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> The law is written by legislators, interpreted occasionally by appellate courts, but applied by countless individuals, each acting largely for himself. How it is applied outweighs in importance its enactment or its interpretation.[1]

I. INTRODUCTION

The fact that criminal legislation is so broad indicates that some conduct falling within the legislation's literal terms may not necessarily lead to criminal prosecution. In reality, there are too few enforcement agencies to investigate and prosecute all the crimes reported. This means a "first things first" policy needs to be adopted by prosecutors. Such a policy would help enforcement agencies focus on areas where crime poses the greatest threat.[2] The central question under such a policy is whether or not to charge someone with a crime. The decision to file charges is essentially the product of an ungoverned process;[3] yet, the entire process, both before and after the decision is made, is affected by the prosecutor's discretion to charge. Justice Jackson once observed that "the prosecutor has more control over life, liberty and reputation than any other person in America."[4] It is at the charging stage of the criminal justice process that this power is most potent.

Traditionally, courts have been reluctant to review the decision to prosecute.[5] This fact seems to indicate that the decision to charge someone with a crime is entitled to great judicial deference. The United

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1. Baker, *The Prosecutor—Initiation of Prosecution,* 23 J. CRIM. L. & CRIMINOLOGY 770, 796 (1933).

2. GERSHMAN, THE PROSECUTORIAL MISCONDUCT, (1986).

3. *See generally* Vorenberg, *Decent Restraint of Prosecutorial Power,* 945 HARV. L. REV. 1521 (1981); Steinberg, *From Private Prosecution to Plea Bargaining: Criminal Prosecution, the District Attorney, and American Legal History,* 30 CRIME & DELINQ. 568 (1984); Newman v. United States, 382 F.2d 479, 480 (D.C. Cir. 1967):

4. NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT 11 (1931).

5. The exceptions are identified in the portion of the paper devoted to the screening process used by the Attorney General's Special Prosecution Unit.

States Supreme Court recently reaffirmed a reluctance to review the decision to charge in *Town of Newton v. Rumery.*[6] In *Rumery,* Justice Powell, writing for a divided Court observed:

> Prosecutorial charging decisions are rarely simple. In addition to assessing the strength and importance of a case, prosecutors also must consider other tangible and intangible factors, such as government enforcement priorities. Finally, they also must decide how best to allocate the scarce resources of a criminal justice system that simply cannot accommodate the litigation of every serious criminal charge. Because these decisions "are not readily susceptible to the kind of analysis the courts are competent to undertake," we have been "properly hesitant to examine the decision whether to prosecute."[7]

While the case does not directly address the prosecutor's decision to charge,[8] the opinions by the contending members of the Supreme Court, addressing the central issues, illustrate how complex and unbounded the prosecutor's discretion in charging can be.

The decision to charge can be an agonizing mental and emotional ordeal for any prosecutor who comprehends the impact of this decision. The decision is influenced by a host of subjective and objective factors that are unrelated to the judicial strength or weakness of the case. Some of these factors include personal sentiment, ethical and moral considerations, practical and political considerations.[9] In no other aspect of the process is there such room for these contending forces to play themselves out and affect the result. Nonetheless, the consistency and fairness of the charging decision contributes greatly to whether the community perceives its system of criminal laws as just and fair or arbitrary and unpredictable. Moreover, public interest is better served by a flexible, thoughtful charging decision. It is important to note that the exercise of individual prosecutorial discretion does not mean the prosecutor can abandon all mechanical applications of the law.

The broad discretion vested in the prosecutor, the need for consistency and fairness, and the probability that the decision to charge or not to charge will be influenced by uncontrollable forces, suggests that the

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6. 107 S. Ct. 1187 (1987).

7. *Id.* at 1194. (Citations omitted.) The success of Rumery's lawsuit against the Town of Newton, Massachusetts turned on whether a prosecutor could properly exchange a promise to drop charges against him for his release of all claims against the authorities who charged him and the witness who complained against him. The Court's plurality refused to hold all such agreements *per se* invalid and specifically found that the release-dismissal arrangement in Rumery's case was voluntary, was not the product of prosecutorial misconduct, and would not, if enforced, adversely affect the public interest. Rumery's civil rights action was ordered dismissed.

8. The case deals only with whether a promise not to pursue a civil remedy can be extracted form one already accused in exchange for charges being dropped.

9. Vorenberg, *supra* note 3, at 1545-1573.

development of standards for governing the exercise of the prosecutor's discretion is necessary in order to insure an evenhanded and fair administration of criminal justice.[10] Several attempts at creating standards have been made.[11] Even though these standards have been criticized for being little more than broad guidelines which do nothing to bridle discretion,[12] they are valuable starting points for discussion of the responsible use of the prosecutor's power to charge. Any standard chosen to guide the process must be perceived both by the prosecutor and the public as reasonable, fair, and just or there will be no commitment to its use. A workable standard must take into account the demands and concerns of those charged, the demands and concerns of the prosecutor, the demands and concerns of society at large, and the demands and concerns of the specific community served by the prosecutor. A standard must guide the use of the prosecutor's power, but be sufficiently dynamic to deal with the myriad situations in which it will be applied.

The purpose of this article is to discuss briefly the foundation of prosecutorial discretion in Utah, the components of the charging decision as it is guided by the standard[13] adopted by the Special Prosecutions Unit of the Utah Attorney General's Office, and the various checks used to limit prosecutorial discretion generally and specifically in the State of Utah. This article is not intended to be a comprehensive examination of the area of prosecutorial misconduct or abuse of discretion.[14]

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10. Orrutt v. United States, 348 U.S. 11, 14 (1954); *see also*, Young v. United States 107 S.Ct. 2124 (1987).

11. Vorenberg, *supra* note 3, at 1560-1573; *see also* Breitel, *Controls in Criminal Law Enforcement,* 27 U. CHIC. L. REV. 427 (1960); Uviller, *The Virtuous Prosecutor in Quest of An Ethical Standard: Guidance from the ABA,* 71 MICH. L. REV. 1145 (1973).

12. ABA STANDARDS FOR CRIMINAL JUSTICE, Prosecution Function, ¶¶ 3-2.9(b), 3-3.1, 3-3.4, 3-3.5, 3-3.6, 3-3.8, and 3-3.9 (Discretion in the charging decision); MODEL CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-13, EC 7-14, EC 7-21, EC 9-6, DR 7-102(A)(1), DR 7-103(A), DR 7-105(A) (1979); Principles of Federal Prosecution, UNITED STATES ATTORNEYS' MANUAL, § 9-27.000 (June 15, 1985).

13. The standard is essentially the set of guidelines proposed in the ABA STANDARDS FOR CRIMINAL JUSTICE, The Prosecution Function, for governing the charging decision.

14. Vorenberg, *supra* note 3, at 1545:

> Self-imposed limits on discretion may have greater force than either their detractors or creators realize. As they acquire greater visibility, they may become part of the popular climate and professional culture in which prosecutors work. In the end, however, such limits are likely to be no stronger than the determination of the men and women who abide by them to limit their own discretion. Human nature being what it is, people rarely give up power voluntarily, and thus the capacity of self-regulation to remove prosecutorial abuse and arbitrariness from the criminal justice system is limited.

II. The Development of Prosecutorial Discretion in Utah: Use of the Model Approach

Prior to 1980, criminal prosecutions initiated by the Utah Attorney General were not common. The authority of the Attorney General in Utah to bring criminal prosecutions is contemplated by statute: "It is the duty of the attorney general . . . to . . . prosecute . . . all causes to which the state . . . is a party."[15] This duty has been acknowledged by the Utah Supreme Court.[16] Moreover, the Attorney General has the power in Utah to supersede a local prosecutor and initiate criminal prosecutions if he believes it to be necessary.[17] If a district judge makes a finding that a county attorney is unable to adequately perform his duties in prosecuting a criminal case without additional legal assistance, the Attorney General has been given the authority to provide that assistance.[18]

The Special Prosecutions Unit [Unit] of the Utah Attorney General's Litigation Division was formed for the express purpose of investigating and prosecuting crimes that have statewide significance or impact, and for dealing with criminal cases where local prosecutors are unable or unwilling to prosecute. Like other prosecutors in Utah's system of criminal justice, the Assistant Attorneys General assigned to the Unit have wide latitude in determining how, when, and whether to prosecute violations of Utah law. To guide the Unit in its exercise of the charging power, the general statements of policy set out in the ABA Standards of Criminal Justice have been adopted to summarize the appropriate considerations to be weighed and the desirable practices to be followed in exercising the charging function.[19]

III. The ABA Standard

ABA Standard 3-3.9 summarizes the policy followed by the Unit in making the decision to charge or not to charge someone with a crime.[20] The standard is used in the evaluation of evidence in every case. Standard 3-3.9 has proven to be a reasonable, workable tool for analyzing facts and making defensible charging decisions.

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15. *See also* Utah Code Ann. § 67-5-1(1) (1953).

16. State v. Jiminez, 588 P.2d 707 (Utah 1978); Meyers v. Second Judicial Dist. Court *ex rel.* Weber County, 108 Utah 32, 156 P.2d 711 (Utah 1945).

17. *See* Utah Code Ann. § 67-5-1(5) (1953), *see also* National Association of Attorneys-General—Committee on the Office of the Attorney-General, The Prosecution Function: Local Prosecutors and the Attorney General 24-28 (1974); Note, *The Common Law Power of the State Attorneys-General to Supersede Local Prosecutors,* 60 Yale L.J. 559 (1951).

18. Utah Code Ann. § 17-18-1(14) (1953).

19. *See* ABA Standards for Criminal Justice, ch. 3 (1980).

20. ABA Standards for Criminal Justice 3.55 (1980).

The pertinent component of Standard 3-3.9 is the consideration of factors arguing against prosecution of the crime, even though existing evidence suggests a likelihood of conviction[21] should the case be prosecuted. The evidence to be considered is:

(a) the prosecutor's reasonable doubt that the accused is in fact guilty;[22]

(b) the extent of the harm caused by the offense;[23]

(c) the consideration that the punishment for the crime committed is more severe than the offense or the offender warrant;[24]

(d) the possible improper motives of the complainant;[25]

(e) the reluctance of the victim to testify;[26]

(f) how cooperative the accused was in assisting law enforcement in the apprehension or conviction of others;[27] and,

(g) the availability and likelihood of prosecution in another jurisdiction.[28]

Standard 3-3.9 also suggests that prosecutors not "bring or seek charges greater in number or degree than can reasonably be supported with evidence at trial."[29] In other words, the prosecutor must not overcharge his case for any purpose.[30] Personal or political advantage must not affect the decision. [31]

Before the components of Standard 3-3.9 can be considered, four inquiries must be made. These are: (1) should full investigation be made;[32] (2) has a crime been committed;[33] (3) who is the offender or offenders;[34] and, (4) is there sufficient admissible evidence available to support a verdict of guilty.[35]

A. Additional Factors Affecting The Charging Process

In addition to what the standard suggests, in practice, the Unit

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21. Standard 3-3.9(a).
22. Standard 3-3.9(b) (i).
23. Standard 3-3.9(b) (ii).
24. Standard 3-3.9(b) (iii).
25. Standard 3-3.9(b) (iv).
26. Standard 3-3.9(b) (v).
27. Standard 3-3.9(b) (vi).
28. Standard 3-3.9(b) (vii).
29. *See* the commentary to Standard 3-3.9.
30. Standard 3-3.9(e).
31. Standard 3-3.9(c).
32. *See* Appendix A.
33. *Id. See also* ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 20, at 3.55.
34. *See* Appendix A. *Compare* MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-103(a) (1980).
35. *Id.*

takes several other factors into consideration before charging. The Unit targets its investigation to problems specifically concerning the state,[36] and tries to limit its caseload to those matters that have wider application and significance than cases handled on the local level. As a result, public scrutiny of the cases brought by the Unit is generally more rigorous than would be expected in most criminal cases. Consequently, the Unit measures its cases, when appropriate, against various judicial characterizations of prosecutorial misconduct[37] before deciding to charge.[38]

1. Misconduct

A prosecutor should prosecute earnestly and vigorously. While he "may strike hard blows, he is not at liberty to strike foul ones."[39] Prosecutors have the duty to use every legitimate means available to bring about a just conviction, and must refrain from any improper methods which would produce a wrongful conviction.[40]

The central judicial characteristic reviewed by the Unit is selective prosecution—arbitrarily selecting and prosecuting a defendant from a group of similarly situated defendants.[41]

A defendant's defense against selective prosecution raises three important questions for a prosecutor. First, have other persons similarly situated to the defendant not been prosecuted?[42] Second, was the defendant consciously and deliberately singled out?[43] Third, was the basis for choosing the defendant arbitrary, invidious or some how improper?[44] Such a review of the judicial characteristic of selective

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36. *See* Vorenberg, *supra* note 3, at 1526-30.

37. *See* Baker, *supra* note 1 for a comprehensive treatment of the subject of prosecutorial misconduct and abuse of prosecutorial authority and discretion.

38. Securities fraud, white collar crime, especially advance fee schemes, and prison corruption are areas the Unit has targeted for special attention in the last several years. Small staff and limited resources have combined to make it very difficult for the Attorney General to target effectively without the cooperation of other state agencies and the United States Attorneys Office. That cooperation has led to some of the more notable successes enjoyed by the Unit in the last few years.

39. Berger v. United States, 295 U.S. 78, 88 (1935).

40. *Id.*

41. The leading case dealing with selective prosecution is Yick Wo v. Hopkins, 118 U.S. 356 (1886).

42. GERSHMAN, *supra* note 2, at § 4.3 (b).

43. *Id.* at § 4.3(c).

44. *Id.* at § 4.3(d). The defense of selective prosecution has not received any attention from the Utah Supreme Court. Neither has the doctrine of vindictive prosecution nor demagogic prosecution. Professor Gershman discusses in detail these issues in §§ 4.3-4.5 of PROSECUTORIAL MISCONDUCT *supra* note 2.

prosecutorial misconduct keeps prosecutors within the legitimate means of getting a just conviction.

B. Applying The Standard

The Unit's approach is similar to that taken by the Justice Department[45] in deciding whether to initiate or decline prosecution. This approach goes further than the Code of Professional Responsibility; it requires more than a simple determination that probably cause exists in a case.[46] The prosecutor is required to engage in a serious analysis of the facts, to determine how evidence can or will be used at trial, to analyze the offender, and to evaluate the community the prosecutor serves. Prosecutors are forced to do more than just screen cases. The standard does not allow placing the burden on the magistrate, the grand jury, or the trier of fact to sort out whether a crime has been committed.[47]

In many cases handled by the Unit, the Assistant Attorney General assigned to a matter will be involved with the Investigations staff from the very beginning of an investigation. This is always true when a practice or conduct is targeted for enforcement purposes. The information collected as part of the investigation is periodically reviewed by the attorney and the agents working on the case. The charging standard is used as a test against which the material generated by the investigation is measured and as a tool for guiding further inquiry.

1. Criminal information, statements of probable cause, indictments

In order to determine whether a crime has been committed, whether there is sufficient evidence for a conviction,whether a full investigation is needed, and who to charge, the Unit encourages the preparation of annotated criminal information, statements of probably cause, and indictments. Evidence and information is indexed and cataloged as it is gathered so that as an investigation or inquiry develops the Unit can account immediately for what has come into its possession. Handling evidence in this manner makes it possible, anytime before the charging decision is made, to retrieve any item, document, statement or other material for the purpose of matching the facts of the case with the elements of the offenses under investigation. This allows the agents and the attorneys to determine where the investigation can best be directed.

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45. UNITED STATES ATTORNEYS' MANUAL, *supra* note 12.

46. MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-103(a).

47. For a general overview, *see* Steinberg, *From Private Prosecution to Plea Bargaining: Criminal Prosecution, the District Attorney, and American Legal History*, 30 CRIME & DELINQ. 568 (1984).

It also indicates whether additional resources should be devoted to the investigation, whether the matter ought to be closed, and whether the case is ready for the charging decision to be made. Annotated criminal information, probable cause statements, and indictments are the vehicle for matching elements and facts.

Handling evidence in this manner assures that the Unit will not charge unless the State's case is ready to try. Handling evidence in this fashion makes discovery more complete, fair and efficient once charges have been filed. The attorney handling a case is generally able to hand defense counsel a copy of the index to the evidence at the time the defendant makes his first appearance. The index is updated as additional material is collected or comes into the possession of the government.

Working drafts of information and probable cause statements or indictments are often discussed while an investigation or inquiry is in progress. Decisions are sometimes made at this stage not to pursue a matter further if efforts to match elements with facts demonstrate that one of the above inquiries is not likely to be satisfied by continued effort. In that way valuable resources are saved for more deserving enforcement efforts.

Once it becomes apparent that facts exist to make out the elements of an offense and that the above inquiries can be satisfied, an annotated information statement and a probable cause statement or indictment is circulated among the members of the Unit. The case is then examined in light of the remaining components of the standard.[48] The attorney or attorneys assigned to the case take the lead are ultimately responsible for making the charging decision; but, the decision will be informed by comment and discussion generated both formally in staff meetings and informally during conversations between the members of the Unit. The collective experience of those who form the Unit is in this way brought to bear on every charging decision made by the Unit. The process forces the assigned attorney to know the facts and law and enables him to defend his decision to charge before any charges are ever filed.

2. *Notice*

In almost every case, after the decision to charge a defendant with a crime has been made, the defendant and counsel for the defendant are given notice of the decision before charges are filed. The defendant is told what the anticipated charges will be and is given an explanation of the evidence that supports the charges. He is invited to explain his ver-

48. *See* notes 21-28 *supra* and accompanying text.

sion of the events underlying the charges and to suggest alternative interpretations of the evidence and alternative dispositions. In some cases defendants have made a case based on "not charging" or for handling the matter in ways other than by involving the criminal justice system.

In many cases the prosecuting attorney will not explain any evidence differing from that reflected in the draft charges and statement of probable cause. No notice is given when such notice of the decision, details of the charges, or statements in support of the charges would put any person at risk, cause economic harm, compromise ongoing investigations, or make it less likely that the case can be successfully prosecuted once charged.

IV. Checks Imposed From Outside the Charging Process

In addition to the self-imposed limitations on the charging decision reflected by the adoption of the ABA standard, there are a number of checks that keep the prosecutor's power to charge within bounds.

A. Personal Checks

The single most important variable in the charging process is the individual making the decision. How that person is selected and trained, how much experience he can bring to the making of the decision, and what resources are available to him as he contemplates the decision are critical factors. These factors combine to determine the quality of any charging decision, and underlie whatever perception the public has of the criminal justice system as a whole. How the system is viewed in terms of its consistency and predictability is the product of how these factors develop over time.

1. Public influence

Creating and supporting career opportunities for public prosecutors is vital to developing a reserve of experience necessary to ensure that charging decisions are made responsibly. The public must be committed to keeping in service those prosecutors who have proven themselves capable of making responsible charging decisions. Providing training and continuing education for career prosecutors, even to the point of requiring them to certify or recertify on a regular basis, must be a feature of any responsible system of public prosecution. This will contribute measurably to the quality and consistency of the charging decisions made by those within the system. Keeping experienced people in the system is one means of ensuring that adequate resources will be

available for others to draw upon when making charging decisions. Education and training keeps those resources current and effective.

2. *Experience and training*

There will be no improvement in the way in which prosecutorial discretion to charge or plea bargain is exercised without improvement in the quality, experience and training of those entrusted with the power to exercise that discretion. There can be no effective check against the use of that authority unless there is some assurance that experienced, well trained, well supported people are the ones using it. Personal checks, however, are not the only means for limiting the use of prosecutorial discretion. Judicial checks are also used.

B. Judicial Checks

Normally, every charging decision made in Utah must survive the scrutiny of a magistrate at a preliminary hearing.[49] If the magistrate finds probable cause to believe that the crime charged has been committed by the defendant, the defendant is bound over for trial in the district court.[50]

1. *The preliminary hearing*

The preliminary hearing offers some protection against the prosecutor who fails to adequately satisfy the four inquiries suggested by this paper; but, it cannot, of course, take into account any of the considerations which might argue against charging or which might militate in favor of an alternative disposition. While the rule allows the defendant at a preliminary hearing to testify under oath, call witnesses, and present evidence,[51] these things are rarely done in practice. Moreover, the defendant's interests are rarely well served by a presentation of any evidence in his favor because the purpose of the preliminary hearing is so narrow—to determine whether probable cause exists to justify requiring the accused to stand trial. The decision whether to prosecute is not exercised by the Unit alone. Another check on the prosecutor's power to charge is the grand jury.

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49. UTAH CONST. ART. I, § 13; UTAH CODE ANN. § 77-35-7(d) (1953).

50. UTAH CODE ANN. § 77-35-7(d)(1) (1953).

51. UTAH CODE ANN. § 77-35-7(d)(1) (1953).

2. *The grand jury*

Utah law provides for charging a crime by means of an indictment voted by a grand jury.[52] Grand juries, however, are rarely used in Utah practice, and when used have seldom if ever successfully protected anyone from the expense and embarrassment caused by an improper charging decision. Traditionally, special counsel has been appointed to assist grand juries.[53] The selection of special counsel has often failed to take into account the need to appoint public prosecutors with current experience in advising the grand jury about its authority to charge crimes. As a result, the quality and consistency of the advice given to grand juries concerning the decision whether, what, and whom to charge has not been good. Because grand juries are so rarely used and because special counsel is not generally a career prosecutor, the possibility exists that those advising the grand jury will attempt to offset the enormous expense associated with a grand jury by ensuring the return of some indictments. This suggests that some irresponsible charging decisions will inevitably be made.

The secrecy which attends a grand jury in Utah[54] compounds the problem by making it generally impossible for special counsel to confer with others and draw upon their experience when evaluating facts in anticipation of recommending criminal charges. In short, the Utah grand jury offers no protection against inadequate, uninformed, or abusive exercise of the discretion to charge someone with a crime.

Besides personal checks and judicial checks, two other means for limiting prosecutorial discretion can be found in Utah's Constitution and statutes.

C. *Constitutional and Statutory Checks*

1. *Constitutional checks*

Utah's Constitution contains a curious check against a prosecutor's refusal or failure to prosecute. Article VIII, Section 16 of the Utah Constitution provides in part: "If a public prosecutor fails or refuses to prosecute, the supreme court shall have power to appoint a prosecutor *pro tempore*."[55] The power to secure the appointment of special coun-

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52. UTAH CONST. ART. I, § 13; UTAH CODE ANN. § 77-35-5 (1953).

53. UTAH CODE ANN. § 77-11-9 (1953).

54. UTAH CODE ANN. § 77-11-10 (1953). See Young v. United States, 107 S.Ct. 2124 (1987).

55. *Compare* United States v. Cox, 342 F.2d 167 (5th Cir.), *cert. denied* 381 U.S. 935 (1965); Cox v. Hauberg, 381 U.S. 935 (1965); Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375 (2nd Cir. 1973); United States v. Lovasco, 431 U.S. 783, 784-88 (1977); and United States v. Thompson, 251 U.S. 407 (1920).

sel to the Salt Lake County grand jury has been invoked only once.[56] The appointment of a prosecutor *pro tempore* was predicated not on any failure to prosecute, but, on the Attorney General's giving into the wishes of special counsel and representing to the court that he refused to prosecute any indictment that might be returned. In hindsight, the appointment was unnecessary and shortsighted.

2. *Statutory checks*

There are several statutory provisions in Utah's criminal code which limit the prosecutor's authority to charge. Section 76-1-104, for example, requires that the criminal code be construed to: (2) Define adequately the conduct and mental state which constitute each offense and safeguard conduct that is without fault from condemnation as criminal. . . . . (4) Prevent arbitrary or oppressive treatment of persons accused or convicted of offenses.[57] Section 76-1-404 bars the prosecution of a person who has previously been charged by the United States or by another state with the commission of an offense if the charge resulted in an acquittal, conviction, or termination of prosecution and the charge contemplated in Utah would be the same offense.

V. CONCLUSION

The charging decision is an aspect of the criminal justice system that is virtually unreviewable. The prosecutorial discretion in choosing what, whom, and whether to charge someone with a crime invests the prosecutor with greater power than any other individuals associated with law enforcement.

Some limits on the exercise of that authority are desirable, but they must not be so restrictive that they ignore the dynamic nature of the prosecutor's role in society. The standard suggested by this paper is a workable, reasonable attempt to bring some relief to the dilemma of deciding whom to prosecute and what to charge.

The best way of ensuring that responsible charging decisions will be made in any system of criminal justice is to adopt a workable standard outlining the issues and concerns involved in the decision to prosecute. Another way of ensuring responsible charging is to incorporate checks limiting prosecutorial discretion into the standards for charging. Finally, the Attorney General's Office should concentrate on selecting, training, and educating prosecutors; to convince those capable of mak-

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56. The power was called into existence in January, 1986, as prosecutors *pro tempore* for the purpose of allowing them to prosecute the indictments returned by that grand jury.

57. UTAH CODE ANN. § 76-1-104 (1953).

ing good, responsible, defensible charging decisions to make careers of public prosecution.

APPENDIX A

Standard 3-3.9. Discretion in the charging decision

(a) It is unprofessional conduct for a prosecutor to institute, or cause to be instituted, or to permit the continued pendency of criminal charges when it is known that the charges are not supported by probably cause. A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction.

(b) The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his or her discretion are:(i) the prosecutor's reasonable doubt that the accused is in fact guilty; (ii) the extent of the harm caused by the offense; (iii) the disproportion of the authorized punishment in relation to the particular offense or the offender; (iv) possible improper motives of a complainant; (v) reluctance of the victim to testify; (vi) cooperation of the accused in the apprehension or conviction of others; and (vii) availability and likelihood of prosecution by another jurisdiction.

(c) In making the decision to prosecute, the prosecutor should give no weight to the personal and political advantages or disadvantages which might be involved or to a desire to enhance his or her record of convictions.

(d) In cases which involve a serious threat to the community, the prosecutor should not be deterred from prosecution by the fact that in the jurisdiction juries have tended to acquit persons accused of the particular kind of criminal act in question.

(e) The prosecutor should not bring or seek charges greater in number of degree than can reasonably be supported with evidence at trial.