be helpful on the margin, the criminal justice system generally cannot afford the luxury of such review in all cases. Thus the proposed rule would not mandate prospective supervisory review for routine investigative decisions—although, of course, it would not prohibit seeking such advice either. While many routine investigative steps require no group analysis to be determined proportionate, the best ethical advice is always to consider seeking supervisory review whenever a prosecutorial decision seems the least bit sensitive to the individual "line" prosecutor.

Moreover, the proposed rule would require that prosecutors report all their investigative decisions at some timely point after the fact, so that experienced supervisory review can be brought to bear on all prosecutorial investigations at some relevant juncture. In such hindsight review, supervisory prosecuting attorneys should look carefully for investigative decisions that seem out of proportion to the matter, and bring them back to the investigating prosecutor (and

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assumption . . . no longer comporting with modern realities.").

197. See Model Rules of Professional Conduct Preamble (1998).

198. See Model Rules of Professional Conduct Rule 3.8 (1998) (discussing the special ethical responsibilities of "a" prosecutor).

199. See Abrahms, *supra* note 172, at 1 (noting, in 1971, that "[t]he modern prosecutor . . . [is] no longer the individual district attorney," but rather practices in "a large bureaucratic institution comprised of tens or sometimes hundreds of lawyers").

200. Even if this were proved to be not empirically so, the rule proposed in this Article could be limited to prosecutorial offices of ten or more attorneys. Small prosecutors' offices generally have one prosecutor who is the elected district attorney and thereby bears supervisory responsibility for the other lawyers in his or her office. Even in offices of fewer than ten lawyers, group consideration of significant investigative steps may occur naturally, and may not need the stimulus of an ethical rule.

perhaps other experienced prosecutors) for discussion and, possibly, reconsideration.

Meanwhile, for all non-routine investigative steps, the proposed rule would make explicit an ethical duty to seek *advance* supervisory review. The only exception to this requirement would be when exigent circumstances require immediate investigative action. Such situations are not uncommon: it may be imperative to conduct a search quickly in response to an unanticipated development; a witness may "flip" on the eve of a vital meeting which must be recorded; or a new telephone number may suddenly become relevant at a crucial juncture of a wiretap investigation. When a prosecutor makes exigent, non-routine investigative decisions alone, however, he or she should report them for supervisory review as soon as circumstances permit, perhaps even contemporaneously with implementation of the investigative step.

Further, exigencies should be real, not manufactured. Most experienced prosecutors are familiar with the "emergency" request for a search warrant or other investigative tool from law enforcement agents who, upon cool inquiry, concede that there is actually no strong reason to rush. Six or twelve hours' delay often will not prejudice an investigation, and may yield great benefits in terms of group consideration. Of course, prosecutors must make such judgments under great pressures, and their decisions in this regard should not be nit-picked in hindsight review. Nothing is more destructive to the morale and effectiveness of aggressive, but good-faith, prosecution than hindsight attacks made without appreciation of real-world criminal justice pressures. This exception to the proposed requirement of prospective supervision should therefore, when properly applied, never permit later ethical charges based on a claim of non-exigency.

In most cases, however, where a non-routine investigative technique (for example, a wiretap) is suggested, or in a high-profile investigation where all involved know that their decisions will later be microscopically examined, a duty to seek prospective review is appropriate. The impact of non-routine investigative steps (or most steps in a non-routine matter) is too large to entrust it to the single mind of even the good-faith experienced prosecutor. Similarly, individual prosecutors can lose their perspectives, and the non-routine instance demands supervisory review to block non-routine harms. The credibility of the prosecutorial profession has been harmed in the past by investigative excesses that appear to have been the result of unsupervised solo prosecutors.<sup>201</sup> While no ethical rule will prevent

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201. See *United States v. Boyd*, 833 F. Supp. 1277 (N.D. Ill. 1993) (reversing the conviction of El Rukin gang members based on "gross prosecutorial misconduct"), *aff'd*, 55 F.3d 239, 246 (7th Cir. 1995); *supra* note 179 (discussing the Hallinan prosecution, acquittal, and attendant bad press).

every such occurrence, one that mandates supervisory review and group consideration in non-routine situations should improve the overall percentage.

Of what would the required supervisory review consist in practice? This Article does not suggest an overly formal process. Absent disagreement among the prosecutors, simple oral consultation would often suffice. Again, the development of internal standards for the details would be part of an evolutionary process. In fact, most sophisticated prosecutors' offices of any size today already have a practice of seeking supervision in place.<sup>202</sup> Line attorneys must report non-routine investigative events and decisions, and even experienced attorneys are expected to seek supervisory review of unusual investigative steps. Incorporating this concept into an ethical rule would, in some sense, merely formalize what large prosecutors' offices have already recognized: supervision improves overall fairness, as well as effective law enforcement.

### B. *The Duty to Provide Ethics Training*

Prosecution Function Standard 3-2.6 already directs prosecutors' offices to maintain effective training programs for their lawyers.<sup>203</sup> The 1967 Presidential Commission on Law Enforcement and Administration of Justice stressed a point which is still, if not more, valid today: while a prosecutor's background may provide sufficient training for the trial and courtroom aspects of the job, "it does not necessarily prepare the man [or woman] for . . . law enforcement functions."<sup>204</sup> This existing Standard, however, has generally been interpreted within prosecutors' offices as requiring training only in substantive areas of law. The rule proposed in this Article would make clear that the duty to provide training should encompass ethics training. With specific regard to the investigative context, prosecutors should receive training on their office's view regarding the proportionate exercise of investigative discretion.<sup>205</sup>

Although Prosecution Function Standard 3-2.6 has existed since 1971, prosecutors' offices have only recently, if at all, begun to mandate ethics training.<sup>206</sup> Indeed, until 1988, when the Second

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202. See Melilli, *supra* note 5, at 687.

203. See Standards, 3d ed., *supra* note 8, Standard 3-2.6 ("Training programs should be established within the prosecutor's office for new personnel and for continuing education . . .").

204. President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 148 (1967).

205. *Accord*, Levenson, *supra* note 12, at 569 (exhorting prosecutors' offices to "Train the People Right").

206. For example, the U.S. Department of Justice's "Professional Responsibility Officer" ethics training program was instituted only in 1994. See Little, *Federal Death Penalty*, *supra* note 106, at 467 n.550.

Circuit shocked the prosecutorial universe by dismissing an indictment for violation of an ethical rule,<sup>207</sup> most prosecutors practiced without giving much active attention to the specifics of their local ethics codes.

In 1994, however, the U.S. Department of Justice instituted the Professional Responsibility Officer ("PRO") training program. The PRO program has produced a thick Ethics Manual, and it directs each U.S. Attorney's office and each Main Justice component to designate at least one experienced attorney as the Professional Responsibility Officer ("PRO") for their offices. All PROs are required to attend a national ethics training seminar when offered (about every 18 months), and is then expected to return to his or her office and provide ethics training to officemates. Attorney General Janet Reno and then-Assistant Attorney General JoAnn Harris deserve great credit for instituting the Department's first-ever stand-alone ethics training program.<sup>208</sup>

The most effective manifestation of a prosecutorial ethics training program provides training not just on applicable substantive standards, but also on the fair exercise of discretion. This recognizes the many prosecutorial areas in which existing standards merely set an ethical floor for conduct. The best ethics training program assists prosecutors in developing their own thinking about ethical issues beyond the rules, and encourages them to develop internal standards for the fair exercise of their discretion within the law.

Thus if a new rule calls for the proportionate exercise of investigative discretion, a prosecutor's office ought to provide training for its attorneys on what this might mean in concrete situations. This training might necessarily be office-specific, to reflect the local community's sense of fairness; investigative steps viewed as routine and obviously proportionate in the Southern District of New York might shock a more rural or less crime-ridden community. Again, the investigative proportionality advocated by the proposed rule is contextual, and the relevant context might well include consideration of community fairness values that differ in various places across the country.

Each prosecutor's office should therefore develop its own training program to address ethics in the investigative stage. Such a program

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207. See *United States v. Hammad*, 858 F.2d 834, 839-40 (2d Cir. 1988).

208. Moreover, in 1999 the Department created a unit titled the Professional Responsibility Advisory Office ("PRAO"), whose mission is to provide ethics advice to the 9000 or so federal prosecutors around the country. The PRAO was created in part to address significant questions arising out of the 1999 McDade Act, which for the first time clarifies that local rules of ethics apply to federal attorneys wherever they may practice. See 28 U.S.C. § 530B (Supp. 1999); *Reining in the Prosecutors*, Wash. Post, Apr. 23, 1999, at A36. The dedication of a full-time ethics advice function within the Department is a further positive development toward the fair exercise of prosecutorial discretion at the federal level.



ought to survey existing investigative techniques that the office uses with some regularity, and develop a sense of what factors are relevant in deciding to use, or to reject the use of, such techniques. Real cases from that office ought to be used as training vehicles when possible. Furthermore, the training program should require periodic retraining of all attorneys, rather than being reserved only for the inexperienced. Indeed, it is sometimes the experienced prosecutor, who has become jaded to the effects that his or her investigative decisions can have on the outside world, that presents the largest challenge for effective prosecutorial ethics training.

Certainly much more could and ought to be said regarding the development of prosecutorial ethics training programs. As Standard 3-2.6 already provides,<sup>209</sup> such programs are an ethical responsibility for every aspect of a prosecutor's job, not just at the investigative stage. The duty to provide such training is included specifically within this proposal not to restrict it to the investigative stage, but simply to emphasize that it is an integral component of any rules structure addressing prosecutorial discretion.

### CONCLUSION

When the ABA first adapted its Prosecution Function Standards in 1971, it warned that "the proposed standards will often recognize that ambiguity is intrinsic in many of the problems with which they deal and the advocate's conscience must guide."<sup>210</sup> The ABA declared, however, that "[t]his should be taken not as an attempt to evade the responsibility of statement but rather as candid recognition of the limits of wholesome definition."<sup>211</sup> This Article recognizes that the investigative stages of a criminal case have historically been viewed as almost entirely open to unregulated prosecutorial discretion. Yet decisions made in the pre-charging investigative stage can have significant impacts on the innocent as well as the guilty. This Article proposes that the time has come to examine whether contextual ethics rules can usefully serve to improve fairness in the exercise of the prosecutor's investigative role. The concrete language proposed will hopefully draw constructive debate as well as fire.

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209. *See supra* note 203.

210. 1971 Standards, *supra* note 55, General Introduction, at 6.

211. *Id.*

## APPENDIX

## Proportionality in Investigation

1. A prosecutor is not obligated to take every possible step in the investigation of a suspected criminal offense. Rather, the prosecutor should consciously engage in an analysis of proportionality in choosing which investigative steps to pursue, and how aggressively to pursue them.<sup>212</sup>
2. At a minimum, a proportionate investigative decision should consider:
  - (a) the monetary cost of the step, not just for the prosecutor's office, but also for any witnesses who must comply with investigative demands;
  - (b) nonmonetary costs of the step, such as intrusions on privacy, potential harm to innocent third parties, potential for violence or destructive harm, damage to the prosecution office's own credibility or community standing, and any unnecessary interference with witness's ongoing lives;
  - (c) the potential benefits of the step, and whether those benefits could be achieved by less intrusive or costly means.
3. These costs and considerations should be balanced against the gravity of the offense and any exigent time constraints.
4. A prosecutor should not approve a particular investigative step or strategy that reasonably seems grossly disproportionate after evaluation, including supervisory evaluation as required below.
5. *Duty to Seek Supervision.* In any non-routine or high-profile matter, or for non-routine investigative techniques, the investigating prosecutor should seek supervisory review and approval of his or her proportionate evaluation before proceeding.
6. *Reporting and Training.* In all cases, a prosecutor's office should implement a system of reporting and supervisory review of investigative steps taken in all cases. In addition, training of all prosecutors on the ethics of investigative proportionality should be available, required, and periodically repeated.

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212. It should go without saying that all investigative techniques should be invoked initially only in good faith and to further a bona fide criminal investigation. It is the general rule, for example, that a grand jury subpoena may not be issued "for the sole purpose of harassment [or] intimidation." *In Re Grand Jury Subpoena: Subpoena Duces Tecum*, 829 F.2d 1291, 1305 (4th Cir. 1987) (Wilkenson, J., concurring).