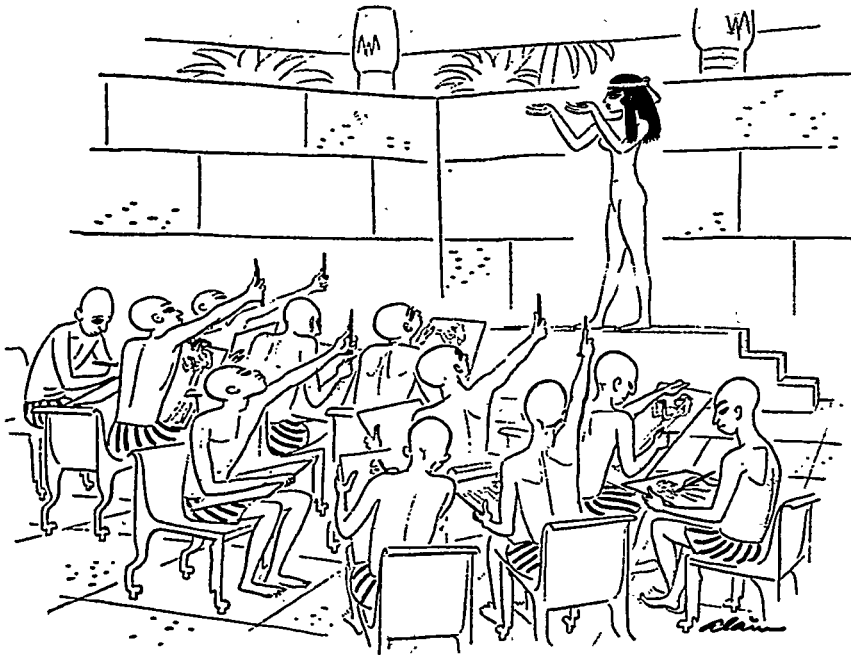


Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform

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I. INTRODUCTION

The above cartoon from an old *New Yorker* magazine demonstrates in an amusing way the extent to which we are all prisoners of our own culture and tradition. The notion that the rigidly stylized art of the Egyptians was the result

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of careful efforts to copy nature seems humorous to us. But the cartoon has a serious point to make as well: It is a reminder that what seems natural and realistic to some may appear stylized and even distorted to those who do not share the same history and cultural background.¹

To a considerable extent the same is true of different systems of criminal procedure. Procedures for determining guilt that seem to those educated in one legal tradition to offer a fair and efficient way of determining guilt or innocence may seem awkward and stylized when viewed by those who have been educated in a different legal tradition. Comparative criminal procedure has become an area of considerable interest among legal scholars because the study of diverse systems of criminal procedure offers scholars and students a way of getting outside their own legal tradition so as to gain valuable perspectives on their own system. In much the same way, exposing the young Egyptian artists in the *New Yorker* cartoon to a completely different artistic tradition from another part of the world might enable those artists to see more clearly important elements of their own artistic style and tradition.

For American scholars, the study of the civil law tradition as embodied in the legal systems of European countries, such as Germany² and France,³ has been particularly rewarding.⁴ These systems seem to function with efficiency and reliability while appearing to treat those who come into contact with the system, such as defendants and victims, with respect. Because the United States shares many societal values in common with these countries, the discovery that European countries have such radically different systems of criminal procedure, makes those systems excellent subjects for comparative study.⁵ When Americans study the continental systems of criminal procedure, they come to understand that what they had considered to be necessary truths about the proper way for evidence to be gathered, or for trials to be conducted in any

¹ For a fascinating exploration of the psychology of representation and the effects of culture and background on what we "see" when we look at works of art, see E.H. GOMBRICH, *ART AND ILLUSION* (2d ed. rev. 1961).

² See, e.g., JOHN H. LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY* (1977) [hereinafter LANGBEIN, GERMANY]; John H. Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204 (1979) [hereinafter Langbein, *Land Without Plea Bargaining*].

³ See, e.g., LLOYD L. WEINREB, *DENIAL OF JUSTICE* (1977); Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 CAL. L. REV. 539, 612-40 (1990).

⁴ See, e.g., JOHN H. MERRYMAN, *THE CIVIL LAW TRADITION* 2-3 (2d ed. 1985).

⁵ See, e.g., John H. Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439, 439-40 (1974) [hereinafter Langbein, *Controlling Prosecutorial Discretion*].

legal system that shares certain values, are perhaps only contingent truths that have application in our system, but not in others that do not share the same history and political tradition.⁶

But there seems to be a strong temptation among comparativists in criminal procedure to go beyond comparative study and suggest that the American legal system might well benefit from adopting by way of reform certain principles or procedures that seem so sensible and workable in civil law systems. This Article sounds a strong cautionary note about efforts to reform the American criminal justice system by incorporating into it elements borrowed from systems within the civil law tradition.⁷ In the first place, certain aspects of European criminal procedure run counter to important tenets of American political ideology making it unlikely that they would find significant political support in the United States. Secondly, the fact that certain of the players in the civil law tradition occupy positions that seem to correspond to those occupied by judges, prosecutors, and defense attorneys in the United States often hides the fact that their attitudes, training, and responsibilities are very different, making it unlikely that procedures that work well in one system could work as well in a different legal system.

To make its cautionary point about comparative criminal procedure as a tool of reform, this Article focuses on a subject that has attracted considerable interest from comparativists: the contrast between the American prosecutor, armed with broad discretion, and prosecutors in the civil law tradition, who have much less discretion and are subject to close judicial supervision.⁸ In these

⁶ In this regard, the writings of Professor Mirjan Damaška are particularly important because they enable readers to see different systems of criminal procedure as a reflection of different political traditions and values. See MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* (1986).

⁷ For an analysis of an attempt to transplant features of the American adversary system into a legal system built on civil law traditions and civil law institutions, see William T. Pizzi & Luca Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, 17 YALE J. INT'L L. 1 (1992).

⁸ See, e.g., KENNETH C. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969) [hereinafter DAVIS, *DISCRETIONARY JUSTICE*]; Joachim Herrmann, *The German Prosecutor*, in *DISCRETIONARY JUSTICE IN EUROPE AND AMERICA* 16 (Kenneth C. Davis ed., 1976); Joachim Herrmann, *The Rule of Compulsory Prosecution and the Scope of Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 468 (1974) [hereinafter Herrmann, *The Rule of Compulsory Prosecution*]; Langbein, *Controlling Prosecutorial Discretion*, *supra* note 5; Robert Vouin, *The Role of the Prosecutor in French Criminal Trials*, 18 AM. J. COMP. L. 483, 488-92 (1970); Thomas Weigend, *Continental Cures for American Ailments: European Criminal Procedure as a Model for Law Reform*, 2 CRIME & JUST. 381 (1980).

comparisons, the American prosecutor always seems to suffer from the comparison with continental counterparts. We are told, for example, that "the German prosecutor's discretion is consistently controlled all along the line, and that the American prosecutor's discretion is consistently uncontrolled all along the line."⁹

This Article also compares the American prosecutor with civil law counterparts, but it does so with the objective of giving a more complete account of the American prosecutor and the power that is vested in that position. This Article contends that the role of the prosecutor is different in the two traditions because, among other things, certain elements of political ideology between the two systems are different, certain values emphasized in the systems are different, and the role of the judge and the nature of trials are different in the two systems. This Article demonstrates that our concept of prosecutorial power is so tied to important tenets of our American political tradition that reforming the American prosecutor along the lines in the civil law model, as has occasionally been proposed,¹⁰ would be far more difficult than it might initially appear.

While this Article is comparative in nature, contrasting features of the civil law tradition with corresponding aspects of the American adversary tradition, it is not a defense of the American prosecutor vis-à-vis the civil law prosecutor. This Article is written from a point of view that is respectful of the civil law tradition and accepts the fact that civil law prosecutors have much less discretion than American prosecutors, not so much because judges keep tight check on civil law prosecutors, as much as the fact that, ideologically, prosecutors in the civil law tradition see their job as much narrower in focus than do American prosecutors.¹¹ Rather this Article is a defense of the

⁹ Kenneth C. Davis, *American Comments on American and German Prosecutors*, in *DISCRETIONARY JUSTICE IN EUROPE AND AMERICA* at 60, 61 (Kenneth C. Davis ed., 1976).

¹⁰ See, e.g., Frase, *supra* note 3, at 612-40 (suggesting problems with American prosecutorial discretion that could be remedied by adopting reforms modeled on French criminal procedures that would restrict (1) the American prosecutor's ability to decline prosecution, (2) the American prosecutor's ability to reduce charges, and (3) the American prosecutor's ability to engage in plea bargaining). See also *infra* notes 12-15 and accompanying text (discussing Professor Kenneth C. Davis's use of the German prosecutor as showing both the desirability and the feasibility of reforms of American prosecutorial discretion).

¹¹ This Article is thus not an attempt to revive the controversy engendered by Abraham Goldstein and Martin Marcus when they claimed that civil law restrictions on prosecutorial discretion are all theory and not practice. Abraham S. Goldstein & Martin Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy and Germany*, 87 *YALE L.J.* 240, 279-83 (1977) [hereinafter Goldstein & Marcus, *Myth of Judicial Supervision*]. Because limited prosecutorial discretion is central to the civil law

American prosecutor within the American adversary tradition, using the civil law system as a contrast to explain why the role of the prosecutor has evolved in a very different way in the American adversary tradition.

Such a defense of the American prosecutor has been long overdue. The American prosecutor has been under nearly constant attack in the criminal procedure literature, at least since the publication of Professor Kenneth Culp Davis's influential book, *Discretionary Justice: A Preliminary Inquiry*, in 1968.¹² In his book, Professor Davis strongly attacked American prosecutorial discretion and argued that it should be sharply limited.¹³ He used the very different role played by the German prosecutor to demonstrate that it was not only desirable to reform the American prosecutor, but feasible as well.¹⁴ Many of Professor Davis's criticisms of American prosecutors and their discretion

tradition, the Goldstein and Marcus article engendered a heated reply by Professors John H. Langbein & Lloyd L. Weinreb, two strong admirers of the civil law tradition. John H. Langbein and Lloyd L. Weinreb, *Continental Criminal Procedure: "Myth" and Reality*, 87 YALE L.J. 1549 (1978). Goldstein and Marcus replied in turn. Abraham S. Goldstein & Martin Marcus, *Comment on Continental Criminal Procedure*, 87 YALE L.J. 1570 (1978). In a later article on plea bargaining, Professor Langbein renewed his attack on the Goldstein and Marcus article. Langbein, *Land Without Plea Bargaining*, *supra* note 2, at 215-16, 219.

Whatever the reality is as to how weak cases get dismissed from the system, the author believes firmly, in part from having lived in civil law countries, that there are major differences in the way that judges and prosecutors in the two systems understand their functions and the way they evaluate cases. See Mirjan Damaška, *The Reality of Prosecutorial Discretion: Comments on a German Monograph*, 29 AM. J. COMP. L. 119, 131 (1981). The author hopes that this Article will help the reader understand *why* prosecutors in the two systems see things from such different perspectives.

¹² See, e.g., DAVIS, DISCRETIONARY JUSTICE, *supra* note 8 (suggesting that American prosecutorial discretion should be sharply limited and controlled and offering Germany as the model to be followed); Davis, *supra* note 9 at 60-72 (comparing unfavorably American prosecutorial discretion and the carefully controlled discretion of the German prosecutor); Frase, *supra* note 3 at 612-40 (suggesting that we adopt reforms modeled on French criminal procedures that would restrict (1) the American prosecutor's ability to decline prosecution, (2) the American prosecutor's ability to reduce charges, and (3) the American prosecutor's ability to engage in plea bargaining); Herrmann, *The Rule of Compulsory Prosecution*, *supra* note 8, at 468-69 (suggesting problems with American prosecutorial discretion).

¹³ "The reasons for a judicial check of prosecutors' discretion are stronger than for such a check of other administrative discretion that is now traditionally reviewable. Important interests are at stake. Abuses are common. The questions involved are appropriate for judicial determination. And much injustice could be corrected." DAVIS, DISCRETIONARY JUSTICE, *supra* note 8, at 211-12.

¹⁴ *Id.* at 192-93, 212.

were adopted and expanded upon by Professor James Vorenberg in his attack on American prosecutors and their discretion.¹⁵

The author believes that the critics of American prosecutorial discretion, such as Davis and Vorenberg, have been unfair to the many highly professional prosecutors' offices that exist in this country, making the repose of broad charging and plea bargaining discretion in those offices seem inexplicable, when it is not so, and also making it seem as though the exercise of such power seems always arbitrary and abusive, when that is also not the case. But while this Article is a defense of American prosecutorial discretion, it is a "gentle" defense to the extent that it makes no empirical claim that abuse of prosecutorial discretion is not a problem,¹⁶ and perhaps even a very serious one in some jurisdictions in the United States. In a large country with so many jurisdictions, not only can the quality of prosecutors vary considerably from state to state, but even within the same state there can be differences. Much the same can be said for the quality of judges, public defenders, and the police as well. But this Article has an important point to make even if we decide that abuse of prosecutorial discretion is a major problem within the United States. We ought to have no illusions that reforming prosecutorial discretion would be an easy task. The idea that we can leave our criminal justice system and our legal tradition substantially intact, but yet achieve meaningful reform of prosecutorial discretion by borrowing mechanisms for controlling such discretion from the civil law tradition is mistaken and unfair to both great traditions.

This Article is divided into six parts. Part II gives a brief overview of the civil law tradition, using the German system as a representative example, because it is the system most discussed in the American literature and one with which the author has some familiarity. Part III deals with the American prosecutor and tries to show the sorts of pressures and controls that bear on the way that American prosecutors exercise their discretion, including political pressures and adversarial pressures, that have no strong counterpart in the civil law tradition. Part IV deals with the theoretical and practical problems that would arise in the American legal system by the sort of close judicial review of prosecutorial discretion that is commonplace in the civil law tradition. Part V

¹⁵ See James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981).

¹⁶ Professor Davis's picture of prosecutors is quite dismal. He indicates that prosecutors, if left on their own to limit their discretion, "do little or nothing." DAVIS, *DISCRETIONARY JUSTICE*, *supra* note 8, at 196. He also states that "abuses are common." *Id.* at 212. In addition, he gives the interesting statistic that "[p]erhaps nine-tenths of the abuses of the prosecuting power involve failure to prosecute." *Id.* at 191 n.2. The data on which these conclusions rest is not provided.

deals with the most troubling and controversial aspect of prosecutorial discretion in our criminal justice system: prosecutorial discretion as it is brought to bear in plea bargaining, particularly when such plea bargaining limits the sentencing options of the judge. Part VI deals with a specific proposal for controlling prosecutorial discretion that is raised so often that the author believes it deserves separate treatment: the idea that prosecutors should be required to limit their discretion through the adoption of announced guidelines that would explain how particular types of cases will be handled by that particular office. That Part will show how difficult it would be to try to capture the sorts of factors that go into a prosecutorial decision in a set of guidelines and why prosecutors' offices, even quite excellent offices, would be reluctant to adopt a formal set of guidelines.

II. A BRIEF INTRODUCTION TO CRIMINAL PROCEDURE IN THE CIVIL LAW TRADITION

As the introduction indicates, this Article focuses more heavily on the American adversary tradition and the role of the prosecutor in that tradition than it does on the civil law tradition. This Article uses the civil law tradition mainly as a reference point and a contrast which helps in understanding the philosophical and political premises that underlie the American adversary tradition. This Part is intended to give those readers who are unfamiliar with civil law tradition, an introduction to that tradition. The German system is used when specifics are necessary.

In the civil law model, the system of criminal procedure is set out in a sophisticated code that lays out in detail what is to happen at each step of the procedure from the initial report of the crime to the police, up through trial, appeal, and even service of any sentence that has been imposed. Instead of having to look to a variety of sources of law as is the case with American criminal procedure—such as federal constitutional law, state constitutional law, rules of criminal procedure, rules of evidence, statutory rights, and local practice—the code of criminal procedure in a civil law country is the dominant authority for the proper conduct of the proceedings including a criminal investigation, criminal trial, and criminal appeal.¹⁷

The prosecutor in the civil law model is a career civil servant who works in a hierarchically organized system in which promotions up the career ladder are merit based and in which the prosecutor is isolated from political

¹⁷ For an excellent discussion of the central place codes occupy in the civil law tradition and the rationalistic ideology embodied in such codes, see MERRYMAN, *supra* note 4, at 26–33.

pressures.¹⁸ The main function of the prosecutor in the system is to control the investigation of any reported crime, to assemble a complete and balanced file or "dossier" that would contain the results of that investigation, and to file appropriate criminal charges if the evidence shows that a crime has been committed.¹⁹ Up until the middle of the nineteenth century in Germany, the pretrial investigation as well as the trial was controlled by the trial judge, but the office of the state's attorney was developed in order to separate the power of investigation from the power of adjudication.²⁰ The office of the German prosecutor, being thus an outgrowth of the judiciary, remains a judicial figure in terms of professional status and tradition.²¹

A German prosecutor's discretion with respect to the decision whether or not to file criminal charges is more limited in comparison to American prosecutors. The practice of prosecutors today is an outgrowth of the civil law tradition of "compulsory prosecution,"²² which demands that a prosecutor file criminal charges whenever the evidence is strong enough to support such charges.²³ While the doctrine of compulsory prosecution has softened with the passage of time and the realities of modern caseloads, it still remains fair to say that a prosecutor's charging discretion in non-minor criminal cases remains limited.²⁴ In the first place, the tradition of compulsory prosecution encourages

¹⁸ LANGBEIN, GERMANY, *supra* note 2, at 91; *see* Frase, *supra* note 3, at 563-64.

¹⁹ *See* Langbein, *Controlling Prosecutorial Discretion*, *supra* note 5, at 446-48.

²⁰ *Id.* at 448-49.

²¹ *Id.*

²² The principle of compulsory prosecution in Germany is contained in section 152(2) of the German Code of Criminal Procedure which Professor Langbein translates as follows: "[The public prosecutor] is required . . . to take action against all judicially punishable . . . acts, to the extent that there is a sufficient factual basis." Langbein, *Controlling Prosecutorial Discretion*, *supra* note 5, at 443.

In Italy, the principle of compulsory prosecution is enshrined in the Italian Constitution. COST. art. 112. *See generally* Pizzi & Marafioti, *supra* note 7, at 9-12 (comparing procedural discretion in Italy and the United States).

²³ *See* Mirjan Damaška, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480, 503-04 (1975).

²⁴ Over the years, this doctrine has, in the words of one German scholar, become "encrusted with exceptions." Weigend, *supra* note 8, at 401. But even though admitting of exceptions, the discretion of the German prosecutor remains limited when compared to American prosecutors. *Id.* at 402-03; *see also* Herrmann, *The Rule of Compulsory Prosecution*, *supra* note 8, at 474-75; Langbein, *Controlling Prosecutorial Discretion*, *supra* note 5, at 458-59.

Professor Frase reports similar developments in France: French prosecutors have considerable discretion to adjust or drop charges, but at the same time, their discretion "is significantly *more* restrained . . . than in the United States." Frase, *supra* note 3, at 611.

prosecutors to "play it safe" in close cases and file criminal charges.²⁵ Secondly, a decision not to prosecute someone with a crime will have to face review by prosecutorial superiors who tend to be conservative in matters of discretion not to prosecute.²⁶ And, finally, if a prosecutor decides not to file criminal charges because the prosecutor believes that the evidence in the case is insufficient to support the filing of criminal charges, civil law systems usually afford victims the right to challenge such decisions unless the crime involved is rather minor.²⁷ Sometimes this challenge is administrative in the form of a complaint about the prosecutor's actions,²⁸ but sometimes the victim's challenge can be brought directly in court seeking reversal of the decision not to prosecute²⁹ or even through a form of private prosecution.³⁰ If review of the prosecutor's decision reveals a violation of the duty of compulsory prosecution, this would be entered in the prosecutor's file and could have a negative impact on the speed with which the prosecutor advances up the hierarchical career path typical of civil law systems.³¹

If criminal charges are filed, the dossier in the case, which can be freely reviewed by the defendant and his counsel, is sent to the trial judge who will conduct the trial in the case. The civil law prosecutor's function at trial diverges sharply from the American counterpart: the trial in the civil law tradition is not an adversary proceeding, but it is an inquisitorial trial in which the judge, rather than the parties, is responsible for developing the facts at trial.³² Because the judge has an obligation in the civil law model to determine

²⁵ See Damaška, *supra* note 11, at 131.

²⁶ *Id.* at 137.

²⁷ Herrmann, *The Rule of Compulsory Prosecution*, *supra* note 8, at 476-77.

²⁸ See Langbein, *Controlling Prosecutorial Discretion*, *supra* note 5, at 463-64 (describing the right of a citizen to challenge through a departmental complaint a prosecutor's decision not to prosecute); see also Herrmann, *The Rule of Compulsory Prosecution*, *supra* note 8, at 476-77.

²⁹ For a discussion of the power, in the Italian system, of the victim or the victim's family to challenge actions of the prosecutor and to participate in the criminal process, see Pizzi & Marafioti, *supra* note 7, at 14.

³⁰ Langbein, *Controlling Prosecutorial Discretion*, *supra* note 5, at 441-42 (describing the French system in which victims or those acting for the victim may sometimes institute criminal charges on their own).

³¹ See Herrmann, *The Rule of Compulsory Prosecution*, *supra* note 8, at 476; Langbein, *Land Without Plea Bargaining*, *supra* note 2, at 211.

³² In terms of the evolution of social systems away from systems of private vengeance, the accusatorial system is sometimes viewed as a preliminary step to the inquisitorial system. MERRYMAN, *supra* note 4, at 126-27. From the system of private vengeance, the right of accusation comes to be vested in a prosecutorial figure, who represents all citizens in making the accusation. *Id.* The trial takes place in front of a judicial figure who will hear

whether or not the defendant is guilty, it is the judge, using the dossier of the case, who will decide which witnesses will testify and who will conduct the bulk of the questioning of those witnesses during the trial.³³ The involvement of the prosecutor and the defense attorney at trial is generally limited to asking a few follow-up questions or perhaps tactfully suggesting other lines of inquiry to be pursued with the witnesses.

Because the judge in the civil law system has studied the dossier prior to trial, there is the danger that the judge will have prejudged the case and will not be open to rethinking the case after trial. The civil law system tries to protect against this danger in several ways. First, in all but the most minor cases, the civil law system prefers to use a panel of judges at trial and only one of the judges will have studied the file in advance of trial.³⁴ This collegial approach counterbalances at least some of the inherent dangers of the inquisitorial system. A second check on the inquisitorial power of the trial judge is the trial court's obligation to explain fully the conclusions that are reached following trial. In contrast to the American system, a civil law trial does not result in a simple verdict of guilty or not guilty. Instead, judges announce their decision and give a general explanation of the reasons why they reached the verdict.³⁵ The court is then required within an interval of several weeks to issue a written judgment which is the authoritative account of the reasons why the court reached the verdict and sentence in question.³⁶ The written judgment is prepared by the professional judges and it (1) summarizes the charges and the evidence developed at trial, (2) explains any legal issues raised at trial and how they were resolved by the court, (3) indicates the factual and legal conclusions reached by the court and why the court reached those conclusions, and (4) if the defendant is found guilty, indicates the sentence that court has imposed and why it decided on that sentence.³⁷ Consistent with the hierarchical model, any aspect of the judgment reached by the trial court is fully appealable by the prosecution or the defense—legal conclusions, factual conclusions, or even the sentence.³⁸

the evidence and decide the case, but who has no inherent powers of investigation. *Id.* In the inquisitorial system the judge is converted from an impartial referee into an active inquisitor who is free to seek evidence and to control the nature and objectives of the inquiry. *Id.*

³³ See LANGBEIN, GERMANY, *supra* note 2, at 62-64.

³⁴ See LANGBEIN, GERMANY, *supra* note 2, at 62-63; MERRYMAN, *supra* note 4, at 131.

³⁵ LANGBEIN, GERMANY, *supra* note 2, at 56-58.

³⁶ *Id.* at 56.

³⁷ For an outline of a written judgment, see *id.* at 39-56.

³⁸ *Id.* at 82-85.

Two important cautionary notes need to be added to this brief overview of criminal procedure within the civil law tradition. The first is that it is a very sketchy account. Those wanting to understand the civil law system in more depth would be well advised to read John Merryman's excellent introduction to the civil law tradition³⁹ or Mirjan Damaška's powerful monograph on the relationship between structures of procedural authority and state power.⁴⁰

Secondly, the reader should be aware that "describing" what happens in civil law systems is not easy. One reason for the difficulty is the fact that civil law systems are undergoing rapid changes that would have seemed unthinkable a decade ago, thus making any description of European systems necessarily somewhat tentative. One has only to consider plea bargaining to see how sweeping the changes have been. At one time plea bargaining was considered impossible to contemplate in a civil law country because it undercuts the judge's obligation to determine the truth about the charges (whether or not the defendant confesses to the crime), and also because plea bargaining has the potential to introduce disuniformities between defendants charged with the same crime. As recently as 1979, John Langbein reported admiringly that the German system has "successfully avoided any form or analogue of plea bargaining in its procedures for cases of serious crimes."⁴¹ And, in 1980, Thomas Weigend, a German comparative law scholar, reported that plea bargaining in Germany and France is "virtually nonexistent."⁴² He explained that "the very idea of commercialized justice is abhorrent (at best, exotic) to German legal tradition and theory."⁴³ But forms of plea bargaining—usually between the judge and defense counsel—have emerged in Germany. Such plea bargaining has become a problem⁴⁴ that is defended by practitioners⁴⁵ and condemned by scholars.⁴⁶

³⁹ See generally MERRYMAN, *supra* note 4.

⁴⁰ See generally DAMAŠKA, *supra* note 11.

⁴¹ Langbein, *Land Without Plea Bargaining*, *supra* note 2, at 205.

⁴² Weigend, *supra* note 8, at 386.

⁴³ *Id.* at 415.

⁴⁴ The estimate is that plea bargaining affects about 20–30% of all trials in Germany. Joachim Herrmann, *Bargaining Justice – A Bargain for German Criminal Justice?*, 53 U. PITT. L. REV. 755, 756 (1992); see also Thomas Weigend, *Abgesprochene Gerechtigkeit – Effizienz durch Kooperation im Strafverfahren?*, 45 ÖSTERREICHISCHE JURISTEN-ZEITUNG [JZ] 774 (1990).

⁴⁵ See Herrmann, *supra* note 44, at 766.

⁴⁶ See *id.* (describing the debates that took place on plea bargaining at the prominent bi-annual German conference, *Deutscher Juristentag*); Bernd Schünemann, *Absprachen im Strafverfahren? Grundlagen, Gegenstände und Grenzen*, 1 VERHANDLUNGEN DES ACHTUNDFÜNFZIGSTEN DEUTSCHEN JURISTENTAGES, B 9 (1990).

Another reason for the difficulty in describing a subject such as prosecutorial discretion as it exists in a civil law country is that people may "see" different things even in the same country. (The cartoon with which this Article began reminds us that seeing is not a passive activity.) In the late 1970's Abraham Goldstein and Martin Marcus challenged much of the prior scholarship claiming that there was an enormous gap between theory and practice in civil law countries and that judicial supervision of prosecutors was a "myth."⁴⁷ There have been vigorous responses to that article, challenging both the research of Goldstein and Marcus and their conclusions.⁴⁸

Obviously, the extent that civil law countries may have had to relax traditional restraints on prosecutorial discretion⁴⁹ seems to suggest that the broad prosecutorial discretion that exists in this country is not quite the anomaly its critics make it out to be. But this Article takes no position on the Goldstein and Marcus debate. The subject of this Article is the American prosecutor. The civil law model is used as a contrast showing that tight judicial control over prosecutorial discretion on the civil law model—whatever its reality in various countries on the continent—would be unworkable in the United States.

III. UNDERSTANDING THE AMERICAN PROSECUTOR

A. *The American Prosecutor as an Elected Public Official*

The starting premise from which all proposals to reform the American prosecutor seem to begin is the worry that American prosecutors, because they possess "virtually unlimited control over charging"⁵⁰ are nearly omnipotent⁵¹ within our system of criminal procedure. Instead of accepting that such power conveys with it responsibilities, prosecutors are pictured as clinging fiercely to their discretionary power, unwilling to contemplate any structures for

⁴⁷ See Goldstein & Marcus, *Myth of Judicial Supervision*, *supra* note 11.

⁴⁸ See *supra* note 11; see also Damaška, *supra* note 11, at 131 (warning that a surface parallelism in the way cases are disposed of by prosecutors in Germany and the United States is not inconsistent with vast divergences in what prosecutors are actually doing).

⁴⁹ See Luca Marafioti, *L'Archiviazione Tra Crisi Del Dogma Di Obbligatorietà Dell'Azione ed Opportunità "Di Fatto,"* 1992 CASSAZIONE PENALE 206 (describing how the principal of compulsory prosecution and tight judicial supervision of prosecutorial discretion has had to give way in practice in civil law countries pressed by the reality of modern case loads).

⁵⁰ See Vorenberg, *supra* note 15, at 1525.

⁵¹ See Langbein, *Controlling Prosecutorial Discretion*, *supra* note 5, at 440.

exercising discretion that would limit their freedom of action in a significant way.⁵²

In terms of the formal controls over prosecutorial discretion, it is certainly true that American prosecutors have far more discretion than their continental counterparts. If an American prosecutor decides not to file a criminal charge, there usually is no mechanism that would permit judicial review of that decision⁵³ and, even when there is a statute permitting review, judicial approval is given perfunctorily.⁵⁴ Thus prosecutors have tremendous discretion in deciding whether to charge someone with a crime, even when the evidence is strong. Professor Davis asks:

Why should the vital decisions [the prosecutor] makes be immune to review by other officials and immune to review by the courts, even though our legal and governmental system elsewhere generally assumes the need for checking human frailties? Why should he have a complete power to decide that one statute duly enacted by the people's representatives shall not be enforced at all, that another statute will be fully enforced, and that a third will be enforced only if, as, and when he thinks that it should be enforced in a particular case?⁵⁵

These questions make the American system of broad prosecutorial discretion seem arbitrary and haphazard.

But it is characteristic of the American legal system that it often prefers controls on officials that are indirect and informal rather than the sort of formal, hierarchical controls that civil law systems prefer.⁵⁶ Because the

⁵² See Vorenberg, *supra* note 15, at 1564–65.

⁵³ 2 WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* § 13.3, at 181 (1984).

⁵⁴ *Id.*

One reason that such judicial review is granted perfunctorily even under such statutes permitting review of a decision not to charge is that such statutes are not intended to limit broad prosecutorial discretion, but are only intended to prevent action that is so arbitrary and capricious that it cannot be defended as an exercise of discretion. *See, e.g.*, COLO. REV. STAT. § 16–5–209 (1986) (stating that the judge may order prosecution only when failure to file charges was “arbitrary or capricious and without reasonable excuse”).

⁵⁵ See DAVIS, *DISCRETIONARY JUSTICE*, *supra* note 8, at 189.

⁵⁶ In his famous article on structures of authority in comparative criminal procedure, Professor Mirjan Damaška contrasts the hierarchical model of authority, characteristic of continental systems of procedure, with the coordinate model of authority, which is the structure of authority typified by Anglo-American systems of criminal procedure. *See* Damaška, *supra* note 23. The hierarchical model places great emphasis on the certainty of decisionmaking and any consideration of individual circumstances must be subordinated to the goal of ensuring the certainty of the system's decisionmaking. *Id.* at 483–87. In contrast,

controls on prosecutorial power are not immediately visible, it is easy to overlook and underestimate the controls that do exist over American prosecutorial discretion. The main difference between American prosecutors and their European counterparts is the fact that American prosecutors are almost always elected public officials⁵⁷ who have to defend their record and the way that they use their discretion to the electorate. Obviously, this fact means that prosecutorial decisions in the United States are "susceptible to political influences,"⁵⁸ as critics of American prosecutorial discretion worry. There are positive and negative aspects to political pressures, however, and it is typical of the American political tradition—in which state power is not viewed with the same trust that it is in civil law countries⁵⁹—to come down in favor of political control over public officials, rather than preferring internal hierarchical controls over public officials.

Professor Davis questions whether a system of electing local prosecutors is consistent "with a sound system of discretionary justice."⁶⁰ He is attracted to the idea of shifting state prosecutorial authority from local prosecutors to the state attorney generals, who, he recognizes,⁶¹ have not traditionally had an important role to play in the enforcement of criminal law.⁶² But the preference for political control over public officials runs deep in the American political tradition, especially in rural areas where populism remains a potent force. Not only are ninety-seven percent of our state prosecutors elected,⁶³ but many judges are elected as well. One only has to observe the battles that have taken place over judicial reform in states such as Ohio and Texas to get some idea of how difficult it would be to divorce prosecutorial power from political control. Ohio has tried on four occasions to reform its judicial system by moving the system away from the partisan election of judges and replacing that system with a merit selection process.⁶⁴ The last attempt lost by a two to one margin despite

the mentality behind the coordinate model of authority is somewhat skeptical of attempts to impress general structures on the complexities of life and is far more willing to try to accommodate the equities of the situation in order to reach a decision that is just. *Id.* at 509-11.

⁵⁷ Telephone interview with Mark C. Faull, Senior Attorney, American Prosecutors Research Institute (Apr. 29, 1992).

⁵⁸ See Vorenberg, *supra* note 15, at 1558.

⁵⁹ See WEINREB, *supra* note 3, at 12.

⁶⁰ See DAVIS, DISCRETIONARY JUSTICE, *supra* note 8, at 208.

⁶¹ *Id.* One state that has such a centralized prosecutorial structure is Alaska. See Frase, *supra* note 3, at 560 n.84.

⁶² See 2 LAFAYE & ISRAEL, *supra* note 53, § 13.2, at 173.

⁶³ See *supra* note 57 and accompanying text.

⁶⁴ See John D. Felice & John C. Kilwein, *Strike One, Strike Two . . . : the History of and Prospect for Judicial Reform in Ohio*, 75 JUDICATURE 193, 194 (1992).

endorsement of the reform by the Ohio Bar Association and the Ohio League of Women Voters.⁶⁵ In Texas, where the partisan election of judges has directly affected the development of tort law in that state⁶⁶ and where campaign contributions totaling over four and one-half million dollars were spent in the 1986 elections for four seats on the state supreme court,⁶⁷ proposals for reform have gone nowhere.⁶⁸ Any reform of prosecutorial power that would divorce the office of prosecutor from political control by the electorate is likely to be seen as a diminution of voters' rights, making passage very unlikely.

When the political nature of the office of prosecutor is taken into account, Professor Davis's concerns seem less serious: If someone is to decide which laws will be aggressively enforced, which laws will be enforced occasionally, and which laws will never be enforced, it makes sense that the person who has to answer to the voters will make those determinations.⁶⁹

As to the need for deciding which laws will be "aggressively enforced" and which will be "occasionally enforced," the nature of substantive criminal law seems to demand more of these decisions from American prosecutors. Because the civil law tradition emphasizes codes so strongly, the overall structure of the criminal code and the way various statutory norms relate to one another get more attention in those countries. The feeling in civil law countries is that if the administration of the penal code produces undesired consequences, it should be amended rather than permitting the prosecutor to alter enforcement policies to produce more desirable consequences.⁷⁰ By contrast, criminal law provisions in most American jurisdictions tend to be a patchwork of statutory norms,⁷¹ leading sometimes to inconsistencies that may call for the exercise of discretion on the part of prosecutors when they arise.

⁶⁵ *Id.* at 193.

⁶⁶ See Christi Harlan, *Texas Supreme Court Race Pits Lawyers Against Business Interest*, WALL ST. J., Nov. 2, 1992, at B4. The incumbent was heavily supported in his campaign by plaintiffs' lawyers, while business interests and the defense bar supported the challenger. *Id.*

⁶⁷ See Anthony Champagne, *Judicial Reform in Texas*, 72 JUDICATURE 146, 149 (1988).

⁶⁸ *Id.* at 158-59.

⁶⁹ "On numerous occasions, we have explained that in general the district attorney is answerable to the people of the state and not to the courts or the legislature as to the manner in which he or she exercises prosecutorial discretion." *State v. Annala*, 484 N.W.2d 138, 146 (Wis. 1992).

⁷⁰ See Herrmann, *The Rule of Compulsory Prosecution*, *supra* note 8, at 470.

⁷¹ Damaška, *supra* note 11, at 129 (explaining that the "overlapping statutes" of the American system force the prosecutor to "correct over-reaching penal statutes in the U.S.>").

Another reason that prosecutors seem to need more discretion in the United States is the comparative severity of the penalties imposed on criminals when compared to the those imposed for the same crimes on the continent.⁷² Whether it is today, or was ever accurate to say, as was said in 1966, that a month in prison on the continent was the equivalent of a one year sentence to prison in the United States,⁷³ it seems to be generally recognized that the penalties imposed on those convicted of the same crimes are harsher in the United States.⁷⁴

The relationship between harshness and prosecutorial discretion is a complicated one. Whether the comparative harshness of criminal sentences in the United States is a cause of broad prosecutorial discretion or an effect of such prosecutorial discretion is an interesting question. Whatever the exact relationship, there are too many crimes that carry harsh mandatory minimum sentences in the wake of conviction.⁷⁵ Professor Vorenberg challenges the notion that harshness is a justification for prosecutorial discretion. He argues that prosecutors who overrule the legislature's judgment by dispensing mercy in the face of harsh sentences are increasing their own power and making it more likely that they will use such statutes for plea bargaining. He maintains that: "If we are truly concerned about compassion, we are less likely to achieve it through the hidden and unpredictable use of prosecutorial discretion than through encouraging the legislature to see and respond to the results of archaic or overly harsh laws."⁷⁶

To some extent it may be the case that prosecutorial discretion encourages harsh laws. As long as the legislature knows that prosecutors will use their

⁷² Herrmann, *The Rule of Compulsory Prosecution*, *supra* note 8, at 473.

⁷³ *Id.* (citing Zeisel, *Die Rolle der Geschworen in den USA*, 21 JZ 121, 123 (1966)).

⁷⁴ *Id.* at 473-74. Professor Frase studied French sentence statistics and concluded that French sentences seem to be more lenient than those in the United States, but his answer is qualified and he suggests more study needs to be done as the statistics are difficult to compare. See Frase, *supra* note 3, at 648-58.

⁷⁵ See generally Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L. REV. 61 (1993).

There are many complaints about the terrible injustices produced in federal courts by mandatory minimum sentences and repeated calls for congressional repeal of such laws. See, e.g., Hon. Gerald W. Heaney, *Revisiting Disparity: Debating Guidelines Sentencing*, 29 AM. CRIM. L. REV. 771, 786 (1992); Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833, 851-52 (1992); Stuart Taylor, Jr., *Janet Reno's Test of Courage*, AM. LAW., Sept. 1993, at 34.

For a moving account of one such injustice, see Michael Winerip, *Tend a Garden, Pay the Price: A Legal Story*, N.Y. TIMES, July 12, 1992, at 25.

⁷⁶ Vorenberg, *supra* note 15, at 1552.

discretion to see that only "real" drug dealers get the harsh ten year mandatory minimum set out in the statute, there is political gain for the legislature in showing the electorate that it is "tough on crime." Whether most legislatures would "respond" appropriately, however, as Professor Vorenberg suggests, and soften "overly harsh laws" if they saw that the "results" of such laws were numerous young drug offenders going to jail for ten years seems quite a gamble in a country in which citizens are worried about crime,⁷⁷ and are often angry at the criminal justice system,⁷⁸ and in which elected officials of all stripes want to appear to be responding to their concerns.⁷⁹ Obviously, Europeans are concerned about crime, too,⁸⁰ but issues surrounding crime and the criminal justice system are not nearly as politicalized as they are in the United States. To get some idea of the different political climate regarding crime that exists in Europe (where there is no death penalty), consider the policy on drugs in the Netherlands, which has been to decriminalize the use and small scale trade in soft drugs (cannabis and hashish).⁸¹ What is instructive is not so much the drug policy as much as the fact that this policy is not a political issue and politicians can see no gain to be made in sounding a strong antidrug theme in that country.⁸² By contrast, both U.S. presidential candidates in 1992 took pains to explain to voters just how tough on drugs they were,

⁷⁷ A Justice Department survey asked respondents if they felt that the crime rate in their area has been increasing, decreasing, or has remained the same. Fifty-five percent said they felt that crime was increasing, thirty-nine percent said it was the same, and only five percent said it was decreasing. U.S. DEPARTMENT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1990, 184 tbl. 2.36 (1991).

⁷⁸ When asked the level of confidence they had in the ability of courts "to convict and properly sentence criminals," 59% of those questioned in a Justice Department survey answered, "Not very much." *Id.* at 161 tbl. 2.10, *see also* WEINREB, *supra* note 3, at 4.

Recently, the American Bar Association (ABA) released the results of a poll it commissioned to determine the public's perception of lawyers. Gary A. Hengstler, *Vox Populi: The Public Perception of Lawyers: ABA Poll*, A.B.A. J., Sept. 1993, at 60. When the public was asked what changes should be made to improve the profession, one of the leading responses was to toughen the criminal justice system, including sentences. *Id.* at 64.

⁷⁹ *See, e.g.*, Andrew Rosenthal, *Campaign Tactics Provoke New Charges*, N.Y. TIMES, Oct. 31, 1988, at B6; Robin Toner, *Prison Furloughs in Massachusetts Threaten Dukakis Record on Crime*, N.Y. TIMES, July 5, 1988, at B6.

⁸⁰ The rate of crime, especially violent crime, seems to be significantly lower in Europe. *See generally* Gunther Arzt, *Responses to the Growth of Crime in the United States and West Germany: A Comparison of the Changes in Criminal Law and Societal Attitudes*, 12 CORNELL INT'L L.J. 43 (1979).

⁸¹ *See* Ed Leuw, *Drugs and Drug Policy in the Netherlands*, 14 CRIME & JUST. 229 (1991).

⁸² *Id.* at 251-53.

with both candidates going so far as to advocate the death penalty for drug "kingpins."⁸³ Admittedly, this is only one example and the Netherlands is recognized as a very liberal country even by other European countries, but as this subpart has explained, the politicalization of criminal justice issues in the United States has its roots in a tradition that prefers for its citizens to have direct political control over prosecutors.

B. The American Prosecutor as a Local Official

Part of the background to the civil law tradition of compulsory prosecution stems from the concern that broad prosecutorial discretion would lead inevitably to local differences in the enforcement of the criminal law.⁸⁴ But prosecutorial discretion in the American legal system must be seen as part of a political tradition that is built on a preference for *local control* over political power and on an aversion to strong centralized governmental authority and power.⁸⁵ There is no better example than our federal system in which each state retains the power to make its own criminal laws and even to determine its own system of criminal procedure, consistent with the U.S. Constitution. This aversion to strong centralized governmental power runs deep in the American political tradition.⁸⁶ It is not an accident that in the United States, in strong contrast with European countries, something as important as education remains not a state matter, but a local matter, and different localities may adhere to quite different educational philosophies and objectives.

Some may see a counterexample to the political tradition just described because each of the United States Attorneys in the U.S. Department of Justice, for each of the ninety-four districts, are appointed by the President and serve under the U.S. Attorney General. But even in this structure which seems to mirror civil law arrangements, one can see the powerful pull of the American political ideology in that even within this centralized structure it has always been accepted that each United States Attorney has considerable discretion in determining the prosecutorial policies and the enforcement priorities for that particular office. Professor Vorenberg, in his article calling for major reforms aimed at curtailing prosecutorial discretion, complained about the failure of the U.S. Department of Justice to adopt guidelines for charging, plea bargaining, and sentencing that would have tied prosecutorial power nationwide to a fixed

⁸³ See Joseph B. Treaster, *Candidates Seek Little Change in Anti-drug Effort*, N.Y. TIMES, Oct. 22, 1992, at A22.

⁸⁴ *Id.*

⁸⁵ ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 346-47 (Henry Reeve trans., Cambridge, University Press 2d ed. 1863).

⁸⁶ GRANT MCCONNELL, PRIVATE POWER AND AMERICAN DEMOCRACY 5 (1966).

set of standards.⁸⁷ That we can draft a single set of standards for the enforcement of federal criminal laws that will work as well in Miami⁸⁸ as they do in Boise is not self-evident. But more important than the wisdom and practicality of national standards and guidelines is the failure to appreciate how much the proposal clashes with our political preference for local control over prosecutorial power. Whatever structural similarity there may be between a United States Attorney and the head of a similar unit in a civil law country, one can rest assured that these two officials think about their job very differently and they approach individual cases very differently.⁸⁹

Typically, prosecutors or "district attorneys" run for office on a county or district basis and each district attorney is free to set policies for that office that take into account the available prosecutorial resources, as well as local crime concerns and priorities. Local units of government, such as counties, will usually not be as diverse in terms of the political values represented within those units as would be the case if the political unit were larger.⁹⁰ Such local units of government may thus have different objectives and priorities which may reflect differences in values, differences in the amount of resources that

⁸⁷ Vorenberg, *supra* note 15, at 1543-44.

⁸⁸ Kenneth Noto, the Deputy Chief of the Narcotics Section at the United States Attorney's Office for the Southern District of Florida, stated that his office declines to prosecute drug cases when the amount of cocaine is viewed as too small even though the same cases would be viewed as "significant" drug cases by most other federal offices. Telephone Interview with Kenneth Noto, Deputy Chief of the Narcotics Section, U.S. Attorney's Office for the Southern District of Florida, (Aug. 31, 1993). He refused to divulge what the exact limit is in terms of the amount of drugs at which such cases are declined. *Id.* He stated that the office would not want such policy known to the public for fear that drug smugglers would break shipments into packages sufficient to get under the limit and thereby try to avoid federal prosecution. *Id.*

⁸⁹ Professor Damaška writes:

The head of a local German prosecutorial office should not be identified with the American chief prosecutor of a local jurisdiction. Even where the latter is not locally elected, he tends to be much more fiercely independent of superior authority and much more inclined to regard problems in his work as requiring compromise, bargaining and creative choice than is the case with his German colleague. The latter seems by comparison almost ascetic in his refusal to boldly confront policy considerations; narrowly technical, he tends to seek and try to discover "correct solutions" in terms of professional standards.

Damaška, *supra* note 11, at 137.

⁹⁰ See Edward W. Weidner, *Decision-Making in a Federal System*, in FEDERALISM MATURE AND EMERGENT 363, 366-67 (Andrew W. MacMahon ed. 1955).

are available, or other local problems.⁹¹ In a state jurisdiction in which prosecutors usually run for office on a county-wide basis, are funded on the same local basis, and must work with juries drawn from the local population, it is almost guaranteed that prosecutors who are elected in highly rural counties will have quite different constituencies and will face very different criminal problems from those prosecutors elected in heavily urban counties.⁹² Partly because of differences in resources, and partly because of differences in enforcement philosophies and priorities, it will often be the case that two prosecutorial offices in the same state will treat the possession of a small amount of cocaine, a first time property offense, or drunk driving differently. This means that the same criminal laws may be enforced differently within a single state. In short, a certain disuniformity in the enforcement of the same criminal laws is built into the political structure in which American prosecutors operate.

C. Informal Guidelines and Standards within Prosecutors' Offices

Obviously, the indirect political controls that exist over American prosecutors are not the equivalent of the sort of direct hierarchical review of prosecutorial decisions that exist in civil law systems. But the political controls are not meaningless either, especially in a society that is very worried about crime. Normally, a prosecutor who wishes to be reelected has a strong incentive to run a professional office which entails that charging decisions are made fairly and that assistants in that office are consistent with each other in how they charge similar crimes and how they plea bargain similar cases. Today, it is important for prosecutors to have good relationships with victims, the police, judges, and the general public. This means, for example, that it usually makes sense for assistant prosecutors to spend some time explaining their decisions to those concerned with a particular case so that they do not feel ignored by the system and they understand what action the prosecutor took and why.

How a prosecutor prefers to run the office may vary considerably from office to office and may depend on many factors, such as the size of the office, the volume of criminal cases, the level of experience and "turnover" rate of the assistants in that office, as well as the style of the prosecutor. There is no one formula that describes the administrative structure of a high quality prosecutor's office. Some prosecutors may prefer to give assistant prosecutors

⁹¹ See MCCONNELL, *supra* note 86, at 117-18.

⁹² The acquittal rate after trial in the District of Columbia is nearly double the national average. Jeff Rosen, *Jurymandering*, THE NEW REPUBLIC, Nov. 30, 1992, at 15, 15-16.

considerable discretion for handling minor cases, while others may prefer to control the handling of high-volume, minor cases through a set of internal guidelines, policies, or paradigm cases.⁹³ Normally, however, each office will have some informal system of internal controls so that less experienced prosecutors are supervised to some degree by more experienced prosecutors through a system of guidelines or internal office policies, through a system of direct review of charging decisions, or a combination of the two.⁹⁴ A scandal in the way prosecutorial power is exercised within the office could hurt the prosecutor's chances of re-election; thus internal controls over prosecutorial discretion aimed at assuring both fairness and consistency have obvious political advantages.

Another very practical reason a prosecutor's office will usually find it wise to have some system of informal controls over charging decisions and plea bargaining decisions is to ensure that similar cases are handled in a similar way. In any jurisdiction with a high volume of criminal cases, (an increasing phenomena), it is much easier to process and resolve cases efficiently and expeditiously when everyone in the process—including not only assistant prosecutors, but also defense lawyers and judges—understands what the general policies of the prosecutor's office are with respect to routine criminal cases. It is difficult for a conscientious defense attorney to counsel a defendant on the advantages or disadvantages of a particular plea bargain offer if there remains the possibility that the offer will be sweetened later in the process. Thus, it is usually the case that from both an ethical as well as a pragmatic viewpoint, it is wise for a prosecutor's office to have informal controls that ensure that charging and plea bargaining are generally consistent within that office.

⁹³ David Heilbroner has written an interesting account of his three-year stint as an assistant district attorney in the Manhattan District Attorney's Office. DAVID HEILBRONER, *ROUGH JUSTICE* (1990). Even in such a busy office, the overall impression one gets from the book is that assistant district attorneys had considerable discretion over how they handled minor criminal cases, with some assistants taking a much more aggressive posture than others.

⁹⁴ See *infra* Part VI, for a detailed description of a set of guidelines that were in place in the Manhattan District Attorney's Office while Richard Kuh was the District Attorney. In general, one might describe them as a system of guidelines that permits controlled discretion on the part of assistants in that office, but that also permits assistants to plea bargain cases in ways that are inconsistent with the general guidelines with approval of a bureau chief. See generally Richard H. Kuh, *Plea Bargaining: Guidelines for the Manhattan District Attorney's Office*, 11 CRIM. L. BULL. 48 (1975) (reproducing an internal office memorandum on plea bargaining).

D. Value Differences Between the Civil Law Tradition and the American Adversary Tradition

The sorts of internal controls described in the previous subpart are important, but they are usually informal and certainly do not guarantee that similar cases will always be handled similarly within that office. This is a major concern of critics of American prosecutorial discretion who push for strict judicial control over prosecutorial discretion, such as the judicial control characteristic of the civil law system. The topic of guidelines aimed at controlling prosecutorial discretion is discussed later in this Article.⁹⁵ But before that subject is explored, it is important to recognize a value difference between the American criminal justice system and European systems of justice concerning the importance to be attached to uniform treatment of offenders under the same penal statutes. In the ideology of civil law systems, uniformity is near the top of the values emphasized by those systems.⁹⁶ In the ideology of the American legal system, however, uniformity has a lower priority. One can see this different emphasis on uniformity at many points of comparison between the two systems. One obvious example of the different priorities that the two systems place on uniformity is evident in the way civil law systems and the American legal system treat decisions at the end of criminal trials. In civil law systems an acquittal or a conviction is fully appealable.⁹⁷ In the United States, however, an acquittal may never be appealed⁹⁸ and even a finding of guilt cannot be directly challenged on appeal. It is an accepted consequence of our jury system that two juries could reach opposite conclusions on virtually identical evidence⁹⁹—something that would be unacceptable in a civil law system. The American legal system prefers to accept such disuniformities¹⁰⁰

⁹⁵ See discussion *infra* Part VI, which explains why guidelines need to be flexible and informal and why guidelines are oversold as a remedy for limiting prosecutorial discretion.

⁹⁶ Damaška, *supra* note 23, at 483–84.

⁹⁷ LANGBEIN, GERMANY, *supra* note 2, at 82–84; MERRYMAN, *supra* note 4, at 120.

⁹⁸ See *Sanabria v. United States*, 437 U.S. 54, 75 (1978) (holding that there is no exception to double jeopardy permitting retrial after an acquittal, no matter how egregiously erroneous the legal rulings were that led to the acquittal).

⁹⁹ In *Standefer v. United States*, the Court refused to give preclusive effect to an acquittal of a codefendant: “This case does no more than manifest the simple, if discomfoting reality that ‘different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system.’” *Standefer v. United States*, 447 U.S. 10, 25 (1980) (quoting *Roth v. United States*, 354 U.S. 476, 492 n.30 (1957)).

¹⁰⁰ An example of such a disuniformity is the Rodney King case, in which the four defendants were acquitted in state court on police brutality charges and were then tried in federal court for the same conduct under civil rights statutes, with the second jury

rather than subject jury verdicts to official scrutiny and the pressures that such scrutiny may entail.¹⁰¹

Someone trained in a European legal system may find variations in the way that local prosecutors in different parts of the state enforce violations of the same criminal statute to be intolerable. But the American legal system has a much greater tolerance for these sorts of variations, as long as they are reached in good faith. It is well to remember that all nonpetty offenses in the United States must ultimately be tried to a jury which is composed of local citizens who bring their own values into the jury box. Prosecutors must work within a jury system in which citizens will have the final word on the guilt of the defendant and juries may vary in their background and attitudes within the same state.¹⁰²

The American legal system's open recognition of jury nullification is another example of that system's willingness to tolerate differences in the enforcement of substantive criminal law that would not be permitted under the civil law tradition. It has long been understood that juries do not always apply the letter of the law to the defendant. The famous Kalven and Zeisel study on juries showed that juries sometimes acquit defendants for reasons such as the following: (1) they sympathize with the defendant as a person, (2) they take into account the contributory fault of the victim, (3) they believe the offense is *de minimis*, (4) they take into account the fact that the statute violated is an unpopular law, (5) they feel the defendant has already been punished enough, or (6) they believe the offense is accepted conduct in the subculture of the defendant and the victim.¹⁰³ Far from a reason to criticize the institution of the jury, this ability of a jury to "reshape" or "modify" the law to fit its own conception of fairness was singled out by the U.S. Supreme Court as one reason in support of its decision to extend the right to jury trials to the states.¹⁰⁴

This willingness to accept the inherent power of juries to modify the statutory law to reflect the equities of the individual case clashes with the heavy

convicting two of the defendants. See John Riley, *A Near-Perfect Case*, *NEWSDAY*, Apr. 18, 1992, at 4.

¹⁰¹ Generally, special verdicts or questions to the jury are viewed with suspicion in criminal cases because it is thought that such questions undermine the independence of the jury. *Heald v. Mullaney*, 505 F.2d 1241, 1245 (1st Cir. 1974), *cert. denied*, 420 U.S. 955 (1975).

¹⁰² See FRANK W. MILLER, *PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME* 43 (1970); John Kaplan, *The Prosecutorial Discretion—A Comment*, 60 *NW. U. L. REV.* 174, 180 (1965).

¹⁰³ HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY*, chs. 15–27 (1966).

¹⁰⁴ See *Duncan v. Louisiana*, 391 U.S. 145, 156–58 (1968).

emphasis that the civil law tradition places on uniformity and verdicts that are fully explicable under applicable law. The subtheme of this Article concerns the difficulties of stepping outside one's political heritage and legal tradition in attempting to reform the American prosecutor. This underlying theme has a historical analog in the attempt of the French, in the aftermath of the French revolution, to introduce onto the continent the institution of the jury that seemed to work so well across the channel.¹⁰⁵ The institution of lay juries never took hold on the continent because it was inconsistent with civil law values.¹⁰⁶

The emphasis that the American legal system places on the equities of the individual case is embodied not only in the institution of the jury, but in the common law tradition itself. In the common law tradition, law develops and evolves case by case, with a strong emphasis on making each case come out correctly. By contrast, European systems do not evolve, rather they are *constructed* in detailed codes which embody an ideology about the written law that has no counterpart in the common law tradition.¹⁰⁷ There is in the civil law tradition a respect, maybe even a reverence, for the written law and what it embodies that is not shared by the common law tradition.¹⁰⁸ This background helps explain why the civil law tradition would have difficulty investing prosecutors with the sort of broad discretion that has come to characterize the position of prosecutor in the United States.¹⁰⁹ Civil law prosecutors, when confronted with a difficult charging decision see themselves not as making a discretionary decision, but rather as making the same decision that other prosecutors would make in that same situation.¹¹⁰ They are likely to try to explain the decision as correct under professional standards.¹¹¹ In short, they see themselves more as administrators, exhibiting what Professor Damaška describes as "traces of a career civil-service mentality."¹¹²

When one understands the role of the prosecutor in the American political tradition as well as the different attitudes and values reflected in the common law tradition compared to the civil law tradition, it is not surprising that the nature of prosecutorial power differs markedly in the two traditions and that the

¹⁰⁵ See Ennio Amodio & Eugenio Selvaggi, *An Accusatorial System in a Civil Law Country: The 1988 Italian Code of Criminal Procedure*, 62 TEMP. L. REV. 1211, 1211 n.1 (1989).

¹⁰⁶ See DAMAŠKA, *supra* note 6, at 36; MERRYMAN, *supra* note 4, at 128.

¹⁰⁷ See MERRYMAN, *supra* note 4, at 26-33.

¹⁰⁸ *Id.*

¹⁰⁹ See Damaška, *supra* note 11, at 124-31.

¹¹⁰ See *id.* at 137.

¹¹¹ *Id.*

¹¹² *Id.*

American criminal justice system has a much higher tolerance for the sorts of disuniformities and inconsistencies that can occur even where prosecutors exercise their discretion in complete good faith.

E. *The Adversary System as Control on American Prosecutorial Discretion*

Besides the political controls over American prosecutorial power, there is another important, albeit also indirect, control over prosecutorial discretion in the United States that has no counterpart in the civil law tradition, namely, the adversary system of trial. In the United States, the prosecutor is responsible for conducting the trial and presenting evidence sufficient to convict the defendant beyond a reasonable doubt. As this trial system has evolved, it has become very sophisticated and complicated with the result that advocacy courses devoted to developing courtroom skills in areas such as jury selection, examining witnesses, cross-examining experts, and the use of demonstrative evidence are standard at American law schools.

One result of the adversary system of trial is that American prosecutors are forced to think about cases quite differently from prosecutors in civil law systems. Trials in the United States are personalized to a very great extent. Prosecutors and defense attorneys talk about the cases they've "won" and those they've "lost." When a prosecutor obtains a conviction, she will be congratulated by others in the office for the "victory" and when she "loses" a case, she will often spend some time wondering what she might have done differently to have changed the outcome and to have convinced the jury to convict.¹¹³ Prosecutors feel personally responsible for the outcome of their cases, in part because the adversary system accepts the consequence that the outcome of a trial may be a reflection of the quality of the advocacy.¹¹⁴

Because jury trials require considerable preparation and are often rather demanding, prosecutors generally do not want to file charges against a defendant unless the chances of convicting the defendant are very good.¹¹⁵ This will be especially true of the type of routine, rather minor criminal cases that are the bread and butter of most prosecutors' offices. Thus, the adversary system serves as a screen to discourage prosecutors from pursuing weak cases.

Those who suggest that judicial review of charging decisions is necessary in the American criminal justice system because neither the grand jury nor

¹¹³ WEINREB, *supra* note 3, at 103.

¹¹⁴ See *infra* note 138.

¹¹⁵ See 2 LAFAYE & ISRAEL, *supra* note 53, § 13.1, at 157 ("As a practical matter, the prosecutor is likely to require admissible evidence showing a high probability of guilt, that is, sufficient evidence to justify confidence in obtaining a conviction.").

preliminary hearings function to screen out weak cases,¹¹⁶ are correct in their assessment of grand juries and preliminary hearings, in which the standard of proof is usually only probable cause. Prosecutors rarely think in terms of probable cause, however, when deciding whether to file formal charges. They want evidence that will be sufficient to secure a conviction at trial before they file formal charges.¹¹⁷

The prosecutor in civil law systems focuses much less on the trial. The prosecutor's main task is to make sure that the investigative file of the case, the dossier, is complete in the sense that it contains all relevant inculpatory and exculpatory evidence and all relevant information on the background of the defendant. But the trial itself is the responsibility of the trial judge (or judges), not the prosecutor.¹¹⁸ It is the judge, using the dossier, who will decide who will testify and in what order the witnesses will be heard, and it is the judge who controls the bulk of the questioning in an effort to determine whether the defendant committed the crime.¹¹⁹ To a large extent the prosecutor's work is completed before the trial takes place and the prosecutor plays a relatively minor role at trial.¹²⁰ Thus, the sorts of adversary pressures that would counsel caution in filing charges when the evidence is not strong are, if not absent, far less important in the thinking of a civil law prosecutor. As long as there was sufficient evidence to support the prosecution, the stigma attached to "losing a case" is not present in the civil law system.¹²¹

Further distinguishing European prosecutors from their American counterparts is the historical tradition of compulsory prosecution in civil law systems under which prosecutors were obliged to file criminal charges whenever there was evidence that a citizen had committed a serious crime.¹²² This tradition has been softened considerably over time¹²³ and today it means different things in different European countries. It is still fair to say, however, that the safe course for a European prosecutor who has evidence that a crime has been committed, but who also has serious doubts about whether a

¹¹⁶ Vorenberg, *supra* note 15, at 1537-38, 1547.

¹¹⁷ See MARVIN E. FRANKEL & GARY P. NAFTALIS, *THE GRAND JURY: AN INSTITUTION ON TRIAL* 25-26 (1977). See also *supra* text accompanying note 115.

¹¹⁸ Langbein, *Land Without Plea Bargaining*, *supra* note 2, at 217.

¹¹⁹ Langbein, *Controlling Prosecutorial Discretion*, *supra* note 5, at 448 ("Because the law of evidence is uncomplicated and the proof-taking is largely conducted by the presiding judge, the prosecutor cuts a peripheral figure at trial.").

¹²⁰ LANGBEIN, *GERMANY*, *supra* note 2, at 64-65.

¹²¹ Damaška, *supra* note 11, at 131.

¹²² Langbein, *Controlling Prosecutorial Discretion*, *supra* note 5, at 448-50.

¹²³ *Id.* at 458-61; see also Herrmann, *The Rule of Compulsory Prosecution*, *supra* note 8, at 480, 484; Weigend, *supra* note 8, at 400-04.

conviction can be obtained, is to file charges in that case.¹²⁴ Free of the political and adversary pressures under which American prosecutors work and encouraged by tradition to put doubtful cases into the system, judicial review of a prosecutor's charging decisions seems to fit comfortably into the civil law tradition. That it does not square with our concept of a judge in the American adversary tradition will be discussed in the next Part.

IV. THE AMERICAN JUDGE: CONCEPTUAL AND PRACTICAL PROBLEMS RAISED BY JUDICIAL SUPERVISION OF PROSECUTORIAL DISCRETION

The previous Part tried to show several of the influences and pressures on the exercise of American prosecutorial discretion that make the charges that American prosecutors have "unfettered" discretion in charging not quite as startling as they might seem on the surface and that distinguish the American prosecutor from civil law counterparts. This Part will look at the equation from the other side and will consider what is being asked of the American judiciary when it is proposed that the exercise of prosecutorial discretion should be limited and that some of that discretion should be shifted to the judiciary.

The first problem that rears its head is the fact that judicial power in the United States is far more limited in the American legal tradition than it is in civil law systems. Put bluntly, except in the narrow band of cases where a prosecutor's actions violates the Constitution, an American judge has no power to reduce or reshape criminal charges to fit the evidence or the equities of a particular case.¹²⁵ Professor Davis, while acknowledging the long line of

¹²⁴ See Damaška, *supra* note 11, at 131; Herrmann, *The Rule of Compulsory Prosecution*, *supra* note 8, at 475, 484; Langbein, *Land Without Plea Bargaining*, *supra* note 2, at 211.

¹²⁵ The United States Court of Appeals for the D.C. Circuit has made the following observations on the limited role of the judiciary in reviewing prosecutorial discretion:

Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought.

....

... [N]o court has any jurisdiction to inquire into or review his decision.

... [W]hile this discretion is subject to abuse or misuse just as is judicial discretion, deviations from his duty as an agent of the Executive are to be dealt with by his superiors.

... [I]t is not the function of the judiciary to review the exercise of executive discretion whether it be that of the President himself or those to whom he has delegated certain of his powers.

decisions raising the principle of separation of powers as a bar to judicial review of prosecutorial charging discretion, argues that this tradition is a product of nineteenth century thinking about the limits of judicial power and that it was established "before the successes of the modern system of *limited* judicial review became fully recognized."¹²⁶ Again he uses comparative criminal procedure to make his point, contending that "[t]he usual assumption that the prosecuting power is inherently unsuitable for judicial review is contradicted by the experience in West Germany."¹²⁷

This contention is a misuse of comparative criminal procedure that is quite unfair to the American adversary tradition and that is superficial in its treatment of the civil law tradition. Judicial review of prosecutorial power is workable in the civil law tradition because the roles of the judge and the prosecutor are very different in that tradition and because the nature of criminal trials are different in that tradition. First of all, judicial review of a prosecutor's decision to charge or not to charge faces no separation of powers principle in the civil law tradition.¹²⁸ The position of prosecutor was the result of splitting the investigative function of the judiciary from its judicial function so that prosecutors are actually considered to be to judicial figures in the civil law tradition operating under the same professional obligations of balance and fairness in carrying out their duties that apply to judges.¹²⁹ In many civil law systems the position of prosecutor remains formally a part of the judicial system.¹³⁰ It is often the case that prosecutors and judges will have taken the same exams, have the same system of hierarchical advancements, and even receive the same pay whether they serve as prosecutor or judge.¹³¹ Moreover, while both the positions of prosecutor and of judge are professional, civil service positions, there is often considerable mobility between the two positions

Newman v. United States, 382 F.2d 479, 480-82 (D.C. Cir. 1967); *see also* Oyler v. Boles, 368 U.S. 448 (1962).

¹²⁶ DAVIS, *DISCRETIONARY JUSTICE*, *supra* note 8, at 211.

¹²⁷ *Id.* at 212.

¹²⁸ In France, an investigating magistrate or *juge d'instruction* is formally in control of the investigation. WEINREB, *supra* note 3, at 126; Weigend, *supra* note 8, at 389.

¹²⁹ Herrmann, *The Rule of Compulsory Prosecution*, *supra* note 8, at 469; Weigend, *supra* note 8, at 395.

¹³⁰ MERRYMAN, *supra* note 4, at 129; Herrmann, *The Rule of Compulsory Prosecution*, *supra* note 8, at 469.

¹³¹ In Italy and France, both judges and prosecutors are part of the magistrature, a body of judicial officials that has no analog in the American legal system. *See* Frase, *supra* note 3, at 561-65 (France); Pizzi & Marafioti, *supra* note 7, at 30 (Italy).

and a judge or a prosecutor may apply for a judicial or prosecutorial vacancy that comes open in the system and that seems attractive.¹³²

There is thus no separation of powers problem in putting a civil law judge in the position of closely supervising the prosecutor and, given the civil law judge's responsibility to develop the evidence at trial, it seems natural to give the civil judge the power to control charging discretion. This power extends even to reshaping the charges to more accurately fit the evidence at trial.¹³³ Because judges have the power to convict the defendant of any violation established by the evidence at trial, the exact charges that a prosecutor chooses to file are much less important in Germany because the judge can reshape them to fit the evidence.¹³⁴

To ask that an American judge play a similarly aggressive role with respect to charging decisions raises serious separation of powers problems and runs contrary to the adversary tradition in which judges are assigned a neutral and passive role with respect to charging decisions and the development of evidence at trial.¹³⁵ If we wish to limit prosecutorial power and "reform" our prosecutors to fit the civil law model, we would have to reform our concept of judicial power to fit the civil law model as well.¹³⁶ Without changing the entire

¹³² LANGBEIN, GERMANY, *supra* note 2, at 105; Pizzi & Marafioti, *supra* note 7, at 30.

¹³³ LANGBEIN, GERMANY, *supra* note 2, at 66; Herrmann, *The Rule of Compulsory Prosecution*, *supra* note 8, at 495 n.150.

¹³⁴ Weigend, *supra* note 8, at 399, 403 (describing the power of the judge to reshape the charges to fit the evidence and noting that the decision *what* to charge or *how many* counts to file is of no real consequence under German procedure).

¹³⁵ On the distrust of strong judicial power, the Court made these comments in *Duncan v. Louisiana*:

[T]he jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary power over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.

Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

¹³⁶ Professor Monroe Freedman has strongly criticized Judge John Sirica for the role that Sirica played in uncovering the Watergate cover-up. See Monroe Freedman, *Evaluating Sirica's Watergate Legacy*, LEGAL TIMES, Sept. 7, 1992, at 7. Freedman asserts that Sirica went beyond the impartial role assigned a judge in the adversary system and assumed an inquisitorial role. *Id.*

concept of what it means to be a judge in the American adversary tradition, it seems inevitable that judicial review of prosecutorial discretion would be a formality.

Besides the conceptual problems in terms of separation of powers that are raised by the concept of judicial review of prosecutorial charging discretion, judicial review under the civil law model raises practical difficulties under our adversary system were a judge to play an active role in deciding whether or not formal criminal charges should be preferred against a defendant. As an initial matter, how would this review work? Would a judge go over the file with the prosecutor?¹³⁷ If it is a discussion prior to charging, would the person, yet to be accused, be represented at this hearing or would it be a discussion solely between the prosecutor and the judge? And how would review work in situations in which, for example, a judge realizes that the prosecutor has reached a conclusion that unfairly favors the defendant? For example, what if a judge realizes that the prosecutor who has decided not to file charges against someone has failed to see the powerful evidentiary significance of a certain item of evidence? Would the judge have the obligation to point it out to the prosecutor? Or what if a judge reviewing a formal charging decision realizes that conviction will be quite difficult under the theft theory as charged, but would be straightforward under a theory of embezzlement? Should the judge explain to the prosecutor the advantages of an embezzlement theory and order the case to be refiled on that theory? Or what if the judge realizes in reviewing the decision not to charge the accused with a serious crime (because the evidence would not sustain a conviction) that the prosecution has failed to consider an obvious investigative lead that could provide crucial evidence? Should the judge order this lead pursued or keep quiet and evaluate the file as it is?

Notice that in the civil law tradition these issues do not cause problems. But in the American adversary tradition, for the judge to be advising a prosecutor on investigative, evidentiary, or strategic matters puts the judge in an awkward position between the judge's obligation to ensure that the results of the process are accurate and fair and the judge's obligation to remain neutral between the parties. It is an accepted consequence of the adversary system that

¹³⁷ It is not clear whether American judges would have the background and expertise that is necessary to supervise prosecutorial discretion on the civil law model. In civil law systems, judges are career civil servants, as are states' attorneys, and there is often considerable movement back and forth from judge to state attorney and vice versa. *See supra* text at notes 130-32. But in the United States, judges may come to the bench with no prosecutorial experience and with trial experience limited to civil matters.

the skill of the advocates may affect the outcome of the trial.¹³⁸ But once the system starts down the road of asking judges to intervene in the charging and plea bargaining process in order to assure substantive fairness to defendants, to victims, to the public, and so on, it becomes difficult to understand why judges should not supervise and intervene at trial for exactly the same reasons.

This tension between a judge's obligation to remain neutral and a judge's obligations to assure the substantive fairness of a prosecutor's actions will be discussed more fully in the next Part which deals with judicial review of prosecutorial discretion as it is manifested in plea bargaining decisions. That Part will show why it is very difficult for judges to reject plea bargains in our system and why it seems unlikely that judicial review of a prosecutor's discretion in charging would be any more effective than it is in supervising such discretion in plea bargaining.

V. THE LESSONS OF PLEA BARGAINING

Up to this point, this Article has discussed only a prosecutor's discretion in deciding whether or not to charge someone with a crime and has avoided discussing plea bargaining. It is difficult, however, to separate the two issues because they are almost always merged in the thinking of prosecutors and defense attorneys. Plea bargaining discussions will often begin before formal charges are even filed, sometimes in an effort by the arrestee's lawyer to convince the prosecutor that some alternative to criminal prosecution, such as restitution, a diversion program, or a deferred prosecution, is preferable to criminal prosecution under the circumstances of the particular case.

Not surprisingly, those who are critical of the broad discretion the system has vested in prosecutors, are particularly concerned about plea bargaining because it allows the prosecutor to guarantee a defendant a maximum sentence with the result that the judge's hands in sentencing are tied by the terms of the

¹³⁸ Commenting on the outcome of the second trial in the beating of Rodney King, Professor Peter Arenella observed: "A trial is like a piece of theater. No two trials are the same, and in an adversary system, the quality of justice depends on the quality of the adversaries." Riley, *supra* note 100, at 4. Professor Lloyd Weinreb, who has proposed a complete shift of our criminal justice system to a system that is modeled on the civil law tradition, argues that we should not accept a system that permits the quality of advocates to affect the outcome: "The very dependence of our criminal process on the individual performances of the prosecutor and defense counsel that makes the appointment of counsel so critical ensures that whether or not defendants stand equal before the law, they stand unequally under its judgments." WEINREB, *supra* note 3, at 9-10.

bargain.¹³⁹ Thus, a prosecutor who agrees to allow a defendant to plead guilty to a burglary charge in return for a promise that any sentence imposed will not exceed one year has, in effect, determined the sentence that the defendant will receive.¹⁴⁰

But there is an important distinction between a prosecutor's exercise of discretion in deciding whether to file criminal charges and a prosecutor's discretion in plea bargaining: All plea bargains must be approved by a judge who has the authority to reject a plea bargain that the judge believes does not serve the public interest.¹⁴¹ But while judges have the authority to reject plea bargains, and do it on occasion, it is not a common occurrence.¹⁴² Obviously,

¹³⁹ Professor Vorenberg argues against the plea bargaining power of prosecutors as follows:

Little in the background, training, self-selection, or general outlook of prosecutors suggests that they are best equipped to make whatever diagnostic and rehabilitative judgments may be involved in deciding, for example, which potential defendants will benefit from participation in a diversion program. The argument for vesting prosecutors with this function is plausible only if the judges and probation and parole officials commonly thought to have such expertise do not in fact have it. Even then, prosecutors retain their responsibility for getting convictions, and it would require special agility of outlook for them to be able simultaneously to decide what treatment will be best for particular offenders.

Vorenberg, *supra* note 15, at 1557-58; see also DAVIS, DISCRETIONARY JUSTICE, *supra* note 8, at 196-97.

¹⁴⁰ Not all plea bargaining involves explicit "sentence bargaining." Some jurisdictions permit only "charge bargaining," in which the prosecutor and defense attorney bargain over the count or counts to which the defendant will plead guilty in exchange for dismissal of the remaining charges, but the prosecutor is not permitted to bargain as to a specific sentence limit within the sentencing range for the offense to which the defendant pled guilty. See, e.g., Kuh, *supra* note 94, at 49-55. But there may not be much difference in practice as charge bargains from higher offenses to lower category offenses can also significantly restrict the sentencing discretion of the judge. See generally Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1136-46 (1976).

An example of sentence bargaining will be discussed in this Part because such bargaining is common and because it is the most controversial form of plea bargaining in that it often explicitly limits the sentencing discretion that a judge would otherwise have under the particular criminal statute.

¹⁴¹ 2 LAFAVE & ISRAEL, *supra* note 53, § 20.4, at 657.

¹⁴² Professor Albert Alschuler, who has studied plea bargaining for many years, cites many authorities in support of the conclusion that "judges almost automatically ratify prosecutorial charge reductions and sentence recommendations." See Alschuler, *supra* note 140, at 1065-66 (and authorities cited therein). Professor Alschuler states that on rare

there are courts that are so overloaded with cases that plea bargaining is the only way that judges can keep control of their dockets and hence they cannot realistically reject plea bargains.¹⁴³ Even where case pressure is not intense, however, conscientious and responsible judges are not well positioned in the American adversary tradition to reject plea bargains and force the parties to trial. The reason why it is awkward for judges to do so, can perhaps best be explained through an example. Consider the following acquaintance-rape hypothetical:

A female college student, who had gone dancing at a local bar with some friends, met the defendant during the evening and enjoyed dancing with him a couple of times during the evening. Around 11 p.m., the student decided to leave and told her friends that she would walk the short distance back to her apartment. The defendant overheard her and said that he would walk along with her as he was ready to leave, too, and was heading in the same direction. The victim claims that when she unlocked the door of her house and turned to say goodbye to the defendant, he grabbed her, pushed her inside the door, threw her to the floor, put his hands around her neck and threatened to choke her unless she slid off her jeans and had intercourse with him. An hour later, when her roommate returned and the victim told her what had happened, she reported the rape to the police. The defendant admits the intercourse, but claims that the victim instigated the sex and that it was entirely consensual. The prosecutor and the defense counsel have proposed a plea bargaining agreement in which the defendant will plead guilty to sexual assault and will receive a sentence limited to probation. Assume further that the judge firmly believes that a sentence of two years in prison would be appropriate if the defendant were to be convicted of such a sexual assault at trial.

The decision whether or not to accept a plea bargain proposal, such as the one in question, reveals a tension that exists in the role of the judge in the American criminal justice system. On the one hand, a judge is assigned a passive role with respect to the determination of guilt: the parties present the evidence, the judge rules on procedural and evidentiary issues, and the decision on guilt then goes to a jury of citizens. But judges, except in death penalty

occasions judges will reject the prosecutor's sentence recommendation and impose a harsher sentence on the defendant in order to maintain "the theory that prosecutors lacked the power to bind the court," but the reality is that plea bargaining yields judicial sentencing authority to prosecutors in order to make plea bargaining work. *Id.* at 1066-67.

¹⁴³ In 1983, it was reported that in New York Criminal Court, which handles minor crimes, judges have a caseload of 100 cases a day and only ½% of their 200,000 cases can be tried. See *Cattle Car Justice*, N.Y. TIMES, July 2, 1983, at 20. See generally William T. Pizzi, *Batson v. Kentucky: Curing the Disease but Killing the Patient*, 1987 SUP. CT. REV. 97, 139.

cases, have always had the duty of imposing sentence on those convicted and the sentencing process has decidedly inquisitorial overtones.¹⁴⁴ Instead of relying on an adversary presentation to develop background information about the defendant and about the particular crime, the court investigates these issues itself through the probation department, which is an arm of the court. The probation department will conduct an investigation and then file with the court a presentence report, containing its conclusions and recommendations. The evidentiary rules that tightly restrict the form and substance of evidence admitted at trial drop away at the sentencing phase, allowing a judge to consider a much wider range of evidence than could ever be presented at trial.

A plea bargain that guarantees a defendant a certain sentence can impinge on the judge's sentencing authority by committing the judge to imposing a sentence that is substantially less than the judge would impose if the defendant were convicted at trial. Because such plea bargains put the judge in the position of having to ratify the prosecutor's decision as to the appropriate sentence for the case, such plea bargains shift sentencing authority from the judge to the prosecutor. Thus, in the above hypothetical, the judge is being asked to ratify a sentence of probation that the judge believes to be substantially less than the sentence the crime and the defendant merit.

Yet it would be highly unlikely that a judge would reject the proposed plea bargain. In the first place, the judge is not in a good position to understand the strengths and weaknesses of the case—the judge will not have the full investigative file in front of her and it is often the case that the judge will not have heard testimony from any of the main prosecution witnesses. The judge is thus not well-positioned to assess the constitutional, evidentiary, or strategic issues that may be lurking in the case. In the plea bargaining hypothetical, in which the judge believes that the proposed sentence is substantially less than the crime deserves, a judge might try to learn more about the reasons that have convinced the prosecutor that this plea bargain is in the public interest. But it is very difficult for a judge to have a candid and open discussion about the strengths and weaknesses of the case in our adversary tradition. It would be unethical for a judge to meet with the prosecutor "ex parte" to discuss in detail weaknesses in the case.¹⁴⁵ And to ask the prosecutor proposing the plea bargain to explain in open court the specific reasons that have led the prosecutor to believe that the proposed plea bargain is in the public interest can be awkward. If the prosecutor were pressed to explain the motivation for

¹⁴⁴ William T. Pizzi, *Some Worries About Sentencing Guidelines*, 64 U. COLO. L. REV. 707, 709 (1993).

¹⁴⁵ See AMERICAN BAR ASSOCIATION, MODEL CODE OF JUDICIAL CONDUCT, Canon 3B(7) (1990); AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.5(b) (1983).

accepting the proposed bargain, it could put the prosecutor in the position of pointing out to the defense strategic weaknesses in the prosecution's case that may not have been seen or fully appreciated by the defense.¹⁴⁶

Another reason why judges in the American adversary tradition are not well-positioned to reject plea bargains based on their own independent assessment of the strengths and weaknesses of the case stems from the fact that the nature of trials in the American adversary tradition differs so fundamentally from those in the civil law tradition. A civil law judge has a much easier task assessing the evidence and predicting the likely course the case will take at trial. In the first place, all relevant evidence is admissible evidence at a civil law trial.¹⁴⁷ While it is not strictly accurate to say that there are no rules of evidence that apply in civil law trials,¹⁴⁸ as a practical matter that is the case.¹⁴⁹ Because the system does not use exclusively lay juries and because the civil law system is ideologically committed to the principle that all relevant evidence should be considered in an effort to determine the truth,¹⁵⁰ the balancing of the probative value of a piece of evidence against its prejudicial value that is a standard feature of American trials simply does not occur in civil law trials.¹⁵¹ In the civil law tradition, many pieces of evidence that would provoke serious evidentiary battles between the prosecutor and the defense attorney at an American trial will be brought out by a civil law judge at trial without even the mildest objection.¹⁵² Witnesses are permitted considerable latitude in their responses and there is an air of informality to the proceedings, especially when compared to American trials.¹⁵³

¹⁴⁶ Robert Heilbroner talks about the awkward situation in which he was placed, when, as an Assistant District Attorney (ADA) in Manhattan, a judge, outside of the hearing of the defense attorney during a pause in plea negotiations in a serious case, turned to him and asked him, "Mr. DA, you've got a conviction there. I hope he turns down the offer and gets what he deserves. Really, why did the ADA recommend nine to eighteen?" HEILBRONER, *supra* note 93, at 238.

¹⁴⁷ LANGBEIN, GERMANY, *supra* note 2, at 68-69; Langbein, *Controlling Prosecutorial Discretion*, *supra* note 5, at 447.

¹⁴⁸ See generally LANGBEIN, GERMANY, *supra* note 2, at 67-69; Mirjan Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure*, 121 U. PA. L. REV. 506 (1973).

¹⁴⁹ Damaška, *supra* note 11, at 130; Langbein, *Land Without Plea Bargaining*, *supra* note 2, at 207; Weigend, *supra* note 8, at 385.

¹⁵⁰ LANGBEIN, GERMANY, *supra* note 2, at 69-70; Weigend, *supra* note 8, at 385.

¹⁵¹ LANGBEIN, GERMANY, *supra* note 2, at 68-69. Civil law countries believe that the professional judges can protect against misuse of evidence by lay judges and, to that end, only the professional judges are permitted to read the dossier. *Id.* at 67.

¹⁵² Langbein, *Land Without Plea Bargaining*, *supra* note 2, at 207.

¹⁵³ LANGBEIN, GERMANY, *supra* note 2, at 65, 74-75.

In addition to a general skepticism about the wisdom of erecting the sort of tight evidentiary screen that is one of the hallmarks of the American trial system, criminal trials in civil law systems also have a broader scope of inquiry so that much more evidence is directly relevant to the issues being tried. A civil law trial is concerned both with guilt and a possible sentence. This means that a defendant's background will always be explored at trial, usually by the judge talking directly to the defendant at the start of trial about the defendant's background.¹⁵⁴ Thus, the thorny issues that frequently arise in the American system, involving the admissibility of prior convictions or other acts of misconduct for substantive purposes,¹⁵⁵ do not pose a problem at civil law trials—who the defendant is and what he has done in the past is always relevant and admissible.¹⁵⁶ Because a civil law trial does not separate the issue of guilt from the issue of sentencing, the trial is the only time that a defendant can raise mitigating factors.¹⁵⁷ For this reason, as well as cultural reasons, defendants in civil law systems tend not to remain silent either during investigation or at trial, but usually cooperate with the system to the extent of freely answering questions about themselves or the crime.¹⁵⁸ Thus, surprise is not the weapon in the civil law system that it can be at an American trial.¹⁵⁹

Finally, if something does happen at a civil law trial that affects the verdict, it can usually be appealed to a higher court by the prosecutor or the defense attorney and there is broad appellate review of the decision of the trial court.¹⁶⁰ In European systems, a trial is an important step in the procedure designed to determine whether the defendant is guilty or not, but it is only a step. By contrast, a trial in the American legal system is of dominant importance because appellate review of the verdict itself is not permitted. If a judge makes an erroneous evidentiary ruling that cripples the prosecution's case or if a judge gives an erroneous jury instruction that favors the defendant, there

¹⁵⁴ *Id.* at 71.

¹⁵⁵ So sophisticated is the issue of uncharged misconduct evidence in the United States that there is now a book, with regular supplements, devoted exclusively to the issues surrounding the admissibility of such evidence. See EDWARD J. IMWINKELREID, *UNCHARGED MISCONDUCT EVIDENCE* (1984).

¹⁵⁶ LANGBEIN, GERMANY, *supra* note 2, at 76-77.

¹⁵⁷ Pizzi & Marafioti, *supra* note 7, at 8.

¹⁵⁸ Damaška, *supra* note 148, at 527; Langbein, *Land Without Plea Bargaining*, *supra* note 5, at 208-09, 218-19; Weigend, *supra* note 8, at 396.

¹⁵⁹ Because the dossier must contain all the incriminating and exculpatory evidence gathered during the pretrial investigation, unpleasant surprises for the defense are also extremely unlikely at a civil law trial. GERHARD O.W. MUELLER & FRÈ LE POOLE-GRIFFITHS, *COMPARATIVE CRIMINAL PROCEDURE* 25 (1969).

¹⁶⁰ See *supra* note 38 and accompanying text.

is no appeal from an acquittal no matter how erroneous.¹⁶¹ A similar presumption of finality attaches to guilty verdicts; while defendants may appeal adverse rulings during the pretrial and trial process that may have affected the verdict, the verdict itself is not subject to direct review and scrutiny.¹⁶²

In the plea bargaining process, the many issues that may affect guilt and sentencing, including constitutional issues, evidentiary issues, problems of proof, and the background and culpability of the defendant, are compromised in a particular bargain. Whether a legal system should permit these important issues to be compromised through plea bargaining is an important question. But both the Court¹⁶³ and the *American Bar Association Standards On Criminal Justice*¹⁶⁴ accept plea bargaining as an important feature of our criminal justice system. Civil law systems are ideologically opposed to plea bargaining¹⁶⁵ because it is seen as inconsistent with a judge's duty to determine guilt and to apply the law uniformly to all offenders. But the adversary tradition, in which the parties control the presentation of evidence, uniformity is emphasized less, and the judge does not have an inquisitorial function with respect to the determination of guilt, is a more fertile environment for plea bargaining. If the opposing parties have reached a compromise that they believe is appropriate for the resolution of the case in question, it is very difficult for a judge to reject the plea bargain and put herself in the position of second-guessing the prosecutor's assessment of the public interest or the defense's decision that the plea furthers its interest.

This is not to say that plea bargaining in the American adversary tradition is desirable¹⁶⁶ or inevitable.¹⁶⁷ But once a system approves the sorts of

¹⁶¹ See *supra* note 98.

¹⁶² Even when there were post-verdict allegations from one of the jurors that certain jury members drank to excess at lunch during the trial and even ingested illegal drugs in the jury room itself during the trial, the Supreme Court in *Tanner v. United States*, ruled that such impeachment of the verdict by a juror after the fact would "disrupt the finality of the process" and was properly barred by Federal Rule of Evidence 606(b). *Tanner v. United States*, 483 U.S. 107 (1987).

¹⁶³ The constitutionality of plea bargaining has been upheld many times even in rather shocking fact situations. See, e.g., *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); *Brady v. United States*, 397 U.S. 742 (1970); *North Carolina v. Alford*, 400 U.S. 25 (1970).

¹⁶⁴ See AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, *The Prosecution Function*, Standard 3-4.1 (3d ed. 1992).

¹⁶⁵ Weigend, *supra* note 8, at 386. But despite the ideological opposition to plea bargaining, forms of plea bargaining are beginning to emerge on the continent. See *supra* notes 41-46 and accompanying text. For a discussion of other forms of plea bargaining on the continent, see Pizzi & Marafioti, *supra* note 7, at 35-37.

¹⁶⁶ Professor Alschuler has argued that defendants lose respect for judges and the entire system when they end up serving time as the result of a deal worked out between the

sentence bargains of which the acquaintance-rape hypothetical is an example, it becomes difficult conceptually and practically for a judge to reject the proffered bargain, even when the bargain impinges significantly on the judge's sentencing authority.¹⁶⁸

Our experience with judicial supervision over plea bargaining strongly suggests that adding to our system new pretrial procedures designed to place prosecutorial charging decisions under judicial supervision is unlikely to be very effective.¹⁶⁹ And in a system that is already heavily encumbered with pretrial procedures that have no analogs in civil law systems, (including discovery motions, suppression motions, and motions *in limine*) adding another level of pretrial hearings might turn out to be a step in the wrong direction absent powerful evidence both that abuse of prosecutorial discretion in charging is a serious problem and that such hearings will be effective in remedying the problem.¹⁷⁰

prosecutor and defense attorney. Alschuler, *supra* note 140, at 1066. There seems no doubt that the cathartic effect that a trial can have for the victim, the defendant, and the public is lost when a case is resolved in a plea bargain, even if the sentence received is the same the defendant would have received if convicted at trial.

¹⁶⁷ Some critics of plea bargaining have suggested that our legal system might be better off giving defendants a sentencing discount to encourage the waiver of the right to a jury trial instead of permitting the state to encourage defendants to waive the right to trial altogether. Albert W. Alschuler, *Implementing the Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 1024-43 (1983); Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037 (1984).

¹⁶⁸ In *United States v. Ammidown*, the trial judge rejected a plea bargain that would have permitted a defendant charged with first degree murder to plead guilty to second degree murder. Subsequently, the defendant was convicted of first degree murder. *United States v. Ammidown*, 497 F.2d 615, 618 (D.C. Cir. 1973). The court of appeals reversed the conviction and ordered the trial judge to accept a plea to second degree murder, concluding that while the judge should not be a rubber stamp for the prosecutor's decision, there was no undue interference with the sentencing domain of the judge in this case. *Id.* at 624. Not surprisingly, *Ammidown* has been severely criticized for effectively ratifying the shift of judicial sentencing authority from the judge to the prosecutor. See Alschuler, *supra* note 140, at 1075-76.

¹⁶⁹ For a discussion critical of the view that prosecutorial guidelines would permit effective judicial supervision of prosecutorial discretion, see *infra* notes 181-88 and accompanying text.

¹⁷⁰ Professor Norman Abrams has argued in favor of prosecutorial guidelines, but he argues that defendants charged with a crime should not be able to seek judicial review under such guidelines. He concludes that the cost to the system would be too great in return for the comparatively few defendants who would be successful in such a challenge. Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1, 51-52 (1971); see discussion *infra* notes 189-92 and accompanying text.

VI. CAPTURING PROSECUTORIAL DISCRETION IN OFFICIAL GUIDELINES

Critics of broad American prosecutorial discretion, such as Professors Davis¹⁷¹ and Vorenberg,¹⁷² rely heavily on guidelines as the key for reforming prosecutorial discretion and for placing that discretion under closer judicial control. Professor Vorenberg argues that prosecutors should be forced to promulgate official guidelines because he thinks they will not do so unless forced to do so.¹⁷³ These published guidelines could then serve as the basis of charge or plea negotiations in an individual case.¹⁷⁴ Once such guidelines were put in place, Professor Vorenberg contemplates that defendants would be able to use the guidelines to challenge a prosecutor's charging decision in court and obtain judicial review of the prosecutor's actions if the defendant believes his or her case was not handled in conformity with the guidelines.¹⁷⁵ Vorenberg believes that this screening by judges of the charges levied at the defendant should logically be part of the preliminary hearing:

There are obvious advantages to having such review before trial, and logically it should be part of the preliminary hearing. This would require a major change in jurisdictions where the preliminary hearing's screening function is a dead letter, for the prosecution would have to offer enough evidence to show that the charge was consistent with its stated policies. In some cases the evidence would be no more than that shown to establish probable cause. In others it might be necessary to show more: for example, why an offense was treated as aggravated, so that the defendant was disqualified from a diversion program.¹⁷⁶

Such judicial review, brought only by those charged with a crime, is very different from the sort of balanced review that occurs in civil law countries¹⁷⁷ in which decisions *not* to prosecute are also subject to review.¹⁷⁸ But, except for the fact that the review proposed is unbalanced—allowing defendants, but

¹⁷¹ DAVIS, *DISCRETIONARY JUSTICE*, *supra* note 8, at 189–90.

¹⁷² Vorenberg, *supra* note 15, at 1562–65.

¹⁷³ *Id.* at 1562, 1565.

¹⁷⁴ *Id.* at 1565.

¹⁷⁵ *Id.* at 1570.

¹⁷⁶ *Id.* at 1570–71.

¹⁷⁷ See *supra* notes 22–31 and accompanying text.

¹⁷⁸ It has been claimed by Professor Davis that the vast majority of the abuses of prosecutorial discretion—“nine-tenths” is the figure he gives—occur in decisions not to prosecute. DAVIS, *DISCRETIONARY JUSTICE*, *supra* note 8, at 192 n.2; see also Abrams, *supra* note 170, at 47.

not victims, to challenge prosecutorial discretion—it seems that there can be no strong objection to this proposal. The prosecutor's office still retains tremendous discretion in setting law enforcement priorities for that office, but must now do so through specific guidelines rather than ad hoc decisions in each case. On the other hand, the guidelines provide standards—in a sense the prosecutor's own standards—against which the handling of a specific case can be reviewed and measured. Thus, judicial review is meaningful but limited. Finally, this review ensures that similar cases will be handled similarly by that office and thus protects defendants from arbitrary or discriminatory treatment.

But the issue of guidelines is a complicated one. As was suggested earlier in this Article,¹⁷⁹ there are sound reasons, both in terms of office professionalism and office efficiency, that push in favor of internal office guidelines or alternative internal office procedures that help ensure the consistent handling of high-volume, criminal cases.¹⁸⁰ Judges like to see similar types of cases handled similarly; so do defense lawyers, and so do prosecutors.

Thus, there will often exist internal policies that might resemble the following two examples:

Policy One It is the general policy of this office that all first-time drug offenders arrested in possession of a small amount of cocaine shall be offered a deferred prosecution if they agree to complete a treatment program.

Policy Two It shall be the general policy of this office that all persons arrested carrying a concealed weapon shall be prosecuted to the extent that no plea bargain shall be offered or accepted that does not include at least thirty days in jail.

When prosecutors' offices are likely to part company with the call for guidelines from a critic such as Professor Vorenberg is not over the desirability of guidelines or policies, but whether those sorts of policies must be officially promulgated and made available to the general public. Most prosecutors' offices prefer to keep such policies informal and "unofficial" for a number of reasons. First, if the policy or guideline is one that offers some leniency to offenders, especially felony offenders, the office will not wish to undercut the deterrent value of the penal law by announcing policies that assure offenders

¹⁷⁹ See *supra* Part II.C.

¹⁸⁰ Professor Vorenberg fails to see that consistency has clear benefits to prosecutors. Vorenberg, *supra* note 15, at 1564–65.

lenient treatment.¹⁸¹ Thus, even if an office is willing to adopt a policy such as Policy One above that permits treatment to substitute for prosecution for first time cocaine offenders, the office might be very reluctant to publicize that policy. It might have the reverse effect of encouraging young people to experiment with cocaine knowing that the first offense will be “forgiven.”¹⁸²

A second reason why a prosecutors office might be reluctant to adopt such a policy is the fact that prosecutors have to run for reelection¹⁸³ and any policy that might be seen as “soft” on crime can raise a political issue that might put the prosecutor on the defensive. Hence, the office might be more comfortable with an informal policy that is well-known to those in the system—such as the defense attorneys, judges, probation officers, and police officers—but is not formally adopted, or even written. In an era in which citizens are angry at the criminal justice system and concerned about crime,¹⁸⁴ formally adopted guidelines may result in guidelines that are considerably harsher than those policies that an office would be willing to live with on an informal basis.¹⁸⁵

A third reason why prosecutors’ offices are normally reluctant to adopt formal published guidelines is that prosecutors’ offices prefer that policies are informal so that they retain flexibility for unusual cases. Thus, to use the drug policy announced in Policy One as an example, consider a person arrested in possession of a small amount of cocaine, who was previously arrested three months earlier in possession of a large amount of cocaine, but the cocaine was suppressed prior to trial. A prosecutor might be reluctant to extend a policy of leniency for “first time” offenders to a person who is in the system for a second time in such a short period of time. Or consider Policy Two above. Despite the office’s tough gun policy, there may well occur situations in which a prosecutor wishes to deviate from that policy in an unusual situation where the equities strongly favor such a result. For example, imagine an inner city resident who must return from her job late at night and who has been robbed

¹⁸¹ Abrams, *supra* note 170, at 29–30.

¹⁸² The United States Attorney’s Office in Miami refuses to divulge the kilogram level at which that office declines to prosecute drug cases because it fears that drug dealers would exploit this limit by packaging drugs so as to avoid federal prosecution. *See supra* note 88.

¹⁸³ *See supra* note 63 and accompanying text.

¹⁸⁴ For a discussion of the politicalization of criminal justice issues in the United States, *see supra* Part III.A.

¹⁸⁵ In *State v. Pettitt*, the prosecutor’s office adopted a policy mandating the filing of habitual criminal complaints against any defendant who had three or more prior felonies. *State v. Pettitt*, 609 P.2d 1364 (Wash. 1980). In the case of *Pettitt*, this policy meant a mandatory life sentence for a defendant with three non-violent property crimes. The Washington Supreme Court had to struggle to reverse the conviction, reasoning that the mandatory policy constituted an abuse of discretion. *Id.* at 1368.

previously with the result that she feels it necessary to carry a gun. If such a person happens to be arrested in possession of a gun, a prosecutor might wish to make an exception to the requirement of jail time for any concealed weapon and allow a plea bargain that would avoid jail time. Whatever policy an office adopts, one can rest assured that special cases will always occur that were not contemplated when the policy was put into effect and that argue for an exception.¹⁸⁶ Presumably, under the Vorenberg proposal the decision to contravene the office policy on concealed weapons would not be reviewed because the defendant would not want such review and only defendants can seek review under his scheme. But, obviously, later defendants charged with possession of a concealed weapon will argue that their cases deserve dispensation from the office policy requiring jail time for carrying a concealed weapon.

This raises a fourth reason, and probably the major reason, why prosecutors' offices prefer to keep charging and plea bargaining policies informal (which may mean that they are unwritten). Prosecutors would resist strongly the idea that these policies should be turned into litigation weapons with which to attack prosecutorial decisions in individual cases. The idea that the cocaine offender mentioned in the previous paragraph who was arrested three months earlier for possession of a sizable quantity of cocaine, but had it suppressed, should be able to challenge in court the refusal of the prosecutor's office to treat him leniently under Policy One would deeply disturb a prosecutor's office. In the first place, the separation of powers problem¹⁸⁷ is not solved by guidelines, it is only papered over. To have a court interpreting the office's *own* policy on cocaine so as to clarify for that office who qualifies as a "first-time offender" or what qualifies as a "small amount of cocaine" would be viewed as interference with the power of the executive branch. But more important is the fact that such review would be adding a whole new layer of pretrial review that dwarfs any of the efficiencies that guidelines can achieve. Anyone who has seen what has happened with federal sentencing guidelines, and the burgeoning of case law as a result,¹⁸⁸ has to worry about the

¹⁸⁶ David Heilbroner in his account of the time he spent in the Manhattan District Attorney's Office describes two instances in which office policies clashed with the equities of the situation, in one case ending with the suicide of the defendant. HEILBRONER, *supra* note 93, at 245-51, 273-79.

¹⁸⁷ See *supra* Part IV.

¹⁸⁸ Although intended to bring predictability and simplicity to sentencing, the guidelines seem to have backfired. It has been reported that between 1988 and 1992, there have been docketed 23,000 appeals in the federal circuit courts involving the guidelines. See Cris Carmody, *Sentencing Overload Hits the Circuits*, NAT'L L.J., Apr. 5, 1993, at 1. This

tremendous potential that prosecutorial guidelines have to become tactical weapons for the defense. Permitting judicial review of prosecutorial guidelines is likely to result in guidelines that have none of the simplicity of Policies One and Two, but are instead hedged with general exceptions so as to ensure maximum flexibility for departures from the policy when good cause arises.

Professor Norman Abrams is an advocate of prosecutorial guidelines, but he concludes that permitting defendants to challenge the decision to prosecute them (as advocated by Professor Vorenberg) should not be permitted.¹⁸⁹ He concludes that “the clogging of the system which would result far outweighs the possible benefits.”¹⁹⁰ As for the argument that such review will be easy for courts to handle because such review is only “limited” judicial review,¹⁹¹ he responds that such an argument “misapprehends the ingenuity of defense counsel.”¹⁹²

But whether specific, publicly-announced guidelines, such as Policies One and Two above, could be kept from being turned into litigation weapons is a matter on which this author has some doubt.¹⁹³

A. *The Limits of Guidelines*

One might argue that policies such as the two examples given in the previous subpart are not good policies, because better drafting would have resulted in a drug policy or a concealed weapon policy that indicated the exceptions that would be made to the particular policy and would have defined the terms in the policy more completely so as to give better and more complete guidance for future cases. But can one really expect that detailed guidelines

despite the fact that the departure rate from the guidelines is very small. Schulhofer, *supra* note 75, at 851.

¹⁸⁹ See Abrams, *supra* note 170, at 52.

¹⁹⁰ *Id.*

¹⁹¹ “Limited judicial review” is the way Professor Davis describes the review of prosecutorial discretion he has in mind. DAVIS, DISCRETIONARY JUSTICE, *supra* note 8, at 211; see *supra* notes 126–27 and accompanying text.

¹⁹² See Abrams, *supra* note 170, at 52 n.176.

¹⁹³ Because of fear that their office policies might be turned into litigation weapons, the Denver District Attorney’s office refuses to put its charging policies in writing. Telephone Interview with Nathan Coats, Chief Deputy District Attorney (Sept. 21, 1993).

The Boulder County District Attorney’s office takes a somewhat different tack, but with the same objective of avoiding litigation based on its charging guidelines. There is a written set of charging and plea bargaining guidelines and anyone can come to the office of the Chief Trial Deputy and read the policies. Telephone Interview with Peter Hofstrom, Chief Trial Deputy, Boulder County District Attorney’s Office (Apr. 2, 1993). But the Chief Trial Deputy will not permit the policies to be copied or taken from his office. *Id.*

could ever be drafted that would anticipate every situation that might occur? There are strong reasons for believing that general statements of policy that are intended to cover the usual case, but not the unusual case, are about as much as we can do with guidelines for prosecutorial discretion. Guidelines should be a starting point for the exercise of prosecutorial discretion, but they cannot and should not eliminate prosecutorial discretion completely.

To some extent, the bloom may be off the rose with respect to guidelines in the wake of our experience with the attempt to capture federal sentencing discretion in a set of detailed guidelines. While it sounds nice in theory to say that sentencing discretion—and the abuse of sentencing discretion—can be restricted or even eliminated through carefully drafted guidelines, it turns out to be much harder to draft specific guidelines for sentencing than we might have thought.¹⁹⁴ The overwhelming hostility to the federal sentencing guidelines¹⁹⁵ and the brutal unfairnesses¹⁹⁶ that can result strongly suggest that the dream of narrow prosecutorial guidelines that would permit judicial review of prosecutorial discretion is naive in the extreme. Prosecutorial discretion is a much more complicated subject than is judicial sentencing discretion. The federal sentencing guidelines do not account for many factors that have traditionally been taken into account by prosecutors in deciding whether or not to charge someone with a crime (because they sometimes bear on the

¹⁹⁴ One commentator, who specializes in criminal appeals, has observed that the effect of the federal sentencing guidelines has been complexity, not simplicity:

In the world of criminal litigation, sentencing law has become a major growth industry. Although the federal sentencing guidelines were intended to simplify the sentencing process and make punishment more uniform, they actually have made the process more complex. Even the most ordinary cases now involve heated battles over the proper application of the guidelines. In several circuits, sentencing issues make up half the criminal appeals docket.

Ira Mickenberg, *Crime Docket Was Quiet*, NAT'L L.J., Aug. 23, 1993, at S6.

¹⁹⁵ A survey of federal judges has revealed broad dissatisfaction with the guidelines and it has been reported that at least one federal judge has resigned as a result of the guidelines. Heaney, *supra* note 75, at 786; *see also* Hon. Joseph F. Weis, Jr., *The Federal Sentencing Guidelines - It's Time for a Reappraisal*, 29 AM. CRIM. L. REV. 823, 823-25 (1992) (reporting on a survey of district court judges undertaken by the Federal Courts Study Committee that revealed strong dissatisfaction with the guidelines).

¹⁹⁶ Many of the most serious problems stem from drug cases in which, for example, the amount of drugs is a very poor barometer of culpability. *See* Schulhofer, *supra* note 75, at 852-57. But other aspects of the guidelines are also troubling—prior criminal records may also be a very poor indicator of culpability or of poor rehabilitative potential. *See* Heaney, *supra* note 75, at 791-92.

rehabilitative potential of the individual), such as, the citizen's education, vocational skills, employment record, family ties and responsibilities, community ties, and the socioeconomic status of the offender.¹⁹⁷ If there is a lesson in the sentencing guidelines it is that it is easy to agree that similar offenders should be treated similarly, but deciding which offenders are "similar" turns out to be much harder than we thought it would be.¹⁹⁸

But even if the federal sentencing guidelines can be turned into a success, very little can be said about the likely success of similarly detailed prosecutorial guidelines because prosecutorial discretion is much more complicated than judicial sentencing discretion. In addition to taking into account the seriousness of the offense and the background of the offender, a plea bargaining decision has to include such other matters as the strength of the case, the willingness of the victim to testify, the attractiveness of the case to the jury, the dangerousness of the offender, and the value of information the defendant might provide in future cases. It seems doubtful that any grid could hope to yield easy answers to the sorts of difficult decisions that prosecutors have to make when the case at hand is a serious one.

The difficulty of controlling prosecutorial discretion through specific standards or guidelines is nicely illustrated by the chapter on the Prosecution Function in the *ABA Standards Relating to the Administration of Criminal Justice*. Standard 3-3.9(b) states that a prosecutor "may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction."¹⁹⁹ To help explain the sorts of items that a prosecutor may consider in determining the public interest, Standard 3-3.9(b) lists seven factors that are "illustrative" of the sorts of considerations that a prosecutor may take into account in exercising discretion: the prosecutor's reasonable doubt that the accused is in fact guilty, the extent of harm caused by the offense, the disproportion of the authorized punishment in relation to the particular offense or offender, possible improper motives of a complainant, the reluctance of the victim to testify, the cooperation of the accused in the apprehension or conviction of others, and the availability and likelihood of prosecution by another jurisdiction.²⁰⁰ The result is a rule that provides general guidance for

¹⁹⁷ See Title II of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified at 28 U.S.C. § 994(d), (e), (k) (1988)); see also Barbara S. Meierhofer, *Individualized and Systemic Justice in the Federal Sentencing Process*, 29 AM. CRIM. L. REV. 889, 891 (1992).

¹⁹⁸ See Meierhofer, *supra* note 197, at 891.

¹⁹⁹ AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, *The Prosecution Function*, Standard 3-3.9 (3rd ed. 1992).

²⁰⁰ *Id.*

how a prosecutor should go about exercising discretion, but basically reaffirms the fact that prosecutors have broad discretion. Not only does the rule not attempt to exhaust the factors that a prosecutor might consider in deciding how to exercise discretion, but it does not indicate how the seven factors that are listed should be balanced against each other when they push in different directions.

Professor Vorenberg criticizes the *ABA Standards* because he thinks they are “toothless” and that they do not limit discretion or provide specific guidance.²⁰¹ It is difficult to imagine guidelines, however, that would tell a prosecutor in the acquaintance-rape hypothetical discussed in Part IV whether or not she should accept the bargain in that case. Different prosecutors (and different defense attorneys) may very well weigh the factors differently in that case, when the punishment seems inadequate but there are a number of obstacles to conviction. Ultimately, we have to recognize that the American criminal justice system has moved from a system that relies heavily on adjudication for the resolution of criminal cases to a system that emphasizes negotiation and compromise. In such a system, there is no formula that will yield easy answers to difficult cases.

B. *An Example of a Set of Guidelines*

Professor Vorenberg, in his criticism of prosecutorial discretion, cannot understand why so few jurisdictions have not followed the advice set out in the *ABA Standards* urging each prosecutor's office to develop a statement of “general policies to guide the exercise of prosecutorial discretion,” which should be maintained in an office handbook made available to the public.²⁰² This Article has tried to explain why prosecutors would be very reluctant to formalize internal office policies and guidelines. One of the few prosecutors' offices to adopt and publicize its internal office guidelines for charging and plea bargaining was the Manhattan District Attorney's Office under the reign of Richard Kuh.²⁰³ Professor Vorenberg points to Mr. Kuh's statement of charging and plea bargaining as an example of the sort of guidelines that he has in mind.²⁰⁴

These guidelines set out the office expectations for the handling of criminal cases which indicate the way most cases should be handled, but, at the same

²⁰¹ Vorenberg, *supra* note 15, at 1563.

²⁰² AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, *The Prosecution Function*, Standard 3-2.5 (3rd ed. 1992).

²⁰³ Kuh, *supra* note 94, at 48 (reproducing an internal office memorandum on plea bargaining).

²⁰⁴ Vorenberg, *supra* note 15, at 1562–63 n.136.

time, leave prosecutors considerable discretion to depart from the general expectations when the prosecutor believes that the facts of a particular case justify such a departure. Thus, for example, the guidelines indicate that the normal expectation for a felony case is that once a criminal case is charged (the guidelines state that charges are not to be “puffed”²⁰⁵), a prosecutor may accept a plea to a lesser charge if it will drop the charge down one class of felonies (or to a misdemeanor if the felony is already in the lowest class).²⁰⁶ A prosecutor may also accept a plea that would reduce the felony more than one class, but may not do so unless there is a prepleading investigation (which is functionally the same as a presentence report) into the background of the defendant and the defense consents to such an investigation.²⁰⁷ If such prepleading report indicates to the assistant that “justice will be fully served and the community fully protected” by permitting a plea reduction of more than one class, the assistant has the authority to agree to a reduction of two classes of felonies.²⁰⁸ The guidelines state that such a reduction of two classes “is *not* to be routinely granted”²⁰⁹ and the guidelines go on to list eight aggravating and seven mitigating factors, which are among the factors that an assistant district attorney may wish to consider in deciding whether to reduce the charge two classes.²¹⁰ The guidelines state that this list of aggravating and mitigating factors “is not exhaustive, and cannot be.”²¹¹ The guidelines go on to state that the “[a]ssistant district attorney who has examined the pre-pleading investigation should consider family status, employment record, psychiatric history, if any, and other factors revealed in that report,” before deciding whether to consent to a plea bargain that lowers the crime two classes.²¹² The guidelines also hold out the possibility of plea bargains in exceptional cases that go beyond the two-classes limit, although any such bargains must first have the approval of the bureau chief.²¹³

The result is a set of guidelines that help assistant district attorneys understand the general office expectations, but leave individual assistant district attorneys considerable discretion. Assistant district attorneys may offer defendants a discount to the next lowest class of felonies in exchange for a plea, but that is certainly not mandated and defendants have no right to such a

²⁰⁵ Kuh, *supra* note 94, at 50.

²⁰⁶ *Id.* at 55.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 57.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 58–59.

²¹¹ *Id.* at 59.

²¹² *Id.*

²¹³ *Id.* at 58–59.

bargain. Prosecutors may seek to give defendants a plea offer lowering the crime by two classes of felonies, but, again, they do not have to entertain such a possibility in a particular case. And even when there is a prepleading investigation to decide whether a reduction of more than one class is appropriate, it is possible that prosecutors will evaluate such prepleading reports differently because there are so many aggravating and mitigating factors and prosecutors may weigh them differently in trying to decide if "justice will be fully served and the community fully protected" by the plea.²¹⁴

That considerable discretion remains in the hands of individual assistant district attorneys even under these guidelines may suggest that these guidelines are deficient or incomplete. But as these guidelines warn in the introduction, discretion is needed in individual cases because "criminal cases involve people and their actions, not fungible mechanical parts."²¹⁵ These guidelines are excellent because they are completely realistic in understanding what guidelines can and cannot achieve.²¹⁶ While guidelines, such as these, are helpful to everyone in the system, they do not eliminate prosecutorial discretion nor would they serve as a vehicle for meaningful judicial review of prosecutorial discretion.

VII. CONCLUSION

This Article has tried to explain why broad prosecutorial discretion has come to define the role of prosecutors in the American criminal justice system and has also tried to show why attempts to limit prosecutorial discretion on the European model are unlikely to work in this country.

²¹⁴ *Id.* at 57.

²¹⁵ *Id.* at 49.

²¹⁶ The introduction states that the guidelines "will assure a considerable degree of consistency," but goes on to state:

It is recognized, of course, that criminal cases involve people and their actions, not fungible mechanical parts. Because conduct, particularly purported criminal conduct (which by definition is conduct that departs from society's norms), as well as the backgrounds of defendant can vary in ten thousand different ways, some flexibility remains. There can be no exact "calculus," definable in advance, to plea bargaining. Some discretion must remain to differentiate people and cases, even though the same crime may be charged, and the defendants superficially may seem similar.

To some extent this Article has been a defense of the broad prosecutorial discretion against those many critics who tend to see such discretion as an accidental characteristic of the American system, or the result of a defect of will or a usurpation of power. This Article has tried to show that broad American prosecutorial discretion stems from a convergence of many forces including (1) the American political tradition, in which prosecutors are local political officials who answer to the voters, (2) the adversary tradition, in which parties control the presentation of evidence and judges are expected to play a passive and neutral role, (3) a system of pretrial and trial procedures that is very sophisticated and complicated, (4) exclusive reliance on lay factfinders at trial coupled with a heavy presumption of finality accorded the decision at trial and, (5) substantive criminal law that tends to be harsh compared to systems in other western countries.

This Article is not meant to suggest, however, that we should be satisfied with the way the American criminal justice functions. Nor is it meant to assert that abuse of prosecutorial discretion is not a problem or that a system with less prosecutorial discretion, especially as it is manifested in plea bargaining, would not be a major improvement in the system. Rather, this Article asserts that if we wish to reduce prosecutorial discretion, we need to look at the entire system and see why the system has moved away from adjudication and come to rely more and more on compromise and negotiation with the result that prosecutorial discretion occupies center stage in the process. Such an examination of our political traditions, our legal institutions, our procedures, and our values would be difficult, controversial, and perhaps even painful. In undertaking such an examination of our system of justice, the study of foreign systems of criminal procedure, such as those that share the civil law tradition, can be tremendously helpful because such systems provide a perspective from which one can better understand one's own system.

But this Article, using as its example proposals to reform American prosecutorial discretion using the civil law model, is skeptical of the notion that we can improve our system of criminal justice by borrowing important procedural controls from civil law systems. In the first place, pieces from one system cannot be easily separated from the rest of that system and isolated for incorporation in a different legal system. In this case, the concept of an American prosecutor is necessarily intertwined with our concept of limited judicial power as well as our concept of what a trial should be. Secondly, a legal system is much more than a set of procedures for determining guilt and deciding on sentences. It is tied to important cultural, historical, and political values, making it unlikely that any reform incorporated from a system that does not share those values will be adopted or, even if adopted, will ever accomplish what it was intended to do.

