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PROSECUTORIAL INTENT IN CONSTITUTIONAL CRIMINAL PROCEDURE

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Few officials can so affect the lives of others as can prosecutors. Yet few operate in a vacuum so devoid of externally enforceable constraints.¹ Indeed, contemporary efforts to constrain the discretion of actors in the criminal justice system have not only bypassed the prosecutor,² they have tended to expand her power by squeezing the system's seemingly insoluble bubble of discretion her way.³

The courts are the most important, and in many instances the

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¹ See generally K. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 188-214 (1969) (discussing the lack of externally enforceable constraints).

² Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1521-22 (1981) (noting recent trends limiting the discretion of the police, magistrates, sentencing judges, parole boards, and correctional officials, but not prosecutors).

³ For example, the Comprehensive Crime Control Act of 1984, 18 U.S.C. § 3553 (Supp. III 1985), 28 U.S.C. §§ 991-98 (Supp. III 1985), requires the United States Sentencing Commission to promulgate guidelines to confine the sentencing discretion of judges. The likely result of this current federal effort will be to attach increased importance to the prosecutor's charging decision.

only, check on prosecutorial misbehavior; and the Constitution is a major source of judicial authority over prosecutorial practices. Surprisingly, however, there has been virtually no systematic examination of the manner in which courts enforce the constitutional proscriptions that circumscribe the prosecutor's considerable power. Instead, courts and commentators have tended to view various prosecutorial abuses as discrete problems to be analyzed and resolved on an atomistic basis.

This Article attempts a systematic examination of the way constitutional principles are utilized to constrain prosecutorial activities. It does so by exploring an array of prosecutorial practices that are subject to constitutional regulation: (1) selective prosecution; (2) prosecutorial vindictiveness in charging; (3) prosecutorial abuse and misuse of the grand jury; (4) the prosecutor's duty to provide the defense with exculpatory evidence; (5) the prosecutor's discriminatory use of peremptory challenges in selecting a petit jury; and (6) the double jeopardy bar to retrying a defendant whose first trial was aborted because of an error by the prosecutor.

These areas are particularly relevant for several reasons. First, unlike issues involving confessions or searches and seizures in which the governmental actions at issue are apt to be those of the police or other investigatory law enforcement personnel, claims made in the enumerated areas will almost always involve allegations of misbehavior on the part of the prosecutor. Second, the six areas cover a fairly broad spectrum of prosecutorial activity, including pre-indictment behavior, behavior in the grand jury, post-indictment/pre-trial behavior, and prosecutorial behavior at various stages of the trial. Finally, the chosen areas implicate a variety of substantive constitutional guarantees—due process,⁴ equal protection,⁵ and double jeopardy⁶—thereby allowing an examination not tied to any particular constitutional provision.

Where a criminal defendant challenges a prosecutorial action as unconstitutional, the courts tend to factor the prosecutor's intent into the calculus for deciding the constitutional claim. This tendency is not the result of any overarching theory concerning the role of intent in the constitutional regulation of prosecutorial conduct—at least not one that has been articulated by the courts. Instead, it is the description of a

⁴ "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

⁵ "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. Although the fifth amendment, unlike the fourteenth, does not contain an equal protection clause, it does contain an equal protection component. See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

⁶ "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V.

thread that weaves through a group of constitutional claims that the courts have treated as discrete, unrelated problems. Yet even within these individual problem areas, the courts have not meaningfully explored whether and why the prosecutor's intent ought or ought not to be part of the analysis of the defendant's constitutional claim. Reliance upon prosecutorial intent has been not only unsystematic, but largely unreflective.

These qualities do not, of course, render such reliance wrong. Courts often reach the right destination without taking law reviewish detours to get there. A preference for intent-based analysis might prove justified on several grounds. These include: (1) the fairness, consistency and predictability of the results reached under it; (2) systemic considerations relating to the administration of criminal justice; and (3) the fact that doctrinally sound, administrable schemes that do not turn on the prosecutor's intent—for example, those which utilize bright line rules or which focus principally on the harm caused by the challenged prosecutorial behavior—are simply not available. In Section I, the examination of the six areas yields two conclusions: first, that the pervasive determinant of the constitutionality of a prosecutorial action is not the objective circumstances surrounding it but the prosecutor's intent in taking it; and second, that this focus on intent divests the system of consistency and predictability.⁷

Section II then explores the systemic costs of this preference for intent-based analysis and finds that these costs are substantial. Section III examines whether, despite these costs, the preference can be justified because it serves important systemic values relating to the administration of criminal justice, and concludes that it cannot. Thus, the use of intent-based analysis in any particular area must be justified rather than assumed.

Section IV returns to the six areas explored in Section I and examines, in a preliminary way, the residual justifications for employing

⁷ The concept of "prosecutorial intent" is used here in its broadest and least technical sense. It encompasses the thoughts, motivations and purposes behind an individual prosecutor's actions in a particular case, as well as any office policies and strategies that affect the prosecutor's handling of a criminal matter. Furthermore, this Article makes no meaningful distinctions between the concepts of "motive" and "purpose," and those terms are used interchangeably. Indeed, some commentators have questioned whether, for purposes of constitutional analysis, there are any meaningful distinctions between the two concepts. See, e.g., Clark, *Legislative Motivation and Fundamental Rights in Constitutional Law*, 15 SAN DIEGO L. REV. 953, 955-63 (1978) (analyzing "motive" and "purpose" and concluding that they are functionally indistinguishable); Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1217-21 (1970) (arguing that any distinction between "motive" and "purpose" grounded upon political expediency, the immediacy of legislative aims, or ascertainability will be of negligible assistance to the court).

intent-based analysis to govern constitutional challenges to prosecutorial behavior in each of those six areas. Where intent-based analysis appears to be warranted, Section IV examines the feasibility of using objectifying presumptions to require the prosecutor to justify the challenged action.

I. THE PERVASIVE PREFERENCE FOR INTENT-BASED ANALYSIS

*O body swayed to music, O brightening glance
How can we know the dancer from the dance?*

—W.B. Yeats, *Among School Children*⁸

By the dancer's thoughts, so it seems, at least where the dancer is a prosecutor and the dance is a prosecution.

In this Section, the review and analysis of doctrine demonstrates that consistency and predictability—the first justification—are not the hallmarks of those areas that place primacy on prosecutorial intent. Indeed, to the contrary, those areas seem prone to yield ad hoc and confused results; and ad hoc and confused results can hardly be said to be fair. Moreover, in at least one of those areas, the double jeopardy bar after a mistrial due to prosecutorial misconduct, the emphasis on prosecutorial intent itself seems unfair.

A. *Selective Prosecution*

1. The Nature and Source of the Prosecution

Ordinarily, “so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”⁹ Thus, a defendant normally has no right to have a prosecutor's charging decision reviewed.¹⁰ When, however, the charge brought is unusual, either

⁸ W.B. YEATS, *Among School Children*, in THE VARIORUM EDITION OF THE POEMS OF W.B. YEATS 446 (P. Allt ed. 1957).

⁹ *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (citation omitted).

¹⁰ The barriers to judicial review of the decision whether and whom to prosecute fall into three categories. The first category encompasses objections to the judiciary's competence to review the executive branch's discretionary law enforcement decisions and is largely derived from the separation of powers doctrine. Briefly, this doctrine holds that the authority to decide how best to enforce the laws is appropriately, and in the federal system constitutionally, vested in the executive, and that the courts must afford the executive due leeway in exercising this authority. See *Wayte v. United States*, 470 U.S. 598, 607 (1985) (stating that the decision to prosecute is ill-suited to

because other known violators have not been prosecuted or because the violated statute is rarely enforced, a defendant may seek to have the prosecutor's exercise of charging discretion closely examined.

A claim of selective prosecution attacks not the merits of the prosecutor's case against the defendant, but the fact that the prosecutor has chosen to proceed against her while declining to bring similar criminal charges against others who appear to be equally culpable and apprehensible.¹¹ In effect, a defendant's selective prosecution challenge says to the prosecutor, "You have singled me out. Why?" Selective prosecution claims thus have an equal protection ring to them. They do, how-

judicial review); *Newman v. United States*, 382 F.2d 479, 481-482 (D.C. Cir. 1967) (stating that courts do not have jurisdiction to review prosecutor's discretionary decisions). The judiciary's authority to review charging decisions is constrained on one side by its lack of competence to disapprove affirmative decisions to prosecute, which stems from the judiciary's inability to evaluate such factors as the allocation of scarce law enforcement resources, the adequacy of various law enforcement agencies, and the demands of the public, and is hemmed in on the other side by the judiciary's lack of power to compel the executive to prosecute where it has decided not to. See *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 380-82 (2d. Cir. 1973) (stating that the absence of statutory standards defeats judicial review of prosecutorial discretion); *United States v. Cox*, 342 F.2d 167, 171-72 (5th Cir.) (stating that the power to prosecute is discretionary and may depend on matters other than probable cause), *cert. denied*, 381 U.S. 935 (1965).

The second category of impediments to judicial review comprises the various barriers to full enforcement of the criminal laws. These barriers include the lack of adequate prosecutorial resources, a surfeit of broad or ambiguous laws that render a wide spectrum of behavior subject to prosecution, and the fact that some laws, such as those dealing with sexual mores, for example, are adopted mainly to express a moral posture and with the expectation that they will not be enforced. See Comment, *Curbing the Prosecutor's Discretion*: *United States v. Falk*, 9 HARV. C.R.-C.L. L. REV. 372, 373-74 (1974). These barriers to full enforcement effectively make selective enforcement an element of virtually every prosecution. Consequently, the argument goes, the courts have no business in making this necessary fact of the legal system's life an issue in some cases but not in others.

The final category of hurdles to judicial review contains the practical objections to its consequences. Another defense is added. Another proceeding, a hearing to explore the defendant's allegations, is necessary. See *United States v. Falk*, 479 F.2d 616, 637 (7th Cir. 1973) (en banc) (Pell, J., dissenting). Another clearly guilty defendant goes free. These consequences may be especially troubling if the selective prosecution defense is as available in prosecutions for serious crimes as it is in prosecutions for minor infractions. See *People v. Zammora*, 66 Cal. App. 2d 166, 236, 152 P.2d 180, 216 (1944) (discussing claim of discriminatory prosecution raised by a defendant charged with murder); Comment, *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 COLUM. L. REV. 1103, 1111 (1961) ("[T]here seems to be no basis for distinguishing between heinous and harmless criminal conduct, because discriminatory enforcement in either situation constitutes unequal treatment."). But cf. *United States v. Banks*, 368 F. Supp. 1245, 1251-52 (D.S.D. 1973) (arguing that the presumption of prosecutorial regularity is enhanced when the crime is serious).

¹¹ It has been argued that the doctrine of selective enforcement is unsound in theory, misguided in policy, and self-defeating in practice. See Cardinale & Feldman, *The Federal Courts and the Right to Nondiscriminatory Administration of the Criminal Law: A Critical View*, 29 SYRACUSE L. REV. 659, 660 (1978).

ever, also implicate other constitutional guarantees, including due process and, in some cases, the first amendment.¹² Nevertheless, the analysis of selective prosecution claims takes place largely within an equal protection framework.¹³

2. How the Proscription Is Enforced

Under current law, a defendant raising a selective prosecution claim must show two things: first, that she was in fact singled out by the prosecutor and second, that the prosecutor acted with an improper purpose in singling her out.¹⁴ As the Second Circuit explained in its widely followed¹⁵ formulation in *United States v. Berrios*:¹⁶

To support a defense of selective or discriminatory [sic] prosecution, a defendant bears the heavy burden of establishing, at least *prima facie*, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to

¹² "Congress shall pass no law . . . abridging freedom of speech." U.S. CONST. amend. I.

¹³ See *Wayte*, 470 U.S. at 608.

¹⁴ A defendant bears the burden of proof, that is, both the burden of going forward with evidence and the burden of persuasion, on both of these elements. *United States v. Jennings*, 724 F.2d 436, 445 (5th Cir.), *cert denied*, 467 U.S. 1227 (1984); *United States v. Catlett*, 584 F.2d 864, 866 (8th Cir. 1978); *People v. Walker*, 14 N.Y.2d 901, 904 n.*, 200 N.E.2d 779, 781 n.*, 252 N.Y.S.2d 96, 99 n.* (1964) (Burke, J., dissenting); Cardinale & Feldman, *supra* note 11, at 676. This is because "[t]he presumption is always that a prosecution for violation of a criminal law is undertaken in good faith and in [a] nondiscriminatory fashion for the purpose of fulfilling a duty to bring violators to justice." *Falk*, 479 F.2d at 620. Once a defendant presents a *prima facie* case of selective prosecution, however, the burden of going forward with some proof of nondiscrimination devolves to the prosecutor. See *id.* at 621. Some courts have even suggested that the burden of proof as well as the burden of production shifts to the prosecutor once the defendant has made out a *prima facie* case. See *United States v. Crowthers*, 456 F.2d 1074, 1078 (4th Cir. 1972); cf. *Chance v. Board of Examiners*, 458 F.2d 1167, 1176 (2d Cir. 1972) (putting burden on school board to prove nondiscriminatory nature of its employment tests).

¹⁵ See, e.g., *United States v. Eklund*, 733 F.2d 1287, 1289-90 (8th Cir. 1984), *cert. denied*, 471 U.S. 1003 (1985); *United States v. Greene*, 697 F.2d 1229, 1234, (5th Cir.), *cert. denied*, 463 U.S. 1210 (1983); *United States v. Hazel*, 696 F.2d 473, 474-75 (6th Cir. 1983); *United States v. Saade*, 652 F.2d 1126, 1135 (1st Cir. 1981); *United States v. Kelly*, 556 F.2d 257, 264 (5th Cir. 1977), *cert. denied*, 434 U.S. 1017 (1978); *United States v. Oaks*, 527 F.2d 937, 940 (9th Cir. 1975), *cert denied*, 426 U.S. 952 (1976).

¹⁶ 501 F.2d 1207 (2d Cir. 1974).

prevent his exercise of constitutional rights.¹⁷

The first prong of the *Berrios* test is reasonably straightforward, although it is not without its ambiguities¹⁸ or difficulties of proof.¹⁹ A defendant will usually attempt to show that she has been singled out by presenting statistical evidence of the infrequency with which others similarly situated have been prosecuted.²⁰ Although a number of selec-

¹⁷ *Id.* at 1211. This formulation, while encompassing a broader range of selective prosecution claims, is consistent with the Court's recent observation that where a prosecutorial policy is challenged on the basis of selective prosecution, a defendant must show "both that the [policy] had a discriminatory effect and that it was motivated by a discriminatory purpose." *Wayte*, 470 U.S. at 608 (citation omitted).

¹⁸ For example, it is not clear whether this prong requires that a defendant prove (1) only that other violators were not prosecuted, (2) that other violators were not prosecuted and that the government was generally aware that there were other violators who were not being prosecuted, or (3) that other violators were not prosecuted and that the government knew of other specific violators who were not being prosecuted. See Note, *Rethinking Selective Enforcement in the First Amendment Context*, 84 COLUM. L. REV. 144, 146 (1984). Compare *Hazel*, 696 F.2d at 475 (allegation that 34 other violators were not prosecuted was arguably sufficient to require an evidentiary hearing on the defense) (dicta) and *United States v. Wayte*, 710 F.2d 1385, 1387 (9th Cir. 1983), *aff'd*, 470 U.S. 598 (1985) (evidence that an estimated 500,000 violators were not prosecuted was sufficient to meet first prong of test) with *Berrios*, 501 F.2d at 1211-12 (allegation that other violators existed without identifying any specific individuals was not sufficient to meet first prong of test).

¹⁹ First, simply gathering information concerning the extent to which similarly situated offenders have or have not been prosecuted is an inherently difficult task. See Applegate, *Prosecutorial Discretion and Discrimination in the Decision to Charge*, 55 TEMP. L.Q. 35, 78-85 (1982); cf. Note, *Defense Access to Evidence of Discriminatory Prosecution*, 1974 U. ILL. L.F. 648, 661-62 (proposing that the court compel the prosecutor to provide the defendant with statistics relating to selective enforcement).

Second, the defendant must prove that the nonprosecuted offenders were in fact "similarly situated." In effect, this means that the defendant must prove: (1) that the nonprosecuted offenders engaged in essentially the same act as the defendant, see *United States v. Cantu*, 557 F.2d 1173, 1177-78 (5th Cir. 1977) (defendant's assertion that others "employ" illegal aliens is not equivalent to assertion that others "shield" aliens and thus no basis for selective prosecution exists), *cert. denied*, 434 U.S. 1063 (1978); (2) as a result of which they violated the same statutes that the defendant is charged with violating, see *United States v. Torquato*, 602 F.2d 564, 571 (3d Cir.) (failure to allege that others had violated the Hobbs Act, 18 U.S.C. § 1951 (1976) was fatal to selective prosecution claim), *cert. denied*, 444 U.S. 941 (1979); cf. *Wheaton v. Hagan*, 435 F. Supp. 1134, 1148-49 (M.D.N.C. 1977) (practice of arresting those with marijuana and not those with alcohol did not violate equal protection clause since each is regulated under different statutes); and (3) that the magnitude of the nonprosecuted offenders' violations was not materially different from that of the defendant, see *Cook v. City of Price*, 566 F.2d 699, 701-02 (10th Cir. 1977) (since alleged zoning violations were not of the same magnitude as those attributable to the defendant, there was good reason for the unequal application of the ordinance).

²⁰ See, e.g., *United States v. Eklund*, 733 F.2d 1287, 1289 (8th Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1003 (1985); *Wayte*, 710 F.2d at 1387-88; *United States v. Greene*, 697 F.2d 1229, 1234 (5th Cir.), *cert. denied*, 463 U.S. 1210 (1983); *United States v. Ojala*, 544 F.2d 940, 943 (8th Cir. 1976); *United States v. Falk*, 472 F.2d 1101, 1106, *rev'd*, 479 F.2d 616 (7th Cir. 1973) (en banc); *United States v. Carson*, 434 F. Supp. 806, 809 (D. Conn. 1977).

tive prosecution claims have foundered on the first prong of the *Berrios* test, especially those relying on small numbers of nonprosecuted offenders,²¹ the focus of most selective prosecution claims has been the second prong of the test: the motivations behind the prosecutor's decision to bring the charges against the defendant.

There are effectively three impermissible bases for prosecutorial selectivity, that is, three factors that may not motivate a prosecutor to proceed against a particular defendant: (1) race, religion, or other suspect classification;²² (2) a desire to impede the exercise of constitutional, usually first amendment, rights;²³ and (3) personal animosity towards the defendant.²⁴ To satisfy the intent prong of the *Berrios* test and succeed on a claim of selective prosecution, a defendant must prove that one of these factors was instrumental in the prosecutor's decision to proceed against her.²⁵

²¹ See, e.g., *United States Labor Party v. Oremus*, 619 F.2d 683, 691 (7th Cir. 1980) ("The isolated incident of another group [violating the statute] is too insignificant and isolated to raise an equal protection claim."); *United States v. Kelly*, 556 F.2d 257, 264-65 (5th Cir. 1977) (insufficient evidence of others not prosecuted), *cert. denied*, 434 U.S. 1017 (1978); *United States v. Bourque*, 541 F.2d 290, 292-93 (1st Cir. 1976) (same); *United States v. Banks*, 368 F. Supp. 1245, 1251-52 (D.S.D. 1973) (same); *State v. Holloway*, 460 A.2d 976, 979 (Del. Super. Ct. 1983) ("a showing of as few as two or three other prosecutions will negate the assertion that defendant has been singled out for prosecution").

²² See, e.g., *United States v. Cammisano*, 546 F.2d 238, 241 (8th Cir. 1976) (Italian defendant); *United States v. Aileyne*, 454 F. Supp. 1164, 1174 (S.D.N.Y. 1978) (black defendant); *State v. Bird Head*, 204 Neb. 807, 813-14, 285 N.W.2d 698, 701 (1979) (American Indian defendant).

²³ See, e.g., *Wayte*, 470 U.S. at 610-14 (first amendment rights); *Eklund*, 733 F.2d at 1291 (same); *Falk*, 479 F.2d at 619-20 (same); *United States v. Steele*, 461 F.2d 1148, 1152 (9th Cir. 1972) (same); *United States v. Crowthers*, 456 F.2d 1074, 1079 (4th Cir. 1972) (same).

²⁴ See, e.g., *United States v. Mangieri*, 694 F.2d 1270, 1273-76 (D.C. Cir. 1982); *Bourque*, 541 F.2d at 292-93.

²⁵ The degree to which the decision to prosecute must be motivated by an impermissible factor is unclear. In *Wayte*, for example, the Court simply observed that the defendant had to prove that the prosecutor was "motivated by" a discriminatory purpose. See *Wayte*, 470 U.S. at 608. Prior to *Wayte*, most courts repeated, without elaboration, the *Berrios* requirement that the prosecution must be "based upon" an impermissible consideration in order to make out a claim of selective prosecution. See, e.g., *United States v. Hazel*, 696 F.2d 473, 474 (6th Cir. 1983); *United States v. Ness*, 652 F.2d 890, 892 (9th Cir.), *cert. denied*, 454 U.S. 1126 (1981); *United States v. Catlett*, 584 F.2d 864, 866 (8th Cir. 1978). Because of the imprecision of such formulations as "motivated by" and "based upon," it is uncertain whether the impermissible basis must be: (1) the sole or dominant factor in the charging decision; (2) a lesser "but for" cause of the prosecutor's selection of the defendant; or (3) only one of a number of reasons, however insignificant, for the prosecutor's decision. Cf. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-68 (1977) (holding that plaintiff need not show that challenged action was dominant purpose and including list of evidentiary factors relevant to intent determination); *Mount Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 284-87 (1977) (holding once initial burden is met, defendant can show by preponderance that same result would have been reached even

Ironically, the very concern with impermissibly motivated prosecutions that prompts the examination of ordinarily unreviewable charging decisions also disables most selective prosecution claims from succeeding, which they almost never do. Because of the myriad of factors that could affect a prosecutor's decision to bring charges, including the strength of the evidence, the culpability of the offender, and the need to send out various enforcement signals, courts are generally unwilling to infer a discriminatory intent from nonenforcement statistics alone.²⁶ Yet it is usually difficult to get evidence of discriminatory intent beyond such statistics. Prosecutors do not have to explain their decision to bring or refrain from bringing charges and many prosecution offices lack even general guidelines governing charging decisions.²⁷ Consequently, there is usually little in the way of documented administrative decision-making for a defendant to utilize. What evidence exists is generally within the prosecutor's control. Yet because of the intrusive nature of the discovery necessary to prove an impermissible discriminatory intent, which may require the examination of the prosecutor under oath,²⁸ the discovery of internal documents concerning a prosecution,²⁹ or the disclosure of confidential law enforcement information,³⁰ courts are reluctant to allow the discovery that is usually necessary to prove the prohibited intent. A defendant seeking to raise a selective prosecution claim is thus placed in a Catch-22 type bind. She cannot obtain discovery unless she first makes a threshold showing (the required strength of which remains unclear)³¹ of selective prosecution, including the dis-

had the impermissible purpose not been considered).

²⁶ See 2 W. LAFAVE & J. ISRAEL, *CRIMINAL PROCEDURE* § 13.2 (1984); Gifford, *Equal Protection and the Prosecutor's Charging Decision: Enforcing an Ideal*, 49 GEO. WASH. L. REV. 659, 693 (1981).

²⁷ See Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1, 8 (1971) (discussing the paucity of prosecutorial standards in most prosecution offices).

²⁸ See, e.g., *United States v. Kelly*, 556 F.2d 257, 263 (5th Cir. 1977), *cert. denied*, 434 U.S. 1017 (1978); *United States v. Mirabile*, 503 F.2d 1065, 1067 (8th Cir. 1974), *cert. denied*, 402 U.S. 973 (1975).

²⁹ See, e.g., *United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974); *United States v. Berrigan*, 482 F.2d 171, 180-82 (3d Cir. 1973); *United States v. Falk*, 479 F.2d 616, 621 (7th Cir. 1973) (en banc).

³⁰ See, e.g., *Wayte v. United States*, 470 U.S. 598, 607 (1985).

³¹ Various courts have stated the required showing as the need for the defendant to raise a reasonable doubt about the prosecutor's purpose, see *United States v. Hayes*, 589 F.2d 811, 819 (5th Cir.), *cert. denied*, 444 U.S. 847 (1979), "to take the question past the frivolous stage," *United States v. Catlett*, 584 F.2d 864, 866 (8th Cir. 1978), to establish a "colorable" basis for the claim, *United States v. Torquato*, 602 F.2d 564, 570 (3d Cir.), *cert. denied*, 444 U.S. 941 (1979), or to establish a *prima facie* case, see *United States v. Johnson*, 577 F.2d 1304, 1308 (5th Cir. 1978). See *Wayte v. United States*, 470 U.S. 598, 623-24 (1985) (Marshall, J., dissenting) (reviewing cases).

criminatory intent component of the claim.³² Yet making a sufficient preliminary showing of discriminatory intent may be impossible without some discovery.

Moreover, even where a defendant obtains access to evidence concerning the prosecutor's decision to prosecute, it will often be difficult to determine whether that decision was impermissibly motivated. This is so both because of the host of reasons why prosecutors legitimately might choose to prosecute a particular defendant,³³ as well as the prospect that more than one actor was involved in the decision to prosecute.³⁴ This lack of predictability is amply illustrated by recent decisions evaluating the constitutionality of the government's "passive enforcement" policy for selecting individuals for prosecution for failing to register for the draft. Several courts evaluating this same prosecution policy reached conflicting conclusions as to whether it was intentionally discriminatory.³⁵

B. Vindictiveness in Charging

1. The Nature and Source of the Proscription

Allied to, but distinct from, the question of selective prosecution is the issue of prosecutorial "vindictiveness" in charging, a due process concern.³⁶ The question of vindictiveness arises when the prosecution increases the number or severity of the charges against a defendant from those initially contemplated or filed after the defendant takes some action that the prosecutor disfavors or opposes.³⁷ Because there is usu-

³² See, e.g., *Johnson*, 577 F.2d at 1309; *United States v. Bennett*, 539 F.2d 45, 54 (10th Cir.), *cert. denied*, 429 U.S. 925 (1976); *United States v. Baechler*, 509 F.2d 13, 15 (4th Cir. 1974), *cert. denied*, 421 U.S. 993 (1975).

³³ See *infra* notes 386-389, 397 and accompanying text.

³⁴ See *infra* note 324 and accompanying text.

³⁵ Compare *United States v. Schmucker*, 721 F.2d 1046 (6th Cir. 1983) (intentionally discriminatory), *vacated*, 471 U.S. 1001 (1985) and *United States v. Wayte*, 549 F. Supp. 1376 (C.D. Cal.) (same), *rev'd*, 710 F.2d 1385 (9th Cir. 1982), *aff'd*, 470 U.S. 598 (1985) with *United States v. Wayte*, 710 F.2d 1385 (9th Cir. 1982) (not intentionally discriminatory), *aff'd*, 470 U.S. 598 (1985) and *United States v. Eklund*, 733 F.2d 1287 (8th Cir. 1984) (en banc) (same), *cert. denied*, 471 U.S. 1003 (1985).

³⁶ See *United States v. Vigil*, 743 F.2d 751, 758 (10th Cir.), *cert. denied*, 469 U.S. 1090 (1984); *United States v. Eddy*, 737 F.2d 564, 571-72 (6th Cir. 1984); Note, *Two Models of Prosecutorial Vindictiveness*, 17 GA. L. REV. 467, 471 n.26 (1983).

³⁷ Like claims of selective prosecution, claims of prosecutorial vindictiveness are typically raised prior to trial on the challenged charges. In the federal courts, a refusal to dismiss charges on the grounds of prosecutorial vindictiveness is not a collateral order subject to interlocutory review, so appellate review of an unsuccessful vindictiveness motion must await the final judgment on the contested charges. See *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 269-70 (1982); 28 U.S.C. §§ 1291-92 (1982 & Supp. III 1985).

ally a sufficient factual basis to support the increased charges, the vindictiveness doctrine is concerned with delineating the circumstances in which increased charges may not be brought in a pending case despite the existence of otherwise sufficient grounds for them.

By its very moniker, the doctrine of prosecutorial "vindictiveness" purports to be concerned with the prosecutor's state of mind; more specifically, with preventing the prosecutor from retaliating against a defendant for exercising the rights that are her due. The ban on "vindictiveness" has, however, also been variously impressed to serve a second interest. Often discussed in terms of "perceived" vindictiveness or a "presumption" of vindictiveness, it has been invoked to prevent a defendant from being "chilled" in the exercise of certain rights because of the likelihood that the defendant will apprehend a prosecutorial motive and capacity to retaliate in the event those rights are exercised.

The Court's earliest vindictiveness cases recognized the nature and validity of both of these interests. In *North Carolina v. Pearce*,³⁸ where the Court introduced the concept of vindictiveness, the defendant, who had succeeded in getting his conviction reversed on appeal, received a harsher sentence after being reconvicted on retrial. The Court held that while the Constitution does not absolutely bar a higher sentence after an appeal,³⁹ due process prohibits increasing a sentence on retrial because of judicial "vindictiveness against a defendant for having successfully attacked his first conviction."⁴⁰ The Court's concern, however, went beyond judicial retaliation in fact, that is, beyond "actual vindictiveness." Worried that "the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction,"⁴¹ the Court further held that "due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge,"⁴² and elaborated procedures to ensure that defendants would not be chilled from exercising their appellate remedies because of such apprehension.⁴³

³⁸ 395 U.S. 711 (1969).

³⁹ The Court found that neither the double jeopardy, equal protection, nor due process clauses prohibited all increased sentences upon reconviction after a successful appeal. *See id.* at 719-25.

⁴⁰ *Id.* at 725.

⁴¹ *Id.*

⁴² *Id.*

⁴³ The Court prescribed a prophylactic rule that requires a judge who increases the severity of a sentence after a retrial to state affirmatively her reasons for doing so. "Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." *Id.* at 726. It is now settled that among the types of postsentencing con-

The prohibition on vindictive behavior was extended to prosecutors in *Blackledge v. Perry*,⁴⁴ where the Court condemned a prosecutor's institution of a felony charge in response to the defendant's exercise of his statutory right to a trial *de novo* after being convicted of the misdemeanor charge originally filed against him. The Court held that the due process principles first announced in *Pearce*⁴⁵ required a reversal of the felony conviction⁴⁶ even though there was "no evidence that the prosecutor in [the] case acted in bad faith or maliciously in seeking a felony indictment against Perry."⁴⁷ Reiterating that "*Pearce* . . . was not grounded upon the proposition that actual retaliatory motivation must inevitably exist,"⁴⁸ the Court reasoned that reversal of Perry's felony conviction was required because:

A prosecutor clearly has a considerable stake in discouraging convicted misdemeanants from appealing and thus obtaining a trial *de novo* in the Superior Court, since such an appeal will clearly require increased expenditures of prosecutorial resources before the defendant's conviction becomes final, and may even result in a formerly convicted defendant's going free. And, if the prosecutor has the means readily at hand to discourage such appeals—by "upping the ante" through a felony indictment whenever a convicted mis-

duct that may justify an increased sentence after a retrial are convictions for crimes pending at the time of the first sentencing. See *Wasman v. United States*, 468 U.S. 559, 571-72 (1984).

⁴⁴ 417 U.S. 21 (1974).

⁴⁵ Subsequent to *Pearce* and prior to *Blackledge*, the Court handed down two other decisions dealing with "vindictiveness" in the sentencing context. The first, *Colten v. Kentucky*, 407 U.S. 104 (1972), concerned a challenge to Kentucky's two-tier system of criminal adjudication which, like the North Carolina system involved in *Blackledge*, allowed a misdemeanor defendant convicted in an inferior trial court to seek a trial *de novo* in a court of general jurisdiction. *Colten* claimed that the Constitution prohibited the court of general jurisdiction from imposing a sentence greater than that imposed by the court in the original trial. The Court rejected this claim, finding an insufficient likelihood of judicial vindictiveness to discourage the assertion of the right to a *de novo* trial because the second sentence was imposed by a different judicial authority. See *id.* at 116-17.

The second case, *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973), upheld a higher sentence imposed by a jury after a conviction on retrial. The Court found that the higher sentence could not be the product of actual vindictiveness where the jury was unaware of the length of the sentence imposed at the original trial and therefore could not be retaliating for the earlier result. The Court also reasoned that, unlike a judge who is reversed on appeal, the jury does not have a stake in the prior conviction or a motivation to discourage criminal defendants from seeking appellate review. See *id.* at 27.

⁴⁶ The defendant pleaded guilty to the new felony charge. *Blackledge*, 417 U.S. at 23.

⁴⁷ *Id.* at 28.

⁴⁸ *Id.*

demeanant pursues his statutory appellate remedy—the State can insure that only the most hardy defendants will brave the hazards of a *de novo* trial.⁴⁹

Pearce and *Blackledge* thus seemed to establish that the prohibition on governmental vindictiveness has two aspects. First, it is unconstitutional for a judge or prosecutor to subject a defendant to greater punishment in retaliation for her exercise of a legal right, that is, to act out of actual vindictiveness. Second, the Constitution also condemns certain judicial and prosecutorial actions that are not in fact retaliatory or motivated by actual vindictiveness. Because the judicial or prosecutorial interests at stake could reasonably cause an observer to perceive that the judge or prosecutor was wrongly motivated, similarly situated defendants would be deterred from exercising the particular right at issue.⁵⁰

⁴⁹ *Id.* at 27-28.

⁵⁰ The precise formulation of the “perceived vindictiveness” prong of *Pearce* and *Blackledge* has caused considerable confusion in the lower courts. See generally Note, *Evaluating Prosecutorial Vindictiveness Claims in Non-Plea Bargained Cases*, 55 S. CAL. L. REV. 1133, 1143-46 (1982) [hereinafter Note, *Evaluating Prosecutorial Vindictiveness Claims*] (describing recurring problems with the purpose of the rule against prosecutorial vindictiveness, the nature of vindictive charges, and the definition of adequate justification for increased charges); Note, *Prosecutorial Vindictiveness: An Examination of Divergent Lower Court Standards and a Proposed Framework for Analysis*, 34 VAND. L. REV. 431, 442-450 (1981) [hereinafter Note, *Divergent Lower Court Standards*] (the differences among the courts relate to whether a defendant must show the appearance of vindictiveness, actual vindictiveness, or some intermediate standard of prosecutorial culpability). The disagreement centers on the precise showing a defendant must make in order for a “presumption” of vindictiveness to arise from the prosecutor’s actions. At one end of the spectrum, the D.C. Circuit, see *United States v. Jamison*, 505 F.2d 407, 415-16 (D.C. Cir. 1974), the Fourth Circuit, see *United States v. Goodwin*, 637 F.2d 250, 253 (4th Cir. 1981), *rev’d*, 457 U.S. 368 (1982), and the Ninth Circuit, see *United States v. Spiesz*, 689 F.2d 1326, 1328 (9th Cir. 1982); *United States v. Motley*, 655 F.2d 186, 188 (9th Cir. 1981); *United States v. Griffin*, 617 F.2d 1342, 1347 (9th Cir.), *cert. denied*, 449 U.S. 863 (1980), have held that the defendant’s demonstration of facts giving rise to the appearance of prosecutorial vindictiveness is all that is required to create a presumption of vindictive motive. In the Sixth Circuit, the “mere appearance” of vindictiveness is not sufficient to trigger a presumption of vindictiveness. Instead, the defendant must show that, judged from the standpoint of a reasonable person, there was a “realistic likelihood” that the prosecutor acted vindictively. See *United States v. Andrews*, 633 F.2d 449, 454 (6th Cir. 1980) (*en banc*), *cert. denied*, 450 U.S. 927 (1981). The Fifth Circuit, after wavering between requiring a showing of actual vindictiveness, see *Hardwick v. Doolittle*, 558 F.2d 292, 302 (5th Cir. 1977), *cert. denied*, 434 U.S. 1049 (1978), or some lesser showing pegged to the prosecutorial interests at stake, see *United States v. Thomas*, 617 F.2d 436, 438 n.1 (5th Cir.) (stating that the circuit employed a balancing test in this area), *cert. denied*, 449 U.S. 841 (1980); *Miracle v. Estelle*, 592 F.2d 1269, 1276 (5th Cir. 1979); *Jackson v. Walker*, 585 F.2d 139, 146, 148 (5th Cir. 1978), has finally decided that a presumption of vindictiveness arises only if “the course of events provides no objective indication that would allay a reasonable apprehension by the defendant that the more serious charge was vindictive,” *United States v. Krezdorn*, 718 F.2d 1360, 1365 (5th Cir. 1983) (*en*

2. How the Proscription Is Enforced

Unfortunately, decisions subsequent to *Blackledge* have been so inconsistent in their recognition and advancement of these two interests that enforcement of the proscription on vindictiveness has been utterly confused. In *Bordenkircher v. Hayes*,⁵¹ for example, Hayes was initially indicted for uttering a forged instrument, a felony that carried a maximum sentence of ten years imprisonment.⁵² The prosecutor offered to recommend a five-year sentence if he would plead guilty, but threatened to seek an indictment under Kentucky's habitual offender statute, which carried a maximum sentence of life imprisonment, if Hayes did not plead guilty and "save the court the inconvenience and necessity of a trial."⁵³ Hayes declined the prosecutor's plea offer and, true to his word, the prosecutor obtained another indictment charging Hayes as an habitual offender. After a trial, Hayes was convicted on the uttering charge, found to be a habitual offender, and sentenced to life imprisonment.

In habeas corpus, Hayes claimed that the prosecutor's actions violated the principles of *Pearce* and *Blackledge*; the Sixth Circuit agreed.⁵⁴ The Supreme Court, however, did not. Despite the fact that the prosecutor possessed the evidence necessary to indict Hayes as a habitual offender at the time he procured the initial indictment charging only uttering,⁵⁵ and despite the prosecutor's express admission that he obtained the habitual offender indictment precisely because Hayes insisted on his right to trial⁵⁶—in short, despite a crystal clear case of actual prosecutorial vindictiveness—the Court held that Hayes had not been denied due process.

The reason the Court found no actual vindictiveness in the prosecutor's blatant retaliation was that it took place in the course of plea-bargaining. In the Court's eyes, "in the 'give and take' of plea-bargain-

banc), *cert. denied*, 465 U.S. 1066 (1984).

This confusion over the nature of the showing required to trigger a "presumption" of vindictiveness was a product not only of uncertainty over the strength of the interest in preventing perceived vindictiveness, but also of a basic analytical flaw common in these decisions: the failure to specify the ultimate fact to which the "presumption" was addressed. *See infra* notes 67-68 and accompanying text.

⁵¹ 434 U.S. 357 (1978).

⁵² *Id.* at 358.

⁵³ *Id.*

⁵⁴ *See Hayes v. Cowan*, 547 F.2d 42 (6th Cir. 1976), *rev'd sub nom. Bordenkircher v. Hayes*, 434 U.S. 357 (1978). The district court had rejected Hayes' petition in an unreported decision. 434 U.S. at 360 n.4.

⁵⁵ 434 U.S. at 359.

⁵⁶ *Id.* at 358 n.1; *see also id.* at 367 (Blackmun, J., dissenting); *id.* at 370-73 (Powell, J., dissenting).

ing, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer."⁵⁷ Underlying this view of plea-bargaining, which is predicated on the assumption that "the prosecution and defense . . . arguably possess relatively equal bargaining power,"⁵⁸ was an apparent concern that disabling the prosecutor from credibly threatening to bring more serious charges would potentially undermine the entire plea-bargaining process,⁵⁹ upon which the Court had recently conferred its constitutional blessing.⁶⁰ However sound the logic of refusing to find actual vindictiveness where a prosecutor increases charges in response to a defendant's recalcitrance during plea negotiations,⁶¹ that portion of *Bordenkircher* at least had the virtue of clarity of application.⁶²

On the other hand, language in the case seemed to eviscerate the second *Pearce-Blackledge* principle while reinterpreting those cases to be almost exclusively concerned with actual rather than perceived vindictiveness. As the Court saw it, "the due process violation in cases such as *Pearce* and [*Blackledge*] lay not in the possibility that a defendant might be deterred from the exercise of a legal right, . . . but rather in the danger that the State might be retaliating against the accused for lawfully attacking his conviction."⁶³ Unlike in the plea-bargaining context, the lower courts responded to these conflicting signals concerning the extent to which the Constitution prohibited reasonably perceived

⁵⁷ *Id.* at 363.

⁵⁸ *Id.* at 362 (quoting *Parker v. North Carolina*, 397 U.S. 790, 809 (1970) (Brennan, J., concurring in the result and dissenting)).

⁵⁹ *See id.* at 361-62; *United States v. Goodwin*, 457 U.S. 368, 378 n.10 (1982).

⁶⁰ *See Brady v. United States*, 397 U.S. 742 (1970); *McMann v. Richardson*, 397 U.S. 759 (1970); *Parker v. North Carolina*, 397 U.S. 790 (1970).

⁶¹ A more persuasive rationale for the decision might be that, unlike other instances of prosecutorial vindictiveness, the tactic approved in *Bordenkircher* actually advantages some defendants. Under this view, the imposition of a "penalty" on defendants who do not plead is necessary to preserve the benefit obtained by others who do. *See Goodwin*, 457 U.S. at 378-80 (holding prosecutor may abandon charges in plea-bargaining to the benefit of the defendant); *cf. Barker v. Wingo*, 407 U.S. 514, 521, 526-30 (1972) (stating right to a speedy trial is not imposed rigidly because delay is not always prejudicial to defendants).

⁶² *See, e.g., United States v. Taylor*, 749 F.2d 1511, 1514 (11th Cir. 1985); *United States v. North*, 746 F.2d 627, 632 (9th Cir. 1984), *cert. denied*, 470 U.S. 1058 (1985); *United States v. Mauricio*, 685 F.2d 143, 145-47 (5th Cir.), *cert. denied*, 459 U.S. 1074 (1982); *United States v. Andrews*, 633 F.2d 449, 456 (6th Cir. 1980) (en banc), *cert. denied*, 450 U.S. 927 (1981); *Martin v. Blackburn*, 606 F.2d 92, 94 (5th Cir. 1979), *cert. denied*, 446 U.S. 911 (1980); *United States v. Litton Sys. Inc.*, 573 F.2d 195, 198-200 (4th Cir.), *cert. denied*, 439 U.S. 828 (1978); *United States v. Allsup*, 573 F.2d 1141, 1143 (9th Cir.), *cert. denied*, 436 U.S. 961 (1978); *Montgomery v. Estelle*, 568 F.2d 457, 457-58 (5th Cir.), *cert. denied*, 439 U.S. 842 (1978).

⁶³ *Bordenkircher*, 434 U.S. at 363 (citation omitted).

prosecutorial vindictiveness with predictable confusion,⁶⁴ usually under the rubric of attempting to determine whether a "presumption of vindictiveness" was warranted in the particular situation under review.

There were three levels to this confusion. First, there was uncertainty whether anything other than a showing of actual vindictiveness would suffice to make out a due process violation.⁶⁵ Second, although most courts assumed that the Constitution still prohibited at least some instances of reasonably perceived vindictiveness, there was disarray as to the showing required for a defendant to make out a due process violation without proving actual vindictiveness.⁶⁶ This confusion was compounded by the propensity of courts to discuss the question in terms of the showing required to give rise to a "presumption" of vindictiveness without specifying whether the ultimate fact to which the presumption was addressed was actual vindictiveness, the likelihood of vindictiveness, the justifiability of the perception of vindictiveness, or something else. As a result, courts that asserted in one breath that the vindictiveness doctrine was designed to stop not only actual vindictiveness but also "to prevent a chilling of the exercise of rights by other defendants in the future,"⁶⁷ in the next breath formulated the "presumption" of vindictiveness so that the ultimate fact in issue was the prosecutor's actual vindictiveness,⁶⁸ leaving the scope of the doctrine a

⁶⁴ See, e.g., *United States v. Krezdorn*, 718 F.2d 1360, 1368 (5th Cir. 1983) (en banc) (Goldberg, J., dissenting) ("After *Bordenkircher*, the prosecutorial vindictiveness doctrine was in disarray."), *cert. denied*, 465 U.S. 1066 (1984); *Mauricio*, 685 F.2d at 147 (no presumption of vindictiveness where prosecutor's charging decision arose from formal negotiations, through an intermediary, with defense counsel); *Andrews*, 633 F.2d at 455 (absent factual situation that poses realistic likelihood of vindictiveness, the mere apprehension of vindictiveness is insufficient to trigger sanctions); Note, *supra* note 36, at 477-78 (stating that some lower courts determined that due process provides varying degrees of protection depending on the circumstances); Note, *Prosecutorial Vindictiveness in the Criminal Appellate Process: Due Process Protection After United States v. Goodwin*, 81 MICH. L. REV. 194, 201-207 (1982) (stating that several circuits avoided a perceived vindictiveness test and an actual vindictiveness test by employing a balancing test).

⁶⁵ See *United States v. Thomas*, 617 F.2d 436, 438 n.1 (5th Cir.), *cert. denied*, 449 U.S. 841 (1980); Note, *Divergent Lower Court Standards*, *supra* note 50, at 448 (indicating that the Fifth Circuit will employ an actual vindictiveness standard).

⁶⁶ See *supra* note 50.

⁶⁷ *United States v. Motley*, 655 F.2d 186, 188 (9th Cir. 1981).

⁶⁸ In *Motley*, for example, the Ninth Circuit, implying that the ultimate fact in issue was actual vindictiveness, observed:

If the government increases the severity of the charges following a defendant's exercise of a procedural right, the sequence of events gives rise to an appearance of vindictiveness, shifting the burden to the government to prove that the decision to re-indict with more severe charges did not result from any vindictive motive.

Motley, 655 F.2d at 188 n.1; accord *United States v. Spiesz*, 689 F.2d 1326, 1328 (9th Cir. 1982); see also *United States v. Andrews*, 633 F.2d 449, 456 (6th Cir. 1980) (en

mystery. Finally, there was disagreement as to the stage of proceedings at which a "presumption" of prosecutorial vindictiveness might arise. While some courts, interpreting *Bordenkircher* to apply not just to plea-bargaining but to all pre-trial charging actions, limited the availability of the presumption to claims based on post-trial prosecutorial behavior,⁶⁹ others allowed for the possibility of the presumption based on pre-trial as well as post-trial prosecutorial conduct.⁷⁰

The Court attempted to resolve the last of these issues in *United States v. Goodwin*.⁷¹ Goodwin was initially charged with several misdemeanors, including assault, growing out of an incident in which he used his car to knock down and flee from a police officer who had stopped him for speeding and then had indicated that he believed Goodwin might have drugs in his car. Goodwin was arrested and arraigned, but he absconded before trial and was not taken into custody for three years. When he was returned to stand trial on the misdemeanor charges, Goodwin's case was given to a Justice Department attorney who was assigned to try petty crimes and misdemeanors before a magistrate, but who had no authority to try felony cases or seek indictments from the grand jury.⁷² Although Goodwin initiated plea negotiations with that prosecutor, he ultimately decided not to plead guilty and insisted on his right to a jury trial. Because the magistrate had no statutory authority to try jury cases, Goodwin's file was transferred to the district court and responsibility for his prosecution was given to an Assistant United States Attorney. After reviewing the case, that prosecutor obtained a four-count indictment charging Goodwin with the felony of forcibly assaulting a federal officer as well as three misdemeanors. After a jury convicted him of the felony and one misdemeanor, Goodwin moved to set aside the verdict on the grounds of prosecutorial vindictiveness. Responding to this motion, the prosecutor submitted an affidavit detailing his nonvindictive reasons for obtaining the indictment.⁷³

banc) ("Once a court has found the existence of a realistic likelihood of vindictiveness the burden of disproving it is on the government."), *cert. denied*, 450 U.S. 927 (1981).

⁶⁹ See, e.g., *Frank v. Blackburn*, 646 F.2d 873, 885 (5th Cir. 1980) (en banc), *modified on other grounds*, 646 F.2d 902 (per curiam), *cert. denied*, 454 U.S. 840 (1981); *United States v. Andrews*, 633 F.2d 449, 457 (Merritt, J., dissenting); *State v. Stevens*, 96 N.M. 627, 630-31, 633 P.2d 1225, 1228-29 (1981), *cert. denied*, 458 U.S. 1109 (1982).

⁷⁰ See, e.g., *Andrews*, 633 F.2d at 456 ("*Bordenkircher* must be confined to the plea-bargaining context in which it arose").

⁷¹ 457 U.S. 368 (1982).

⁷² The charges against Goodwin were federal because the incident took place on a Maryland parkway under jurisdiction of the Federal Parks Service and involved a United States Park Policeman. See *id.* at 370.

⁷³ Those reasons were as follows: (1) he considered Goodwin's conduct to be a

Persuaded by this affidavit, the district court found that "the prosecutor in this case has adequately dispelled any appearance of retaliatory intent,"⁷⁴ and denied the motion. Although the Fourth Circuit agreed that "the prosecutor did not act with actual vindictiveness in seeking a felony indictment,"⁷⁵ it reversed because it found that the situation gave rise to a "*per se* violation of the due process clause, absent proof by objective evidence that the increased charges could not have been brought in the first instance."⁷⁶ The Court too found that there was no evidence of actual vindictiveness⁷⁷ but it disagreed that the situation nevertheless called for a prosecutorial refutation of the claim of vindictiveness and reinstated Goodwin's conviction.

In doing so, the Court for the first time lapsed into the unfortunate lower court habit of discussing vindictiveness in terms of undefined presumptions. Without elaborating upon either the nature of the ultimate fact in issue or the relationship of the presumption to that fact—failings bound to disable resolution of the scope of the vindictiveness doctrine⁷⁸—the Court held that a presumption of vindictiveness was not warranted under the circumstances in *Goodwin*. It explained: "The possibility that a prosecutor would respond to a defendant's pre-trial demand for a jury trial by bringing charges not in the public interest that could be explained only as a penalty imposed on the defendant is so *unlikely* that a presumption of vindictiveness certainly is not warranted."⁷⁹

Even taken at face value, the presumption analysis in *Goodwin* sheds little light on the nature of the proscription on vindictiveness. The Court's refusal to allow the presumption rested largely on the sharp distinction it perceived between pre-trial and post-trial prosecutorial responsibilities and interests.⁸⁰ In its review of the differ-

serious violation of the law; (2) Goodwin had a lengthy history of violent crime; (3) the prosecutor believed that the underlying incident was related to a major narcotics transaction; (4) the prosecutor believed that Goodwin committed perjury at his preliminary hearing; and (5) Goodwin had failed to appear for trial as originally scheduled. In addition, the prosecutor stated that his decision to seek a felony indictment was not motivated in any way by Goodwin's request for a jury trial. *Id.* at 371 n.2.

⁷⁴ *Id.* at 371.

⁷⁵ *United States v. Goodwin*, 637 F.2d 250, 252 (4th Cir. 1981).

⁷⁶ *Id.* at 255. The court interpreted *Pearce* and *Blackledge* to prohibit the institution of more serious charges after a defendant has invoked her right to a jury trial unless the prosecutor demonstrates with objective evidence that the increased charges could not have been brought prior to the defendant's insistence on her rights. *Id.*

⁷⁷ See *Goodwin*, 457 U.S. at 380-81.

⁷⁸ See *supra* notes 66-68 and accompanying text.

⁷⁹ *Goodwin*, 457 U.S. at 384.

⁸⁰ The Court recognized several bases for this distinction. See *infra* notes 81-83. The persuasiveness and even the underlying truth of some of these bases have been sharply questioned. First, the Court's rejection of an "inflexible presumption of vindic-

ences between pre- and post-trial charging decisions, however, the Court was not clear as to the extent to which its skepticism towards pre-trial vindictiveness claims stemmed from the exigencies of a prosecutor's pre-trial responsibilities,⁸¹ the absence of systemic biases against the defendant that may arise only after conviction,⁸² or the decreased likelihood that such prosecutorial behavior will, in fact, be vindictively motivated.⁸³ As a result, the Court was not clear whether a presumption of vindictiveness was always inappropriate where the challenged charge increase occurred pre-trial, no matter what right the defendant claims the prosecutor retaliated against, or was only inappropriate where, as in *Goodwin*, the defendant claims that the prosecutor's pre-trial charge increase was in retaliation for her insistence on her right to a jury trial rather than some other right, such as a change in venue or the suppression of unconstitutionally seized evidence.⁸⁴

Not only did *Goodwin* fail to resolve whether a presumption of

tiveness" was based on a concern that the prosecution may uncover new evidence at the pre-trial stage; but this concern does not mean vindictiveness does not occur at the pre-trial stage and new evidence may simply rebut the presumption. Second, the Court believed that prosecutors were less likely to retaliate at the pre-trial stage since defendants commonly assert their rights at that time, but the Court failed to support this assumption with empirical evidence. Third, the Court referred to an "institutional bias" against retrial of decided questions at the post-trial stage that may give rise to vindictiveness, but that turns on the psychological make-up of the individual prosecutor. If a prosecutor is vindictive, then the institutional pressures existing post-trial will not make her less vindictive pre-trial. See Schwartz, *The Limits of Prosecutorial Vindictiveness*, 69 IOWA L. REV. 127, 184-93 (1983).

⁸¹ For example, the Court in *Goodwin* recognized both that the initial charges filed against a defendant may not reflect the extent to which she is subject to prosecution, 457 U.S. at 382, and, relatedly, that a prosecutor's assessment of the case may not have crystallized until the time of trial, *id.* at 381.

⁸² As *Goodwin* recognized, retrial requires a duplicative expenditure of prosecutorial resources. *Id.* at 383. Moreover, the doctrines of stare decisis, res judicata, the law of the case, and double jeopardy represent an institutional bias against the retrial of decided questions. *Id.* at 376, 383.

⁸³ According to the Court, a prosecutor expects a defendant to exercise her procedural rights before trial, and is therefore unlikely to penalize a defendant for their invocation. *Id.* at 381. In contrast, post-trial motions and appeals ask the prosecution "to do over what it thought it had already done correctly." *Id.* at 383 (quoting *Colten v. Kentucky*, 407 U.S. 104, 117 (1972)).

⁸⁴ See *id.* at 380-84; see also *Wasman v. United States*, 468 U.S. 559, 568 (1984) (noting that *Goodwin* held that a presumption of vindictiveness is unwarranted where the prosecutor added a felony charge *pre-trial* although after the defendant demanded a jury trial, but applying the presumption when a trial judge increased a sentence after appeal); *Thigpen v. Roberts*, 468 U.S. 27, 30 n.4 (1984) (noting that *Goodwin* held that no presumption arose when charges were enhanced following a *pre-trial* demand for a jury trial, but applying the presumption where charges were enhanced after exercise of a statutory right by appealing a misdemeanor conviction). The narrower interpretation of *Goodwin* would render it simply a variant of *Bordenkircher* and, in fact, *Goodwin* has been viewed by some as essentially a plea-bargaining case. See *United States v. Barker*, 681 F.2d 589, 593 (9th Cir. 1982).

vindictiveness could ever be based on pre-trial prosecutorial behavior,⁸⁵ but, by approvingly quoting the statement in *Bordenkircher* that *Pearce* and *Blackledge* were concerned not with "the possibility that a defendant might be deterred from the exercise of a legal right . . . but rather [with] the danger that the State might be retaliating . . .,"⁸⁶ the Court also continued the uncertainty over the extent to which the Constitution prohibited reasonably perceived vindictiveness based on post-trial prosecutorial actions—an uncertainty aggravated by the Court's failure to explicate the nature of the "presumption" that the Court declined to apply. Indeed, in *Thigpen v. Roberts*,⁸⁷ a case factually identical to *Blackledge* argued less than a year after *Goodwin* was decided, the state contended that *Goodwin* had overruled *Blackledge*.⁸⁸ The Court, in a brief opinion, disagreed and held that at least on the precise facts of *Blackledge* and *Thigpen*—where the prosecutor brought a felony charge after a defendant convicted of a misdemeanor before a court of limited jurisdiction exercised his statutory right to a trial de novo—a "presumption" of unconstitutional vindictiveness arose.⁸⁹ Again the Court failed to clarify whether the presumption went to the existence of actual vindictiveness and, instead, gave conflicting signals.⁹⁰

⁸⁵ Post-*Goodwin* lower court decisions reflect this uncertainty. While some cases indicate that a presumption of vindictiveness based on pre-trial prosecutorial behavior may still be available, see, e.g., *United States v. Grabinski*, 727 F.2d 681, 685 (8th Cir. 1984); *United States v. Allen*, 699 F.2d 453, 460-461 (9th Cir. 1982); *United States v. Gallegos-Curiel*, 681 F.2d 1164, 1169 (9th Cir. 1982), others indicate that it is not, see, e.g., *United States v. Krezdorn*, 718 F.2d 1360, 1368-70 (5th Cir. 1983) (en banc) (Goldberg, J., dissenting), cert. denied, 465 U.S. 1066 (1984); *United States v. Hinton*, 703 F.2d 672, 678-79 (2d Cir.), cert. denied, 462 U.S. 1121 (1983); *Fardella v. Garrison*, 698 F.2d 208, 213 (4th Cir. 1982); *Rowe v. Grizzard*, 591 F. Supp. 389, 401 (E.D. Va. 1984).

⁸⁶ *Goodwin*, 457 U.S. at 378 (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978)).

⁸⁷ 468 U.S. 27 (1984).

⁸⁸ *Id.* at 30 n.4.

⁸⁹ The Court noted that the presumption is rebuttable, but that the state, despite an opportunity, had made no attempt to demonstrate a lack of vindictiveness. See *id.* at 32 n.6.

⁹⁰ In addressing the state's argument that *Pearce* was distinguishable because the same prosecutor brought all of the charges there while the manslaughter charge against Thigpen was brought by a different prosecutor than the one who initially filed the misdemeanor charges against him, the Court recognized:

It might be argued that if two different prosecutors are involved, a presumption of vindictiveness, which arises in part from assumptions about the individual's personal stake in the proceedings, is inappropriate. On the other hand, to the extent the presumption reflects 'institutional pressure that . . . might . . . subconsciously motivate a vindictive prosecutorial . . . response to a defendant's exercise of his right to obtain a retrial of a decided question,' it does not hinge on the continued involvement of a particular individual.

Id. at 31. Because the Court found that the same prosecutor was, in fact, involved in

The Court's ambivalence over whether the Constitution bars any type of perceived vindictiveness or reaches only actual vindictiveness surfaced more visibly only a week later in its decision in *Wasman v. United States*.⁹¹ *Wasman* involved the question whether, under *Pearce*, a judge could give a defendant convicted on retrial after a successful appeal a greater sentence than she received following her original trial because of an intervening criminal conviction for acts committed prior to the original sentencing. All Justices agreed with Chief Justice Burger, who wrote the lead opinion for the Court, that the answer was yes. Five Justices,⁹² however, refused to join that portion of the Chief Justice's opinion expressly limiting the constitutional concern in *Pearce* and *Blackledge* to actual vindictiveness and characterizing the presumptions approved in those cases as presumptions of actual judicial and prosecutorial vindictiveness respectively.⁹³ As Justice Powell, who joined the other portions of the Chief Justice's opinion, observed: "The *Pearce* presumption is not simply concerned with actual vindictiveness, but also was intended to protect against reasonable apprehension of vindictiveness that could deter a defendant from appealing a first conviction."⁹⁴

the prosecution of Thigpen on the manslaughter charge, the Court found it unnecessary to "determine the correct rule when two independent prosecutors are involved." *Id.*

⁹¹ 468 U.S. 559 (1984).

⁹² See *id.* at 573 (Powell, J., joined by Blackmun, J., concurring in part and concurring in the judgment); *id.* at 574 (Brennan, J., joined by Marshall, J., concurring in the judgment); *id.* at 574 (Stevens, J., concurring in the judgment).

⁹³ According to the Chief Justice:

In *Pearce* and *Blackledge*, the Court "presumed" that the increased sentence and charge were the products of actual vindictiveness aroused by the defendants' appeals. It held that the defendants' right to due process was violated not because the sentence and charge were enhanced, but because there was no evidence introduced to rebut the presumption that actual vindictiveness was behind the increases; in other words, by operation of law, the increases were deemed motivated by vindictiveness.

Id. at 568-69.

⁹⁴ *Id.* at 574 (Powell, J., concurring). The Court's failure to confront squarely the nature of the ban on governmental vindictiveness continued in *Texas v. McCullough*, 106 S. Ct. 976 (1986), the Court's latest vindictiveness decision. McCullough was convicted of murder and sentenced to 20 years imprisonment by the jury. The trial judge granted his motion for a new trial, which the prosecutor did not oppose because he believed that a new trial might result in a harsher sentence. *Id.* at 983 (Marshall, J., dissenting). McCullough was convicted again. This time he opted to be sentenced by the judge rather than the jury, as Texas law allowed, because under *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973), the jury would have been free to impose a higher sentence. Under *Pearce*, however, the judge would have been limited by the 20-year sentence imposed by the jury at the earlier trial. See *id.* at 984 (Marshall, J., dissenting). Nonetheless, the judge imposed a 50-year sentence, and McCullough challenged the increase under *Pearce*. Despite the fact that the increased sentence was imposed by the same judge who presided over McCullough's first trial, the Court held the sentence constitutional. Covering all bases, the majority (comprised of the members of the Chief

The vice of the Court's equivocation on the extent to which the Constitution prohibits perceived vindictiveness, couched in terms of determining when an undefined "presumption" of vindictiveness should arise, is not limited to the considerable confusion the Court's meanderings have caused on that question.⁹⁵ For several reasons, the Court's pronouncements on vindictiveness have also left unresolved the extent to which due process is truly concerned with actual prosecutorial vindictiveness.

First, the Court's resolution and analysis of the two prosecutorial vindictiveness cases, in which the existence vel non of actual vindictiveness was clear, turned on considerations other than the prosecutor's actual vindictiveness. In *Bordenkircher*, where it was indisputable that the prosecutor was actually retaliating against the defendant for exercising his right to trial, the Court focused on the requisites of plea-bargaining and found no due process violation.⁹⁶ In *Goodwin*, where it was uncontroverted that the prosecutor was not acting out of actual vindictiveness in bringing more serious charges against the defendant,⁹⁷

Justice's *Wasman* plurality plus Justice Powell) held that the situation did not give rise to a presumption of vindictiveness; but even if it did, the prosecution overcame the presumption because the testimony of two witnesses who had not testified at McCullough's first trial shed new light on his culpability. Again, the Court did not elucidate the ultimate fact to which the presumption is directed. The Court's failure to apply the presumption in a situation in which a defendant almost certainly would perceive vindictiveness strongly indicates that it is actual vindictiveness.

⁹⁵ See *supra* notes 57-60 and accompanying text. The law of perceived prosecutorial vindictiveness in the lower courts has been described as "chaotic." See *United States v. Spence*, 719 F.2d 358, 361 (11th Cir. 1983); *United States v. Andrews*, 612 F.2d 235, 257 (6th Cir. 1979) (Keith, J., dissenting), *vacated and remanded*, 633 F.2d 449 (6th Cir. 1980) (en banc), *cert. denied*, 450 U.S. 927 (1981).

⁹⁶ Although the Court subsequently indicated that a defendant still might make out a constitutional deprivation based on a prosecutor's actions during plea-bargaining by showing "through objective evidence an improper prosecutorial motive," *United States v. Goodwin*, 457 U.S. 368, 380 n.12 (1982); see also *Wasman*, 468 U.S. at 569 (Burger, C.J.) ("Where the presumption does not apply, the defendant must affirmatively prove actual vindictiveness."), it is difficult to imagine what more compelling showing of actual retaliation a defendant could make than the showing the defendant made in *Bordenkircher*. For example, in *State v. Halling*, 66 Or. App. 180, 672 P.2d 1386 (1983), the Oregon Court of Appeals affirmed the dismissal of additional charges brought during the course of plea negotiations because it agreed with the trial court that the charges were brought "in reprisal" for the defendant's rejection of a plea offer. Both courts based their finding of actual vindictiveness on (a) the prosecutor's statement to defense counsel that she would charge the defendant with additional crimes unless he accepted her plea offer, (b) the prosecutor's expressed intention "to cause further evil" to the defendant in the event that he did not plead guilty, and (c) the fact that the additional charges the prosecutor brought were not mentioned until the defendant made clear his determination to go to trial on the original charge. See *id.* at 184, 672 P.2d at 1388. These factors, however, do not distinguish the case from *Bordenkircher*, for all three factors were also present there, although the second may not have been stated quite so graphically.

⁹⁷ *Goodwin*, 457 U.S. at 380-81 (1982).

the Court nevertheless examined at length whether a presumption of vindictiveness was warranted. If, as Chief Justice Burger wrote for the plurality in *Wasman* and implied in *Texas v. McCullough*,⁹⁸ the Constitution condemns only actual vindictiveness, then this exploration was entirely unnecessary.⁹⁹

Second, were actual vindictiveness the dispositive focus of the vindictiveness cases, then a valid claim by the prosecutor that the original charges against a defendant were the product of a mistake, an oversight, or a prosecutor's inexperience should suffice to resolve in the prosecutor's favor a vindictiveness challenge based on the prosecutor's subsequent augmentation of the charges. Such increased charges would merely be brought to correct an error and could hardly be said to be the product of purposeful retaliation.¹⁰⁰ Yet there has been considerable reluctance to accept these excuses as adequate justifications for increasing the charges against a defendant.¹⁰¹

Finally, it is simply unclear what actual prosecutorial vindictiveness is.¹⁰² Ensuring the infliction of deserved punishment is part and parcel of the prosecutor's job, so that "the prosecutor's attitude toward the defendant in a hard-fought criminal case is seldom benign or neutral."¹⁰³ Thus, many entirely legitimate prosecutorial actions could be said to be punitively or retaliatorily motivated.¹⁰⁴ The notion of constitutionally impermissible retaliation therefore would appear to have little substance without reference to some set of judicially developed rules determining what prosecutorial concerns are and are not sufficient to

⁹⁸ See *supra* note 94.

⁹⁹ See Schwartz, *supra* note 80, at 181-83.

¹⁰⁰ See MODEL PENAL CODE § 2.02(2)(a) (Proposed Official Draft 1962) (defining kinds of culpability).

¹⁰¹ See, e.g., *United States v. Motley*, 655 F.2d 186, 189-90 (9th Cir. 1981); *United States v. Andrews*, 633 F.2d 449, 454 (6th Cir. 1980) (en banc), *cert. denied*, 450 U.S. 927 (1981); *United States v. Ruesga-Martinez*, 534 F.2d 1367, 1370 (9th Cir. 1976); *United States v. Jamison*, 505 F.2d 407, 417 (D.C. Cir. 1974); *Twiggs v. Superior Court*, 34 Cal. 3d 360, 374, 667 P.2d 1165, 1174, 194 Cal. Rptr. 152, 161 (1983); Note, A "Realistic Likelihood of Vindictiveness: Due Process Limitations on Prosecutorial Charging Discretion," 1981 U. ILL. L. REV. 693, 711. But see *United States v. Taylor*, 749 F.2d 1511, 1514 (11th Cir. 1985) ("A mistake or oversight in the prosecutor's initial decision is a sufficient explanation to negate a subsequent claim of vindictiveness."); *Hardwick v. Doolittle*, 558 F.2d 292, 301 (5th Cir. 1977) (same), *cert. denied*, 434 U.S. 1049 (1978).

¹⁰² Indeed, the term "prosecutorial vindictiveness" has been described as "an unfortunate choice of words," *United States v. Krezdorn*, 718 F.2d 1360, 1367 (5th Cir. 1983) (en banc) (Goldberg, J., dissenting), *cert. denied*, 465 U.S. 1066 (1984), a "term[] of art," Schwartz, *supra* note 80, at 195, and "a conclusionary term rather than an analytic tool," Note, *Divergent Lower Court Standards*, *supra* note 50, at 451.

¹⁰³ *Andrews*, 633 F.2d at 459 (Merritt, J., dissenting).

¹⁰⁴ See *United States v. Goodwin*, 457 U.S. 368, 372-73 (1982).

justify particular prosecutorial actions or reactions. Yet once such concerns are identified¹⁰⁵ and found in a given situation, an examination of the prosecutor's actual intent hardly seems worth the candle. The finding of a legitimate ground for the prosecutor's action is so likely to be decisive of the question whether the prosecutor acted on it that this finding might as well be treated as the end of the inquiry rather than the beginning.¹⁰⁶

C. *Prosecutorial Misconduct With the Grand Jury*

Unlike claims of selective or vindictive prosecution, in which the prosecutorial action challenged—the institution or augmentation of charges—is always the same, constitutional challenges based upon a prosecutor's misconduct with the grand jury may involve a wide array of prosecutorial behavior. Among the prosecutorial grand jury actions frequently complained of are the use of the grand jury to help prepare an already pending indictment for trial,¹⁰⁷ violations of the secrecy rules governing grand jury proceedings,¹⁰⁸ the failure to present exculpatory evidence,¹⁰⁹ the use of perjured testimony,¹¹⁰ the use of unrelia-

¹⁰⁵ Several commentators have concluded that the courts have been too quick to accept as legitimate the justifications offered by prosecutors. *See, e.g.*, Note, *supra* note 64, at 207 n.62; Note, *Divergent Lower Court Standards*, *supra* note 50, at 455.

¹⁰⁶ This is especially so given the practical problems with determining whether a prosecutor's actions were really motivated by legitimate concerns or by impermissibly "vindictive" ones. *See Texas v. McCullough*, 106 S. Ct. 976, 986 (1986) (Marshall, J., dissenting) (finding of legitimate ground to rebut presumption of vindictiveness "effectively vicescates" previous efforts to ensure that vindictiveness against a defendant played no part in the sentence she receives after a new trial). Moreover, the difficulty in determining what motive was the driving force behind a particular prosecutorial action is likely to be exacerbated by the fact that many prosecutorial actions are likely to be the product of "mixed" motives. *See Goodwin*, 457 U.S. at 372-73 ("The presence of a punitive motivation . . . does not provide an adequate basis for distinguishing governmental action that is fully justified as a legitimate response to perceived criminal conduct from governmental action that is an impermissible response to non-criminal, protected activity."); *infra* notes 326-27 and accompanying text.

¹⁰⁷ *See, e.g.*, *In re Grand Jury Subpoena Duces Tecum* Dated January 2, 1985 (Simels), 767 F.2d 26, 29-30 (2d Cir. 1985); *United States v. Doss*, 563 F.2d 265, 274 (6th Cir. 1977) (en banc); *United States v. Sellaro*, 514 F.2d 114, 121-22 (8th Cir. 1973), *cert. denied*, 421 U.S. 1013 (1975); *United States v. Dardi*, 330 F.2d 316, 336 (2d Cir.), *cert. denied*, 379 U.S. 845 (1964).

¹⁰⁸ *See, e.g.*, *United States v. Kilpatrick*, 594 F. Supp. 1324, 1334-35 (D. Colo. 1984); *United States v. Lawson*, 502 F. Supp. 159, 167 (D. Md. 1980); *United States v. Gold*, 470 F. Supp. 1337, 1351 (N.D. Ill. 1979); *see also* FED. R. CRIM. P. 6(e)(2) ("A grand juror . . . [or] an attorney for the government . . . shall not disclose matters occurring before the grand jury . . .").

¹⁰⁹ *See, e.g.*, *United States v. McClintock*, 748 F.2d 1278, 1285 (9th Cir. 1984), *cert. denied*, 106 S. Ct. 75 (1985); *United States v. Adamo*, 742 F.2d 927, 936-37 (6th Cir. 1984), *cert. denied*, 469 U.S. 1193 (1985); *United States v. Levine*, 700 F.2d 1176, 1180-81 (8th Cir. 1983); *United States v. Ciambrone*, 601 F.2d 616, 623-25 (2d

ble hearsay in lieu of readily available live testimony,¹¹¹ and the prosecutor's acting as a witness.¹¹² Diverse though these forms of misbehavior are, prosecutorial grand jury improprieties may be grouped into two general categories: those involving an abuse of the grand jury's process¹¹³ and those concerning a prosecutor's evidentiary presentation to the grand jury.¹¹⁴ These categories correspond to the two basic functions of the grand jury: its function as an investigatory body, which presupposes that its process will be used only to gather evidence of uncharged criminal activity,¹¹⁵ and its function as a screening body, which requires that it be able fairly to evaluate evidence to prevent the institution of unjust or unfounded charges.¹¹⁶

1. Abuse of Grand Jury Process

a. *The Nature of the Proscription*

The grand jury's investigatory powers, which flow from its historical common law function and the grand jury clause of the fifth amendment,¹¹⁷ are supposed to be used by the prosecutor to gather informa-

Cir. 1979); *United States v. Kennedy*, 564 F.2d 1329, 1338 (9th Cir. 1977), *cert. denied*, 435 U.S. 944 (1978); *United States v. Loraine*, 396 F.2d 335, 339 (9th Cir.), *cert. denied*, 393 U.S. 933 (1968); *Lawson*, 502 F. Supp. at 163; *Gold*, 470 F. Supp. at 1352-53; *United States v. Phillips Petroleum Co.*, 435 F. Supp. 610, 618-19 (N.D. Okla. 1977).

¹¹⁰ See, e.g., *Adamo*, 742 F.2d at 927; *United States v. Hogan*, 712 F.2d 757, 759 (2d Cir. 1983); *Levine*, 700 F.2d at 1180; *Ciambrone*, 601 F.2d at 623-24; *United States v. Richman*, 600 F.2d 286 (1st Cir. 1979); *United States v. Cathey*, 591 F.2d 268, 271-72 (5th Cir. 1979); *United States v. Bracy*, 566 F.2d 649, 654-55 (9th Cir. 1977), *cert. denied*, 439 U.S. 818 (1978); *United States v. Guillette*, 547 F.2d 743, 752-53 (2d Cir. 1976), *cert. denied*, 434 U.S. 839 (1977); *United States v. Basurto*, 497 F.2d 781, 785-86 (9th Cir. 1974); *Coppedge v. United States*, 311 F.2d 128, 131 (D.C. Cir. 1962), *cert. denied*, 373 U.S. 946 (1963).

¹¹¹ See, e.g., *United States v. Jacobson*, 691 F.2d 110, 115 (2d Cir. 1982); *United States v. Samango*, 607 F.2d 877, 880-84 (9th Cir. 1979); *United States v. Chanen*, 549 F.2d 1306, 1311 (9th Cir. 1977); *United States v. Estepa*, 471 F.2d 1132, 1133-35 (2d Cir. 1972).

¹¹² See, e.g., *United States v. Birdman*, 602 F.2d 547, 551, 559-61 (3d Cir. 1979), *cert. denied*, 444 U.S. 1032 (1980); *Gold*, 470 F. Supp. at 1351-52.

¹¹³ See *supra* note 107 and accompanying text.

¹¹⁴ See *supra* notes 108-12 and accompanying text.

¹¹⁵ See *United States v. Calandra*, 414 U.S. 338, 343-46 (1974); *Branzburg v. Hayes*, 408 U.S. 665, 701-02 (1972).

¹¹⁶ See *Calandra*, 414 U.S. at 343; *United States v. Hogan*, 712 F.2d 757, 759 (2d Cir. 1983).

¹¹⁷ The clause provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger." U.S. CONST. amend. V. This right is not applicable to the states through the fourteenth amendment's due process clause. See *Hurtado v. California*, 110 U.S. 516 (1884); see also *Blair v. United States*, 250 U.S.

tion about as yet unindicted criminal activities.¹¹⁸ When a prosecutor uses the grand jury process for some other ends—such as uncovering evidence to be used in a civil action,¹¹⁹ gathering evidence to prove the charges of an indictment that has already been returned,¹²⁰ or inducing a prospective defendant to commit perjury¹²¹—her misuse of the grand jury's process may result in the invalidation of its proceedings¹²² and the evidence gathered through them.¹²³

273 (1919) (investigatory powers flow from the grand jury clause). There is some scholarly controversy over the extent to which the grand jury clause enshrined the grand jury's investigatory function as opposed to its screening function. See 1 W. LAFAVE & J. ISRAEL, *supra* note 26, at § 8.2; Comment, *Federal Grand Jury Investigations of Political Dissidents*, 7 HARV. C.R.-C.L. L. REV. 432 (1972) (arguing against unrestricted grand jury investigatory power and proposing limitations).

¹¹⁸ See *Branzburg*, 408 U.S. at 686-88; *Costello v. United States*, 350 U.S. 359, 362 (1956); *Blair*, 250 U.S. at 282; *United States v. Zarattini*, 552 F.2d 753, 756 (7th Cir.), *cert. denied*, 431 U.S. 942 (1977); 2 W. LAFAVE & J. ISRAEL, *supra* note 26, at § 8.1; 8 J. MOORE, W. TAGGART & J. WICKER, *MOORE'S FEDERAL PRACTICE* ¶ 6.04[1] (2d ed. 1984).

¹¹⁹ See, e.g., *FTC v. Atlantic Richfield Co.*, 567 F.2d 96, 104-05 & n.19 (D.C. Cir. 1977) (discussing procedures followed by the Antitrust Division of the Justice Department to ensure that it does not conduct any criminal investigative proceedings before a grand jury that relate to civil cases already initiated in district court); *United States v. Doe*, 341 F. Supp. 1350 (S.D.N.Y. 1972) (denying Internal Revenue Service agents access to witness's grand jury testimony to determine civil tax liability); see also *United States v. LaSalle Nat'l Bank*, 437 U.S. 298, 311-13 (1978) (inherently intertwined nature of criminal and civil elements of a tax fraud case suggests that it is unrealistic to attempt to build a partial information barrier between the Internal Revenue Service and Department of Justice); *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 681-84 (1958) (government may use a grand jury transcript in a case in which no indictment was brought to prepare a civil suit brought under the Sherman Act; defendant only entitled to discovery when defendant can show "good cause" based on prosecutor's subversion of the criminal process).

¹²⁰ See, e.g., *In re Grand Jury Subpoena Duces Tecum Dated January 2, 1985* (Simels), 767 F.2d 26, 29-30 (2d Cir. 1985); *In re Grand Jury Proceeding* (Johanson), 632 F.2d 1033, 1041 (3d Cir. 1980); *United States v. Doss*, 563 F.2d 265, 274 (6th Cir. 1977) (en banc); *Zarattini*, 552 F.2d at 756; *United States v. Beasley*, 550 F.2d 261, 266 (5th Cir.), *cert. denied*, 434 U.S. 938 (1977); *United States v. Sellaro*, 514 F.2d 114, 122 (8th Cir. 1973), *cert. denied*, 421 U.S. 1013 (1975); *United States v. Star*, 470 F.2d 1214, 1217 (9th Cir. 1972); *United States v. Dardi*, 330 F.2d 316, 336 (2d Cir.), *cert. denied*, 379 U.S. 845 (1964).

¹²¹ See, e.g., *Bursey v. United States*, 466 F.2d 1059, 1080 n.10 (9th Cir. 1972); *Brown v. United States*, 245 F.2d 549, 554-55 (8th Cir. 1957).

¹²² See, e.g., *Doss*, 563 F.2d at 276-77 (Stewart, J., concurring) (grand jury proceeding that has as its "substantial purpose" the questioning of a secretly indicted defendant about the crimes for which she has already been indicted is void).

¹²³ See *In re Grand Jury Subpoena Duces Tecum Dated January 2, 1985* (Simels), 767 F.2d at 30 (remedy against a grand jury subpoena used predominantly for trial preparation is either the quashing of the subpoena or the exclusion at trial of any evidence obtained pursuant to it); *United States v. Doe*, 455 F.2d 1270, 1276 (1st Cir. 1972) (where a witness is called before the grand jury to enable the prosecutor to gather information about a pending indictment, an available remedy is to "proscribe the calling of [the] witness" at the trial on the pending indictment).

b. How the Proscription is Enforced

The prosecutor's intent is the critical determinant of claims that the prosecutor abused the grand jury process. Despite uncertainty over just how impure the prosecutor's motive must be to warrant remedial action,¹²⁴ it is clear that the inquiry in abuse of grand jury process claims is one centered on the prosecutor's motive. For example, the paradigm complaint of prosecutorial abuse of grand jury process is that the prosecutor used the grand jury to obtain impermissible discovery¹²⁵—especially to gather evidence for the trial of a pending, previously returned indictment. With virtually no explanation or analysis, the federal courts have adopted the view first expressed in *United States v. Dardi*¹²⁶ that the issue in such claims, either in the context of challenging a conviction¹²⁷ or moving to quash a subpoena,¹²⁸ is the intent-centered question whether the acquisition of such improper pre-trial discovery was the prosecutor's "sole or dominating purpose."¹²⁹ There is, however, a sufficient number of prosecutorial interests other than pre-trial discovery that are so frequently implicated in post-indictment efforts to gather information—including identifying unindicted conspirators,¹³⁰ determining the disposition of contraband involved in the pending indictment,¹³¹ and ascertaining whether there were efforts to obstruct the apprehension or prosecution of those under indictment¹³²—that the prosecutor will almost invariably be able to advance at least one of them as the basis for her post-indictment use of the grand jury's process. Consequently, as has been recognized, the intent-

¹²⁴ Compare *In re* Grand Jury Proceedings (Miller Brewing Co.), 687 F.2d 1079, 1086-87 (7th Cir. 1982) (suggesting that the grand jury can be used only to conduct investigations that, at least at the outset, are "exclusively criminal") and *United States v. Doe*, 341 F. Supp. 1350, 1352 (S.D.N.Y. 1972) with *Universal Mfg. Co. v. United States*, 508 F.2d 684, 686 (8th Cir. 1975) (rejecting an abuse of process challenge because the subpoenaed material was "not being sought primarily for another purpose").

¹²⁵ See *supra* notes 119-20 and accompanying text.

¹²⁶ 330 F.2d 316, 336 (2d Cir.), *cert. denied*, 379 U.S. 845 (1964).

¹²⁷ See, e.g., *United States v. Zarattini*, 552 F.2d 753 (7th Cir. 1977), *cert. denied*, 431 U.S. 942 (1977); *United States v. Woods*, 544 F.2d 242 (6th Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); *United States v. Sellaro*, 514 F.2d 114 (8th Cir. 1973), *cert. denied*, 421 U.S. 1013 (1975); *United States v. Star*, 470 F.2d 1214 (9th Cir. 1972).

¹²⁸ See, e.g., *In re* Grand Jury Subpoena Duces Tecum Dated January 2, 1985 (Simels), 767 F.2d 26 (2d Cir. 1985); *In re* Grand Jury Proceedings (Johanson), 632 F.2d 1033 (3d Cir. 1980).

¹²⁹ *In re* Grand Jury Subpoena Duces Tecum Dated January 2, 1985 (Simels), 767 F.2d at 29; *In re* Grand Jury Proceedings (Johanson), 632 F.2d at 1041; *Zarattini*, 552 F.2d at 757; *Woods*, 544 F.2d at 250; *Sellaro*, 514 F.2d at 121.

¹³⁰ See *Woods*, 544 F.2d at 250.

¹³¹ See *Zarattini*, 552 F.2d at 756-57.

¹³² See *United States v. Dardi*, 330 F.2d 316, 336 (2d Cir. 1964).

based *Dardi* prohibition "is difficult, if not impossible, to enforce."¹³³

2. Misconduct in the Presentation of Evidence

a. *The Nature and Source of the Proscription*

Although a prosecutor's misconduct in presenting evidence to the grand jury may take many forms, the legal questions most often raised by such actions are whether the indictment should be dismissed because the prosecutor's behavior has deprived the defendant of her constitutional rights under either the due process clause or the grand jury clause of the fifth amendment¹³⁴ and, if not,¹³⁵ whether the prosecutor's behavior is sufficiently improper to warrant the dismissal of the indictment under the court's supervisory powers.¹³⁶ The constitutional analysis tends to be similar regardless of whether it is discussed in terms of the due process clause,¹³⁷ the grand jury clause,¹³⁸ or both.¹³⁹ Proceed-

¹³³ *In re Grand Jury Subpoena Duces Tecum Dated January 2, 1985* (Simels), 767 F.2d at 30 (quoting 8 J. MOORE, W. TAGGART & J. WICKER, *supra* note 118, at ¶ 6.04[5]).

¹³⁴ See *supra* note 117.

¹³⁵ Challenges to grand jury proceedings have also been premised on violations of a defendant's rights under the fourth amendment, see *United States v. Calandra*, 414 U.S. 338 (1974), the self-incrimination clause of the fifth amendment, see *Lawn v. United States*, 355 U.S. 339 (1958), and various statutory provisions, such as the federal electronic surveillance statutes, see *Gelbard v. United States*, 408 U.S. 41 (1972). The first two types of challenge have lost much of their force in the wake of the Court's decisions in *Calandra* and *Lawn*, which effectively held that an indictment may not be challenged on the ground that the grand jury acted on the basis of information secured in violation of the defendant's fourth and fifth amendment rights respectively. See *Calandra*, 414 U.S. at 354; *Lawn*, 355 U.S. at 355. Nevertheless, some lower courts have recognized that an indictment may be dismissed when the grand jury itself violates the constitutional privilege in obtaining the evidence upon which the indictment was based. See, e.g., *Jones v. United States*, 342 F.2d 863, 873-74 (D.C. Cir. 1964) (en banc) (plurality opinion); *United States v. Pepe*, 367 F. Supp. 1365, 1369 (D. Conn. 1973).

¹³⁶ Supervisory powers enable the federal courts to "formulate procedural rules not specifically required by the Constitution or the Congress." *United States v. Hastings*, 461 U.S. 499, 505 (1983). Two purposes are served by such power: deterring illegality and protecting the integrity of the judicial process. See *United States v. Payner*, 447 U.S. 727, 735 n.8 (1980). In deciding whether to invoke its supervisory power to dismiss an indictment, the courts have "consider[ed] the egregiousness of the prosecutor's misconduct and the availability of less drastic sanctions." *United States v. McClintock*, 748 F.2d 1278, 1284 (9th Cir. 1984) (describing prosecutorial behavior leading to the court's exercise of its supervisory power to dismiss an indictment, including the provision of transcripts of a witness of doubtful credibility when the prosecutor could have subpoenaed live testimony), *cert. denied*, 106 S. Ct. 75 (1985); see also *United States v. Samango*, 607 F.2d 877, 881 (9th Cir. 1979); *infra* notes 166-69 and accompanying text.

¹³⁷ See, e.g., *Samango*, 607 F.2d at 884; *United States v. Basurto*, 497 F.2d 781, 785-86 (9th Cir. 1974).

¹³⁸ See, e.g., *United States v. Sears, Roebuck & Co.*, 719 F.2d 1386, 1391 n.7 (9th Cir. 1983), *cert. denied*, 465 U.S. 1071 (1984); *United States v. McKenzie*, 678 F.2d

ing from the Court's seminal observation in *Costello v. United States*¹⁴⁰ that "[a]n indictment returned by a legally constituted and unbiased grand jury . . . if valid on its face, is enough to call for trial of the charge on the merits,"¹⁴¹ that analysis focuses on whether the prosecutorial actions complained of deprived the defendant of an "unbiased" grand jury. The "bias" rubric, while responsive to *Costello*, is misleading; the constitutional inquiry is really whether the prosecutor's grand jury presentation was so unfairly skewed against the defendant that the grand jury's decision to indict was not an informed, independent one.¹⁴² Thus, although *Costello* and its progeny¹⁴³ bar a federal court from inquiring into the sufficiency of the evidence before the grand jury,¹⁴⁴ the constitutional requirement of an "unbiased" grand jury has been read to allow judicial examination of the manner in which evidence was presented to it.¹⁴⁵

629, 631 (5th Cir.), *cert. denied*, 459 U.S. 1038 (1982).

¹³⁹ See, e.g., *McClintock*, 748 F.2d at 1284 n.2; *United States v. Samango*, 450 F. Supp. 1097, 1102 & n.9 (D. Haw. 1978), *aff'd*, 607 F.2d 877 (9th Cir. 1979).

¹⁴⁰ 350 U.S. 359 (1956). *Costello* held that an indictment based solely on hearsay evidence was a valid indictment under the fifth amendment. See *id.* at 363.

¹⁴¹ *Id.* at 363.

¹⁴² See *United States v. Wright*, 667 F.2d 793, 796 (9th Cir. 1982) ("[A] grand jury indictment will not be dismissed unless the record shows that the conduct of the prosecuting attorney was flagrant to the point that the grand jury was 'deceived' in some significant way. The conduct must significantly infringe upon the ability of the grand jury to exercise independent judgement." (citation omitted)).

¹⁴³ E.g., *United States v. Calandra*, 414 U.S. 338, 351-52 (1974) (evidence obtained in violation of fourth amendment is admissible before the grand jury); *United States v. Blue*, 384 U.S. 251, 255 n.2 (1966) (indictment valid even if secured on basis of information obtained in violation of defendant's privilege against self-incrimination); *Lawn v. United States*, 355 U.S. 339, 355-58 (1958) (same).

¹⁴⁴ In *Costello*, the Court explained the rationale for precluding such inquiries:

If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment.

350 U.S. at 363.

¹⁴⁵ There is obviously some tension between these two principles. For example, a claim that the grand jury was "biased" because the prosecutor both failed to inform the grand jury of significant exculpatory evidence and presented unreliable hearsay in lieu of readily available live testimony can easily be characterized as a claim that the evidence the grand jury did hear was inadequate to support the indictment. Nevertheless, the focus of the sufficiency and bias inquiries are different. The essential claim in a sufficiency challenge is that no reasonable grand juror could have found an adequate basis for indicting the defendant from the evidence that the prosecutor presented. On the other hand, where the prosecutor's actions are claimed to have "biased" the grand jury, the complaint is that while the evidence may have permitted a reasonable grand juror to return the indictment, the prosecution's presentation of the evidence was so

b. How the Proscription is Enforced

Despite the consensus as to the framework for analyzing constitutional challenges to a prosecutor's behavior before the grand jury, there is little certainty as to what results this analysis should yield in a particular case. Indeed, courts confronted with such challenges frequently bemoan the lack of any established standard by which to decide whether a prosecutor's misbehavior in presenting evidence to the grand jury warrants dismissal of an indictment.¹⁴⁶ The inability of courts to define with precision the circumstances in which dismissal is warranted is due to several factors. First, the prosecutorial grand jury actions that may generate constitutional challenges to an indictment are very diverse.¹⁴⁷ Second, the *Costello* line of cases, which greatly restricts review of evidence-based challenges to grand jury proceedings, has inhibited the formulation of a corpus juris defining a defendant's substantive rights in connection with the prosecutor's presentation of evidence to the grand jury. Third and consequently, it remains considerably unclear which prosecutorial grand jury practices constitute violations of a defendant's rights.¹⁴⁸

The grand jury presentation area thus bears important similarities to the charging vindictiveness area. In both, the situations that may generate claims are diverse, and in both there are impediments to judicial review of the prosecutor's behavior for constitutional improprieties.¹⁴⁹ Yet, although the prosecutor's intent in performing challenged

distorted that it "undermined the grand jury's ability to make an informed and objective evaluation of the evidence presented to it." *United States v. Sears, Roebuck & Co.*, 719 F.2d 1386, 1391 (9th Cir. 1983), *cert. denied*, 465 U.S. 1079 (1984).

¹⁴⁶ See, e.g., *Sears, Roebuck & Co.*, 719 F.2d at 1391 n.6 (characterizing the standard for dismissing the indictment applied by that court as "vague and conclusory"); *United States v. Chanen*, 549 F.2d 1306, 1309, 1311 (9th Cir.) (finding holdings of cases addressing the issue as "difficult to reconcile"), *cert. denied*, 434 U.S. 725 (1977).

¹⁴⁷ See *Chanen*, 549 F.2d at 1309.

¹⁴⁸ For example, the courts seem hopelessly confused over the nature of a prosecutor's obligation to present exculpatory evidence to the grand jury. While some courts have held that the prosecutor has no legal obligation to disclose exculpatory material to the grand jury, see, e.g., *United States v. McClintock*, 748 F.2d 1278, 1285 n.3 (9th Cir. 1984), *cert. denied*, 106 S. Ct. 75 (1985); *United States v. Adamo*, 742 F.2d 927, 937 (6th Cir. 1984), *cert. denied*, 469 U.S. 1193 (1985), others have held that a prosecutor "is under legal and ethical obligations to present evidence which is exculpatory of persons under investigation, since the grand jury cannot protect citizens from malicious prosecutions if it is not given information which is material to its determination," *United States v. Gold*, 470 F. Supp. 1336, 1353 (N.D. Ill. 1979); see also *United States v. Ciambone*, 601 F.2d 616, 623 (2d Cir. 1979) ("Where a prosecutor is aware of any substantial evidence negating guilt he should, in the interests of justice, make it known to the grand jury, at least where it might reasonably be expected to lead the jury not to indict.").

¹⁴⁹ In the charging area, these impediments to judicial review of prosecutorial

grand jury actions has been accorded significance sporadically,¹⁵⁰ the courts have not viewed it as the lodestar in determining whether a defendant's rights have been violated by improprieties in a prosecutor's grand jury presentation. Indeed, some courts have expressed the view that the prosecutor's intent is unimportant to the inquiry.¹⁵¹

There are three factors that apparently account for the failure of courts to accord prosecutorial intent in this context the preeminent role it is supposed to play in the evaluation of claims of selective and vindictive prosecution. The first is the amenability of grand jury bias claims to a harm-based analysis that focuses on the probable effect of the challenged prosecutorial behavior rather than the prosecutor's intent in engaging in it.¹⁵² The selective and vindictive prosecution areas do not lend themselves to such analysis. Those claims are characterized by effects—the institution or augmentation of criminal charges—that can always be said to harm the defendant; for even a defendant ultimately acquitted of the challenged charges will suffer the anxiety of exposure to them and the ordeal of defending against them.

The second factor is the existence of reasonably clear ethical rules

misconduct are largely derived from separation of powers considerations. *See supra* note 10. In the grand jury presentation area, they flow from concerns over interfering with the grand jury's independence, violating grand jury secrecy, and the administrative burden that review of the prosecutor's evidentiary presentation to the grand jury would entail. *See Arenella, Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 MICH. L. REV. 463, 487-96 (1980).

¹⁵⁰ The one area in which there is general agreement as to the significance of the prosecutor's intent involves claims that the indictment was based on perjured testimony. For the presentation of perjured testimony to warrant the dismissal of an indictment on constitutional grounds, the courts consistently hold that the prosecutor must have known that the grand jury testimony was perjurious. *See, e.g., Adamo*, 742 F.2d at 940; *Ciambrone*, 601 F.2d at 623; *United States v. Richman*, 600 F.2d 286, 292 (1st Cir. 1979); *United States v. Guillelte*, 547 F.2d 743, 752-753 (2d Cir. 1976), *cert. denied*, 434 U.S. 839 (1977); *United States v. Basurto*, 497 F.2d 781, 785-86 (9th Cir. 1974). *See generally* *United States v. Levine*, 700 F.2d 1176, 1179-80 (8th Cir. 1983) (reviewing circuit case law regarding prosecutorial use of perjury in grand jury proceedings).

¹⁵¹ *See United States v. Sears, Roebuck & Co.*, 719 F.2d 1386, 1392 (9th Cir. 1983) ("The relevant inquiry . . . focuses not on the degree of culpability of the prosecutor, but on the impact of his misconduct on the grand jury's impartiality."), *cert. denied*, 465 U.S. 1079 (1984); *United States v. Al Mudarris*, 695 F.2d 1182, 1188 (9th Cir.) ("[U]nintentional misconduct can cause improper influence and usurpation of the grand jury's role."), *cert. denied*, 461 U.S. 932 (1983); *United States v. Samango*, 607 F.2d 877, 882 (9th Cir. 1979); *United States v. McKenzie*, 524 F. Supp. 186, 189, 195 (E.D. La. 1981), *rev'd on other grounds*, 678 F.2d 629 (5th Cir. 1982).

¹⁵² *See United States v. Griffith*, 756 F.2d 1244, 1249-50 (6th Cir. 1985) (dismissal of indictment inappropriate unless the prosecutorial misconduct resulted in prejudice to the accused), *cert. denied*, 106 S. Ct. 114 (1986); *Sears, Roebuck & Co.*, 719 F.2d at 1392; *United States v. Hogan*, 712 F.2d 757, 761 (2d Cir. 1983).

governing a prosecutor's grand jury behavior,¹⁵³ or at least the existence of recurring prosecutorial practices that clearly violate those rules.¹⁵⁴ In evaluating challenges to a prosecutor's presentation to the grand jury, the federal courts repeatedly make reference to and adopt those guidelines.¹⁵⁵ Although violation of the rules alone generally is not sufficient to warrant dismissal of an indictment,¹⁵⁶ the existence of ethical guidelines readily applicable to common grand jury abuses enables the courts to condemn certain unacceptable prosecutorial behavior there without having to resort to an examination of the prosecutor's mental culpability in taking the improper actions. Indeed, in the one situation where courts agree that the prosecutor's mental state is relevant to a constitutional challenge to the manner in which the prosecutor presented the case to the grand jury—the use of perjured testimony—¹⁵⁷ their consensus that the testimony must be used “knowingly” to be actionable error is likely the product of ethical rules that define the prohibition on the use of perjured testimony expressly in terms of an advocate's knowledge of the perjury.¹⁵⁸

¹⁵³ See, e.g., 1 STANDARDS FOR CRIMINAL JUSTICE §§ 3-3.5 to .6 (2d ed. 1980) [hereinafter REVISED ABA PROSECUTION STANDARDS]; STANDARDS RELATING TO THE PROSECUTION FUNCTION AND DEFENSE FUNCTION §§ 3.5-.6 (1971) [hereinafter ABA PROSECUTION STANDARDS]; NATIONAL PROSECUTION STANDARDS OF THE NATIONAL DISTRICT ATTORNEYS ASS'N Standards 14.2(D), 14.4 (1st ed. 1977) [hereinafter NDAA NATIONAL PROSECUTION STANDARDS].

¹⁵⁴ See, e.g., *United States v. Birdman*, 602 F.2d 547, 555 (3d Cir. 1979) (prosecutor acting as a witness), *cert. denied*, 444 U.S. 1032 (1980); *United States v. Gold* 470 F. Supp. 1336, 1351-52 (N.D. Ill. 1979) (same).

¹⁵⁵ *United States v. McClintock*, 748 F.2d 1278, 1285 (9th Cir. 1984) (referring to 1 REVISED ABA PROSECUTION STANDARDS, *supra* note 153, at § 3-3.6(d)), *cert. denied*, 106 S. Ct. 75 (1985); *United States v. Hogan*, 712 F.2d 757, 761 (2d Cir. 1983) (referring to 1 REVISED ABA PROSECUTION STANDARDS, *supra* note 153, at § 3-3.6); *United States v. Serubo*, 604 F.2d 807, 818 (3d Cir. 1979) (referring to 1 REVISED ABA PROSECUTION STANDARDS, *supra* note 153, at § 3-3.5(b)); *Birdman*, 602 F.2d at 555 (referring to ABA PROSECUTION STANDARDS, *supra* note 153, at § 3.5(b)); *United States v. Ciambone*, 601 F.2d 616, 623 (2d Cir. 1979) (referring to ABA PROSECUTION STANDARDS, *supra* note 153, at § 3.6); *United States v. Crisconi*, 520 F. Supp. 915, 921 (D. Del. 1981) (noting that “[i]n defining the boundaries of proper prosecutorial conduct before the Grand Jury, courts have looked to the American Bar Association Standards Relating to the Prosecution Function”); *Gold*, 470 F. Supp. at 1351 (referring to ABA PROSECUTION STANDARDS, *supra* note 153, at § 3.5(b)); *United States v. Phillips Petroleum Co.*, 435 F. Supp. 610, 618-19 (N.D. Okla. 1977) (referring to ABA PROSECUTION STANDARDS, *supra* note 153, at § 3.6(b)).

¹⁵⁶ See *McClintock*, 748 F.2d at 1285-86; *United States v. Trass*, 644 F.2d 791, 797 (9th Cir. 1981); *Birdman*, 602 F.2d at 555-56. *But see* *United States v. Serubo*, 604 F.2d 807, 817 (3d Cir. 1979) (dismissal of indictment may be the only way to encourage compliance with ethical standards).

¹⁵⁷ See *supra* note 150.

¹⁵⁸ 1 REVISED ABA PROSECUTION STANDARDS, *supra* note 153, at § 3-5.6(a) provides: “It is unprofessional conduct for a prosecutor knowingly to offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or to fail

Although there are a variety of ethical guidelines applicable to a prosecutor's decisions concerning whether and what to charge, the actions at issue in selective and vindictive prosecution claims, they provide little basis for condemning or condoning challenged charging behavior. Ethical rules governing charging decisions are of two types: those which set forth the factors prosecutors should consider in exercising their charging discretion,¹⁵⁹ and those which prohibit the filing of charges

to seek withdrawal thereof upon discovery of its falsity." Similarly, the Model Code of Professional Responsibility, which is applicable to all lawyers, provides that "a lawyer shall not [k]nowingly use perjured testimony or false evidence," MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(a)(4) (1982) (footnote omitted), and the new Model Rules of Professional Conduct, also applicable to the bar in general, provide that "[a] lawyer shall not knowingly offer evidence that the lawyer knows to be false," MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(4) (1983).

¹⁵⁹ For example, 1 REVISED ABA PROSECUTION STANDARDS, *supra* note 153, at § 3-3.9(b), provides:

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.

Similarly, NDAA NATIONAL PROSECUTION STANDARDS, *supra* note 153, at Standard 8.2, which deals with whether to prosecute, provides:

The prosecutor should utilize his discretion in screening to eliminate those cases from the criminal justice system in which prosecution is not justified. The factors to be considered in this decision are:

- A. Doubt as to the accused's guilt;
- B. Undue hardship caused to the accused;
- C. Excessive cost of prosecution in relation to the seriousness of the offense;
- D. Possible deterrent value of prosecution;
- E. Aid to other prosecution goals through non-prosecution;
- F. The expressed wish of the victim not to prosecute;
- G. The age of the case;
- H. Insufficiency of admissible evidence to support a case;
- I. Attitude and mental state of the defendant;
- J. Possible improper motives of a victim or witness;
- K. A history of non-enforcement of the statute [sic] at issue;
- L. Likelihood of prosecution by another criminal justice authority;
- M. The availability of suitable diversion programs;
- N. Any mitigating circumstances; and

that are not adequately supported by the evidence.¹⁶⁰ Neither type is of much utility in assessing claims of selective or vindictive prosecution. Rules of the first type expressly recognize the discretionary nature of the prosecutor's charging decision and are simply advisory. While rules of the second type are prohibitory and condemn a fairly specific type of charging conduct, the conduct they condemn is rarely at issue in selective and vindictive prosecution claims; for there is generally adequate evidence to support the challenged charges where such claims are raised. It is not surprising, then, that one commentator found that "no court has dismissed an indictment or other criminal charge for failure to comply with written [charging] guidelines."¹⁶¹

The third factor that accounts for the subsidiary role prosecutorial intent plays in the evaluation of constitutional challenges to a prosecutor's grand jury presentation is the greater freedom courts have to use their supervisory power to control prosecutorial behavior before the grand jury. This wider latitude is a product of the independent stature that the fifth amendment confers on the grand jury as an institution.¹⁶² Because the grand jury cannot properly be "pigeonholed" into either the executive or judicial branches of government,¹⁶³ but instead has a

O. Any provisions for restitution.

NDAA NATIONAL PROSECUTION STANDARDS, *supra* note 153, at Standard 9.3, which deals with what charges to bring, provides that "[t]he prosecutor may properly exercise his discretion to present only those charges which he considers to be consistent with the best interests of justice," and lists 15 factors similar to those set forth in Standard 8.2 that may properly influence the prosecution's selection of charges.

¹⁶⁰ REVISED ABA PROSECUTION STANDARDS, *supra* note 153, at § 3-3.9(a) provides:

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 probable 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.

NDAA NATIONAL PROSECUTION STANDARDS, *supra* note 153, at Standard 9.4(A) provides that "[t]he prosecutor shall file only those charges which he believes can reasonably be substantiated by admissible evidence at trial."

¹⁶¹ Gifford, *supra* note 26, at 704.

¹⁶² See *United States v. Dionisio*, 410 U.S. 1, 16 (1973) (noting that the fifth amendment guarantees that "no civilian may be brought to trial for an infamous crime" without a grand jury indictment or presentment); *Stirone v. United States*, 361 U.S. 212, 218 (1960) (function of the grand jury system is "to limit [a defendant's] jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge"); *United States v. Al Mudarris*, 695 F.2d 1182, 1184 (9th Cir. 1983), *cert. denied*, 461 U.S. 932 (1983); *United States v. Chanen*, 549 F.2d 1306, 1312-13 (9th Cir. 1977), *cert. denied*, 434 U.S. 825 (1977).

¹⁶³ See *Chanen*, 549 F.2d at 1312 (The grand jury "is not relegated by the Constitution to a position within any of the three branches of government.").

substantial relationship with and dependence upon both,¹⁶⁴ the impediments to judicial interference with prosecutorial actions before the grand jury are weaker than they are with respect to judicial oversight of prosecutorial charging decisions,¹⁶⁵ which are purely executive actions.

Accordingly, the federal courts have consistently assumed and asserted the legitimacy of the use of their supervisory power to oversee the prosecutor's presentation before the grand jury.¹⁶⁶ Even in the wake of Supreme Court decisions generally limiting the ability of lower federal courts to exercise supervisory power over law enforcement activities outside the grand jury context,¹⁶⁷ the federal courts have "increasingly exercised [their] supervisory power . . . to regulate the manner in which grand jury investigations are conducted"¹⁶⁸ and have used the power to dismiss indictments because of prosecutorial misbehavior before the grand jury.¹⁶⁹

This supervisory power, especially when coupled with the exis-

¹⁶⁴ For example, the grand jury is generally dependent upon the prosecutor, the representative of the executive branch, to determine what evidence the grand jury should hear to conduct the presentation of that evidence. See *United States v. Hogan*, 712 F.2d 757, 759 (2d Cir. 1983); Note, *The Grand Jury as an Investigatory Body*, 74 HARV. L. REV. 590, 596 (1961). On the other hand, the grand jury is dependent upon the judiciary's power of process to summon witnesses and to compel them to testify if they refuse to do so. See *Brown v. United States*, 359 U.S. 41, 49 (1959).

¹⁶⁵ See *supra* note 10.

¹⁶⁶ See *United States v. Griffith*, 756 F.2d 1244, 1249 (6th Cir.), *cert. denied*, 106 S. Ct. 114 (1985); *United States v. McClintock*, 748 F.2d 1278, 1284 (9th Cir. 1984), *cert. denied*, 106 S. Ct. 75 (1985); *Hogan*, 712 F.2d at 761; *United States v. Pino*, 708 F.2d 523, 531 (10th Cir. 1983); *United States v. Gonsalves*, 691 F.2d 1310, 1315-19 (9th Cir. 1982), *vacated*, 464 U.S. 806 (1983); *United States v. Serubo*, 604 F.2d 807, 816 (3d Cir. 1979); *United States v. Birdman*, 602 F.2d 547, 558 & n.43 (3d Cir. 1979), *cert. denied*, 444 U.S. 1032 (1980); *United States v. Estepa*, 471 F.2d 1132, 1136 (2d Cir. 1972). *But cf.* *United States v. Asdrubal-Herrera*, 470 F. Supp. 939, 942-43 (N.D. Ill. 1979) (stressing supervisory power is to be used rarely).

¹⁶⁷ See, e.g., *United States v. Hasting*, 461 U.S. 499 (1983) (supervisory power does not eliminate the applicability of the harmless error rule to justify reversal of a criminal conviction); *United States v. Payner*, 447 U.S. 727 (1980) (supervisory power does not permit the suppression of otherwise admissible evidence that was seized unlawfully from third party).

¹⁶⁸ *Serubo*, 604 F.2d at 816; see also *United States v. Sears, Roebuck & Co.*, 719 F.2d 1386, 1395 (9th Cir. 1983) (Norris, J., dissenting in part from the judgment) (court's decision in *Hasting* does not preclude court from exercising supervisory power over prosecutor's actions before the grand jury), *cert. denied*, 465 U.S. 1079 (1984); *Hogan*, 712 F.2d at 762 n.2 (same).

¹⁶⁹ See *Hogan*, 712 F.2d at 761-62; *Gonsalves*, 691 F.2d at 1319-20; *United States v. Samango*, 607 F.2d 877, 884-85 (9th Cir. 1979); *United States v. Basurto*, 497 F.2d 781, 793-94 (9th Cir. 1974) (Hufstedler, J., concurring); *Estepa*, 471 F.2d at 1136; *United States v. Kilpatrick*, 594 F. Supp. 1324, 1352 (D. Colo. 1984); *United States v. Sears, Roebuck & Co.*, 579 F. Supp. 1055, 1056 (C.D. Cal. 1984); *Asdrubal-Herrera*, 470 F. Supp. at 942-43; *United States v. Phillips Petroleum Co.*, 435 F. Supp. 610, 622 (N.D. Okla. 1977).

tence of ethical rules enforceable through its exercise, enables the courts to maintain some direct control over prosecutorial improprieties before the grand jury without having to resort to constitutional doctrine to allow for such judicial intervention.¹⁷⁰ In the absence of this supervisory power, judicial control would likely be exercised either through the formulation of constitutionally derived rules governing the prosecutor's presentation to the grand jury or by the incorporation of the prosecutor's culpability into the calculus for assessing whether the prosecutor's actions before the grand jury violated the defendant's constitutional rights.¹⁷¹ It might be argued that in the absence of judicial supervisory responsibility over grand juries there would not be, and courts would not perceive, any need to regulate prosecutorial conduct before the grand jury—and certainly not without primary regard to its impact on the defendant. However persuasive this contention might be in a world in which grand juries truly functioned as an independent screen between the prosecutor and the accused rather than as a captive, investi-

¹⁷⁰ This point is illustrated by the Ninth Circuit's decisions in *Sears, Roebuck & Co.* and *Basurto*. In *Basurto*, the prosecutor discovered just prior to trial that a witness he had presented to the grand jury had perjured himself. Although the prosecutor informed defense counsel of this fact, he did not inform the grand jury or take steps to correct the testimony there. The majority held that the prosecutor's failure to "cure" the indictment by informing the grand jury violated the defendant's due process rights and reversed his conviction. See *Basurto*, 497 F.2d at 784, 787. Specially concurring, Judge Hufstедler found the majority's conclusion that the defendant's constitutional rights had been violated "not persuasive" because the prosecutor notified both defense counsel and the trial court of the problem. See *id.* at 793. She found, however, that "it would be an appropriate exercise of our power to supervise the administration of criminal justice in the federal courts to impose upon federal prosecutors the duty to notify the grand jury described by the majority." *Id.* The majority's unnecessary reliance on the Constitution to impose on the prosecutor the duty to notify the grand jury upon learning that testimony presented to it was perjurious may have contributed to the fact that "*Basurto* has not fared well in the ensuring [sic] years." 8 J. MOORE, W. TAGGART & J. WICKER, *supra* note 118, at ¶ 6.04[2].

In *Sears, Roebuck & Co.*, the majority held that the cumulative effect of a variety of prosecutorial grand jury abuses did not violate the defendant's rights under the fifth amendment and reversed the district court's dismissal of the indictment. See *Sears, Roebuck & Co.*, 719 F.2d at 1393-95. However Judge Norris, who wrote the court's opinion, also wrote a separate opinion dissenting in part from the judgment and recommending that the case be remanded so that the district court could consider whether the indictment ought to be dismissed under its supervisory powers. See *id.* at 1394. Despite the majority's outright reversal of the district court's initial decision dismissing the indictment, the district court on remand again dismissed the indictment, this time expressly exercising its supervisory powers. See *Sears, Roebuck & Co.*, 579 F. Supp. at 1056.

¹⁷¹ This assumes the continued absence of legislation governing the prosecutor's grand jury presentation, a very reasonable assumption. The courts could exercise indirect control over a prosecutor's misdeeds before the grand jury, for example, by referring the incident to a relevant professional disciplinary body, such as the prosecutor's bar association or employer. See, e.g., *Serubo*, 604 F.2d at 819 (suggesting discipline by the Attorney General).

gative arm of the government, that day has long since passed.¹⁷² The increasing willingness of courts to monitor prosecutorial actions before the grand jury in large part reflects their skepticism that the grand jury meaningfully restrains the prosecutor.¹⁷³

The courts are freer to use their supervisory power over grand juries to disapprove a prosecutor's grand jury actions without making the prosecutor's personal culpability the linchpin of their disapprobation because one of the dominant rationales for exercising supervisory power is the protection of judicial integrity;¹⁷⁴ and judicial integrity may be impaired by inadvertent or negligent prosecutorial actions no less than by intentional ones.¹⁷⁵ Consequently, although the courts have indicated that their supervisory power is most appropriately exercised to correct a pattern of prosecutorial grand jury abuse that must, by its

¹⁷² See Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & CRIMINOLOGY 174, 182 (1973) (The grand jury "has degenerated into nothing but a convenient shield for the prosecutor."); Comment, *The Improbability of Probable Cause—The Inequity of the Grand Jury Indictment Versus the Preliminary Hearing in the Illinois Criminal Process*, 1981 S. ILL. L.J. 281, 282-88 (1981) (detailing the history of the grand jury system); see also *Grand Jury Reform: Hearings on H.R. 94 Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 738 (1977) (statement of Benjamin Civiletti, Assistant Attorney General, Department of Justice) (In 1976, 123 no-true bills were returned by federal grand juries compared with 23,000 indictments.).

¹⁷³ See *Basurto*, 497 F.2d at 785 (dismissing indictment as unconstitutional when based on testimony that the prosecutor knows to be perjured); *In re Grand Jury Proceedings* (Schofield), 486 F.2d 85, 94 (3d Cir. 1973) (Seitz, J., concurring) (noting the potential for arbitrary exercise of prosecutorial power in the grand jury system); 1 W. LAFAYE & J. ISRAEL, *supra* note 26, at § 8.4.

¹⁷⁴ See, e.g., *United States v. Payner*, 447 U.S. 727, 735 n.8 (1980) (stating that the interest in protecting judicial integrity outweighs the societal interest in presenting probative evidence); *United States v. McClintock*, 748 F.2d 1278, 1285 (9th Cir. 1984) (stating that the purpose of using supervisory powers is to protect judicial integrity and deter illegality), *cert. denied*, 106 S. Ct. 75 (1985); *United States v. Adamo*, 742 F.2d 927, 942 (6th Cir. 1984) (stating that "the power to exercise supervisory control over the prosecutor to protect the integrity of the judicial system" still exists), *cert. denied*, 469 U.S. 1193 (1985); *Sears, Roebuck & Co.*, 719 F.2d at 1394 (Norris, J., dissenting in part from the judgment) (stating that the court may use its supervisory power to dismiss an indictment in order to protect judicial integrity); *United States v. Pino*, 708 F.2d 523, 531 (10th Cir. 1983) (holding that use of suppressed testimony in grand jury proceedings does not justify exercise of supervisory power to protect judicial integrity); *United States v. Gonsalves*, 691 F.2d 1310, 1317 (9th Cir. 1982) (acknowledging that an important purpose of the court's supervisory power is to preserve judicial integrity), *vacated*, 469 U.S. 806 (1983); *United States v. Asdrubal-Herrera*, 470 F. Supp. 939, 943 (N.D. Ill. 1979) (stating that where the totality of circumstances permits, supervisory power may be employed to protect judicial integrity). The other major rationale for a court's exercise of its supervisory powers is to determine illegality. See *McClintock*, 748 F.2d at 1285; *Sears, Roebuck & Co.*, 719 F.2d at 1394 (Norris, J., dissenting in part from the judgment).

¹⁷⁵ See *Asdrubal-Herrera*, 470 F. Supp. at 943 (N.D. Ill. 1979); cf. *Mesarosh v. United States*, 352 U.S. 1, 9 (1956) ("The dignity of the United States Government will not permit the conviction of any person on tainted testimony.").

institutional nature, be intentional,¹⁷⁶ they have also evinced a willingness to use that power to correct individual grand jury improprieties of serious magnitude regardless of the particular prosecutor's mental state in committing the abuses.¹⁷⁷

D. *The Prosecutor's Obligation to Disclose Exculpatory Evidence*

1. The Nature and Source of the Proscription

Under some circumstances, the prosecution has a constitutional obligation, derived from the due process clause, to reveal to a defendant information in its possession that is favorable to the defendant.¹⁷⁸ Commonly called the "*Brady* doctrine" after the case in which the duty was first explicitly recognized,¹⁷⁹ this obligation applies not only to evidence that would affirmatively negate a defendant's guilt or tend to reduce her punishment ("exculpatory" evidence), but also to evidence that

¹⁷⁶ See, e.g., *United States v. Griffith*, 756 F.2d 1244, 1249 (6th Cir.), *cert. denied*, 106 S. Ct. 114 (1985); *Adamo*, 742 F.2d at 941; *United States v. Serubo*, 604 F.2d 807, 817 (3d Cir. 1979); *United States v. Birdman*, 602 F.2d 547, 564 (3d Cir. 1979), *cert. denied*, 444 U.S. 1032 (1980).

¹⁷⁷ See, e.g., *United States v. Hogan*, 712 F.2d 757, 762 (2d Cir. 1983); *United States v. Al Mudarris*, 695 F.2d 1182, 1188 (9th Cir.), *cert. denied*, 461 U.S. 932 (1983); *United States v. Samango*, 607 F.2d 877, 882 (9th Cir. 1979); *United States v. McKenzie*, 524 F. Supp. 186, 189, 195 (E.D. La. 1981), *vacated*, 678 F.2d 629 (5th Cir.), *cert. denied*, 459 U.S. 1038 (1982); *Asdrubal-Herrera*, 470 F. Supp. at 943 (N.D. Ill. 1979); *United States v. Phillips Petroleum Co.*, 435 F. Supp. 610, 618 (N.D. Okla. 1977).

¹⁷⁸ There are, of course, other nonconstitutionally based disclosure obligations imposed on prosecutors. In federal prosecutions, for example, these obligations include those imposed by Rule 16 of the Federal Rules of Criminal Procedure and the Jencks Act, 18 U.S.C. § 3500 (1982). Rule 16 generally provides for the disclosure, upon request, of any statement made by the defendant, the defendant's criminal record, relevant documents and other tangible evidence, and reports of examinations and tests. The Jencks Act provides for disclosure of any previous statement made by a witness called by the government at trial. Under the Act, which is a codification of the Court's decision in *Jencks v. United States*, 353 U.S. 657 (1957), the prosecutor must turn over such material only after the witness has testified on direct examination. In practice, however, "Jencks material" is often turned over prior to a government witness's testimony in order to afford the defense adequate time to digest the material in preparing for the witness's cross-examination.

Many states have provisions that parallel Rule 16 and the Jencks Act as well as additional criminal discovery procedures. See 3 W. LAFAYE & J. ISRAEL, *supra* note 26, at § 19.3. Nevertheless, because a prosecutor's obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), are constitutionally derived and concern all types of evidence in all criminal cases, *Brady* remains a critical source of a prosecutor's discovery obligations. See *United States v. Starusko*, 729 F.2d 256, 263 (3d Cir. 1984) (if evidence is covered by both the Jencks Act and the prosecutor's obligations under *Brady*, the timing of its production is governed by the latter).

¹⁷⁹ See *Brady*, 373 U.S. at 87.

could discredit prosecution witnesses ("impeachment" evidence).¹⁸⁰ A prosecutor's failure to reveal *Brady* material may result in the reversal of a defendant's conviction.¹⁸¹

The *Brady* doctrine has its roots in an earlier line of cases that held various knowing uses of perjured testimony by a prosecutor to violate a defendant's due process rights.¹⁸² As *Brady*'s acknowledged foundation in these perjury cases suggests,¹⁸³ the *Brady* doctrine's overriding purpose is to ensure that the prosecutor's suppression of favorable evidence in its possession does not deny a defendant who goes to trial a fair trial. The doctrine apparently does not reach the prosecutor's suppression of favorable evidence where, as in the vast majority of criminal cases, the defendant does not go to trial but instead pleads guilty.¹⁸⁴ The Court's unwillingness to define a prosecutor's constitutional disclosure obligations in terms other than a defendant's right to a fair trial stems from its concern that a broader, constitutionally based right to discovery "would entirely alter the character and balance of our present

¹⁸⁰ See *United States v. Bagley*, 473 U.S. 667, 676 (1985).

¹⁸¹ See, e.g., *Brown v. Wainwright*, 785 F.2d 1457, 1464-66 (11th Cir. 1986) (holding that a prosecutor's use of false evidence that is material requires reversal); *United States v. Srulowitz*, 785 F.2d 382, 387-389 (2d Cir. 1986) (holding that refusal to allow defendant access to files held by the government violated *Brady*); *Lindsey v. King*, 769 F.2d 1034, 1043 (5th Cir. 1985) (reversing conviction where police withheld a specifically requested police report); *State v. Cohane*, 193 Conn. 474, 496, 479 A.2d 763, 777 (stating that failure to disclose exculpatory evidence was reversible error), cert. denied, 469 U.S. 990 (1984); *State v. Lukezic*, 143 Ariz. 60, 65, 691 P.2d 1088, 1092 (1984) (ordering new trial where prosecutor failed to disclose that state aid was given to witness).

¹⁸² In the earliest of these cases, *Mooney v. Holohan*, 294 U.S. 103 (1935), the Court condemned as unconstitutional a prosecutor's deliberate use of perjured testimony to obtain a conviction. The *Mooney* holding, which was reaffirmed in *Pyle v. Kansas*, 317 U.S. 213 (1942), was first expanded in *Alcorta v. Texas*, 355 U.S. 28 (1957), where the Court held that a prosecutor's knowing failure to correct unsolicited perjured testimony also violated due process. *Alcorta*, in turn, was expanded in *Napue v. Illinois*, 360 U.S. 264 (1959), where the Court extended a prosecutor's obligation to correct known, unsolicited, perjured testimony to testimony that relates solely to the credibility of the witness.

¹⁸³ The Court in *Brady* characterized its ruling as "an extension of *Mooney v. Holohan*." 373 U.S. at 86.

¹⁸⁴ See *Bagley*, 473 U.S. at 675 ("[T]he prosecutor is . . . required . . . only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial."); *United States v. Agurs*, 427 U.S. 97, 108 (1976) ("[T]he prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial."); *id.* at 112 n.20 (rejecting the argument that the focus should be on "the impact of the undisclosed evidence on the defendant's ability to prepare for trial, rather than the materiality of the evidence to the issue of guilt or innocence"); cf. *United States v. Starusko*, 729 F.2d 256, 262 (3d Cir. 1984) (indicating that *Brady* is inapplicable where, despite the prosecutor's nondisclosure of favorable evidence, the defense obtains it from another source immediately prior to trial).

systems of criminal justice.”¹⁸⁵

2. How the Proscription Is Enforced

Because the courts have derived the prosecutor's constitutional disclosure obligation from the right to a fair trial and have limited it to securing that right, they define the obligation by reference to the probable effect of the suppressed evidence on the defendant's trial. Unless the evidence had a sufficient potential to influence the verdict, its suppression by the prosecutor does not amount to constitutional error.¹⁸⁶ The capacity of the undisclosed evidence to affect the verdict is, in the parlance of the *Brady* cases, phrased as a question of the “materiality” of the suppressed evidence.¹⁸⁷ Nondisclosure does not violate due process unless the unrevealed evidence is sufficiently “material.” Given its overriding concern with the putative effect of the undisclosed evidence

¹⁸⁵ *Giles v. Maryland*, 386 U.S. 66, 117 (1967) (Harlan, J., dissenting), quoted in *Bagley*, 473 U.S. at 675 n.7.

¹⁸⁶ It is possible to take the view that a defendant's interest in being informed about information helpful to her case is so substantial that any failure by the prosecutor to disclose favorable material in its possession constitutes a constitutional violation. See *Bagley*, 473 U.S. at 693 (Marshall, J., dissenting); *United States v. Oxman*, 740 F.2d 1298, 1311 (3d Cir. 1984) (applying admissibility standard), vacated and remanded *sub nom.*, *United States v. Pflaumer*, 473 U.S. 922, *rev'd*, 774 F.2d 1224, 1230 (3d Cir. 1985) (applying *Bagley*). Under this view, the materiality of the evidence and, perhaps, the prosecutor's motivation in failing to turn it over would be relevant to the remedy for the violation—whether the failure warrants reversal—rather than to the question whether a constitutional violation exists. The Court, however, has viewed the materiality of the suppressed evidence as a necessary element of the constitutional violation itself. As the Court observed in *Agurs*, 427 U.S. at 108, “the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial.” This is consistent with the Court's recent insistence in other contexts that prejudice to the defendant is a necessary element of a constitutional violation. See, e.g., *Strickland v. Washington*, 466 U.S. 668, 691-96 (1984) (ineffective assistance of counsel); *United States v. Valenzuela-Bernal*, 458 U.S. 858, 873-74 (1982) (compulsory process); see also *United States v. Morrison*, 449 U.S. 361, 365-66 (1981) (remarks by federal agents disparaging defendant's attorney did not interfere with defendant's right to assistance of counsel absent showing of prejudice).

¹⁸⁷ The choice of the term “materiality” is unfortunate. In evidence, at least as used by McCormick and his followers, the term simply refers to “the relation between the propositions for which the evidence is offered and the issues in the case.” E. CLEARY, *MCCORMICK ON EVIDENCE* § 185, at 541 (3d ed. 1984). So long as the proposition to which the evidence is applicable has a reasonable bearing on an issue in the case, the evidence is material. See *Bagley*, 473 U.S. at 703 n.5 (Marshall, J., dissenting).

It is rarely the case that evidence that is the subject of a *Brady* claim is not material in this sense. As used in the *Brady* context, however, materiality is concerned not with the logical connection between the proposition for which evidence is offered and the issues in the case, but with the broader and more speculative question of the likely effect of the suppressed evidence on the outcome of the trial. Thus, evidence may be material in the traditional sense, but lack materiality for *Brady* purposes.

on the defendant's trial, the Court has emphasized that a prosecutor's mental state in failing to reveal *Brady* material is irrelevant to whether the failure constitutes a constitutional violation. Indeed, the central holding in *Brady* itself was that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."¹⁸⁸ This holding has been reiterated verbatim in subsequent cases¹⁸⁹ and underscored by the Court's observations that "the misconduct's effect on the trial, not the blameworthiness of the prosecutor, is the crucial inquiry for due process purposes,"¹⁹⁰ and "[i]f the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor."¹⁹¹

The Court's insistence on the irrelevance of prosecutorial culpability is, if not inaccurate, at least misleading. This is because the Court has been unwilling to evaluate all suppression claims under a single standard of materiality but has, instead, varied the level of materiality required in accord with the prosecutor's culpability or knowledge. This development is manifest in two of the Court's most recent pronouncements in the *Brady* area.

In *United States v. Agurs*,¹⁹² the Court indicated that there is a constitutionally significant difference between a prosecutor's knowing use of perjured testimony and a prosecutor's refusal or failure to reveal favorable evidence to the defense.¹⁹³ In addition, with respect to undisclosed evidence favorable to the defense, the Court held that the Constitution imposes different obligations upon the prosecutor depending upon whether the evidence in its possession is the subject of a "specific" defense request on the one hand, or only a "general" request or no request at all on the other.¹⁹⁴ The Court distinguished these three situ-

¹⁸⁸ *Brady*, 373 U.S. at 87; accord *Agurs*, 427 U.S. at 110 n.17.

¹⁸⁹ See, e.g., *Pennsylvania v. Ritchie*, 107 S. Ct. 989, 1001 (1987); *Valenzuela-Bernal*, 458 U.S. at 868; *Smith v. Phillips*, 455 U.S. 209, 219 (1982); *Agurs*, 427 U.S. at 104 n.10, 110 n.17; *Moore v. Illinois*, 408 U.S. 786, 794, 808 (1972) (Marshall, J., concurring in part and dissenting in part); *Giglio v. United States*, 405 U.S. 150, 153 (1972).

¹⁹⁰ *Smith*, 455 U.S. at 220 n.10.

¹⁹¹ *Agurs*, 427 U.S. at 110.

¹⁹² 427 U.S. 97 (1976).

¹⁹³ See *id.* at 103-04.

¹⁹⁴ See *id.* at 106-07. Earlier cases had generally alluded to the fact that a defense request for the favorable evidence might factor into the constitutional analysis. See, e.g., *Moore v. Illinois*, 408 U.S. 786, 794-95 (1972); *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Prior to *Agurs*, however, the Court had neither elaborated upon what constituted a "defense request," nor formalized the constitutional consequences of the presence or absence of such a request.

ations—(a) the knowing use of perjured testimony, (b) the failure to disclose specifically requested evidence, and (c) the failure to disclose generally requested or unrequested evidence—in terms of the showing of materiality required for each type of suppression to constitute a due process violation.

In the first situation—where “the prosecution’s case includes perjured testimony and . . . the prosecution knew, or should have known, of the perjury”¹⁹⁵—the Court held that the lowest standard of materiality applies and that a conviction must be reversed “if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.”¹⁹⁶ In the second situation—where the prosecutor fails to disclose specifically requested evidence—the Court indicated that a low standard of materiality would suffice to warrant reversal, but it did not specify what that standard was.¹⁹⁷ In the final situation—where the undisclosed evidence was not requested by the defense or was encompassed only within a general request, such as one for “all exculpatory evidence,” or “all *Brady* material”—the Court held that reversal was warranted only where the undisclosed evidence met a high standard of materiality, which the Court seemingly set at “creat[ing] a reasonable doubt that did not otherwise exist”¹⁹⁸

This tripartite scheme was subsequently modified in *United States v. Bagley*.¹⁹⁹ The Court there confirmed that the most lenient material-

¹⁹⁵ *Agurs*, 427 U.S. at 103.

¹⁹⁶ *Id.*

¹⁹⁷ Relying on the Court’s observations that this category of cases was “illustrated by the *Brady* case itself,” *id.* at 104, and that “[a] fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial,” *id.*, a number of courts and commentators interpreted the standard of materiality to be applied in specific request cases as whether the undisclosed evidence “might have affected the outcome of the trial.” See, e.g., *Walker v. Lockhart*, 598 F. Supp. 1410, 1431 (E.D. Ark. 1984), *rev’d*, 763 F.2d 942 (8th Cir. 1985) (en banc), *cert. denied*, 106 S. Ct. 3332 (1986); *United States v. Stifel*, 594 F. Supp. 1525, 1539 n.14 (N.D. Ohio 1984); *State v. Cohane*, 193 Conn. 474, 497, 479 A.2d 763, 776, *cert. denied*, 469 U.S. 990 (1984); Comment, *The Prosecutor’s Duty of Disclose [sic]: From Brady to Agurs and Beyond*, 69 J. CRIM. L. & CRIMINOLOGY 197, 201 & n.78 (1978). In *United States v. Bagley*, 473 U.S. 667 (1985), the Court modified the standard of materiality in “specific request” cases. It held that the same standard applies regardless of whether there was a specific request, a general request or no request. In all cases of prosecutorial nondisclosure, “[t]he evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.” *Id.* at 682.

¹⁹⁸ *Agurs*, 427 U.S. at 112; see also *Lindsey v. King*, 769 F.2d 1034, 1041 (5th Cir. 1985) (citing *Agurs*); *Carey v. Duckworth*, 738 F.2d 875, 877 (7th Cir. 1984) (same).

¹⁹⁹ 473 U.S. 667 (1985).

ity standard applies in situations involving "the prosecutor's knowing use of perjured testimony or, equivalently, the prosecutor's knowing failure to disclose that testimony used to convict the defendant was false."²⁰⁰ The Court also confirmed that this low standard of materiality is confined to such cases and is not applicable to other types of prosecutorial suppression.²⁰¹ The Court in part, however, disavowed the distinction in *Agurs* between specific request cases and general or no request cases. A bare majority held that the same standard of materiality applies for determining whether a prosecutor's nondisclosure constitutes a due process violation regardless whether the unrevealed evidence was the subject of a specific request, a general request, or no request at all.²⁰² Nevertheless, two of the five Justices in the majority indicated that a prosecutor's nondisclosure was more likely to meet this standard of materiality²⁰³ when the evidence was the subject of a specific defense request.²⁰⁴

It is clear, then, that under the *Agurs-Bagley* scheme a prosecutor's mental state is not, as the Court has insisted, wholly irrelevant to determining when the nondisclosure of evidence favorable to the defense amounts to constitutional error. Were the constitutional concern truly limited to "the misconduct's effect on the trial,"²⁰⁵ then the same standard of materiality would be applicable to all nondisclosures. If some types of prosecutorial suppression are more likely than others to affect a trial, then such nondisclosures are more apt to meet the requisite standard of materiality and will more frequently result in a constitutional violation. There is no need to evaluate their effect under a different standard of materiality.

The distinctions the Court has drawn in the *Brady* area reflect

²⁰⁰ *Id.* at 678. The Court noted that the materiality standard to be applied in perjury cases, as set forth in *Agurs*, is effectively the same as the constitutional harmless error standard established in *Chapman v. California*, 386 U.S. 18 (1967). See *Bagley*, 473 U.S. at 679 & n.9. Thus, another way to view the materiality standard applicable where a conviction was obtained through the prosecutor's knowing use of perjured testimony is that such a conviction must be set aside unless the use of the perjured testimony is harmless beyond a reasonable doubt.

²⁰¹ See *id.* at 680-83; see also *United States v. Jackson*, 780 F.2d 1305, 1309-10, 1312 (7th Cir. 1986).

²⁰² *Bagley*, 473 U.S. at 682-83 (Blackmun, J., joined by O'Connor, J.); *id.* at 685 (White, J., joined by Burger, C.J., and Rehnquist, J.).

²⁰³ For the standard of materiality applicable to all nondisclosure cases other than cases involving the prosecutor's knowing use of perjury, see *supra* note 194.

²⁰⁴ *Bagley*, 473 U.S. at 682-83 (Blackmun, J., joined by O'Connor, J.); see also *Lindsey v. King*, 769 F.2d 1034, 1041 (5th Cir. 1985) ("Viewing the opinions [in *Bagley*] as a whole, it is fair to say that all of the participating Justices agreed on one thing at least: that reversal for suppression of evidence by the government is most likely where the request for it was specific . . .").

²⁰⁵ *Smith v. Phillips*, 455 U.S. 209, 220 n.10 (1982).

differences in the prosecutor's culpability with respect to different types of suppression. First, the lenient, pro-defense standard of materiality applicable where a prosecutor has knowingly used or failed to correct perjured testimony reflects the high degree of prosecutorial culpability inherent in this situation.²⁰⁶ Although the Court has acknowledged this,²⁰⁷ it has contended that the "more important[]" reason for treating perjured testimony so strictly is that it involves "a corruption of the truth-seeking function of the trial process."²⁰⁸ The Court has never explained the precise nature of the "corruption" rationale. If its concern is with the integrity of the evidence that the government utilizes to prove its case, the rationale is not a persuasive basis for treating perjured testimony differently from other types of prosecutorial suppression—a point readily seen from the Court's decision in *Giglio v. United States*.²⁰⁹

In *Giglio*, a government witness denied at trial that he had been promised that the government would not prosecute him in exchange for his testimony. In fact, such a promise had been made by the prosecutor who presented the case to the grand jury. The prosecutor who tried *Giglio*'s case did not, however, know about the first prosecutor's promise. At the time *Giglio* was decided, neither the perjury decisions nor *Brady* reached *Giglio*'s situation—the perjury cases because the trial prosecutor did not know that the witness' testimony was false and *Brady* because it had not yet been expanded by *Bagley* to cover impeachment evidence. Rather than choosing between the perjury cases and *Brady* for the relevant analysis, a unanimous Court relied upon both. It held that the prosecutor had a duty to disclose information relating to the credibility of an important government witness, and that a failure to inform the jury of such information required reversal "if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . .'"²¹⁰—the standard of materiality applicable in perjury cases. Thus, *Giglio* correctly recognized that the prosecutor's suppression of evidence and the prosecutor's use of false evidence "are sides of a single coin."²¹¹ The integrity of the prosecutor's

²⁰⁶ See *United States v. Agurs*, 427 U.S. 97, 121 (1976) (Marshall, J., dissenting) (suggesting that the purpose of the lenient materiality standard may be to deter deliberate prosecutorial misconduct).

²⁰⁷ See *Bagley*, 473 U.S. at 678-80 (Blackmun, J.); *Agurs*, 427 U.S. at 103-04.

²⁰⁸ *Agurs*, 427 U.S. at 104.

²⁰⁹ 405 U.S. 150 (1972).

²¹⁰ *Id.* at 154 (quoting *Napue v. Illinois*, 360 U.S. 264, 271 (1959)).

²¹¹ *Babcock, Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133, 1151 (1982). But see Note, *A Prosecutor's Duty to Disclose Promises of Favorable Treatment Made to Witnesses for the Prosecution*, 94 HARV. L. REV. 887, 896 (1981) ("[A] jury that hears nothing is better in-

case is impaired whether the jury hears that no promises were made or, instead, does not hear that promises were made.²¹²

In addition to the corollary relationship between the obligation to refrain from using perjured testimony and the duty to reveal favorable evidence, there is another reason to doubt the "corruption" rationale for treating perjury cases differently. That is the Court's insistence that the prosecutor's use of the perjured testimony must be "knowing" for the most lenient standard of materiality to apply.²¹³ Putting aside the un-

formed than one that is actively misled.").

²¹² See Babcock, *supra* note 211, at 1151. This point is buttressed by the fact that whether a witness's testimony amounts to perjury or simply implicates a nondisclosure by the prosecutor is often largely a matter of characterization. *Id.* at 1151 n.70; Comment, *supra* note 197, at 204-05. For example, in *Scott v. Foltz*, 612 F. Supp. 50 (E.D. Mich. 1985), a prosecution witness who testified against the defendant in exchange for a plea agreement disposing of the charges against her denied that she was "promised anything in return for the plea of guilty," or for her testimony. *Id.* at 52. The witness's plea agreement did, however, require the prosecutor to make certain recommendations concerning the witness's sentence. Despite the fact that the witness's answer was, arguably, technically true and therefore not perjury, the court held that the case was governed by the perjury cases and granted the defendant's habeas petition. The court reasoned: "[w]hether [the witness] could properly be charged with perjury under state law or not, the jury was clearly misled. This 'false evidence' is precisely what the rule of *Napue* and *Giglio* was designed to prevent." *Id.* at 57; see also Babcock, *supra* note 211, at 1151 (arguing that the prosecutor's failure to disclose promises of favorable treatment should always be treated as the knowing use of perjury).

In contrast, in *Carey v. Duckworth*, 738 F.2d 875 (7th Cir. 1984), where the key government witness testified that the Drug Enforcement Administration (DEA) had promised him nothing despite the fact that DEA agents had promised that they "would put in a good word for him," *id.* at 878, the court held that the testimony should not be viewed as perjurious. The court observed: "[w]hile [the witness] might have been more forthcoming in his testimony, neither can he be charged with defense counsel's failure to ask penetrating questions on cross examination." *Id.*

Similar problems of characterization arise when a prosecution witness testifies inconsistently with a prior statement that the prosecutor has in her possession, but which she has failed to disclose to the defense. Whether the prosecutor's case includes known perjury in this situation depends upon (a) whether the witness's trial testimony is truly inconsistent with the witness's previous statement, (b) whether any inconsistency that does exist is deliberate rather than due to mistake, and (c) which of the statements, the trial testimony or the previous statement, is, in fact, true. Compare *United States v. Hutcher*, 622 F.2d 1083, 1088 n.3 (2d Cir.) (when it was the witness's prior testimony, rather than the testimony at defendant's trial, that was false, the perjury standard of materiality does not apply), *cert. denied*, 449 U.S. 875 (1980) with *State v. Cohane*, 193 Conn. 474, 497-99, 479 A.2d 763, 776-77 (regardless of whether it was the witness's prior statement that was false, the perjury standard applies), *cert. denied*, 469 U.S. 990 (1984).

²¹³ See *United States v. Bagley*, 473 U.S. 667, 679-80 (1985) (Blackmun, J.); *id.* at 709 (Stevens, J., dissenting); *Smith v. Phillips*, 455 U.S. 209, 220 n.10 (1982); *Agurs*, 427 U.S. at 103 (Since *Mooney*, "the Court has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."); *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (a criminal conviction procured by state prosecuting authorities solely by the use of perjured testimony known by them to be perjured and knowingly used to procure the

certain extent to which knowledge on the part of other members of the prosecution team will be imputed to the trial prosecutor,²¹⁴ if the prosecutor did not in some sense "know" that the state's case included perjury, then, presumably, the defense must demonstrate that the perjured testimony meets a standard of materiality higher than that set forth in *Bagley* and *Agurs* for perjury cases, in order to obtain relief.²¹⁵ The effect, however, of perjured testimony on the "truth seeking function of the trial process" is the same whether or not the prosecutor knows of the perjury. The prosecutor's knowledge does not change what the jury hears.

The second way in which the prosecutor's culpability is reflected in the *Brady* area is the disparate treatment accorded the nondisclosure of favorable evidence depending upon whether the evidence was specifically requested by the defense, a disparity that was reduced, but not

conviction violates the fourteenth amendment's due process clause).

²¹⁴ Under *Giglio*, knowledge possessed by one prosecutor in a given office is imputed to another prosecutor in the same office. 405 U.S. at 154. In addition to treating the prosecutor's office as a single entity, the courts are generally willing to impute to a prosecutor the knowledge of investigatory law enforcement personnel who work closely with the prosecutor. See e.g., *United States v. Kaufmann*, 783 F.2d 708, 709 n.5 (7th Cir. 1986) (noting that "other courts have held that the knowledge of a public officer or government agent may be attributable to the prosecution"); *Government of the Virgin Islands v. Martinez*, 780 F.2d 302, 308 n.8 (3d Cir. 1985) (citing cases where *Brady* applied despite the fact that prosecutor had no personal knowledge of the existence of evidence); *Wedra v. Thomas*, 671 F.2d 713, 717-18 n.1 (2d Cir.) (imputing police officer's knowledge to prosecutor if officer acted as an arm of the prosecutor), *cert. denied*, 458 U.S. 1109 (1982). Beyond this, however, the extent to which a prosecutor will be charged with knowledge on the part of other state actors—even law enforcement personnel—is unclear, and seems largely a function of the strength of the connection between the prosecutor and the person possessing knowledge of the evidence. See *Pina v. Henderson*, 752 F.2d 47, 49-50 (2d Cir. 1985) (refusing to impute parole officer's knowledge to prosecutor since he did not work in conjunction with either the police or the prosecutor and thus could not be regarded as an arm of the prosecutor); *Walker v. Lockhart*, 598 F. Supp. 1410, 1432 (E.D. Ark. 1984) (since police officer was not involved in general investigation of crime, but was instead given a limited investigative assignment, it was unreasonable to charge prosecutor with having suppressed material, the significance of which was lost upon police officer), *rev'd*, 763 F.2d 942 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 3332 (1986).

²¹⁵ See *United States v. Stofsky*, 527 F.2d 237, 245 (2d Cir. 1975) (government witness's perjury was not the product of governmental misconduct justifying the application of the looser standards of post-trial review), *cert. denied*, 429 U.S. 819 (1976). The standard of materiality most likely to be applied is the standard applicable where a defendant seeks a new trial on the ground that newly discovered evidence demonstrates that a witness at trial committed perjury. Under the leading case of *Larrison v. United States*, 24 F.2d 82, 87 (7th Cir. 1928), that standard is whether the newly discovered evidence might have produced a different verdict. See *Kyle v. United States*, 297 F.2d 507, 512 (2d Cir. 1961) (contrasting the *Larrison* standard with the stricter standard that the evidence would "probably" produce a different verdict), *cert. denied*, 377 U.S. 909 (1964).

eliminated, in *Bagley*.²¹⁶ The Court's greater willingness to find specifically requested evidence to be material stems in part from a sense that the nondisclosure of such evidence affirmatively misleads the defense to believe that it does not exist, while the nondisclosure of generally requested or unrequested evidence is less likely to have this effect.²¹⁷ As valid as this concern may be, it is one directed to the effect of the prosecutor's actions on a defendant's preparation for trial, a concern that is not the focus of the *Brady* doctrine,²¹⁸ rather than to the effect of the evidence on the trial itself. More to the point of the doctrine's fair trial focus, inherent in the greater solicitude for specifically requested evidence is the recognition that a specific request puts the prosecutor on notice of the importance of the evidence to the defense.²¹⁹ Where specifically requested evidence is not disclosed and consequently is not presented or utilized at trial, the prosecutor "knows" that the jury has not received information that the defense deems meaningful in much the same way that the prosecutor "knows" that the jury has received misinformation where the prosecutor's case includes known perjury.²²⁰ Conversely, in the absence of a specific request, it will often be unfair to impute such knowledge to the prosecutor.²²¹

Indeed, the prosecutor's *Brady* obligations with respect to generally requested or unrequested evidence are, to a significant degree, driven by notions concerning when an inference of prosecutorial knowledge may be drawn. As Justice Stevens explained in *Agurs*, the vice shared by a general request and the absence of any request is their lack

²¹⁶ See *Bagley*, 473 U.S. at 681-83 (Blackmun, J.); see also *Martinez*, 780 F.2d at 307 (post-*Bagley* case noting that "[i]f the suppressed information was specifically requested, review of its materiality must take that fact into account"); *Lindsey v. King*, 769 F.2d 1034, 1041 (5th Cir. 1985) (post-*Bagley* case noting that "reversal for suppression of evidence by the government is most likely where the request for it was specific"); *supra* note 204.

²¹⁷ See *Bagley*, 473 U.S. at 682 (Blackmun, J.); *id.* at 714 (Stevens, J., dissenting); Babcock, *supra* note 211, at 1150.

²¹⁸ See *supra* notes 183-85 and accompanying text.

²¹⁹ See *Agurs*, 427 U.S. at 106, 121-22 n.7 (Marshall, J., dissenting); *Martinez*, 780 F.2d at 307 n.5.

²²⁰ In his dissent in *Bagley*, Justice Stevens, who authored *Agurs*, argued that the *Brady* doctrine was only applicable to "the prosecution's deliberate nondisclosure." *Bagley*, 473 U.S. at 709 (Stevens, J., dissenting). In his view, other types of nondisclosure "simply fall 'outside the *Brady* context.'" *Id.* at 712 (quoting the majority opinion at 681).

²²¹ The less stringent treatment of *Brady* evidence that has not been specifically requested may also reflect a related concern with fairness to the prosecutor. According to this notion, just as appellate reversal is generally forbidden unless an error is raised at trial so that the trial judge can correct it, a prosecutor should not have to suffer the reversal of an otherwise valid conviction because of error that the defendant was able to, but did not, bring to the prosecutor's attention prior to the verdict.

of notice to the prosecutor.²²² Consequently, the prosecutor's obligation to disclose evidence in these situations arises only "if the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce."²²³ That is, the disclosure is required only if the evidence is such that the prosecutor's knowledge of both its existence and its exculpatory character may be inferred. If, however, the prosecutor actually does not have knowledge of the exculpatory information in her possession, a duty of disclosure does not arise.²²⁴

In addition to shaping the structure of analysis in the *Brady* area,

²²² See *Agurs*, 427 U.S. at 106-07.

²²³ *Id.* at 107; see also *id.* at 103 (describing the *Brady* rule as arguably applicable in three situations, each of which "involves the discovery, after trial, of information which had been known to the prosecution but unknown to the defense"). Although *Bagley* modified the standard of materiality *Agurs* set forth for general and no request cases, see *supra* note 202 and accompanying text, *Bagley* did not alter the analysis in *Agurs* as to when a prosecutor's duty to disclose information in these situations arises.

It is not clear what standard of materiality applies to undisclosed evidence in the prosecutor's possession of which she had no knowledge. On the one hand, it would appear that because no *Brady* disclosure obligation would attach to such evidence, the appropriate standard would be the standard for granting a new trial based on newly discovered evidence—namely that the evidence "probably would have resulted in acquittal." *Agurs*, 427 U.S. at 111 & n.19. On the other hand, because the new trial standard is generally applicable to all newly discovered evidence regardless of its source, application of this standard to evidence in the prosecutor's possession would eviscerate "the prosecutor's obligation to serve the cause of justice." *Bagley*, 473 U.S. at 680 (Blackmun, J., quoting *Agurs*, 427 U.S. at 111). In any event, the question is probably academic. It is highly unlikely that unrequested evidence that is not sufficiently favorable to trigger a constitutional disclosure obligation would nevertheless meet either the new trial standard of materiality or the standard of materiality *Bagley* makes applicable to constitutionally required prosecutorial disclosures. See *United States v. McKenzie*, 768 F.2d 602, 610 (5th Cir. 1985) (calling it "altogether improbable" that the production of evidence containing cumulative impeachment material would have changed the jury's verdict and thus would not mandate reversal of a conviction pursuant to *Brady* standards), *cert. denied*, 106 S. Ct. 861 (1986).

²²⁴ See, e.g., *Halliwell v. Strickland*, 747 F.2d 607, 610 (11th Cir. 1984), *cert. denied*, 472 U.S. 1011 (1985). *Halliwell* illustrates how far a court is willing to go in insisting that the prosecutor actually know about exculpatory evidence before imposing constitutionally based disclosure obligations upon it. The defendant there was convicted of the first degree murder of his lover's husband. His lover had confessed that she had killed her husband with a spear gun, but, after talking with her, the defendant confessed that he alone was the killer. During its investigation, the state had seized a large tool box from the defendant's dive shop which was ultimately found to contain a pair of bloody women's tennis shoes—evidence that certainly bore on who did the killing given the initial confession of the victim's wife. The prosecutor, however, claimed that it did not discover that the tool box contained the bloody shoes until after the trial was over. Despite the clearly exculpatory nature of the evidence, and despite the fact that the "the prosecution . . . was at least technically in possession of the evidence" prior to trial, *id.* at 609, the court found that "no *Brady* violation has occurred" because no one on the prosecution team actually knew of the evidence before the trial. See *id.* at 610; see also *United States v. Jackson*, 579 F.2d 553, 559-60 (10th Cir.) (holding that prosecutor was not required to disclose to the defense that a key witness had been paid by DEA agents), *cert. denied*, 439 U.S. 981 (1978).

a concern with the prosecutor's culpability also influences the application of that analytical structure in two ways. First, the prosecutor's good or bad faith may affect the *Agurs-Bagley* category into which a court places a challenged nondisclosure.²²⁵ The courts have considerable leeway in this determination because of the malleability of the categories.²²⁶ Second, especially in close cases, the prosecutor's culpability may color a court's decision as to whether the evidence in issue meets the applicable standard of materiality.²²⁷ As one post-*Bagley* court has observed, "the existence of bad faith is . . . a factor a court may consider in making its materiality determination."²²⁸

Thus, prosecutorial intent is clearly an important factor in claims that the prosecutor violated her constitutional disclosure obligations, notwithstanding the Court's seeming insistence that, as a matter of doctrine, it should be irrelevant.²²⁹ Indeed, were the framework governing the prosecutor's constitutional disclosure obligations designed to turn on "the blameworthiness of the prosecutor," as the Court urges it is not,²³⁰

²²⁵ See, e.g., *Scurr v. Niccum*, 620 F.2d 186, 190 (8th Cir. 1980) (A request's "specificity" is a function of several factors, including . . . the reasonableness of the explanation, if any, for which the evidence was not exposed or was not considered to be material by the prosecution.").

²²⁶ With respect to the "fuzziness" of the perjury category, see *supra* note 212. With respect to the difficulty of distinguishing "specific" from "general" requests, see Comment, *supra* note 197, at 206-07. A common question in drawing the line between specific and general requests is whether a request for a particular type of evidence, for example, all prior statements made by prosecution witnesses, constitutes either a specific or only a general request. See, e.g., *United States v. McCrane*, 547 F.2d 204, 207-08 (3d Cir. 1976) (regarding defense request for exculpatory material as specific for impeachment purposes).

²²⁷ The apparent rationale for factoring a prosecutor's intent into this determination is that a prosecutor is unlikely to suppress evidence intentionally unless the prosecutor believes that the evidence is material. See *United States v. Jackson*, 780 F.2d 1305, 1311 n.4 (7th Cir. 1986). This rationale is not persuasive. A prosecutor may intentionally choose not to disclose material in her possession precisely because she believes that it is not material and therefore not subject to compelled disclosure under *Brady*. Moreover, because it remains unsettled whether admissibility is a precondition to the prosecutor's disclosure obligations under *Brady*, see Comment, *supra* note 197, at 209-11, an alternative explanation for a prosecutor's intentional nondisclosure is the prosecutor's belief that the evidence is inadmissible. See *Lindsey v. King*, 769 F.2d 1034, 1039 (5th Cir. 1985) (prosecutor failed to produce a statement in a police report because he thought that the statement had never been made and that its inclusion in the report was error).

²²⁸ *Jackson*, 780 F.2d at 1311 n.4; see also *Talamante v. Romero*, 620 F.2d 784, 788 (10th Cir.) ("although the good faith or bad faith of the prosecutor is irrelevant if the evidence is material, the good faith or bad faith of the prosecutor may well bear on the materiality determination" (quoting *United States v. Disston*, 582 F.2d 1108, 1112 (7th Cir. 1978)), cert. denied, 449 U.S. 877 (1980)); *United States v. Disston*, 612 F.2d 1035, 1038 (7th Cir. 1980) ("Since the information was not withheld in bad faith, we are less inclined to hold the unproduced evidence material.").

²²⁹ See *supra* notes 188-91 and accompanying text.

²³⁰ *Smith v. Phillips*, 455 U.S. 209, 220 n.10 (1982).

that structure would look much like the existing *Agurs-Bagley* regime. Under such a framework, the prosecutor's culpability in failing to reveal evidence would be the key determinant of the existence of a constitutional violation. However, unless the prospect of harmless error were eliminated,²³¹ at least some showing that the undisclosed evidence might have helped the defendant at trial would be required even in the most egregious instances of prosecutorial suppression. Thus, a culpability-based scheme would link the extent to which a defendant must show that the unrevealed evidence could have favorably affected his trial to the degree of the prosecutor's fault in not disclosing the evidence: the greater the prosecutor's culpability, the less probative the evidence need be for its suppression to amount to a constitutional violation.²³² This scheme tracks the *Agurs-Bagley* structure, although its application might vary in minor respects.²³³

E. *The Prosecutor's Discriminatory Use of Peremptory Challenges*

1. The Nature and Source of the Proscription

A peremptory challenge is an arbitrary blackball which a litigant may cast against a prospective juror during the selection of the petit or

²³¹ This is unlikely given the Court's current inclination to make prejudice to the defendant a precondition for the existence of a constitutional violation in the criminal procedure area. See *Strickland v. Washington*, 466 U.S. 668, 691-96 (1984) (holding that, in the context of sixth amendment, error by counsel "must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution"); *United States v. Valenzuela-Bernal*, 458 U.S. 858, 872-74 (1982) (in determining materiality of testimony made unavailable to defense by government deportation of a witness, defendant must show reasonable probability that testimony could have affected judgment of trier of fact).

²³² An intent-based framework similar to this was utilized by the Second Circuit prior to the Court's decision in *Agurs*. See *United States v. Morell*, 524 F.2d 550, 553 (2d Cir. 1975); *Kyle v. United States*, 297 F.2d 507, 513-15 (2d Cir. 1961) *cert. denied*, 377 U.S. 909 (1964). Although *Agurs*' insistence that the relevant inquiry was "the character of the evidence, not the character of the prosecutor," 427 U.S. at 110, caused the Second Circuit to abandon its focus on the prosecutor's culpability in *United States v. Provenzano*, 615 F.2d 37, 47 (2d Cir.), *cert. denied*, 446 U.S. 953 (1980), that focus was seemingly resurrected in *United States v. Petito*, 671 F.2d 68, 74 (2d Cir.), *cert. denied*, 459 U.S. 824 (1982), where the court cited and discussed the *Kyle-Morell* principle with approval.

²³³ For example, the courts would likely be less inclined to impute to an otherwise unaware prosecutor knowledge of suppressed evidence possessed by other members of the prosecution team. See *supra* note 214. A prosecutor's failure to turn over evidence in this situation would probably be deemed negligent rather than knowing, and the required showing of materiality would reflect this. See *Kyle*, 297 F.2d at 515 ("If the hearing should lead to a finding of such negligence plus deliberate misstatements to the court and the petitioner, petitioner's burden would be less than in the case of negligence alone but more than in a case of deliberate suppression.").

trial jury. Such challenges are generally used against jurors who, while not sufficiently biased to be excused for cause,²³⁴ are believed by the side exercising the peremptory strike to be predisposed against it. Although not constitutionally required,²³⁵ the right to make peremptory challenges has long been associated with the right to a fair trial,²³⁶ and is an integral part of jury selection in both civil²³⁷ and criminal²³⁸ trials in all state and federal courts.²³⁹

Until recently, the only constraint on the prosecutor's use of her allotted peremptory challenges was an institutional one. As set forth in *Swain v. Alabama*,²⁴⁰ the equal protection clause of the Constitution barred only the systematic use of peremptories by a prosecutor's office "in case after case, whatever the circumstances, whatever the crime and whoever the victim may be . . . with the result that no Negroes ever serve on petit juries."²⁴¹ In any particular case, a prosecutor, like other trial lawyers, was free to strike peremptorily a prospective juror for any reason, including "grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty."²⁴² This virtually unfettered discretion was curtailed in *Batson v. Kentucky*.²⁴³

²³⁴ Although a litigant may make an unlimited number of challenges for cause, the grounds for such challenges are relatively narrow. Challenges for cause are generally "restricted to eliminating bias that is admitted or clearly implied by the juror's connections with the case or parties." Note, *Voir Dire: Establishing Minimum Standards to Facilitate the Exercise of Peremptory Challenges*, 27 STAN. L. REV. 1493, 1500 (1975); see also Saltzburg & Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 MD. L. REV. 337, 340 (1982).

²³⁵ See *Stilson v. United States*, 250 U.S. 583 (1919); see also *Batson v. Kentucky*, 106 S. Ct. 1712, 1720 (1986) (referring to *Swain v. Alabama*, 380 U.S. 202 (1965)); *Swain*, 380 U.S. at 219 (quoting *Stilson*, 250 U.S. at 586); *United States v. Wood*, 299 U.S. 123, 145 (1936) (quoting *Stilson*, 250 U.S. at 586).

²³⁶ See *Batson*, 106 S. Ct. at 1720; *Swain*, 380 U.S. at 219; Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545, 555-56 (1975).

²³⁷ See FED. R. CIV. P. 47(b) (allowing up to three peremptory challenges against alternate jurors, depending on how many alternate jurors the court appoints).

²³⁸ See FED. R. CRIM. P. 24(b) (entitling each side to a certain number of peremptory challenges depending on the offense).

²³⁹ See Note, *The Defendant's Right to Object to Prosecutorial Misuse of the Peremptory Challenge*, 92 HARV. L. REV. 1770, 1773 (1979).

²⁴⁰ 380 U.S. 202 (1965).

²⁴¹ *Id.* at 223.

²⁴² *Id.* at 220.

²⁴³ 106 S. Ct. 1712 (1986). Prior to *Batson*, a number of state courts and lower federal courts had placed constitutional limits on the prosecutor's use of peremptory challenges in a particular case. In the state cases, generally courts found limitations in state constitutional law. See, e.g., *People v. Wheeler*, 22 Cal. 3d 258, 276-77, 583 P.2d 748, 761-62 (1978); *Riley v. State*, 496 A.2d 997, 1009 (Del. 1985), *cert. denied*, 106 S. Ct. 3339 (1986); *State v. Neil*, 457 So. 2d 481, 486-87 (Fla. 1984); *Commonwealth v. Soares*, 377 Mass. 461, 486-88, 387 N.E.2d 499, 515-16, *cert. denied*, 444 U.S. 881 (1979); *State v. Gilmore*, 199 N.J. Super. 389, 397-99, 489 A.2d 1175 (1985), *aff'd*,

Responding to the fact that it had proved almost impossible for defendants to show that peremptory challenges were systematically used by the prosecutor to keep blacks off juries²⁴⁴ despite evidence that "the practice of peremptorily eliminating blacks from petit juries in cases with black defendant [sic] remained widespread,"²⁴⁵ the Court for the first time imposed constitutional restraints on the prosecutor's use of peremptory challenges in a particular case. It held that "the Equal Protection Clause . . . forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black."²⁴⁶

2. How the Proscription Is Enforced

The constitutional restriction on the prosecutor's use of her peremptory challenges turns on the prosecutor's intent in exercising the strikes. To make out a constitutional violation, a minority defendant

103 N.J. 508, 511 A.2d 1150 (1986). In the federal cases, it was done pursuant to the sixth amendment's "fair cross section" guarantee that a jury be representative of the community from which it is drawn. *See* *Booker v. Jabe*, 775 F.2d 762, 770-71 (6th Cir. 1985), *vacated*, 106 S. Ct. 3289, *aff'd on remand*, 801 F.2d 871 (6th Cir. 1986); *McCray v. Abrams*, 750 F.2d 1113, 1128 (2d Cir. 1984), *vacated*, 106 S. Ct. 3289 (1986).

²⁴⁴ *See Batson*, 106 S. Ct. at 1720-21 & n.17; *see also* Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1658 (1985); Saltzburg & Powers, *supra* note 234, at 345 & n.42 (stating that "no defendant could satisfy" the Swain standard); Case Comment, *A New Standard for Peremptory Challenges*: *People v. Wheeler*, 32 STAN. L. REV. 189, 192 n.20 (1979) (same).

²⁴⁵ *Batson*, 106 S. Ct. at 1725 (White, J., concurring).

²⁴⁶ *Id.* at 1723; *see also id.* at 1725 (White, J., concurring) (asserting that *Batson* creates a rule whereby the prosecutor's use of peremptories "to strike blacks from the petit jury panel in the criminal trial of a black defendant . . . in a given case may, but does not necessarily, raise an inference, which the prosecutor carries the burden of refuting, that his strikes were based on the belief that no black citizen could be a satisfactory juror or fairly try a black defendant.").

Although it might be possible to view *Batson* as broadly condemning any consideration of race in the prosecutor's use of her peremptory strikes, the tenor, analysis, and language of the opinion suggest that *Batson* applies only where a prosecutor strikes jurors of the same racial minority as the defendant, and possibly only where a prosecutor strikes black jurors in a case against a black defendant. *See id.* at 1737 (Burger, C.J., dissenting) (analyzing the majority opinion's equal protection analysis as limited to members of "cognizable racial groups" excluded from the petit jury "on account of their race"). *Batson* thus may be inapplicable to cases involving white defendants, *see* *Schreiber v. Salamack*, 619 F. Supp. 1433 (S.D.N.Y. 1985), the use of peremptories against white jurors, and even the use of peremptories against minority jurors of a different racial minority than the defendant. *See Batson*, 106 S. Ct. at 1722-23. (To "establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial . . . the defendant . . . must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race.").

must show that the prosecutor purposely struck members of the defendant's race from the petit jury because of their race. A defendant may make out a prima facie showing that this has occurred by, among other means, pointing to a pattern of strikes against minority jurors in the venire.²⁴⁷ If the trial judge agrees that a prima facie case of discrimination has been shown,²⁴⁸ the burden shifts to the prosecutor to come forward with a neutral explanation for challenging the minority jurors.²⁴⁹ A prosecutor may not meet this burden simply by denying any discriminatory intent or by pointing to an assumed affinity between the defendant and the struck juror based on their shared race.²⁵⁰ Instead, the prosecutor must give meaningful reasons for challenging the minority jurors.²⁵¹ If these explanations are found wanting, the trial judge may reinstate the improperly discharged jurors²⁵² or discharge the entire venire and begin petit jury selection anew.²⁵³

²⁴⁷ *Batson*, 106 S. Ct. at 1723. A pattern of strikes sufficient to make out a prima facie constitutional violation may take a number of forms. See, e.g., *People v. Motton*, 39 Cal. 3d 596, 607 n.3, 704 P.2d 176, 182 n.3, 217 Cal. Rptr. 416, 422 n.3 (1985) (use of peremptories against an otherwise heterogeneous group of prospective jurors whose only common characteristic is that they share the defendant's race); *Riley v. State*, 496 A.2d 997, 1013 n.20 (Del. 1985) (disproportionate use of peremptories against members of the defendant's racial group), *cert. denied*, 106 S. Ct. 3339 (1986); *State v. Gilmore*, 199 N.J. Super. 389, 395, 489 A.2d 1175, 1178 (use of peremptories against all members of the defendant's racial group), *aff'd*, 103 N.J. 508, 511 A.2d 1150 (1986). The *Batson* Court noted that "the prosecutor's questions and statements during *voir dire* and in exercising challenges may support or refute an inference of discriminatory purpose." *Batson*, 106 S. Ct. at 1723.

²⁴⁸ The trial judge, however, has considerable discretion in this determination, as evidenced by the fact that even a demonstrable pattern of prosecutorial strikes against jurors of the defendant's race is not always sufficient to make out a prima facie case of prohibited discrimination. See, e.g., *United States v. Tucker*, 773 F.2d 136, 142 (7th Cir. 1985) (use of four of seven peremptories to exclude all four black members of the venire from the jury did not demonstrate discrimination because prosecutor wanted an educated jury that could understand letters of credit, and the four blacks had very little education or commercial experience), *cert. denied*, 106 S. Ct. 3338 (1986).

²⁴⁹ *Batson*, 106 S. Ct. at 1723.

²⁵⁰ *Id.*

²⁵¹ Presumably, once a prima facie case showing that the prosecutor has used her peremptory challenges in a discriminatory fashion has been made, the prosecutor must justify her strike of every minority juror even though, in the absence of a prima facie case, she would not have to justify her challenge to any of them.

²⁵² See, e.g., *United States v. Robinson*, 421 F. Supp. 467, 474 (D. Conn. 1976), *mandamus granted sub nom.*, *United States v. Newman*, 549 F.2d 240, 251 (2d Cir. 1977) (disallowing prosecutor's challenge to four black veniremen and ordering the prosecutor's office to maintain a record of the number of black jurors in the selection pool and the number stricken in each criminal trial). Although the Court in *Batson* declined to elaborate on the appropriate remedy where the prosecutor is found to have used peremptory challenges in a racially discriminatory fashion, see *Batson*, 106 S. Ct. at 1724 n.24, reinstating struck jurors would present problems concerning the jurors' ability to be fair to the prosecutor if the struck jurors knew who struck them.

²⁵³ See, e.g., *Booker v. Jabe*, 775 F.2d 762, 773 (6th Cir. 1985), *vacated*, 106 S. Ct. 3289, *aff'd on remand*, 801 F.2d 871 (6th Cir. 1986); *McCray v. Abrams*, 750

The focus in *Batson* on the motives of a prosecutor in striking particular jurors in a specific case represents, for several reasons, a concern with prosecutorial intent in its most concentrated form. First, *Batson* erected a boundary of impermissible motive in the exercise of a prerogative that, both by definition and long tradition, could previously be exercised for any reason, no matter how misguided or irrational.²⁵⁴ *Batson* thus injects a concern with prosecutorial intent into an area where it was long thought to be irrelevant.

Second, *Batson* makes the presence of the impermissible motive not only relevant to, but dispositive of the defendant's constitutional claim. On one hand, apparently no degree of prosecutorial necessity, a compelling state interest or otherwise, can justify the behavior of a prosecutor who has acted with the prohibited intent.²⁵⁵ On the other hand, the prohibited use of peremptories cannot be excused on the basis of lack of harm to the defendant, as, for example, where the petit jury retains a disproportionate number of jurors of the defendant's race despite the prosecutor's discriminatory use of the challenges.²⁵⁶ Harm is either conclusively presumed to flow from the exercise of peremptories based on improper intent,²⁵⁷ or is not an element of the constitutional

F.2d 1113, 1132 (2d Cir. 1984), *vacated*, 106 S. Ct. 3289 (1986); see also *Riley v. State*, 496 A.2d 997, 1013 (Del. 1985), *cert. denied*, 106 S. Ct. 3339 (1986) (denying claim that prosecutor used peremptories in a racially discriminatory manner but noting that remedy for such use was dismissal of jury); *State v. Gilmore*, 199 N.J. Super. 389, 414, 489 A.2d 1175, 1186 (1985) (involving prosecutor who admitted to striking blacks based on his supposition that they would be predominantly Baptist and likely to be swayed by the expected testimony of a Baptist minister, and to striking black women in particular because of their strong "maternal instincts"), *aff'd*, 103 N.J. 508, 511 A.2d 1150 (1986).

²⁵⁴ See *Swain v. Alabama*, 380 U.S. 202, 212-17 (1965) (discussing and accepting the historically accepted definition of peremptory challenges).

²⁵⁵ For example, it appears that under *Batson*, a prosecutor could not justify striking minority jurors on the ground that statistics gathered by the prosecuting office demonstrate that minority jurors almost invariably refuse to return guilty verdicts against minority defendants accused of that particular crime. See *Batson*, 106 S. Ct. at 1723.

²⁵⁶ Moreover, it may be argued that any harm a defendant suffers as a result of the prosecutor's discriminatory use of peremptories is constitutionally immaterial, so long as the jury is not otherwise unfairly biased against the defense. A prosecutor has only a limited number of peremptories with which to remove the most defense-prone members of the venire who cannot successfully be challenged for cause. Thus, the exercise of each racially discriminatory strike entails an opportunity cost. Cf. *United States v. Leslie*, 783 F.2d 541, 554 (5th Cir. 1986) (en banc) (discussing exclusion of blacks from the venire). To the extent that race is an inaccurate proxy for determining those who would be most sympathetic to the defense, a defendant may actually benefit from the prosecutor's ill-conceived discrimination because the prosecutor will have forgone the opportunity to strike more defense-prone jurors from the jury.

²⁵⁷ This presumed harm may affect not only the defendant, but also the community. The community has interests in having defendants tried by representative juries and in the abolition of practices that undermine confidence in the fairness of the crimi-

violation at all.²⁵⁸

Third, the exclusion of members of the defendant's race from the defendant's petit jury that prompted the *Batson* holding is not in and of itself prohibited.²⁵⁹ So long as the absence of minority trial jurors results from a reason other than the prosecutor's discriminatory use of peremptory strikes, whether it be a small minority population, chance, or even the permissible use of peremptory challenges, there is no constitutional infirmity. Finally, the procedure for challenging a prosecutor's use of peremptories places a spotlight on the prosecutor's motives in the most immediate, dramatic, and intrusive fashion. That procedure requires that a prosecutor reveal and explain his motivations in court, on the record, and in the presence of defense counsel, immediately after the prosecutor has engaged in the challenged behavior.²⁶⁰

This stark focus on the prosecutor's subjective intent is bound to make *Batson* difficult to administer. As an initial matter, it is unclear just how reasonable or persuasive a prosecutor's "neutral explanation"

nal justice system, which may, in turn, be harmed by the discriminatory use of peremptory challenges. See *Batson*, 106 S. Ct. at 1717-18; Johnson, *supra* note 244, at 1666-67.

²⁵⁸ See *Vasquez v. Hillery*, 106 S. Ct. 617, 623 (1986) (deliberate exclusion of blacks from grand jury cannot be harmless error).

²⁵⁹ See, e.g., *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975) ("[I]n holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population."); *McCray v. Abrams*, 750 F.2d 1113, 1128-29 (2d Cir. 1984) (same), *vacated*, 106 S. Ct. 3289 (1986); *Koenig v. State*, 497 So. 2d 875, 880 (Fla. Dist. Ct. App. 1986) (rule against exercising peremptory challenges on the basis of race does not mean that judges may take affirmative steps to ensure minority representation on petit juries); Note, *supra* note 239, at 1780 ("[T]here is no right to a fair cross section on any particular petit jury" because such a right could be violated simply by the principle of random selection.).

²⁶⁰ It remains to be seen whether prosecutors will be called upon to justify each peremptory strike of a venireman of the defendant's race as each such strike is made. One federal district judge has suggested that this prospect may be avoided by using the "struck panel" method of selecting the petit jury rather than the "jury box" method. Sand, *Jury Selection and Race Discrimination*, N.Y.L.J., June 10, 1986, at 1, col. 4. Under the struck panel system, a panel of jurors cleared for challenge for cause and large enough to yield a petit jury after counsel exercise all of their peremptories is drawn. Counsel then exercise their peremptory challenges in some pattern of alternation against this panel until the allotted number of challenges is exhausted and a petit jury of twelve remains. Counsel thus know who will remain in the jury box as a result of their exercise of peremptory challenges. Under the jury box system, twelve members of the array of potential jurors are selected by lot to be seated in the jury box. Both challenges for cause and peremptory challenges are exercised against those seated in the box. Because replacements for challenged jurors are drawn by lot from the pool each time a challenge is exercised, counsel have no way of knowing who will be the next replacement. See Sand & Reiss, *A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit*, 60 N.Y.U. L. REV. 423, 425-26 & nn.16-17 (1985).

for challenging a black juror must be.²⁶¹ All *Batson* does is delineate the borders of a spectrum. At one end is the prohibited assumption that a black juror will favor a black defendant solely because of their shared race; at the other are justifications so probative that they would compel the removal of the juror for cause.²⁶² The field spanning these boundaries is immense. To the extent that any explanation within the spectrum remains available, prosecutors may seek to justify a strike by arbitrary factors such as the juror's dress, hair style, speech pattern or demeanor. A prosecutor may believe that the cited trait indicates a dislike of authority or a streak of individuality that makes it more likely that the juror is predisposed against the prosecution, or less likely that the juror will join the consensus—usually unanimity—necessary to convict.

Of course, the more arbitrary the basis of the strike, the more likely it is to be pretextual. If reasons just inside the border can be "neutral" despite their arbitrary character, however, then identifying pretextual strikes will be difficult, and *Batson* may have little effect. This is especially so given the self-generating quality of motivation. If the only thing required to justify the exercise of a peremptory against a black is any purpose other than the assumption that blacks will favor blacks, such a purpose is likely to materialize whenever the peremptory is exercised.²⁶³ So long as the prosecutor's reason for exercising the peremptory need not be very persuasive to be "neutral," courts will be hard-pressed to find that the prosecutor did not subjectively harbor the professed purpose in striking the juror.

Consequently, it can be expected that defendants will attempt to narrow the spectrum of justifications towards the challenge-for-cause line. In these efforts, defendants are likely to challenge not only the most idiosyncratic justifications, but also the prosecutor's use of seemingly more neutral factors that may, in fact, prove to be race-linked, such as economic status, education, home ownership, political affiliation, and residence. These challenges will force courts to confront a number of elusive issues, including whether and under what circumstances such factors may serve as the "neutral" basis for a peremptory

²⁶¹ See *Batson*, 106 S. Ct. at 1723 (stating that although "the prosecutor's explanation need not rise to the level justifying exercise of the challenge for cause . . . [,] the prosecutor may not rebut the defendant's prima facie case . . . by stating merely that he challenged jurors of the defendant's race on the assumption—or his intuitive judgment—that they would be partial to the defendant because of their shared race").

²⁶² *Id.*; see also *id.* at 1739 (Burger, C.J., dissenting).

²⁶³ See Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 437 (1974).

strike.²⁶⁴

F. *The Double Jeopardy Bar to Retrial After a Mistrial Due to Prosecutorial Misconduct*

1. The Nature and Source of the Proscription

During the course of a trial, there are numerous actions a prosecutor may take that are legally improper. They include making unwarranted assertions during an opening statement,²⁶⁵ obtaining the admission of evidence that should not be admitted,²⁶⁶ engaging in the improper cross-examination of the defendant or defense witnesses,²⁶⁷ and making various inappropriate statements during a closing argu-

²⁶⁴ See, e.g., *People v. Hall*, 35 Cal. 3d 161, 168-69, 672 P.2d 854, 858-59, 197 Cal. Rptr. 71, 78-79 (1983) (noting that the trial court has a duty to attempt to evaluate seriously the prosecutor's explanation to determine whether it is bona fide). On a more practical level, the more a prosecutor's ability to exercise peremptories on the basis of highly subjective judgments is restricted, the more pressure prosecutors may place on courts to expand their participation in the voir dire of prospective jurors. Most federal courts do not allow counsel to question jurors directly during the voir dire. See *Sand & Reiss*, *supra* note 260, at 427-28. It will often be difficult, however, for a prosecutor to demonstrate case-specific bias on the part of a minority juror unless the prosecutor is allowed to put directly to the juror particular questions designed to elicit that bias. See *id.* at 432-33.

²⁶⁵ Such improper assertions usually involve overstating the prosecutor's case by reference to facts the prosecution cannot or does not intend to prove. See, e.g., *Government of the Virgin Islands v. Oliver*, 360 F.2d 297, 299 (3d Cir. 1966) (finding prejudicial error when prosecutor improperly referred to defendant's prior arrest for assault and escape from custody); *Leonard v. United States*, 277 F.2d 834, 841 (9th Cir. 1960) (finding prejudicial error when prosecutor improperly referred to 83 other crimes allegedly committed by defendant, but not charged in the indictment); *State v. Colvin*, 425 A.2d 508, 512 (R.I. 1981) (finding prejudicial error when prosecutor's improper remarks were reinforced by inadmissible testimony despite limiting instruction); CALIFORNIA CRIMINAL LAW PRACTICE SERIES, PROSECUTORIAL AND JUDICIAL MISCONDUCT 41-42 (1979) [hereinafter CALIFORNIA PRACTICE SERIES].

²⁶⁶ For example, a prosecutor may introduce evidence conditionally, subject to later satisfying foundation or relevancy requirements, and then fail to satisfy those requirements. See, e.g., *Reimnitz v. State's Attorney*, 761 F.2d 405, 410 (7th Cir. 1985) (admission of evidence that defendant committed a homosexual assault was clearly improper and warranted retrial); *Bryson v. Alabama*, 634 F.2d 862, 865 (5th Cir. Unit B Jan. 1981) (erroneous admission of defendant's prior criminal record was sufficiently prejudicial to entitle defendant to habeas corpus relief); *United States v. Martin*, 561 F.2d 135, 139-41 (8th Cir. 1977) (prosecutor's reading of grand jury transcript containing biased and prejudicial material rose to the level of bad faith prosecutorial overreaching that warranted both a mistrial and preclusion of retrial).

²⁶⁷ See, e.g., *United States v. Garza*, 603 F.2d 578, 579-80 (5th Cir. 1979) (prosecutor's calling a witness to the stand despite knowledge that the witness would assert a fifth amendment privilege contributed to prejudicial conduct warranting a mistrial); *United States v. Broderick*, 425 F. Supp. 93, 96 (S.D. Fla. 1977) (prosecutor's eliciting of hearsay testimony despite explicit prohibition by court constituted reversible error); CALIFORNIA PRACTICE SERIES, *supra* note 265, at 45-48.

ment.²⁶⁸ If sufficiently serious, such trial improprieties may prompt a motion for a mistrial by the defendant, or a sua sponte declaration of a mistrial by the trial judge.

When the prosecutor's misbehavior results in a mistrial, a retrial of the defendant may implicate double jeopardy concerns. These concerns arise because

[t]he constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. . . . The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.²⁶⁹

The double jeopardy goal of "protect[ing] an individual from being subjected to the hazards of trial and possible conviction more than once" does not amount to a guarantee that a defendant will have to undergo only one trial on the charges against him. As a matter of practical necessity, the clause generally does not prohibit the retrial of a defendant after the reversal of his conviction on appeal.²⁷⁰ "[i]t would be a high price indeed for society to pay were every accused granted

²⁶⁸ See, e.g., *Hall v. United States*, 150 U.S. 76, 81-82 (1893) (prosecutor's attempt in closing argument to induce jury to assume defendant's guilt of another crime for which he had actually been acquitted was reversible error); *United States v. Green*, 786 F.2d 247, 254 (7th Cir. 1986) (prosecutor's accusation in his closing argument that defendant had attempted to make a "charade" of the trial, though highly improper, was not reversible error); *United States v. Capone*, 683 F.2d 582, 585 (1st Cir. 1982) (prosecutor's assertion during closing argument that the case was proven "beyond a reasonable doubt" was improper in light of the "invisible cloak of credibility" resulting from his position); Vess, *Walking a Tightrope: A Survey of Limitations on the Prosecutor's Closing Argument*, 64 J. CRIM. L. & CRIMINOLOGY 22, 24 & n.18 (1973) ("[I]mproper argument alone may be sufficient grounds for reversal."); Note, *Prosecutorial Misconduct: The Limitations upon the Prosecutor's Role as an Advocate*, 14 SUFFOLK U.L. REV. 1095, 1104 (1980) ("Appeals to prejudice and bias are improper; convictions must stand on the evidence presented at trial.").

²⁶⁹ *Green v. United States*, 355 U.S. 184, 187-88 (1957); see also *United States v. DiFrancesco*, 449 U.S. 117, 132-37 (1980) (distinguishing the double jeopardy bar to a second prosecution from that of a review of sentence, and declaring legislation granting the prosecutor a review of a criminal sentence did not violate double jeopardy).

²⁷⁰ See, e.g., *United States v. Ball*, 163 U.S. 662, 669 (1896). When the conviction is reversed on the grounds of insufficient evidence, however, the double jeopardy clause does bar retrial. See *United States v. Burks*, 437 U.S. 1, 15-17 (1978).

immunity from punishment because of any defect sufficient to constitute reversible error in the proceeding leading to conviction."²⁷¹ Similarly, the double jeopardy clause does not absolutely bar retrial after the declaration of a mistrial.²⁷²

However, because a mistrial aborts a defendant's first trial prior to the return of a verdict, retrial following a mistrial implicates a second double jeopardy concern that retrial following a reversal does not involve. That concern is the defendant's "valued right to have his trial completed by a particular tribunal."²⁷³ "[T]he crucial difference between reprosecution after appeal by the defendant and reprosecution after a . . . mistrial declaration is that in the first situation the defendant has not been deprived of his option to go to the first jury and, perhaps, end the dispute then and there with an acquittal."²⁷⁴ The Court has recognized that a defendant's double jeopardy interest in receiving a verdict from the first tribunal chosen to decide his case is entitled to considerable solicitude. Thus, in contrast to the common law principle that jeopardy does not attach until a final verdict is rendered,²⁷⁵ the Court has ruled that jeopardy attaches as soon as the jury is impaneled and sworn,²⁷⁶ and it has barred reprosecution when a jury was improperly dismissed only hours after being sworn and without hearing any evidence.²⁷⁷ As a result of this recognition that a defendant has a cognizable interest in proceeding to verdict before the "particular tribunal" impaneled to decide the charges against her, there are greater double jeopardy strictures against retrying a defendant after the declaration of a mistrial than after the reversal of her conviction on appeal.

The question of exactly when a retrial may follow a mistrial has troubled the Court for over 160 years. The most important determinant

²⁷¹ *United States v. Tateo*, 377 U.S. 463, 466 (1964); *see also* *United States v. Jorn*, 400 U.S. 470, 484 (1971) (Harlan, J., plurality opinion) ("The determination to allow reprosecution [after a successful appeal] reflects the judgment that the defendant's double jeopardy interests, however defined, do not go so far as to compel society to so mobilize its decisionmaking resources that it will be prepared to assure the defendant a single proceeding free from harmful governmental or judicial error.").

²⁷² *See* *Wade v. Hunter*, 336 U.S. 684, 688 (1949) ("The double jeopardy provision of the Fifth Amendment . . . does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment."); *see also supra* notes 270-71 and accompanying text; *infra* notes 278-84 and accompanying text.

²⁷³ *Wade*, 336 U.S. at 689.

²⁷⁴ *Jorn*, 400 U.S. at 484.

²⁷⁵ *See* 4 W. BLACKSTONE, COMMENTARIES *361.

²⁷⁶ *See* *Crist v. Bretz*, 437 U.S. 28, 37-38 (1978) (holding that the federal rule that jeopardy attaches when the jury is impaneled and sworn is an integral part of the constitutional guarantee against double jeopardy and is, therefore, applicable to the states through the fourteenth amendment).

²⁷⁷ *See* *Downum v. United States*, 372 U.S. 734 (1963).

of whether a retrial can follow a mistrial is the defendant's role in the declaration of the mistrial. When a mistrial is granted without the defendant's request or consent, the rule, as first announced by Justice Story in *United States v. Perez*,²⁷⁸ is that a retrial can occur only if there existed a "manifest necessity" for the mistrial.²⁷⁹ Although this principle has been repeated ad nauseam by the Court,²⁸⁰ the Court's decisions provide notably little guidance as to what constitutes "manifest necessity."²⁸¹ The Court, however, has allowed retrials after the declaration of mistrials to which defendants did not consent and whose necessity was far from manifest.²⁸² Nevertheless, it is reasonably clear that when a mistrial is declared over a defendant's objection, a retrial is permissible only when the problem that prompted the mistrial is not susceptible to prosecutorial manipulation,²⁸³ and the mistrial is consistent with the fair administration of criminal justice.

When, however, a mistrial is granted at the defendant's request, there is no double jeopardy predisposition against retrial. A defendant's request for a mistrial may be viewed as "a deliberate election on his part to forego his valued right to have his guilt or innocence determined before the first trier of fact."²⁸⁴ Yet, it cannot be that double jeopardy protection is completely and automatically forsaken as a consequence of a defendant's mistrial motion. Otherwise, prosecutors would have both the leeway and the incentive to force the abortion of trials that were not going as they wished by engaging in improper conduct that would leave

²⁷⁸ 22 U.S. (9 Wheat.) 579 (1824).

²⁷⁹ *Id.* at 580.

²⁸⁰ See, e.g., *Arizona v. Washington*, 434 U.S. 497, 505 (1978); *United States v. Dinitz*, 424 U.S. 600, 607 (1976); *Illinois v. Somerville*, 410 U.S. 458, 461 (1973); *United States v. Jorn*, 400 U.S. 470, 481 (1971); *Gori v. United States*, 367 U.S. 364, 368-69 (1961); *Wade v. Hunter*, 336 U.S. 684, 689-90 (1949).

²⁸¹ See *United States v. Jorn*, 400 U.S. 470, 480 (1971) (Harlan, J., plurality opinion) ("[T]his Court has, for the most part, explicitly declined the invitation of litigants to formulate rules based on categories of circumstances which will permit or preclude retrial."); Schulhofer, *Jeopardy and Mistrials*, 125 U. PA. L. REV. 449, 451 (1977) ("In the more than 150 years since formulation of the *Perez* test, the course of adjudication has provided little clarification of its meaning.").

²⁸² See, e.g., *Washington*, 434 U.S. at 511 (permitting retrial after trial court granted prosecutor's motion for mistrial because of improper opening statement by defense despite fact that "[i]n a strict, literal sense, the mistrial was not 'necessary'"); *Dinitz*, 424 U.S. at 611-12 (allowing retrial after trial judge's expulsion of one of defendant's lawyers despite option to stay proceedings pending appellate review of expulsion); *Gori*, 367 U.S. at 367-69 (retrial permissible after trial judge prematurely declared a mistrial sua sponte because of belief that prosecutor was about to elicit improper testimony from a witness).

²⁸³ See, e.g., *Downum v. United States*, 372 U.S. 734, 736 (1963) (barring retrial where mistrial was granted at prosecutor's request because one of prosecutor's witnesses failed to appear for trial).

²⁸⁴ *United States v. Scott*, 437 U.S. 82, 93 (1978).

a defendant little choice but to request a mistrial if the trial judge did not grant one sua sponte. A defense motion for a mistrial in these circumstances could hardly be deemed a meaningful decision by the defendant to relinquish her right to a verdict by the first fact-finder chosen to hear her case. Thus, in some situations the double jeopardy clause prohibits the retrial of a defendant whose first trial ends in a mistrial because of prosecutorial misbehavior, even if the mistrial was granted at the defendant's behest.

2. How the Proscription Is Enforced

In *Oregon v. Kennedy*,²⁸⁵ a five-to-four decision, the Court held that

the circumstances under which [a defendant who successfully moves for a mistrial based on prosecutorial misconduct] may invoke the bar of double jeopardy in a second effort to try him are limited to those cases in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial.²⁸⁶

Eschewing indications in earlier cases that retrial might be barred if the mistrial was due to prosecutorial "overreaching"²⁸⁷ or "harassment,"²⁸⁸ the Court made clear in *Kennedy* that "[p]rosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion . . . does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause."²⁸⁹

Kennedy's focus on prosecutorial intent is especially dramatic. The Court ruled that no matter how egregious, a prosecutor's misbehavior at trial will not bar a subsequent retrial so long as the prosecutor did not act with the specific intent to deprive the defendant of the protection of the double jeopardy clause, and the defendant did not object to the mistrial.²⁹⁰ In effect, not only is a defendant's double jeopardy protection from prosecutorial improprieties at trial defined solely in terms of the prosecutor's intent, but the prohibited intent is itself defined in

²⁸⁵ 456 U.S. 667 (1982).

²⁸⁶ *Id.* at 679.

²⁸⁷ See *United States v. Jorn*, 400 U.S. 470, 485 (1971) (Harlan, J., plurality opinion).

²⁸⁸ See *United States v. Dinitz*, 424 U.S. 600, 611 (1976); *Downum v. United States*, 372 U.S. 734, 736 (1963).

²⁸⁹ *Kennedy*, 456 U.S. at 675-76.

²⁹⁰ See *id.*

terms of the specific interests protected by the double jeopardy guarantee.

When a defendant's "valued right to have his trial completed by a particular tribunal"²⁹¹ is threatened by serious prosecutorial misbehavior at trial, *Kennedy* does much to deny any protection of the right. First, the decision eliminates any double jeopardy concern with prosecutorial overreaching prompted by improper motives other than the intent to provoke a mistrial.²⁹² Thus, a defendant faced with a prosecutor who is willing to commit reversible error for other improper reasons such as an overriding desire to obtain the defendant's conviction at trial,²⁹³ or to subject the defendant to repeated or protracted criminal proceedings,²⁹⁴ has no redress under the clause. In addition, even when a prosecutor's improprieties are prompted by an intent to provoke a mistrial, *Kennedy* is unlikely to afford a defendant relief. Despite the Court's palliative statement that discerning whether a misbehaving prosecutor has acted with the prohibited intent simply implicates the "familiar" process of "[i]nfering the existence or nonexistence of intent from objective facts and circumstances,"²⁹⁵ the nature and specificity of the prohibited intent make it almost impossible to prove.²⁹⁶ Not only is it "almost inconceivable that a defendant could prove that the prosecutor's deliberate misconduct was motivated by an intent to provoke a mistrial instead of an intent simply to prejudice the defendant,"²⁹⁷ but, given the severe professional and personal consequences likely to follow a finding that a prosecutor's misbehavior at trial was done with the purpose of provoking a mistrial,²⁹⁸ a judge will likely be reluctant to

²⁹¹ *Wade v. Hunter*, 336 U.S. 684, 689 (1949).

²⁹² See *Kennedy*, 456 U.S. at 674-76.

²⁹³ This situation may arise in a highly publicized or political case. The prosecutor may believe that the benefits of obtaining a conviction after trial will not be greatly reduced if the conviction is reversed on appeal. See Ponsoldt, *When Guilt Should Be Irrelevant: Government Overreaching as a Bar to Reprosecution Under the Double Jeopardy Clause After Oregon v. Kennedy*, 69 CORNELL L. REV. 76, 97 n.107 (1983) (arguing that after *Kennedy* prosecutors will be careful to demonstrate that they actually intended to convict).

²⁹⁴ See, e.g., *Shaw v. Garrison*, 328 F. Supp. 390, 400 (E.D. La. 1971), *aff'd*, 467 F.2d 113 (5th Cir.), *cert. denied*, 409 U.S. 1024 (1972).

²⁹⁵ *Kennedy*, 456 U.S. at 675; see also *id.* at 679-80 (Powell, J., concurring) ("Because 'subjective' intent often may be unknowable, I emphasize that in considering a double jeopardy motion, a court should rely primarily upon the objective facts and circumstances of the particular case.").

²⁹⁶ See Note, *Mistrials Arising from Prosecutorial Error: Double Jeopardy Protection*, 34 STAN. L. REV. 1061, 1074 (1982).

²⁹⁷ *Kennedy*, 456 U.S. at 688 (Stevens, J., concurring) (footnotes omitted).

²⁹⁸ As the Oregon Supreme Court observed in rejecting the *Kennedy* standard under Oregon's double jeopardy clause in reviewing *Kennedy* on remand from the Court:

[A] finding that a prosecutor initially pursued a course of prejudicial mis-

make such a finding.²⁹⁹ This is especially true if, to make the finding, the judge must completely discredit a prosecutor's sworn assertions³⁰⁰ that she acted with an intent other than that prohibited by *Kennedy*.

The stringency in *Kennedy*, moreover, is not greatly ameliorated by the two other mechanisms available for protecting the double jeopardy interests threatened by a prosecutor's prejudicial misconduct at trial: a sua sponte declaration of a mistrial by the trial judge and appellate reversal of any resulting conviction. With respect to the first mechanism, a trial judge may respond to a prosecutor's misbehavior with a sua sponte declaration of a mistrial, after which any retrial would have to be justified on the basis of "manifest necessity" if the defendant did not agree to the mistrial.³⁰¹ However, due to understandable caution, trial judges are unlikely to declare a mistrial without obtaining the defendant's acquiescence on the record, which then would trigger the *Kennedy* standard. Moreover, even without the defendant's consent to the mistrial, it is doubtful that a court's sua sponte mistrial declaration would bar retrial. In the one instance in which the Court evaluated the "manifest necessity" of a mistrial declared sua sponte by the trial judge in response to perceived prosecutorial misbehavior at trial, the Court, giving great deference to the trial court's discretion, found retrial permissible even though the mistrial declaration was premature and of dubious necessity.³⁰²

Under the second mechanism available for ensuring double jeopardy protection, the defendant may opt to have the tainted trial proceed to verdict despite the presence of serious prosecutorial overreaching. Al-

conduct for the purpose of forcing a mistrial is a grave matter. Such behavior is a contempt of court. It is also a violation of professional standards that can lead to disbarment or other discipline, and perhaps of federal civil rights statutes. A judge prepared to make such a finding properly would not only declare a mistrial without possibility of reprosecution but also report the episode to the Oregon State Bar.

State v. Kennedy, 295 Or. 260, 275-76, 666 P.2d 1316, 1325-26 (1983) (citations omitted).

²⁹⁹ See *Illinois v. Somerville*, 410 U.S. 458, 482 n.1 (1973) (Marshall, J., dissenting).

³⁰⁰ Because the double jeopardy inquiry focuses on the prosecutor's subjective intent, the prosecutor likely would have to take the stand if there were a hearing in connection with a defendant's double jeopardy motion. See *Kennedy*, 456 U.S. at 688 n.25 (Stevens, J., dissenting); see also *Thomas v. Sumner*, 610 F. Supp. 583, 585 (D. Nev. 1985) (noting that trial judge properly conducted full and fair hearing as to the prosecutor's intent behind improper questioning). Even in the absence of a hearing, it would seem prudent, if not necessary, for a prosecutor to respond to a defendant's double jeopardy motion with an affidavit setting forth the prosecutor's motives in taking the improper action. See *United States v. Martin*, 561 F.2d 135, 138 n.4 (8th Cir. 1977).

³⁰¹ See *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824).

³⁰² See *Gori v. United States*, 367 U.S. 364, 365-66, 369 (1961).

though this choice superficially preserves a defendant's right to a verdict from the first fact-finder chosen to hear his case, it does so largely in form, because prosecutorial misbehavior sufficiently serious to warrant a mistrial is apt to induce a conviction at trial. Nor are the defendant's double jeopardy interests likely to be vindicated on appeal of the conviction. A reversal will not preserve the defendant's interest in being judged by the first tribunal because reversal ordinarily does not prevent the defendant from being retried.³⁰³

Summary

There is a pervasive inclination to analyze constitutional challenges to a prosecutor's actions in terms of the prosecutor's motives or knowledge when taking them. This preference exists no matter when during the criminal process the challenged prosecutorial action occurred, from the initiation of charges through the trial itself. It also cuts across a wide range of constitutional provisions, including the double jeopardy, due process, equal protection, and grand jury clauses, under which a prosecutor's actions may be challenged.

³⁰³ Even if the defendant can convince an appellate court that the prosecutor acted with the intent prohibited by *Kennedy*, it appears that the double jeopardy clause may not bar the defendant's retrial after the reversal of his conviction on appeal. The Court in *Kennedy* indicated that where a conviction is reversed on appeal on account of a prosecutor's misbehavior, a retrial is permissible even if the conviction is reversed on grounds that would have warranted a mistrial and barred a retrial had the mistrial been granted. See *Kennedy*, 456 U.S. at 676 & n.6; *id.* at 687 n.22 (Stevens, J., concurring). Although this is consistent with the Court's statement in *United States v. Scott*, 437 U.S. 82 (1978), that "[t]he successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence to support the verdict poses no bar to further prosecution," *id.* at 90-91 (citations omitted), it is at odds with the logic of the Court's decision in *Burks v. United States*, 437 U.S. 1 (1978). In *Burks*, the Court held that the double jeopardy guarantee precludes the retrial of a defendant whose conviction is reversed on appeal for insufficient evidence, reasoning that "to hold otherwise would create a purely arbitrary distinction between those [who have their convictions reversed on appeal because of insufficient evidence] and others who would enjoy the benefit of a correct decision by the District Court [to direct a verdict of acquittal]." *Id.* at 11. At least where the trial court erroneously denies a defendant's mistrial motion that would bar retrial under *Kennedy*, this logic would seem to bar retrial after a conviction is reversed on appeal because of prosecutorial misbehavior that prompted the erroneously denied mistrial motion.

The courts of appeals have recognized the strength of this argument, but have declined to rule on its merits. See, e.g., *United States v. Singer*, 785 F.2d 228, 238-40 (8th Cir.) (permitting retrial after conviction reversed because of judicial misconduct), *cert. denied*, 107 S. Ct. 273 (1986); *Robinson v. Wade*, 686 F.2d 298, 306 (5th Cir. 1982) (permitting retrial because trial errors did not evince a deliberate attempt to provoke a mistrial required to bar reprosecution); *United States v. Singleterry*, 683 F.2d 122, 124 (5th Cir.) (upholding trial court finding that prosecutor's references to defendant's prior convictions were not intended to provoke mistrial, a prerequisite to barring retrial), *cert. denied*, 459 U.S. 1021 (1982).

One area, however, remains somewhat resistant to the preference for intent-based analysis: challenges to a prosecutor's grand jury presentation. In that context, the preference is undercut by the presence of three factors—a basis for objective assessment of the harm to the defendant, the existence of objective rules governing some of the commonly challenged actions, and the enhanced judicial authority over that sphere of prosecutorial behavior. The extent to which the absence of these factors dictates a concern with intent is discussed in Part III.

II. THE SYSTEMIC COSTS OF INTENT-BASED ANALYSIS

The difficulties and confusion in such areas as selective prosecution, vindictive charging, and the discriminatory use of peremptory challenges are symptomatic of the dysfunctional consequences of an intent-based analysis. No matter what the particular area of prosecutorial activity at issue, there are certain systemic costs that are apt to flow from an unreflective preference for analyzing constitutional challenges to prosecutorial behavior in terms of the prosecutor's intent. This section will discuss these systemic costs.³⁰⁴

A. *Fostering Ad Hoc Adjudication at the Expense of Rule Formation*

Because intent-based analysis focuses on what the prosecutor thought rather than on what the prosecutor did, it impedes the formulation of rules governing prosecutorial behavior.³⁰⁵ This is especially so because prosecutorial intent is the bellwether of constitutionality,³⁰⁶ and not, as in the fourth amendment area, a determinant of remedy once a violation is found. Consequently, courts lack the leeway to evaluate the constitutionality of the prosecutor's action apart from the question of intent that exists in the adjudication of fourth amendment challenges to

³⁰⁴ Of course, the mere fact that the costs exist is not reason enough to eschew intent-based analysis. Such costs and, consequently, the preference for intent-based analysis, might be justified by the systemic benefits that accrue from intent-based analysis, an issue examined in Section III, or because within each area of prosecutorial activity, the alternatives to intent-based analysis, including rule formulation, generate even greater dysfunctional consequences. The latter inquiry is reserved for Section IV.

³⁰⁵ Cf. Ashdown, *Good Faith, the Exclusionary Remedy, and Rule-Oriented Adjudication in the Criminal Process*, 24 WM. & MARY L. REV. 335, 359-62 (1983) (focusing on police behavior).

³⁰⁶ This is true whether prosecutorial intent is (a) the sole basis for finding a constitutional violation, as it is in the grand jury process, peremptory challenge, and double jeopardy mistrial areas, (b) a necessary element of the constitutional violation, as it is in the selective and, perhaps, vindictive prosecution areas, or (c) an additional reason for finding a constitutional violation, as it is in the grand jury presentation and *Brady* areas.

police activity,³⁰⁷ an area considerably less amenable to judicial control.³⁰⁸ The result is a corpus juris that provides remarkably few hard and fast rules governing prosecutorial activity.

There are several reasons why such rules are desirable. First, from a systemic standpoint, prosecutors exercise extraordinary power.³⁰⁹ There is no other "single official [who] can invoke society's harshest sanctions on the basis of ad hoc personal judgments."³¹⁰ Not only does the prosecutor exercise power virtually unparalleled in terms of both breadth and consequences, she remains largely unaccountable in so doing.³¹¹ Simply put, the expansive terrain of prosecutorial discretion needs more visible boundary markers.

Second, there is an inherent tension in the prosecutor's role. That tension flows from the prosecutor's responsibility to function both as a quasi-judicial official and as the state's advocate against the defendant.³¹² Prohibitions couched in terms of the prosecutor's mental state tend to exacerbate this tension by forcing the prosecutor to justify, in neutral terms, actions that often are prompted by adversarial instincts. Nonintent-based rules, on the other hand, relieve this tension by defining the prosecutor's adversarial framework.³¹³ The more a prosecutor knows about the constraints on her activities, the better she is able to evaluate discretionary choices such as whether to prosecute or what charges to bring in the first place.³¹⁴

³⁰⁷ See, e.g., *United States v. Leon*, 468 U.S. 897, 924-25 (1984).

³⁰⁸ See *infra* note 345 and accompanying text.

³⁰⁹ As Justice Jackson, himself a former prosecutor, once put it: "The prosecutor has more control over life, liberty, and reputation than any other person in America." Jackson, *The Federal Prosecutor*, 24 J. AM. JUDICATURE SOC'Y 18, 18 (1940).

³¹⁰ Vorenberg, *supra* note 2, at 1555.

³¹¹ See *id.* at 1554-56; Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 303 (1980) ("the huge discretion of the U.S. Attorney can distort or swallow up all but the most massive reform efforts").

³¹² See *infra* notes 330-32 and accompanying text.

³¹³ See Adlerstein, *Ethics, Federal Prosecutors, and Federal Courts: Some Recent Problems*, 6 HOFSTRA L. REV. 755, 758 (1978) (according to a former prosecutor, "[i]n view of the ethical dilemma that is often faced, it would be helpful for the prosecutor to have a body of standards to which he could refer for guidance in particular situations").

³¹⁴ Similar concerns over broad discretion and the need for dispassionate evaluation by the official exercising it have led to a preference for bright-line rules in the fourth amendment area. See, e.g., *United States v. Ross*, 456 U.S. 798, 822-23 (1982) (permitting search of closed containers in motor vehicle if there is probable cause to search the vehicle); *Michigan v. Summers*, 452 U.S. 692, 705 (1981) (allowing detention of persons found at the scene of the execution of a warrant to search for contraband); *Dunaway v. New York*, 442 U.S. 200, 216 (1979) (requiring probable cause for any detention or custodial interrogation); *Pennsylvania v. Mimms*, 434 U.S. 106, 109-11 (1977) (finding that a motorist can be ordered out of vehicle following a traffic arrest); *United States v. Robinson*, 414 U.S. 218, 236 (1973) (permitting a search inci-

Finally, the process of prosecution is full of uncertainty for the defendant, which both provokes anxiety and hinders informed decision-making. Intent-based limitations are ill-suited to alleviate this uncertainty. Instead, when the prosecutor's mental state is the fulcrum of the constitutional restrictions on her actions, a defendant will draw the conclusion naturally and commonly drawn by defendants. That is, a defendant will believe that her fate is largely tied to the prosecutor's subjective feelings towards her. Moreover, because many defendants are less than confident in the purity of prosecutorial motives, they are apt to view intent-based restrictions with a good deal of skepticism. In contrast, nonintent-based rules provide concrete restraints on prosecutorial behavior that are likely to make the system seem more rational and fair, regardless of whether the rules are ultimately more advantageous to defendants.³¹⁵

The development of rules governing prosecutorial behavior is unlikely to occur at significant levels outside the context of constitutional adjudication during the criminal process.³¹⁶ Prosecutors' offices have not rushed to adopt guidelines on their own.³¹⁷ The rules they do issue tend to be sufficiently general and hortatory that deviations are difficult to prove. Moreover, even when deviations are demonstrable, voluntarily adopted guidelines usually contain the neutering caveat that the rules are solely for the guidance of the prosecutors and do not confer any enforceable rights upon defendants.³¹⁸ This may account for the fact

dent to a lawful arrest).

³¹⁵ Experience with indeterminate sentencing supports the notion that defendants, like most people, place a good deal of value on certainty. Under indeterminate sentencing schemes, a defendant is sentenced to imprisonment for an indefinite period of time, with her release determined by a board that periodically reviews the defendant's suitability for release. Regardless of whether defendants as a group serve less time than they would have under a more "determinate" scheme, a commonly perceived vice of indeterminate sentencing is the "prolonged and cruel suspense for the prisoners affected." Schulhofer, *Due Process of Sentencing*, 128 U. PA. L. REV. 733, 737 (1980).

³¹⁶ Civil suits are effectively unavailable as a rulemaking mechanism because prosecutors have absolute immunity for acts performed in "initiating a prosecution and . . . presenting the State's case." *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976); cf. *Butz v. Economou*, 438 U.S. 478, 515-16 (1978) (giving federal agency officials performing prosecutor-like duties absolute immunity from damages liability arising from their actions in initiating an administrative proceeding).

³¹⁷ Cf. Gifford, *supra* note 26, at 673 (proposing a requirement that prosecutors prepare written reasons for declining to proceed with a particular criminal charge, and the use of guidelines by the prosecutor's office in order to facilitate review of these explanations).

³¹⁸ For example, the U.S. Department of Justice Principles of Federal Prosecution provides:

The principles set forth herein, and internal office procedures adopted pursuant hereto, are intended solely for the guidance of attorneys for the government. They are not intended to, do not, and may not be relied upon

that courts consistently refuse to dismiss criminal charges because of the prosecutor's failure to comply with written charging guidelines.³¹⁹

Ethical rules promulgated by professional associations may provide a needed external enforcement mechanism, as well as occasional guidance.³²⁰ Nevertheless, for the most part, ethical guidelines are too general, too infrequently revised, and too rarely refined through actual application³²¹ to serve as the primary vehicles for delineating the constraints on prosecutorial activity. Moreover, ethical rules have historically had a reactive rather than a generative relationship with constitutional decisionmaking. That is, they tend to codify rather than evolve apart from established constitutional principles.³²² Although this sort of development is understandable given that the thrust of ethical rules is defining the grounds for professional discipline, their reactive orientation is hardly conducive to rule development.

to create a right or benefit, substantive or procedural, enforceable at law by a party to litigation with the United States.

U.S. DEPARTMENT OF JUSTICE PRINCIPLES OF FEDERAL PROSECUTION Part A, Rule 5, [hereinafter DEP'T OF JUSTICE PRINCIPLES] *reprinted in* 27 Crim. L. Rep. (BNA) 3277 (1980).

³¹⁹ See Gifford, *supra* note 26, at 704.

³²⁰ See *supra* notes 153-61 and accompanying text. The Code of Professional Responsibility should guide Department of Justice Attorneys. See Standards of Conduct for the Department of Justice, 28 C.F.R. § 45.735-1(b) (1986).

³²¹ Not only are prosecutors rarely subjected to disciplinary action as a result of their prosecutorial activity, but one commentator found that "[n]o published federal decision has ever granted relief based solely upon a prosecutor's failure to adhere to . . . advisory standards," such as the ABA PROSECUTION STANDARDS, *supra* note 153, or the NDAA PROSECUTION STANDARDS, *supra* note 153. Holderman, *Preindictment Prosecutorial Conduct in the Federal System*, 71 J. CRIM. L. & CRIMINOLOGY 1, 2 (1980).

³²² For example, the original version of REVISED ABA PROSECUTION STANDARDS, *supra* note 153, at § 3-4.2(c), dealing with the situations under which a prosecutor could fail to live up to a plea agreement, was revised because it conflicted with the Court's subsequent decision in *Santobello v. New York*, 404 U.S. 257 (1971). REVISED ABA PROSECUTION STANDARDS, *supra* note 153, at § 3-4.2, History of Standard, at 3.66. Similarly, the original ABA Prosecution Standard § 4.3, requiring that "[a] prosecutor may not properly participate in a disposition by plea of guilty if he is aware that the accused persists in denying guilt or the factual basis for the plea, without disclosure to the court," was deleted from the revised standards because of the Court's decision in *North Carolina v. Alford*, 400 U.S. 25 (1970). REVISED ABA PROSECUTION STANDARDS, *supra* note 153, at § 3-4.2, History of Standard, at 3.66. This is especially revealing since the old standard was not inconsistent with, but simply more restrictive than, *Alford*, which held that a court may accept a guilty plea even if a defendant persists in denying guilt, so long as the plea is knowingly and voluntarily entered.

B. *Fostering Inconsistent Adjudication
Because of Problems of Ascertainability*

Although inquiries into mental state are undeniably common under American law, it remains true that it is easier to determine what someone did than what she thought while doing it. Thus, unless governed by highly structured rules of proof,³²³ an intent-based analysis is likely to lead to less predictable results than a nonintent-based approach. When the intent in question is prosecutorial intent, two commonly recurring issues exacerbate the difficulty of obtaining consistent results.

The first issue concerns whose intent is legally significant. Especially in larger prosecution offices, different prosecutors may be responsible for various phases of the same case. The prosecutor who seeks increased charges after some defense maneuver may simply disagree with the charging decision of the prosecutor who initially handled the case. The prosecutor who fails to reveal that a trial witness made inconsistent statements during a pretrial interview may be unfamiliar with those statements because a different prosecutor conducted that interview. Moreover, the participation of multiple prosecutors is but one aspect of the problem. There is also the issue of the extent to which prosecutors should be held accountable for the intention of other actors in the law enforcement process. This problem poses even more difficult and less predictably answered questions. Does a prosecutor act with discriminatory intent when she relies upon citizen complaints to bring violations to her attention if suspect selectivity is exercised by the complaining citizenry?³²⁴ Does a prosecutor "know" about exculpatory evidence if such evidence is known to the police but does not appear in the prosecutor's files?³²⁵

The second obstacle to consistent results is the question of mixed motives. Frequently, there are several reasons behind a prosecutor's decision to file or increase charges, call someone before the grand jury, or exercise a peremptory strike against a prospective juror; and prosecutors rarely document their reasons for taking such actions. Thus, even assuming agreement on both the precise nature of the prohibited intent and the causal role that that intent must play to invalidate the prosecu-

³²³ See *infra* text following note 337.

³²⁴ See *People v. Tornatore*, 46 Misc. 2d 908, 910, 261 N.Y.S.2d 474, 478-79 (Poughkeepsie City Ct. 1965); Alexander, *Motivation and Constitutionality*, 15 SAN DIEGO L. REV. 925, 946 (1978); Bice, *Motivational Analysis as a Complete Explanation of the Justification Process*, 15 SAN DIEGO L. REV. 1131, 1132 n.6 (1978).

³²⁵ See *supra* note 214.

tor's action—difficult issues in their own right³²⁶—the recurrence of mixed motive problems and the difficulty in securing probative evidence to resolve them virtually ensure the inconsistent resolution of challenges evaluated under an intent-based scheme.³²⁷

C. *The Costs of Efficiency, Integrity, and Legitimacy*

Ascertaining prosecutorial intent often entails discovery³²⁸ and may require an evidentiary hearing or other subsidiary proceedings³²⁹—procedures that prolong the adjudicatory process. Such proceedings burden not only the prosecutor's time, but also her integrity. When a prosecutor is questioned about her intent, and that intent is dispositive of a claim that the prosecutor opposes, the prosecutor faces enormous pressure to rationalize her actions as permissibly motivated. This dynamic is unlikely to be lost on defendants. Consequently, even if the prosecutor's disclaimer of any improper intent is entirely truthful, which will often be the case, a defendant on the losing end of a motion will be reluctant to accept it as such. From a defendant's standpoint, a ruling that turns on accepting the prosecutor's professed "good" intentions at her word loses much of its legitimacy.

D. *The Disincentive to Prosecutorial Competency*

To the extent that careless or ignorant prosecutorial actions remain beyond the ambit of intent-based constitutional restraints, such restraints disserve the goal of promoting responsible prosecutorial behavior. For example, making an illicit motivation the only bar to filing increased postindictment charges provides no incentive to rationalize charging practices. Haphazard charging practices will remain unchecked. Similarly, tying a prosecutor's obligation to reveal exculpatory evidence to her knowledge of the existence of such evidence discourages, rather than encourages, thorough prosecutorial investigation and full police candor with the prosecutor. Conditioning double jeopardy protection on the prosecutor's intent to provoke a mistrial, moreover, does not spur training concerning impermissible trial practices, since a prosecutor's ignorance that the maneuver was impermissible will prevent

³²⁶ See *supra* notes 102-06 and accompanying text.

³²⁷ Indeed, as decisions evaluating the constitutionality of the government's "passive enforcement" policy for selecting individuals for prosecution for failing to register for the draft illustrate, even when reasonably good evidence concerning the prosecutor's intent is available, determining what that intent is may still be difficult. See *supra* notes 31-32 and accompanying text.

³²⁸ See *supra* notes 28-30 and accompanying text.

³²⁹ See *supra* note 260 and accompanying text.

the imposition of the double jeopardy bar to retrial if a mistrial is declared. Nor does intent-based double jeopardy analysis dissuade prosecutors who do know the rules from engaging in improper trial tactics when the temptation to do so is strongest: in weak cases when the prosecutor is willing to risk reversal on appeal in order to bolster her chances of obtaining a conviction at trial. The prosecutor's intention in such situations is to obtain a conviction, not to prompt a mistrial.

E. *The Cost of Hypocrisy*

If, as we have seen, the prosecutor's intent determines the constitutionality of a considerable spectrum of actions, the question arises as to why all prosecutorial actions are not subject to challenge on the grounds of impermissible motivation. Actions challengeable on the grounds of improper intent are neither the only, nor necessarily the most, important ones a prosecutor may take in determining a defendant's fate. A prosecutor's refusal to accept a defendant's plea offer can be as crucial to a defendant as the prosecutor's institution of additional charges against her. A prosecutor's decision to immunize one codefendant rather than another may affect each defendant no less than the prosecutor's decision to institute charges in the first place. Yet, like many other prosecutorial actions, refusals to accept plea offers and decisions concerning who to immunize generally remain beyond defense challenge and judicial scrutiny, whatever the motivations involved. If purity of prosecutorial intent is truly the pre-eminent concern in evaluating the constitutionality of prosecutorial actions, then it could well be argued that all prosecutorial decisions of consequence should be subject to challenge on the ground of improper motivation.

III. THE SYSTEMIC JUSTIFICATIONS FOR INTENT-BASED ANALYSIS

As demonstrated in Section II, there are a number of costs inherent in making prosecutorial intent the linchpin of constitutional challenges to the prosecutor's behavior. There are, however, several systemic considerations that might be advanced to justify these costs and, consequently, create a systemic preference for intent-based analysis. This section examines these justifications.

A. *Fostering the Reality or the Appearance of Fairness*

The preference for intent-based analysis is at least partially driven by an assumed connection between prosecutorial intent and fairness. This linkage is weaker than meets the eye. The prosecutor's role con-

tains both adversarial and judicial³³⁰ elements.³³¹ These dual characteristics yield the most important benchmarks of the fairness of prosecutorial behavior: the adequacy of the procedural safeguards surrounding the behavior and its apparent evenhandedness.³³²

Prosecutorial intent has little to do with procedural adequacy. If certain actions are prohibited, it is because those actions interfere to an unacceptable degree with the fair formulation or disposition of the charges against the defendant. The objective circumstances of the prosecutorial action, such as whether charges added post-indictment are based on newly discovered evidence or on information known to the prosecutor at the time of the initial indictment, may affect this determination.³³³ The prosecutor's motivations in taking the action, however, do not. The very idea of procedural safeguards is to erect mechanisms that ensure just adjudication against improper state maneuvers, whatever the motivation behind them.

Evenhandedness, the second gauge of fairness in a criminal proceeding, is primarily a function of two factors: the impartiality of the prosecutorial decisionmaker and the objective consistency of the results that the prosecutor's decisionmaking yields. Impartiality may be

³³⁰ See *Imbler v. Pachtman*, 424 U.S. 409, 422-24 (1976) (analogizing the common law immunity of prosecutors to that of the judiciary, and noting the prosecutor's duty as the public's adversary).

³³¹ The most oft-quoted acknowledgment of the dual nature of a prosecutor's responsibilities is found in *Berger v. United States*:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

295 U.S. 78, 88 (1935).

³³² A defendant's interest in evenhanded treatment is, however, a limited one. This is because of the essentially nonrational and haphazard nature of crime detection and apprehension. A defendant caught selling a small quantity of narcotics in an undercover drug operation has no valid claim that she ought to be treated like other similarly situated dealers, the vast majority of whom are never caught. Her claim is that she ought to be treated like others in her position who are caught.

³³³ There are, of course, a variety of basic procedural guarantees that are not circumstance-dependent. Among them are the right to counsel, see *Gideon v. Wainwright*, 372 U.S. 335 (1963), and the right to a jury trial for any offense punishable by more than six months, see *Baldwin v. New York*, 399 U.S. 66 (1970), where the jury must be composed of at least six persons, see *Ballew v. Georgia*, 435 U.S. 223 (1978).

achieved through the use of nonintent-based mechanisms that ensure the removal of a biased prosecutor. In protecting the goal of judicial impartiality, the Court has frequently focused not on the subjective bias of the assertedly partial judge, but on whether the objective factors present create an intolerable potential for the judge to act in a nonneutral fashion.³³⁴ Given that judicial impartiality is even more central to fairness concerns than prosecutorial neutrality,³³⁵ a similar approach could be used to ensure against prosecutorial bias.³³⁶

Objective consistency is best achieved through rule-oriented, nonintent-based constraints rather than an intent-based analysis. The most expeditious way to ensure equal treatment when an intolerable potential for disparate treatment exists is to formulate objective rules that limit prosecutorial actions. Constitutional prohibitions couched in terms of the prosecutor's mental state are inherently less likely to yield consistent results because of the problems of proof and ascertainableness that attend them.³³⁷

When, however, the proof problems can be alleviated, intent-based analysis may promote consistency, albeit indirectly. The best means of easing proof problems where intent is at issue is through the use of objectifying presumptions which require the prosecutor to articulate a verifiable justification for a challenged action once the defendant makes a specified showing. Such presumptions encourage consistency both because the prospect of public explication they raise spurs rational decisionmaking, and because the justification they require exposes the considerations that affect the challenged action to judicial as well as public scrutiny. An intent-based analysis that focuses only on the existence vel non of a specified improper motive is unlikely to generate such benefits with any regularity.

B. *Disciplining the Prosecutor*

A second reason to consider the prosecutor's intent in evaluating

³³⁴ See, e.g., *Connally v. Georgia*, 429 U.S. 245, 250 (1977) (per curiam) (due process denied when justice of the peace received payment only for the *issuance* of a warrant and not for denial); *Withrow v. Larkin*, 421 U.S. 35, 57 (1975) (due process not denied when adjudicatory and investigative functions combined within an agency); *Tumey v. Ohio*, 273 U.S. 510, 535 (1927) (due process denied when judge has direct pecuniary interest in the outcome of the trial); see also Redish & Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 495-503 (1986) (suggesting various structural mechanisms to ensure adjudicatory independence).

³³⁵ See *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248-49 (1980).

³³⁶ For a discussion of such an approach, see *infra* notes 394-95 and accompanying text.

³³⁷ See *supra* notes 27-30 and accompanying text.

the constitutionality of her actions is the disciplinary function that a declaration of unconstitutionality might serve. Because of the strong link between culpability and mental state,³³⁸ to the extent that disciplinary considerations are part of the constitutional calculus, the prosecutor's mental state arguably should be as well. A prosecutor who has purposefully violated a defendant's rights is, according to this notion, a more fitting candidate for constitutional disapprobation than one who has done so unwittingly.

As a preliminary matter, it is doubtful that disciplining law enforcement officials is a function of the constitutional guarantees protecting defendants in criminal proceedings. The disciplinary notion is strongly undercut by the Court's increasing insistence that a defendant demonstrate harm as a necessary element of claiming a constitutional violation, no matter how egregious the behavior of the government's agents.³³⁹ Disciplinary action also runs counter to the standing requirements of the fourth³⁴⁰ and fifth³⁴¹ amendments, which prevent a defendant from challenging the admissibility of evidence illegally obtained from others. Even assuming that a decision on the constitutionality of prosecutorial behavior will serve some disciplinary interest, it may do so ineffectively. An important reason for punishing an official, including declaring her behavior unconstitutional, is to deter similar misconduct in the future. Disciplinary action, however, seeks to deter the repetition of unacceptable behavior, not the harboring of bad intentions. Turning the constitutionality of the prosecutor's actions on what the prosecutor thought as opposed to what the prosecutor did diminishes the disciplinary force of declarations of unconstitutionality by making it more difficult for prosecutors to ascertain what behavior is prohibited.³⁴²

This may be why the subjective intent of law enforcement personnel does not factor into the question whether their actions violate the

³³⁸ See, e.g., MODEL PENAL CODE § 2.02(2) (Official Draft 1962).

³³⁹ See *Strickland v. Washington*, 466 U.S. 668 (1984); *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982); *United States v. Morrison*, 449 U.S. 361 (1981).

³⁴⁰ See *Rawlings v. Kentucky*, 448 U.S. 98 (1980); *United States v. Payner*, 447 U.S. 727 (1980); *Rakas v. Illinois*, 439 U.S. 128 (1978); *Mancusi v. DeForte*, 392 U.S. 364 (1968); *Wong Sun v. United States*, 371 U.S. 471 (1963).

³⁴¹ See *People v. Varnum*, 66 Cal. 2d 808, 427 P.2d 772, 59 Cal. Rptr. 108 (1967), *cert. denied*, 390 U.S. 529 (1968); *People v. Condley*, 69 Cal. App. 3d 999, 138 Cal. Rptr. 515 (1977).

³⁴² See *Screws v. United States*, 325 U.S. 91, 154 (1945) (Roberts, J., dissenting) (when a statute is vague as to what actions it prohibits, a court cannot remedy the vagueness by manipulating the mens rea requirement); *Ashdown*, *supra* note 305, at 338.

fourth amendment.³⁴³ In the event a violation is found, the good or bad faith of the police is relevant only to the question of remedy, that is, whether the exclusionary rule should apply.³⁴⁴ In that context, moreover, the "good faith" of the police is determined by a highly objective standard that turns on the degree to which the police action was consistent with fourth amendment rules as they appeared at the time the action was taken.³⁴⁵ In effect, the good faith "exception" to the exclusionary rule works as a cushion to protect law enforcement personnel against being penalized because of "fuzziness" in the then existing fourth amendment rules. Consequently, intent in the fourth amendment area serves not as a vehicle for avoiding a substantive decision on the propriety of a challenged police action, but as a determinant whether punishment is warranted if that action is found to be constitutionally impermissible. Second, finding their actions unconstitutional is a haphazard means of disciplining prosecutors. In a number of constitutional challenges to prosecutorial behavior, harm is either a component of the constitutional claim itself, as in the *Brady* area,³⁴⁶ or the claim is subject to some formulation of the harmless error rule,³⁴⁷ as it is when a prosecutor's grand jury presentation is at issue.³⁴⁸ When a claim turns on harm, its disposition largely depends upon factors divorced from the prosecutor's culpability, most notably the strength of the evidence against the defendant. The disciplinary effect of declaring the prosecutor's actions unconstitutional is, therefore, undercut.

Harm is not, however, a factor in all constitutional challenges to prosecutorial behavior. There are certain claims, generally those which implicate a right "cast in terms of the risk or hazard of trial and conviction,"³⁴⁹ in which a finding that the prosecutor acted improperly and violated the right requires automatic reversal. In such instances, any disciplinary force that inheres in a declaration of unconstitutionality is not diluted by the filter of harmlessness analysis. Thus, to the extent that disciplinary considerations militate for intent-based analysis, they

³⁴³ See *Scott v. United States*, 436 U.S. 128, 136-39 (1978) (rejecting argument that subjective intent makes an otherwise lawful action unconstitutional); see also *United States v. Rowell*, 612 F.2d 1176, 1177-79 (7th Cir. 1980) (validity of arrest dependent on probable cause); *Klingler v. United States*, 409 F.2d 299, 302-03 (8th Cir.) (validity of arrest dependent on probable cause), *cert. denied*, 396 U.S. 859 (1969).

³⁴⁴ See *United States v. Leon*, 468 U.S. 897, 913-17 (1984).

³⁴⁵ See *id.* at 922-24 & n.23.

³⁴⁶ See *supra* note 184 and accompanying text.

³⁴⁷ See, e.g., *Milton v. Wainwright*, 407 U.S. 371 (1972); *Whitely v. Warden*, 401 U.S. 560 (1971); *Chambers v. Maroney*, 399 U.S. 42 (1970); *Anderson v. Nelson*, 390 U.S. 523 (1968); *Chapman v. California*, 386 U.S. 18 (1967).

³⁴⁸ See *supra* note 152 and accompanying text.

³⁴⁹ *Price v. Georgia*, 398 U.S. 323, 331 (1970).

do so when harm to the defendant plays no role in the constitutional inquiry, either because it is presumed, as in the selective and vindictive prosecution areas, or because it is irrelevant, as in the peremptory challenge discrimination area.

C. *Respecting Institutional Competence*

Finally, it might be argued that by alleviating the need for courts to formulate more objective rules, intent-based analysis prevents judicial meddling into areas appropriately left to the executive and enables courts to avoid immersion into matters beyond their institutional competence. There is little doubt that the courts view this concern as a powerful one. This is evident not only from their preoccupation with separation of powers issues when charging decisions are involved,³⁵⁰ but also conversely from their increasing willingness to disapprove, on a nonintent basis, certain prosecutorial practices before the grand jury, an institution over which the courts exercise supervisory authority.

Yet to the degree that institutional competence concerns drive the judicial inclination towards intent-based restraints to circumscribe prosecutorial improprieties, it is hard to square the contrary preference the courts have displayed for objective rules to govern police behavior. The latter preference is visible in the fourth amendment area, where the courts have increasingly eschewed a concern with the subjective motivations of police in favor of rule-oriented adjudication governing the conduct of searches and seizures,³⁵¹ as well as in decisions under the fifth amendment governing police interrogation practices. The Court's decision in *Miranda v. Arizona*³⁵² inaugurated a nonintent-based regime for regulating questioning by law enforcement personnel; the Court has insisted that the key elements of that scheme—whether a defendant is “in custody” and whether the police conduct towards the defendant constitutes “interrogation”—turn on objective considerations rather than the intent of the police.³⁵³

³⁵⁰ See *supra* note 10.

³⁵¹ See *supra* notes 344-45 and accompanying text. See generally Ashdown, *supra* note 305, at 335 (discussing the judicial belief in both the need to provide concrete guidelines and the need to maintain flexibility through a case by case determination of the reasonableness of police conduct).

³⁵² 384 U.S. 436 (1966).

³⁵³ In *Berkemer v. McCarty*, 468 U.S. 420 (1984), the Court considered whether a motorist stopped for a routine traffic stop was “in custody” for purposes of *Miranda*. After evaluating the degree to which traffic stops in general are coercive, see *id.* at 437-39, the Court held that a motorist detained by a policeman during a traffic stop was not “in custody,” even if the policeman involved in a particular stop actually intended to take the motorist into custody. See *id.* at 442.

In *Rhode Island v. Innis*, 446 U.S. 291 (1980), the Court held that the inquiry

Whatever one may think about the current state of fourth or fifth amendment law, surely the courts are no more institutionally competent or constitutionally empowered to "police the police" than they are to regulate the practices of prosecutors who practice before them daily. The police, like prosecutors, are creatures of the executive branch. The range of factual variation and nuance possible in the situations to which the police must respond is such that many prosecutorial decisions seem binary by comparison. Moreover, the problems confronting the police are likely to be dynamic in nature because the context in which police work is performed is constantly changing in response to new methods and strategies of committing as well as detecting crime. In contrast, the problems raised by prosecutorial practices tend to be somewhat static because the legal process which provides the context for a prosecutor's activities is apt to change little over time. Prosecutorial practices thus would seem to provide a more hospitable terrain for objective restraints than police practices.

Comparison with the regulation of police behavior aside, institutional competence is not a persuasive reason to prefer intent to nonintent-based restraints as the means for controlling prosecutorial abuses. The notion that institutional competence creates this preference rests on two premises: first, that intent-based restraints intrude less on prosecutorial prerogatives than objective restraints; and second, that prosecutorial behavior is generally unsusceptible to objective restraints, leaving prosecutorial intent as the only available basis for constitutional regulation.

Both of these premises, however, are questionable. With respect to the first, it is important to remember that when a prosecutor's behavior implicates constitutional guarantees, the question is not whether the prosecutor's actions are subject to judicial scrutiny, but how the necessary judicial supervision will be exercised. There is nothing inherently unobtrusive about intent-based restraints. Procedurally, as is evident from the selective prosecution, vindictive charging, and peremptory challenge areas, such restraints may require collateral proceedings, the disclosure of prosecutorial files, and the cross examination of prosecutors in open court. Substantively, intent-based restraints may subject a broader range of prosecutorial behavior to judicial scrutiny than nonintent-based restrictions. For example, the current law of charging vindictiveness allows a defendant to challenge a wide array of post-indictment charge increases as vindictive. The range of such challenges

into whether police behavior constitutes "interrogation" should be conducted "without regard to objective proof of the underlying intent of the police." *Id.* at 301.

would almost certainly shrink under a nonintent-based scheme that clearly delineated both the procedural rights that could support a vindictiveness claim, as well as the circumstances, such as the discovery of new evidence, that would justify increased charges in the wake of a defendant's exercise of such rights.³⁵⁴

With respect to the second premise, the issue of whether intent-based analysis is compelled by the lack of objective alternatives is best examined area by area, as it is in the next section, rather than answered on a systemic basis. Nevertheless, it is worth making the general observation that claims that an area is not susceptible to objective restraints but is susceptible to intent-based regulation should be viewed cautiously. The ascertainability of impermissible intent is largely dependent upon the existence of some objective benchmarks governing the challenged action. The less clear it is that the prosecutor should not have done what she did, the more difficult it is to conclude that she took the action for impermissible reasons.³⁵⁵

For example, in the prosecutorial vindictiveness area, a good deal of the confusion stems from the failure of courts, other than in the plea bargaining context, to set forth the objective circumstances under which charges may be increased postindictment. In the peremptory challenge area, questions will undoubtedly arise concerning the propriety of the prosecutor's striking jurors on the basis of factors that correlate strongly with race, such as economic status or location of residence. It is obviously difficult to decide whether such strikes have been prompted by an impermissible discriminatory intent without first deciding whether peremptory strikes may be exercised on the basis of race linked factors such as economic status or residence.

The notion that the difficulty of formulating objective rules to govern prosecutorial behavior in a particular area should be examined, rather than assumed, is confirmed by developments in the grand jury presentation area. On the surface, that area would seem difficult to regulate through rule formulation because of the broad variety of challenged prosecutorial actions. Yet it is the grand jury presentation area in which the courts have been least inclined to focus on prosecutorial intent.

Summary

In sum, systemic considerations appear inadequate to justify a

³⁵⁴ See *infra* notes 405-06 and accompanying text.

³⁵⁵ See *Screws v. United States*, 325 U.S. 91, 149-57 (1945) (Roberts, J., dissenting).

general preference for intent-based analysis in deciding constitutional challenges to prosecutorial behavior. They do, however, point to two factors that might justify intent-based analysis in a particular area: the absence of a concern with harm and the unavailability of objective constraints. The first is of limited force, however, because it is pegged to the questionable proposition that findings of unconstitutionality should serve a disciplinary function. In addition, systemic considerations also point to the type of intent-based analysis—that which utilizes objectifying presumptions to require the prosecutor to justify the challenged action—which should be preferred when intent-based analysis is warranted.

IV. THE RESIDUAL CASE FOR INTENT-BASED ANALYSIS

It is clear that, far from being the preferred mode of evaluating constitutional challenges to prosecutorial behavior, intent-based analysis should be used only if there are identifiable reasons to do so. There are three reasons why an area may not be susceptible to nonintent-based restraints. First, doctrinal principles, especially equal protection, may compel a concern with prosecutorial intent. Second and related, intent-based analysis may, despite its problems, be necessary to conform a defendant's right to the constitutional interest at stake. This may be either because it is not possible to reach all behavior that is of constitutional concern through the use of objective constraints, or because to do so would significantly alter the scope of the right at issue. Finally, echoing institutional competence concerns, objective restraints may be too difficult for the courts to formulate or administer.

This Section returns to the six areas discussed in Section I and examines whether an intent-based test is justified in each area by any of these three considerations. When intent-based analysis appears to be warranted, it examines the feasibility of using objectifying presumptions to require the prosecutor to justify the challenged action, which is the mode of intent-based analysis that systemic considerations favor. This Section is designed not to analyze exhaustively the feasibility of formulating constitutionally derived rules to govern the prosecutor's behavior, but only to adumbrate the areas that might be explored and to indicate, in a preliminary way, the conclusions that might be expected to follow.

A. *Selective Prosecution*

Due to doctrinal and practical considerations, the strength of the case for requiring an inquiry into the prosecutor's actual motive in se-

lective prosecution claims varies somewhat according to the asserted basis of impermissible selectivity. However, a concern with prosecutorial intent in at least some selective prosecution claims is unavoidable. This is because a general formulation of the selective prosecution doctrine entirely divorced from a concern with prosecutorial intent would leave some constitutionally reprehensible behavior beyond reach.

Such a formulation would make the infrequency of a statute's enforcement, if of sufficient magnitude, grounds for invalidating a prosecution under it regardless of the prosecutor's motive in initiating the prosecution.³⁵⁶ It could be predicated upon the due process requirement of fair notice,³⁵⁷ the eighth amendment ban on cruel and unusual punishment³⁵⁸ and the doctrine of desuetude,³⁵⁹ a somewhat elusive concept that basically holds that the long and continued disuse of a statute results in its abrogation. It could also draw support from the vagueness doctrine,³⁶⁰ under which the Court has consistently invalidated legisla-

³⁵⁶ See Comment, *Curbing the Prosecutor's Discretion: United States v. Falk*, *supra* note 10, at 396.

³⁵⁷ See *Lambert v. California*, 355 U.S. 225 (1957). *Lambert* struck down, on due process grounds, a conviction for violating a Los Angeles municipal ordinance that required convicted felons coming into the city more than five times within a 30-day period to register with the Chief of Police. The Court's rationale rested in part on the fact that there was no reason for the defendant to know that her failure to register was a crime. A defendant prosecuted for an activity for which no one else is being punished would be able to make this "no notice" argument in even stronger terms, since the massive nonenforcement of the law would serve as affirmative proof that the activity was condoned.

³⁵⁸ See *Furman v. Georgia*, 408 U.S. 238 (1972). *Furman* held that the death penalty, as administered in 1972, constituted cruel and unusual punishment in violation of the eighth amendment. Although the holding of the Court was contained in a brief per curiam opinion, four of the five Justices who joined that opinion, each of whom also wrote separately, were significantly influenced by the highly sporadic and arbitrary imposition of capital punishment. See *id.* at 257 (Douglas, J., concurring); *id.* at 293-95 (Brennan, J., concurring); *id.* at 308 (Stewart, J., concurring); *id.* at 310-11 (White, J., concurring).

³⁵⁹ See *Rodgers & Rodgers, Desuetude as a Defense*, 52 IOWA L. REV. 1 (1966); cf. *Poe v. Ullman*, 367 U.S. 497 (1961) (dismissing suit due to lack of immediate threat of criminal prosecution, relying in part on the fact that only one prosecution was initiated since the law was enacted in 1879). But see *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 113-14 (1953) ("The failure of the executive branch to enforce a law does not result in its modification or repeal.").

³⁶⁰ That doctrine "requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement.'" *Smith v. Goguen*, 415 U.S. 566, 572-73 (1974) (citation omitted). The Court has highlighted the close relationship between the doctrines of selective prosecution and vagueness. Traditionally, the vagueness doctrine was justified on three grounds: the need for fair notice and warning, the need to limit the discretion vested in law enforcement personnel, and where the law "abut[s] upon sensitive areas of basic First Amendment freedoms," *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964), the need to prevent the inhibition of the exercise of those freedoms, see *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). In *Kolender v. Lawson*, 461 U.S. 352 (1983), how-

tion that is too susceptible to selective prosecution without any inquiry into the motive behind the particular prosecution that serves as the vehicle for challenging the law.³⁶¹ Since legislative judgments should be afforded no less, and probably more, deference than executive actions,³⁶² the invalidation of legislative acts solely because of their potential for arbitrary enforcement supports the condemnation of a prosecutor's actual arbitrary enforcement of a statute, a fact inferable from the extreme infrequency of its use,³⁶³ without a showing that the prosecutor acted with an impermissible motive.

While doctrinally sound, a principle of selective prosecution concerned solely with the infrequency with which others in the defendant's situation are prosecuted would require a greater showing of non-prosecution than is currently required to make out a *prima facie* case of selective prosecution.³⁶⁴ Thus, there would be some impermissibly motivated prosecutions that present selective prosecution analysis would reach but a doctrine divorced from intent would not.³⁶⁵

Because of the Constitution's special sensitivity to race-based discrimination and the doctrinal preoccupation of the equal protection clause with governmental intent in such matters, this shortfall is most unacceptable when race is the asserted impermissible basis of selectivity. A concern with prosecutorial intent in race-based selective prosecution claims is thus unavoidable. The use of evidentiary presumptions that objectify the proof of discriminatory intent is, however, both a feasible and desirable means of vindicating that concern. First, the use of objectifying presumptions to prove racial discrimination is well established in other areas of the law, including jury selection³⁶⁶ and Title

ever, the Court emphasized that "the more important aspect of vagueness doctrine 'is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.'" *Id.* at 358 (quoting *Smith*, 415 U.S. at 574).

³⁶¹ See, e.g., *Kolender*, 461 U.S. at 352; *Goguen*, 415 U.S. 566; *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Coates v. Cincinnati*, 402 U.S. 611 (1971); *Cox v. Louisiana*, 379 U.S. 536 (1965).

³⁶² See *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1077-87 (1969).

³⁶³ There are two situations in which a state's interest in prosecuting under a dormant criminal statute may be justified as not being arbitrary and capricious. The first is when the prosecutor uses the statute as a vehicle for bringing a test case, with the anticipation that success will lead to its use in future prosecutions. The second is when changes in legal doctrine render the statute applicable to a range of behavior previously difficult to prosecute under it. See *Monroe v. Pape*, 365 U.S. 167, 181-87 (1961).

³⁶⁴ See *supra* notes 14-17 and accompanying text.

³⁶⁵ This number would undoubtedly be very small, if only because selective prosecution claims under current law so rarely succeed.

³⁶⁶ See *supra* note 247 and accompanying text.

VII litigation.³⁶⁷ Second, because under present law the proof required to establish the first prong of a selective prosecution claim—that others similarly situated have not been prosecuted³⁶⁸—will often contain statistics showing a disproportionate number of prosecutions against minorities, selective prosecution claims are especially amenable to the use of objectifying presumptions.³⁶⁹ Third, the benefits that flow from requiring the prosecutor to justify her actions, such as the inducement towards regularity and the articulation of factors that affect the decision, are desperately needed in the charging area. This is especially true when, as will often be the case in selective prosecution claims, the statutes involved are enforced somewhat sporadically. Finally, the use of objectifying presumptions to demonstrate impermissible intent should be useful in smoking out an actual discriminatory intent. Because the conscious use of race or ethnicity will rarely further legitimate prosecutorial objectives,³⁷⁰ the criteria available to defend a prosecution that was, in fact, discriminatorily motivated will not explain the defendant's selection as well, making the true motive behind the prosecu-

³⁶⁷ See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In *McDonnell Douglas*, the Court set forth the initial showing required of a plaintiff to make out a prima facie case of employment discrimination based upon the employer's discriminatory intent in highly objective terms:

The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. at 802.

³⁶⁸ See *supra* notes 14 & 17 and accompanying text.

³⁶⁹ For example, once a defendant presents evidence that (1) the law is infrequently enforced against whites so that (2) a disproportionate number of defendants against whom the law is enforced are black, a presumption may arise that requires the state to demonstrate either that, under a neutral enforcement program, blacks are apprehended with disproportionate frequency or that, under acceptable charging considerations, blacks more frequently merit prosecution. See *Wayte v. United States*, 470 U.S. 598, 608-10 (1985); *United States v. Wilson*, 806 F.2d 171, 176 (8th Cir. 1986); *Taylor v. United States*, 798 F.2d 271, 274 (7th Cir. 1986); *United States v. Dukehart*, 687 F.2d 1301, 1303 (10th Cir. 1982).

³⁷⁰ One possible exception is the use of ethnicity in selecting defendants to prosecute for violations of the immigration laws. It is conceivable that the government could decide that illegal aliens from a specific country are posing particular law enforcement problems, and that resources should be concentrated on prosecuting illegal entrants from that country. But because immigration offenses are unique in making ethnic origin (non-U.S. citizenship) the crux of the offense, it is unclear whether this possible "exception" is an exception at all. For claims based on selective prosecution based on ethnicity, see *Adame-Hernandez v. INS*, 769 F.2d 1387, 1388 (9th Cir. 1985); *United States v. McWilliams*, 730 F.2d 1218, 1221 (9th Cir. 1984); *Lennon v. INS*, 527 F.2d 187, 195 (2d Cir. 1975).

tion more discernible.³⁷¹

When selective prosecution claims are premised on bases of selectivity other than race—the exercise of first amendment rights or the prosecutor's personal animosity towards the defendant—the doctrinal imperatives mandating an inquiry into the prosecutor's motives are weaker, although their strength varies according to the nature of the claim. There are three distinct situations in which selective prosecution claims premised on the defendant's exercise of her first amendment rights may arise.

First, a defendant may be prosecuted under a statute that directly reaches the defendant's asserted first amendment activity as well as other activity that is not regularly prosecuted. This situation is typified by *United States v. O'Brien*,³⁷² in which a defendant who publicly burned his draft card was prosecuted under a provision that declared that a crime was committed by any person "who forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes" his draft card.³⁷³ The constitutionality of such prosecutions is dependent upon the constitutionality of the provision the defendant is charged with violating, which is a question that can readily be determined under principles ordinarily used to evaluate first amendment challenges to governmental proscriptions.³⁷⁴ These principles include doctrines such as vagueness and overbreadth, which take into account the potential for enforcement patterns that would infringe on first amendment rights, but do not focus on the prosecutor's actual intent in enforcing the provision.

Second, as in cases involving the prosecution of tax protesters³⁷⁵ and draft registration resisters,³⁷⁶ a defendant may be prosecuted because of her activities in openly defying or protesting the law she is charged with violating. Almost invariably, the prosecutor will defend the targeting of such offenders on the grounds of deterrence and culpability. These bases for selection, even if not embodied in a written specific³⁷⁷ or general³⁷⁸ statement of prosecutorial policy, are likely to be

³⁷¹ See Ely, *The Centrality and Limits of Motivation Analysis*, 15 SAN DIEGO L. REV. 1155, 1156-57 (1978).

³⁷² 391 U.S. 367 (1968).

³⁷³ *Id.* at 370.

³⁷⁴ See Note, *supra* note 18, at 149-51.

³⁷⁵ See, e.g., *United States v. Catlett*, 534 F.2d 864 (8th Cir. 1978); *United States v. Erne*, 576 F.2d 212 (9th Cir. 1978); *United States v. Oaks*, 508 F.2d 1403 (9th Cir. 1974).

³⁷⁶ See, e.g., *Wayte v. United States*, 470 U.S. 598 (1985); *United States v. Eklund*, 733 F.2d 1287 (8th Cir. 1984), *cert. denied*, 471 U.S. 1003 (1985); *United States v. Falk*, 479 F.2d 616 (7th Cir. 1973) (en banc).

³⁷⁷ See *Wayte*, 470 U.S. at 602-03.

part of the charging policy in every prosecutor's office large enough to have to exercise some discretion in enforcement. The constitutionality of using such a policy to enforce the statute the defendant is charged with violating may be evaluated under present doctrine without examining the prosecutor's intent. As illustrated by the Court's recent decision in *Wayte v. United States*,³⁷⁹ the issue may be decided purely on the basis of first amendment principles. These principles reflect the importance of the governmental interest furthered by the policy, whether that interest is unrelated to the suppression of free expression—a question dependent on the nature of the interest and not on the prosecutor's motive—and the extent to which any encroachment on first amendment protections is necessary to further the government's interest.³⁸⁰ The issue is also amenable to determination under the "fundamental rights" branch of equal protection analysis.³⁸¹ There too, the focus is not on the prosecutor's motive,³⁸² but on the degree to which the enforcement policy abridges the asserted first amendment right and the strength of the governmental interests that justify any extant infringement.³⁸³

It is true that these nonintent-based analyses might not reach some cases in which a vocal opponent of a law is prosecuted solely because of the prosecutor's dislike of her message, a scenario that raises serious first amendment concerns.³⁸⁴ An inquiry into the prosecutor's actual intent in instituting the prosecution, however, is unlikely to rectify this shortfall. In contrast to the situation in which race is consciously used as a selective factor, when a defendant is prosecuted for violating the very law she openly disdains,³⁸⁵ it will usually be virtually impossible

³⁷⁸ See DEP'T OF JUSTICE PRINCIPLES, *supra* note 318, at Part B, Principle 3.

³⁷⁹ 470 U.S. 598 (1985).

³⁸⁰ See *Wayte*, 470 U.S. at 611; *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

³⁸¹ See, e.g., *Police Dep't v. Mosley*, 408 U.S. 92 (1972); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1969). The infringement of first amendment rights would constitute the infringement of "fundamental rights" because a fundamental right is one that is explicitly or implicitly guaranteed by the Constitution. See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1973).

³⁸² See Note, *supra* note 18, at 156.

³⁸³ See *Graham v. Richardson*, 403 U.S. 365, 376 (1971); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

³⁸⁴ See *Police Dep't v. Mosely*, 408 U.S. 92, 95-96 (1972) (denial of forum based on content of speech violates first amendment and equal protection clause); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-2 (1978).

³⁸⁵ See, e.g., *Wayte v. United States*, 470 U.S. 598 (1985) (violating draft registration); *United States v. Eklund*, 733 F.2d 1287 (8th Cir. 1984) (en banc) (violating draft registration), *cert denied*, 471 U.S. 1003 (1985); *United States v. Ojala*, 544 F.2d 940 (8th Cir. 1976) (refusing to file income tax returns); *United States v. Falk*, 479 F.2d 616 (7th Cir. 1973) (en banc) (failing to have draft cards); *United States v. Steele*, 461 F.2d 1148 (9th Cir. 1972) (refusing to answer census questions).

to determine whether the prosecutor's choice of the defendant was made solely or even principally on the impermissible basis, or was generated by nondiscriminatory law enforcement objectives.

The difficulty in determining whether the prosecutor's intent was impermissible arises because, unlike the conscious use of race or ethnicity, the purposeful selection of a highly vocal and visible violator may further legitimate prosecutorial needs and objectives. These include the relative ease with which the case against the defendant can be proved,³⁸⁶ the flagrancy or egregiousness of the defendant's violation,³⁸⁷ the defendant's prominence or visibility in the community,³⁸⁸ and the need for a test case to clarify the reach or application of an uncertain law.³⁸⁹ Put simply, a prosecutor may select a vocal protester for prosecution because the very activities which give rise to her first amendment claim also render her a highly visible, flagrant violator whose culpable *mens rea* is easily proved. Because of this mesh between first amendment activity opposing a law and the legitimate objective of the law's enforcement, it is difficult to condemn a prosecutor's conscious use of a defendant's demonstrative opposition to a law as a factor in the defendant's selection for prosecution. To disallow such selection on first amendment grounds would effectively immunize the most conspicuous offenders from prosecution.

The third situation in which a claim of selective prosecution may

³⁸⁶ See, e.g., *Wayte*, 470 U.S. at 612-13 (noting the cost effectiveness of prosecuting prominent offenders); *United States v. Taylor*, 693 F.2d 919, 923 (9th Cir. 1982) (government can consider whether potential defendants have made their participation in illegal activity public); *United States v. Saade*, 652 F.2d 1126, 1136 (1st Cir. 1981) (defendant selected based on ease of apprehension).

³⁸⁷ See, e.g., *United States v. Berrigan*, 482 F.2d 171, 180 (3d Cir. 1973) (holding that prosecutor can consider relative gravity of smuggling letters into prison); *United States v. Malizia*, 437 F. Supp. 952, 954 (S.D.N.Y.) (finding defendant's flagrant contempt for the law a permissible consideration in prosecutorial selection), *aff'd*, 573 F.2d 1298 (2d Cir. 1977), *cert. denied*, 435 U.S. 969 (1978).

³⁸⁸ See, e.g., *United States v. Greene*, 697 F.2d 1229, 1234-35 (5th Cir.) (selective prosecution of leaders of illegal strike permissible), *cert. denied*, 463 U.S. 1210 (1983); *United States v. Saade*, 652 F.2d 1126, 1136 n.14 (1st Cir. 1981) (deterrence rationale legitimate absent evidence controverting government's interest in deterring prosecuted activity); *United States v. Catlett*, 584 F.2d 864, 867-68 (8th Cir. 1978) (defendant's public assertion of personal privilege not to pay taxes is permissible basis for selection); *United States v. Ojala*, 544 F.2d 940, 944-45 (8th Cir. 1976) (same); *United States v. Peskin*, 527 F.2d 71, 86 (7th Cir. 1975) (defendant's prominent position as attorney giving tax advice is permissible basis in case of falsifying tax returns), *cert. denied*, 429 U.S. 818 (1976); *United States v. Swanson*, 509 F.2d 1205, 1208 (8th Cir. 1975) (same for accountant for failure to file tax returns).

³⁸⁹ See, e.g., *Cook v. City of Price*, 566 F.2d 699, 701 (10th Cir. 1977) (selective enforcement is justified where no malicious intent shown and test case needed to determine reach of statute) (quoting *Mackay Tel. Co. v. Little Rock*, 250 U.S. 94, 100 (1919)).

be premised on the exercise of first amendment rights arises when a defendant is prosecuted under a statute unrelated to the expressive activity she claims triggered the prosecution.³⁹⁰ In this situation, first amendment doctrine requires examination of the prosecutor's motives in instituting the prosecution.³⁹¹ This is needed because unlike the two previous situations in which the connection between the defendant's first amendment activity and the charge against her is patent, inquiry into the prosecutor's motive in bringing the charge is necessary to establish that this nexus exists. The establishment of this link, however, can hardly be dispositive grounds for invalidating a prosecution. A defendant should not be immune from prosecution for any offense simply because she engaged in noncriminal behavior that called the prosecutor's attention to her.

The problem is similar to that posed by the last category of selective prosecution claims, which are based on the prosecutor's personal animosity towards the defendant. In these prosecutions, the issue is whether a prosecutor "ought . . . to be obligated to forego prosecuting a violator whom he believes to be guilty, merely because of some personal feeling or antagonism he has toward that violator."³⁹² Indeed, the third category of first amendment cases and the personal animosity prosecutions have much in common. Both are apt to involve prosecutions under statutes that are enforced not rarely, but with some regularity, and both involve personal antipathy towards the defendant. Consequently, it is not inappropriate to view this latter type of first amendment case as a variety of personal animosity selective prosecution claims.

Such selective prosecution claims raise general equal protection

³⁹⁰ See, e.g., *United States v. Mangieri*, 694 F.2d 1270 (D.C. Cir. 1982) (prosecution for making false statements on loan application brought because of defendant's "whistleblowing" activities); *Dixon v. District of Columbia*, 394 F.2d 966 (D.C. Cir. 1968) (prosecution for traffic violations brought because defendant protested police misconduct); *Lenke v. United States*, 383 F.2d 20, 27-30 (9th Cir. 1967) (separate opinion of Madden, J.) (prosecution for tax evasion and making false statements on a tax return brought because the defendant was a communist and a leader of the Lawyer's Guild); *State v. Holloway*, 460 A.2d 976 (Del. Super. Ct. 1983) (prosecution for state tax evasion and filing false statements brought because defendant was a "controversial political figure"); *People v. Walker*, 14 N.Y.2d 901, 200 N.E.2d 779, 252 N.Y.S.2d 96 (1964) (prosecution for violations of the Multiple Dwelling Law brought because the defendant exposed corrupt practices in the Department of Buildings).

³⁹¹ See *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 284-87 (1977) (board declined to renew teacher's contract because of disruptive behavior which included criticism of board); *Pickering v. Board of Educ.*, 391 U.S. 563, 569-73 (1968) (same).

³⁹² Note, *Equal Protection Clause: Enforcement of a Constitutionally Valid Ordinance: Administrator's Motive in Enforcing a Statute*, 50 CORNELL L.Q. 309, 315 (1965).

and due process concerns, the resolution of which does not require an inquiry into prosecutorial intent. The disposition of general equal protection claims usually turns on the existence of a rational basis for the government's action. This question is divorced from the government's intent, and is capable of determination in the selective prosecution context by an objective examination of the evidence that triggered the prosecution. Similarly, due process analysis is generally concerned with the adequacy of and adherence to available procedures rather than the intent of the government actor with respect to them.³⁹³ Due process analysis would, therefore, resolve a challenge to the filing of charges by examining whether constitutionally sufficient procedures were followed by the prosecutor.

Because there is usually sufficient evidence to support institution of the challenged charge, these analyses might seem to eliminate meaningful scrutiny of selective prosecution claims premised on the prosecutor's personal antipathy towards the defendant. This elimination, however, may not occur. A critical mechanism for preventing personally vengeful prosecutions is the adoption and enforcement of effective disqualification requirements applicable to prosecutors.³⁹⁴ In the absence of compensating procedural devices such as meaningful administrative review of charging decisions, a court, in an appropriate case, may find that the absence of adequate disqualification procedures constitutes a due process violation, thereby spurring prosecution offices to adopt them. Alternatively, taking a cue from decisions that have held judicial disqualification to be constitutionally required in certain instances,³⁹⁵ a court might itself formulate and apply disqualification requirements to

³⁹³ See *supra* note 386 and accompanying text.

³⁹⁴ See, e.g., 28 U.S.C. § 528 (1982) (requiring Attorney General to "promulgate rules and regulations which require the disqualification of any officer or employee of the Department of Justice, including a United States Attorney or a member of such attorney's staff, from participation in a particular investigation or prosecution if such participation may result in a personal, financial, or political conflict of interest, or the appearance thereof."); Standards of Conduct, 28 C.F.R. § 45.735 (1986) (setting forth the disqualification rules promulgated by the Attorney General).

³⁹⁵ See, e.g., *Aetna Life Ins. Co. v. Lavoie*, 106 S. Ct. 1580, 1586 (1986) (state supreme court justice disqualified from case on unsettled issues when he had pending lawsuit on same issues); *Taylor v. Hayes*, 418 U.S. 488 (1974) (finding that defendant's contemptuous conduct may color the court's judgment); *In re Murchinson*, 349 U.S. 133 (1955) (disqualifying judge who served as both grand jury and trial judge in contempt case); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (disqualifying judges who have "direct, personal and substantial interest" in convictions of defendants); cf. *Gibson v. Berryhill*, 411 U.S. 564 (1973) (optometry board disqualified from hearing complaint because it had filed a similar claim in state court and members had pecuniary interest in case); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) (mayor disqualified in traffic case where revenues from the infractions were a substantial portion of village funds).

prosecutors under the due process clause.³⁹⁶

The courts have been chary about selective prosecution claims premised on a prosecutor's personal animosity towards the defendant because the expansive array of prosecutorial motives that may be called into question and the complex nature of their relationship to legitimate law enforcement aims guarantee that attempts to determine whether and when such motives may play a part in the decision to prosecute will prove fruitless.³⁹⁷ Consequently, objective disqualification approaches are unlikely to diminish and may well increase the modicum of protection afforded under current selective prosecution law.

B. *Vindictiveness in Charging*

Despite the considerable confusion sown by casting the vindictiveness doctrine in terms of impermissible prosecutorial intent, the decisions have nevertheless resulted in several concrete guidelines concern-

³⁹⁶ See *Ganger v. Peyton*, 379 F.2d 709 (4th Cir. 1967) (due process violated where prosecutor was representing defendant's wife in divorce proceedings based on same alleged assault).

³⁹⁷ To the extent that any guiding principles are discernible in this area, there are three factors that appear important: the level of enforcement of the law the defendant is charged with violating, the strength of the case against the defendant, and the particular vindictive reason for which the prosecutor wants to "get" the defendant. For example, the prosecution of a controversial cult leader for regularly enforced fire code violations would be less troubling than her prosecution for rarely enforced Sunday closing provisions. See, e.g., *United States v. Berrigan*, 482 F.2d 171 (3d Cir. 1973) (emphasizing rate of prosecution); *Dear Wing v. United States*, 312 F.2d 73 (9th Cir. 1962) (no vindictive purpose); *State v. Holloway*, 460 A.2d 976 (Del. Super. Ct. 1983) (emphasizing nonuniqueness of prosecution). Similarly, the institution of a prosecution likely to yield political benefits to the prosecutor is far less objectionable where the evidence clearly demonstrates the commission of a regularly prosecuted, serious offense than where the supporting evidence is, at best, marginal. See *Shaw v. Garrison*, 467 F.2d 113 (5th Cir.), *cert. denied*, 409 U.S. 1024 (1972). Finally, while it might be acceptable for the government to pursue a known organized crime boss for minor, sporadically enforced tax infractions because the government's evidence against her on more serious charges is weak or largely inadmissible, it would be far more troubling if such a prosecution were initiated against an individual only because she insulted the prosecutor's husband. Cf. *United States v. Mangieri*, 769 F.2d 1270 (D.C. Cir. 1982) (no prejudice where "whistle blower" prosecuted for filing false loan application); *United States v. Bourque*, 541 F.2d 290 (1st Cir. 1976) (commonly charged offense, no showing of vindictive purpose).

Of course, even if the three factors identified are controlling, the results they should yield in any particular case may be unpredictable because of difficulties in determining not only the degree to which a particular motive is unacceptable, but whether it is unacceptable at all. Compare *Freedman, The Professional Responsibility of the Prosecuting Attorney*, 55 GEO. L.J. 1030, 1034-35 (1967) (prosecutions of Al Capone and James Hoffa were examples of unacceptable charging motivated by defendant's other misdeeds (Capone) or prosecutor's personal antipathy (Hoffa)) with *Braun, Ethics in Criminal Cases: A Response*, 55 GEO. L.J. 1048, 1056-57 (1967) (charges against Capone (tax evasion) and Hoffa (mail fraud, among others) were nontrivial and generally prosecuted, so defendants not immune because of prosecutor's motives).

ing the doctrine's application. *Bordenkircher* permits the increase of charges during plea bargaining;³⁹⁸ *Goodwin* disfavors their increase post-trial;³⁹⁹ and *Blackledge* and *Thigpen* flatly ban their increase when a defendant exercises her unconditional right to a de novo trial after being convicted of minor offenses in a court of limited jurisdiction.⁴⁰⁰ As a doctrinal matter, these guidelines fit far more comfortably into the mainstream of due process analysis than does the vindictiveness doctrine itself.

Other than in the vindictiveness area, due process is generally far more concerned with whether acceptable procedures have been followed in depriving an individual of "life, liberty, or property," than with monitoring the intent of those following the procedures.⁴⁰¹ Thus, in the absence of the vindictiveness doctrine, a prosecutor's charging actions would be immune from a due process attack so long as the prosecutor followed proper and constitutionally adequate procedures in instituting and prosecuting the increased charges. A prosecutor would not be immune from attack if her actions implicated interests that normal procedures, including submission of the charges to a grand jury⁴⁰² and, at the defendant's instance, proving them beyond a reasonable doubt before a petit jury, were inadequate to protect. In effect, the vindictiveness doctrine is a mechanism for identifying and protecting such inadequately protected interests. It is not, however, necessary that this mechanism turn on the prosecutor's intent in bringing the increased charges.

The thrust of the vindictiveness doctrine is to identify those situations in which a prosecutor, despite the existence of adequate evidence, may not increase the charges against a defendant in the wake of the defendant's assertion of some right. The vindictiveness doctrine thus functions much like the unconstitutional conditions doctrine.⁴⁰³ That

³⁹⁸ See *supra* notes 51-62 and accompanying text.

³⁹⁹ See *supra* notes 77-84 and accompanying text.

⁴⁰⁰ See *supra* notes 89-90 and accompanying text.

⁴⁰¹ See, e.g., *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Vitek v. Jones*, 445 U.S. 480 (1980); *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Goss v. Lopez*, 419 U.S. 565 (1975); *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Morrissey v. Brewer*, 408 U.S. 471 (1972).

⁴⁰² See 2 W. LAFAVE & J. ISRAEL, *supra* note 26, at § 15.4(a) ("Where the prosecutor is acting vindictively, the grand jury should be able to recognize that motivation from the unjust nature of the charges presented.").

⁴⁰³ Indeed, the Court seemingly acknowledged the relevance of unconstitutional conditions analysis to the vindictiveness area in *North Carolina v. Pearce*, 395 U.S. 711, 724 n.19 (1969), the first of the Court's vindictiveness decisions, and a number of commentators have assumed that *Pearce* and its progeny represent a branch of the unconstitutional conditions doctrine. See McCoy & Mirra, *Plea Bargaining as Due Process in Determining Guilt*, 32 STAN. L. REV. 887, 906 (1980); Rubin, *The Resurrection of the Right-Privilege Distinction? A Critical Look at Maher v. Roe and Bordenkircher v. Hayes*, 7 HASTINGS CONST. L.Q. 165, 174 (1979); Note, *Divergent*

doctrine holds that a state cannot condition the receipt of benefits upon the forfeiture or nonassertion of fundamental constitutional rights, or withhold or cancel benefits so that a recipient is penalized for exercising such rights, unless the state presents a sufficiently compelling justification for doing so.⁴⁰⁴ Formulated along these lines,⁴⁰⁵ the vindictive-

Lower Court Standards, *supra* note 50, at 438-42.

For discussion of the unconstitutional conditions doctrine, see French, *Unconstitutional Conditions: An Analysis*, 50 GEO. L.J. 234 (1961); Merrill, *Unconstitutional Conditions*, 77 U. PA. L. REV. 879 (1929); O'Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached*, 54 CALIF. L. REV. 443 (1966); Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960); Comment, *Another Look at Unconstitutional Conditions*, 117 U. PA. L. REV. 144 (1968).

⁴⁰⁴ See, e.g., *Elrod v. Burns*, 427 U.S. 347 (1976) (rejecting state's contention that patronage dismissals contribute to the proper functioning of the democratic process); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (rejecting durational requirements on voting rights); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (rejecting durational requirements for the receipt of welfare benefits); *Elfbrandt v. Russell*, 384 U.S. 11 (1966) (finding requirement that state employees take an oath to support federal and state laws compelling); *Sherbert v. Verner*, 374 U.S. 398 (1963) (rejecting state's denial of workman's compensation benefits to Seventh Day Adventist who refused to work on Saturday); *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583 (1926) (rejecting the imposition of common carrier requirements on private carriers to protect the business of common carriers).

The Court applied the unconstitutional conditions doctrine to criminal sanctions in *United States v. Jackson*, 390 U.S. 570 (1968), where the Court invalidated a provision of the Federal Kidnapping Act, 18 U.S.C. § 1201(a), which provided for the imposition of the death penalty only "if the verdict of the jury [should] so recommend." Because the statute provided no procedure for imposing the death penalty when a defendant pleaded guilty or was tried before a judge, the Court found that the statute effectively conditioned an avoidance of the death penalty on a defendant's waiver of his fifth amendment right to plead not guilty and his sixth amendment right to a jury trial, and held that the statute thereby created unconstitutional conditions which unnecessarily penalized a defendant's exercise of these rights. The Court observed that if the statute had "no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional." *Jackson*, 390 U.S. at 581.

⁴⁰⁵ It is the structure rather than the scope of unconstitutional conditions analysis that could be utilized. A pure unconstitutional conditions analysis would be inapplicable to situations in which the increased charges followed the assertion of rights that are not "fundamental." The lower courts have applied the vindictiveness doctrine in a number of situations in which the right exercised could hardly be so characterized. See, e.g., *United States v. Groves*, 571 F.2d 450, 453 (9th Cir. 1978) (rights under the Speedy Trial Act, 18 U.S.C. § 3161(b) (1976)); *United States v. De Marco*, 550 F.2d 1224, 1226-27 (9th Cir.) (venue rights under 18 U.S.C. § 3237(b) (1976)), *cert. denied*, 434 U.S. 827 (1977); *United States v. Johnson*, 537 F.2d 1170, 1174-75 (4th Cir. 1976) (rights under FED. R. CRIM. P. 11 concerning the acceptance of guilty pleas); *United States v. Velsicol Chem. Corp.*, 498 F. Supp. 1255, 1261-66 (D.D.C. 1980) (statutory right to plead nolo contendere).

However, one commentator has argued that although the unconstitutional conditions doctrine does not technically apply where the prosecutor brings increased charges after the assertion of such nonfundamental rights, the courts should nevertheless use their supervisory powers to require an "intermediate" level of justification—less than a compelling interest but more than a rational basis—from the prosecutor in such cases. See Note, *Divergent Lower Court Standards*, *supra* note 50, at 457-58.

ness doctrine need not focus on the prosecutor's motive in bringing the increased charges. Instead, it would entail (1) identifying the procedural rights that are sufficiently important that their exercise should bar the institution of increased charges absent adequate justification, which is a process similar to that courts currently engage in to determine whether a "presumption" of vindictiveness is warranted, and (2) specifying the justifications that will suffice to allow the filing of increased charges after such rights have been exercised. Although mired in the unfortunate rubric of "presumptions" of vindictiveness, some courts have effectively analyzed claims of prosecutorial vindictiveness in this manner.⁴⁰⁸

This formulation does much to reconcile the two prosecutorial vindictiveness decisions at greatest tension: *Blackledge* and *Bordenkircher*.

⁴⁰⁸ For example, in *In re Bower*, 38 Cal. 3d 865, 700 P.2d 1269, 215 Cal. Rptr. 267 (1985), the defendant successfully requested a mistrial after one of the prosecutor's witnesses revealed that the defendant was on parole at the time of the murder with which defendant was charged. Prior to the mistrial declaration, the prosecutor and the defense had entered into a stipulation that limited the defendant's liability to second degree murder. *Id.* at 870, 700 P.2d at 1271, 215 Cal. Rptr. at 269. This stipulation was spurred by the prosecutor's belief that the fatal shot was fired by a codefendant, and not the defendant. On retrial, however, the prosecutor announced that this stipulation would not be renewed because a more thorough examination of the evidence between the mistrial and the retrial convinced him that the defendant had fired the fatal shot. The defendant was convicted of first degree murder and he challenged his conviction on vindictiveness grounds. The state defended the conviction on the basis of the prosecutor's affidavit, in which he swore that it was his re-evaluation of the evidence that caused his refusal to enter into the limiting stipulation on retrial. *Id.* at 878, 700 P.2d at 1278, 215 Cal. Rptr. at 274.

The California Supreme Court found the state's justification for exposing the defendant to the more serious charge insufficient. After first confirming that a "presumption of vindictiveness" is warranted where a defendant is subjected to increased charges on retrial after a mistrial declared at his behest, *id.* at 876-77, 700 P.2d at 1276-77, 215 Cal. Rptr. 273-74, the court noted that "[t]he People's argument reflects a fundamental misunderstanding of the nature of the presumption of vindictiveness." *Id.* The Court held that the existence of the presumption "is not based on the subjective state of mind of the individual prosecutor" and, therefore, "cannot be rebutted by the prosecutor's declaration that he or she was motivated by a reassessment of the evidence against the defendant rather than by any desire to punish the exercise of a protected right." *Id.* at 879, 700 P.2d at 1277, 215 Cal. Rptr. at 275. Instead,

[i]n order to rebut the presumption of vindictiveness, the prosecution must demonstrate that (1) the increase in charge was justified by some objective change in circumstances or in the state of the evidence which legitimately influenced the charging process and (2) that the new information could not reasonably have been discovered at the time the prosecution exercised its discretion to bring the original charge.

Id.

As *In re Bower* demonstrates, it is possible for courts to set objective standards governing the circumstances under which increased charges may be brought against a defendant in the wake of her exercise of various procedural rights. Such standards could, as *Bordenkircher* and *Goodwin* suggest, take into account the timing of the right's exercise.

Both could be viewed as cases in which the prosecutor penalized the defendant for insisting on his fundamental right to a jury trial,⁴⁰⁷ and the issue was whether such a penalty was adequately justified.⁴⁰⁸ The different results—a due process violation in *Blackledge*, but no constitutional infirmity in *Bordenkircher*—could then be explained as a determination by the Court that the state's need to engage in effective plea bargaining, a justification proffered in *Bordenkircher* but not in *Blackledge*,⁴⁰⁹ was a sufficiently compelling interest⁴¹⁰ to justify upholding the filing of increased charges in the case in which that interest was advanced.⁴¹¹

In addition, a formulation that turns on the objective justifications for the increased charge is better suited than an intent-based analysis to protecting all of the interests behind the vindictiveness doctrine. Preventing actual retaliation against a defendant, which is the sole concern of an intent-based doctrine, may be one of those interests, but there are at least two others. The first is ensuring that defendants are not deterred from exercising their procedural rights. Although the tendency to discuss this interest in terms of the availability of an undefined "presumption" of vindictiveness has left the strength of this interest in various situations in a state of confusion,⁴¹² the existence of the interest has been explicitly recognized in a number of cases, including *Pearce*,⁴¹³ *Blackledge*,⁴¹⁴ and *Wasman*.⁴¹⁵ This interest must go beyond a concern with actual vindictiveness; for prior to the assertion of a given right a defendant ordinarily will not know whether her prosecutor is of a mind to retaliate. What is important to a defendant planning her defense is knowledge of the circumstances under which a prosecutor is allowed to increase charges. Conditioning the permissibility of increased charges on the prosecutor's attitude towards what the defendant has done to defend herself is too uncertain a restraint to ensure that defendants will exercise their procedural rights intelligently. Instead,

⁴⁰⁷ The Court has held that the right to a jury trial in all cases in which the potential prison sentence exceeds six months is fundamental. See *Baldwin v. New York*, 399 U.S. 66 (1970); *Duncan v. Louisiana*, 391 U.S. 145 (1968).

⁴⁰⁸ See Note, *Divergent Lower Court Standards*, *supra* note 50, at 439-42.

⁴⁰⁹ There was no indication in *Blackledge* that the prosecutor attempted to engage the defendant in plea bargaining prior to obtaining the felony indictment after the defendant exercised his right to a trial de novo on the misdemeanor originally charged. See *Blackledge v. Perry*, 417 U.S. 21, 22-23 (1974).

⁴¹⁰ See *Bordenkircher v. Hayes*, 434 U.S. 357, 362-65, 372 (1978) (Powell, J., dissenting); *Santobello v. New York*, 404 U.S. 257, 260 (1971).

⁴¹¹ See Note, *Divergent Lower Court Standards*, *supra* note 50, at 439-42.

⁴¹² See *supra* notes 65-70 and accompanying text.

⁴¹³ 395 U.S. 711, 725 (1969).

⁴¹⁴ 417 U.S. 21, 27-29 (1974).

⁴¹⁵ 468 U.S. 559, 574 (1984) (Powell, J., concurring).

ascertainable guidelines are necessary.

Unfortunately, under the present intent-oriented analysis, the only thing that is clear from "[t]he judicial history of decisions involving . . . prosecutorial vindictiveness is . . . that it is a mistake to measure cases in this area of the law against fixed gauges."⁴¹⁶ In contrast, there is reason to expect that an objectified analysis would ultimately result in a system of guidelines clearly delineating the circumstances under which a prosecutor could increase charges after the institution of a prosecution. Such a development has largely occurred in the judicial vindictiveness area, where the Court has objectified the rules of proof governing a defendant's claim and, consequently, the situations in which a harsher sentence after retrial is permissible.⁴¹⁷

The second interest served by the vindictiveness doctrine flows from the fact that vindictiveness cases generally do not involve challenges to the sufficiency of the evidence to support the increased charges. Thus, where a new charge is filed purely to retaliate and not, for example, because of evidentiary developments subsequent to the initial filing of charges, it will necessarily be true that the "retaliatory" charge could have been brought initially. If the new charge cannot be brought after the initial charging instrument has been filed it must, at least in part, be because the defendant has some cognizable interest in proceeding on the charges as initially formulated. Although the source of this interest has not been articulated, it may lie in a defendant's due process need to have the charges against her settled so that she can adequately prepare her defense. Whatever the strength of this interest, the validity of its abrogation is best analyzed in terms of the objective bases for the new charges, not the prosecutor's good or bad faith in bringing them.

Finally, casting the vindictiveness doctrine in objective terms

⁴¹⁶ *United States v. Krezdorn*, 718 F.2d 1360, 1364 (5th Cir. 1983) (en banc), cert. denied, 465 U.S. 1066 (1984).

⁴¹⁷ Under that scheme, the defendant must first show (a) that she received a more severe sentence after retrial, and (b) that this sentence was imposed by the same judge who presided over the defendant's first trial. See *Texas v. McCullough*, 106 S. Ct. 976, 979-80 & n.3 (1986); *Chaffin v. Stynchcombe*, 412 U.S. 17, 33-35 (1973); *Colten v. Kentucky*, 407 U.S. 104, 116-17 (1972). If the defendant makes this showing, then the prosecution must present evidence that the increased sentence was based on information relevant to the defendant's culpability that was not presented at the first trial in either the merits or sentencing phases. See *McCullough*, 106 S. Ct. at 980-81; *Wasman v. United States*, 468 U.S. 559, 569-71 (1984). It is unclear whether this additional information must have been unavailable at the first trial. Compare *Wasman*, 468 U.S. at 569 (increased sentence justified on the basis of another conviction occurring after sentencing at the first trial but prior to sentencing on retrial) with *McCullough*, 106 S. Ct. at 982 (increased sentence justified on the basis of testimony from two additional witnesses at the retrial, whose availability at the first trial was not discussed).

would not disserve a concern with actual retaliation. Actual retaliation is not a Pavlovian notion, dependent simply upon whether the increased charge followed the assertion of some procedural right. Rather, actual retaliation must be examined in light of the context in which it occurs. For example, a prosecutor's institution of homicide charges against a defendant immediately after the defendant's successful appeal of a conviction for assault would hardly be retaliatory if the assault victim died only after the appeal. A conclusion that a charge increase is retaliatory entails a judgment that there are no adequate reasons for it. Thus, in determining the sufficiency of various considerations that might prompt prosecutors to file increased charges, courts not only define the charging context, but the concept of retaliation as well.

C. *Prosecutorial Misconduct with the Grand Jury*

1. Abuse of Grand Jury Process

The grand jury, and derivatively the prosecutor, is granted subpoena power only to gather evidence to determine whether a crime has been committed for which an indictment should be issued.⁴¹⁸ Even though the prohibition on abuse of grand jury process condemns the use of grand jury subpoenas for an improper "purpose," there are three doctrinal mechanisms available to ensure that the power is not misused, only one of which turns on intent.⁴¹⁹ First, as current doctrine dictates, there may be an inquiry into the intention with which the power is utilized in a particular case. Second, objective rules may be formulated that prohibit the issuance or enforcement of grand jury subpoenas in circumstances where they are likely to result in forbidden discovery. Finally, mechanisms may be employed that render the use of the power for improper purposes futile. For example, rules could limit the prosecutor's ability to use evidence gathered by the grand jury in contexts other than the particular criminal proceeding to which the grand jury's investigation pertains.⁴²⁰

⁴¹⁸ See *supra* notes 117-18 and accompanying text.

⁴¹⁹ Cf. Amsterdam, *supra* note 263, at 434-38 (discussing mechanisms for preventing misuses of evidence found in stop-and-frisk searches).

⁴²⁰ See, e.g., *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 684-85 (1958) (Whittaker, J., concurring) (suggesting that the government's use of the grand jury to gather evidence for civil matters may be discouraged through the use of a rule requiring the sealing of grand jury proceedings that result in a finding of "no true bill" and court permission for the disclosure of such proceedings to any party, including the government); see also *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 432 (1983) ("If prosecutors in a given case knew that their colleagues would be free to use the materials generated by the grand jury for a civil case, they might be tempted to manipulate the grand jury's powerful investigative tools to root out additional evidence useful in the

Rules of the latter type are not only feasible, but are already in existence. Although designed to promote the requirement of grand jury secrecy rather than to prevent abuse of the grand jury's process, Rule 6(e) of the Federal Rules of Criminal Procedure carefully controls the disclosure of evidence gathered by the grand jury, and goes far towards eliminating the prospect that the grand jury will be used to gather evidence for civil purposes.⁴²¹ Limitations on disclosure are not a complete answer, however, for they do not address two important types of potential abuse of grand jury process: the use of grand jury subpoenas to gather evidence for a pending criminal case and for harassment. In the first, there is no opportunity to prevent disclosure once the evidence is gathered so long as the prosecutors responsible for the issuance of the subpoena are also responsible for the pending case. In the second, limiting the disclosure of the information gathered is of little consequence because the vice lies in using the grand jury's process against those who have no information to give.

Objective restraints on the circumstances in which grand jury subpoenas may be issued also appear inadequate to reach these types of abuses. For example, a ban on the issuance of subpoenas to those already under indictment,⁴²² or to individuals slated to appear as witnesses in pending trials,⁴²³ would no doubt inhibit the use of grand jury process to obtain evidence in a pending criminal case; but it would also

civil suit, or even to start or continue a grand jury inquiry where no criminal prosecution seemed likely.”)

⁴²¹ See FED. R. CRIM. P. 6(e) (no participant can disclose “matters occurring before a grand jury” except to a government attorney for use in performing her duty or other government personnel to aid in such performance); see, e.g., *Sells Eng'g*, 463 U.S. 418, 427 (1983) (limiting disclosure to those attorneys who conduct the criminal matters to which the materials pertain); *United States v. Baggot*, 463 U.S. 476, 480 (1983) (party seeking disclosure must show particularized need for access to grand jury material that is directly related to some identifiable litigation); *In re Grand Jury Investigation*, 774 F.2d 34, 41 (2d Cir. 1985) (requiring examination of a number of factors including, inter alia, the threat to the integrity of the grand jury, before granting disclosure to government attorneys for civil use), *rev'd sub nom.* *United States v. John Doe, Inc.* 1, 107 S. Ct. 1656 (1987).

⁴²² See, e.g., *United States v. Doss*, 563 F.2d 265, 278-79 (6th Cir. 1977) (en banc) (finding substantial grand jury questioning of a secretly indicted defendant on the subject of the indictment to be prosecutorial abuse). But see *United States v. Zarattini*, 552 F.2d 753, 757 (7th Cir.) (declining to find an abuse of grand jury process to call defendant's brother, an undicted coconspirator, before grand jury after it had returned indictment against defendant), *cert. denied*, 431 U.S. 942 (1977).

⁴²³ See, e.g., *United States v. Star*, 470 F.2d 1214 (9th Cir. 1972) (holding prosecutor's subpoena of witness before grand jury for purposes of pretrial discovery to be an abuse of process, but finding admission of the testimony to be harmless error); cf. *United States v. Sellaro*, 514 F.2d 114, 121 (8th Cir. 1973) (finding no abuse of grand jury process in subpoenaing witnesses to testify regarding activities of persons other than the defendant, but “any collateral fruits from bona fide inquiries may be utilized by the government”), *cert. denied*, 421 U.S. 1013 (1975).

cause major difficulties in conducting grand jury investigations, especially where ongoing or complex criminal activities are involved.⁴²⁴ Similarly, it is difficult to formulate objective rules to prevent a prosecutor from using the grand jury's process for harassment. Even the most apparent case, where the prosecutor has subpoenas issued by one grand jury after another to the same individual, seems impervious to such regulation. As Professors LaFave and Israel have noted, a rule barring the issuance of more than a fixed number of subpoenas to an individual within a given period would be problematic:

The fact that the witness was called before a third grand jury, after having twice previously refused to testify, may suggest no more than a continuing need for the information and a hope that he may have changed his mind. Similarly, successive appearances required of a testifying witness may evidence no more than an investigation that has moved from one subject to another, all of which relate to the witness.⁴²⁵

The reluctance of the federal courts to impose objective limitations on the circumstances under which subpoenas may issue thus appears justified.⁴²⁶ Consequently, an intent-based proscription remains the only practical means available to prevent use of the grand jury's process for harassment or to gather evidence in a pending criminal case. Moreover, the case for employing objectifying presumptions to demonstrate an impermissible motive seems unpersuasive. First, it is difficult to identify generic situations that are sufficiently indicative of a prohibited motive that a presumption of improper intent is warranted. Second, any justification that an objectifying presumption would compel would, because of grand jury secrecy requirements, almost certainly be proffered by the prosecutor in camera. Thus, the public explanation of the factors guiding the decision, one of the principal benefits of the use of such presumptions, would largely be lost.

2. Misconduct in the Presentation of Evidence

Neither doctrine nor the nature of the right to indictment by grand

⁴²⁴ Such cases often require information from those unlikely to cooperate unless indicted themselves, and the use of informants who may testify in a series of investigations and trials.

⁴²⁵ 1 W. LAFAVE & J. ISRAEL, *supra* note 26, at § 8.8(f) (footnotes omitted).

⁴²⁶ This reticence stems from the wide latitude traditionally afforded the prosecutor and the grand jury in conducting investigations. See, e.g., *Zarattini*, 552 F.2d at 757; *United States v. Woods*, 544 F.2d 242, 250 (6th Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); *United States v. Braasch*, 505 F.2d 139, 147 (7th Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *United States v. George*, 444 F.2d 310, 314 (6th Cir. 1971).

jury compels a concern with the prosecutor's motives.⁴²⁷ Although a review of all the ways in which a prosecutor may misbehave in presenting evidence to the grand jury is beyond the scope of this Article, it is important to note that this is one area in which the courts appear less inclined to adopt intent-based approaches to the problem of prosecutorial impropriety.⁴²⁸ In federal courts, however, *Costello's* ban on examining the sufficiency of the evidence to support an indictment has greatly inhibited courts from monitoring the prosecutor's evidentiary presentation to the grand jury, so that a coherent body of doctrine regulating the prosecutor's grand jury advocacy has been slow to evolve.⁴²⁹ Nevertheless, to the extent that the courts have been willing to use their supervisory authority over the grand jury to circumvent *Costello*, their sporadic forays into regulating the prosecutor's grand jury presentation indicate that, despite its breadth, the area is susceptible to nonintent-based restraints. For example, some courts have placed limits on the extent to which prosecutors may rely on hearsay in their grand jury presentation, and have authorized the dismissal of indictments where those limits are exceeded.⁴³⁰ Others have prohibited prosecutorial advocacy that amounts to testifying.⁴³¹

D. *The Prosecutor's Obligation to Disclose Exculpatory Evidence*

The Court has insisted that the prosecutor's constitutional disclosure obligations do not turn on the "character" of the prosecutor.⁴³²

⁴²⁷ This point receives support, if somewhat obliquely, from the grand jury discrimination cases. If prosecutorial intent were to matter in the context of challenges to the integrity of the grand jury's screening process, arguably it should matter where the challenges concern the composition of the grand jury; the most expedient way to negate wholesale the grand jury's independent screening function is purposefully to manipulate the grand jury's membership to assure its receptivity to any prosecution biases. Yet, although the existence vel non of a discriminatory purpose is generally the core concern of challenges to governmental actions that disproportionately affect constitutionally cognizable groups, *see* *Washington v. Davis*, 426 U.S. 229, 239-44 (1976), the government's motive in limiting the representation of such groups in the grand jury is not central to challenges to the grand jury's composition, *see e.g.*, *Rose v. Mitchell*, 443 U.S. 545, 565-66 (1979); *Washington*, 426 U.S. at 241.

⁴²⁸ *See supra* notes 147-48 and accompanying text.

⁴²⁹ *See supra* notes 147-48 and accompanying text.

⁴³⁰ *See, e.g.*, *United States v. Cruz*, 478 F.2d 408 (5th Cir.), *cert. denied*, 414 U.S. 910 (1973); *United States v. Estepa*, 471 F.2d 1132 (2d Cir. 1972); *United States v. Pastor*, 419 F. Supp. 1318 (S.D.N.Y. 1976); *United States v. Gallo*, 394 F. Supp. 310 (D. Conn. 1975).

⁴³¹ *See, e.g.*, *United States v. Birdman*, 602 F.2d 547 (3d Cir. 1979), *cert. denied*, 444 U.S. 1032 (1980); *United States v. Treadway*, 445 F. Supp. 959 (N.D. Tex. 1978).

⁴³² *See* *United States v. Agurs*, 427 U.S. 97, 110 (1976).

The use of intent-based analysis to enforce those obligations, which, the Court's denials notwithstanding, present doctrine does, is thus not compelled by doctrinal considerations. There are three nonintent-based alternatives to enforcing these obligations.

First, courts could attempt to formulate rules that prescribe the categories of evidence that the prosecutor must provide the defense, such as witness statements or the results of tests performed on physical evidence. Such attempts are bound to falter on congruence grounds. Putting aside serious objections that the promulgation of such rules is a legislative rather than judicial matter, rules cast in categorical terms would require the disclosure of material that is not favorable to the defense and, therefore, not constitutionally compelled.⁴³³ Indeed, such rules would run directly counter to the Court's admonition that, unless favorable evidence is involved, "the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded."⁴³⁴

A second nonintent-based framework for enforcing the prosecutor's disclosure obligations could take at its word the Court's asserted concern with "the misconduct's effect on the trial"⁴³⁵ and divorce the prosecutor's blameworthiness from the showing required concerning the probable impact of the undisclosed evidence at trial. The same showing would be necessary to make out a constitutional violation regardless of whether the prosecutor's failure to reveal the evidence was knowing, negligent, or even excusable. The prosecutor's obligation to disclose favorable evidence would be triggered simply by the prosecutor's possession of the evidence.⁴³⁶

This approach has some surface appeal. In addition to its simplic-

⁴³³ See, e.g., *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) (defendant has no constitutional right to disclosure of unfavorable evidence); *United States ex rel. Knights v. Wolff*, 713 F.2d 240, 246 (7th Cir.) (prosecutor's withholding of inculpatory statements of witnesses did not amount to a denial of due process), *cert. denied*, 464 U.S. 1000 (1983); cf. *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (suppression by the prosecutor of evidence favorable to the accused violates due process where the evidence is material either to guilt or punishment).

⁴³⁴ *Wardius v. Oregon*, 412 U.S. 470, 474 (1973); see also *United States v. Augenblick*, 393 U.S. 348 (1969) (refusing to find a violation of constitutional magnitude in a denial of discovery of unfavorable evidence).

⁴³⁵ *Smith v. Phillips*, 455 U.S. 209, 220 n.10 (1982).

⁴³⁶ This would not be true if the disclosure was pegged to the showing required by a defendant when she seeks a new trial based on newly discovered evidence. In that event, a defendant would have to make the same showing regardless of whether the evidence was in the prosecutor's possession prior to trial, so that the prosecutor's possession of the evidence would have no special significance. Obviously, however, removing any significance from the fact that the evidence was in the prosecutor's possession effectively nullifies a prosecutor's constitutional disclosure obligations. See *Agurs*, 427 U.S. at 111.

ity, a framework that makes the focus of the prosecutor's disclosure obligations the prosecutor's possession of favorable evidence rather than her awareness of favorable evidence is likely to discourage some of the prosecutorial gamesmanship that currently takes place⁴³⁷ and encourage prosecutors to be more forthcoming; the prosecutor's ignorance of the favorable quality of certain evidence would not suffice to justify its nondisclosure.

The approach, however, raises substantial congruence concerns. First, the lower the single standard of materiality which would apply to all nondisclosures, the greater the likelihood that a disclosure model driven solely by the prosecutor's possession of favorable evidence would evolve from a duty designed to ensure the defendant a fair trial into a general, constitutionally-based discovery obligation. A prosecutor's information about the defendant's theory of the case or the evidence the defendant possesses will inevitably be incomplete. The prospect that overlooking even marginally helpful evidence could result in the reversal of a defendant's conviction might well impel prosecutors to open their files to the defense⁴³⁸ or to seek pretrial judicial determinations⁴³⁹ concerning their disclosure obligations, with respect to either particular pieces of evidence or even an entire case file.⁴⁴⁰ If, on the other hand, the standard of materiality were set too high, a prosecutor would be encouraged not to disclose evidence even if she was aware of its favorable nature, on the ground that such evidence is not favorable enough.

Second, regardless of the standard of materiality applied, a frame-

⁴³⁷ See, e.g., *United States v. Pflaumer*, 774 F.2d 1224, 1230-31 (3d Cir. 1985) (noting prosecutorial gamesmanship, but finding that in light of *United States v. Bagley*, 105 S. Ct. 3375 (1985), prosecutor's failure to disclose information received from a witness who had been granted use immunity did not warrant new trial), *cert. denied*, 106 S. Ct. 1263 (1986).

⁴³⁸ See, e.g., *Agurs*, 427 U.S. at 109 ("If everything that might influence a jury must be disclosed, the only way a prosecutor could discharge his constitutional duty would be to allow complete discovery of his files as a matter of routine practice."), *quoted in* *United States v. Valenzuela-Bernal*, 458 U.S. 858, 866 (1982).

⁴³⁹ In order to avoid revealing information that the prosecutor has no duty to disclose, such review is necessarily in camera. It may or may not be ex parte, largely depending upon whether it is the prosecutor or the defendant that requests the hearing. See Capra, *Access to Exculpatory Evidence: Avoiding the Agurs Problems of Prosecutorial Discretion and Retrospective Review*, 53 *FORDHAM L. REV.* 391, 423 (1984).

⁴⁴⁰ Prosecutors only rarely request pretrial judicial examinations. See Capra, *supra* note 439, at 423-24; 2 W. LAFAYE & J. ISRAEL, *supra* note 26, at § 19.5. Presumably, the prosecutor's incentive to seek pretrial review stems from the greater deference that an appellate court would give to a trial court's determination that the disclosure of certain evidence was not required, rather than a prosecutor's determination of the same matter. See Capra, *supra* note 439, at 431-37.

work that makes possession the linchpin of the prosecutor's disclosure obligations is more susceptible to defense complaints concerning the prosecutor's failure to gather evidence⁴⁴¹ than is a framework keyed to the prosecutor's appreciation of the favorable nature of evidence in its possession. If a prosecutor must reveal favorable evidence because she has it, she should not be able to skirt this obligation simply by declining to get it. This logic seems persuasive, at least where the prosecutor departs from normal evidence gathering procedures⁴⁴² or refuses to pursue leads that appear helpful to the defense. To the extent that this logic is convincing, adoption of a nonintent-based scheme governing required prosecutorial disclosures also raises the specter of imposing added constitutional obligations to the prosecutor's evidence-gathering activities.

The third nonintent-based approach to regulating disclosure obligations is to remove responsibility for making disclosure decisions from the prosecutor. Professor Capra has argued that the only way to guarantee that defendants receive all evidence to which they are constitutionally entitled is to place disclosure determinations entirely in the hands of the judiciary by requiring *in camera*, pretrial judicial review of the prosecutor's file in every case.⁴⁴³ Practical problems such as the composition of the "file" and timing of the review aside, the extraordinary judicial time and resources required by this scheme pose enormous obstacles to its implementation, especially in urban jurisdictions with congested criminal dockets. Moreover, as Professor Capra recognizes, because a judge reviewing a "file" can hardly be expected to be as familiar with the case as the lawyers litigating it, input by the prosecutor and defense counsel would be necessary to ensure that judicial disclosure determinations are meaningfully informed. That input, however, would create a new layer of adversarial proceedings in criminal cases.⁴⁴⁴ Placing disclosure determinations in the hands of the judiciary

⁴⁴¹ See, e.g., *Morgan v. Salamack*, 735 F.2d 354 (2d Cir. 1984) (claiming prosecutor failed to recognize false statements made by the state's principal witness at trial); *United States v. Hutter*, 622 F.2d 1083 (2d Cir.) (attacking the thoroughness of the prosecutor's pretrial investigation), *cert. denied*, 449 U.S. 875 (1980).

⁴⁴² In cases challenging the government's loss or destruction of evidence, the Court has placed considerable importance on the regularity of the procedures that led to the loss or destruction. The greater the extent to which the challenged procedure is normal and regularly followed, the less likely its utilization in a particular case will violate due process. See, e.g., *California v. Trombetta*, 467 U.S. 479, 488 (1984) (police procedure of destroying breath samples of suspected drunk drivers); *United States v. Augenblick*, 393 U.S. 348, 355-56 (1969) (routine destruction of interrogation tapes by the military); *Killian v. United States*, 368 U.S. 231, 242 (1961) (FBI procedure of destroying notes made during witness interviews).

⁴⁴³ Capra, *supra* note 439, at 421-48.

⁴⁴⁴ See *id.* at 428-30, 438-40.

may well promote greater compliance with constitutional dictates and avoid a concern with prosecutorial intent but it does so only by working a major structural change in the process of criminal adjudication.

Thus, the present intent-driven scheme may well be justified because nonintent-based schemes are either impractical or substantially alter the shape of the adversary or adjudicatory process.

E. *The Prosecutor's Discriminatory Use of Peremptory Challenges*

Given *Batson*'s concern with racial discrimination and the equal protection basis of the decision, strong doctrinal imperatives dictate a focus on prosecutorial intent.⁴⁴⁵ Nevertheless, several considerations undermine the inevitability of a concern with intent in this area. First, in making the discriminatory intent of a prosecutor exercising peremptories in a particular case a matter of constitutional concern, *Batson* marked " 'an explicit and substantial break with prior precedent' because it 'overruled [a] portion of *Swain*.' "⁴⁴⁶ *Swain* cabined the prosecutor's use of peremptories only if they were systematically used as a vehicle to keep blacks off all juries.⁴⁴⁷ Second, although it is true that race-based equal protection claims almost always turn on invidious intent, jury selection is the one area in which an intent showing is not clearly required.⁴⁴⁸ Indeed, *Washington v. Davis* itself indicated that the jury selection cases were different.⁴⁴⁹ Finally, there was no need to

⁴⁴⁵ Equal protection jurisprudence, especially in the racial discrimination area, evinces a well recognized concern for intent. See, e.g., *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (requiring proof of racially discriminatory intent of housing authorities in order to show an equal protection violation); *Washington v. Davis*, 426 U.S. 229, 242 (1976) (calling for proof of racially discriminatory purpose in hiring to support an equal protection claim); see also Baker, *Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection*, 131 U. PA. L. REV. 933, 972-84 (1983) (equal protection analysis should focus on the objective, contextual purposes of laws).

⁴⁴⁶ *Griffith v. Kentucky*, 107 S. Ct. 708, 715 (1987) (holding *Batson* applicable to cases pending on direct review) (quoting *Allen v. Hardy*, 106 S. Ct. 2878, 2880 (1986) (per curiam) (holding *Batson* does not apply retroactively to cases on federal habeas review)).

⁴⁴⁷ See *supra* notes 240-42 and accompanying text.

⁴⁴⁸ See, e.g., *Castaneda v. Partida*, 430 U.S. 482, 494-95 (1977) (requiring only a statistical showing of underrepresentation of a distinct class in order to make out a prima facie equal protection violation); *Alexander v. Louisiana*, 405 U.S. 625, 630-32 (1972) (stating that a statistical showing of underrepresentation combined with selection procedures that are not racially neutral demonstrates a prima facie case of invidious racial discrimination); Note, *To Infer or Not to Infer a Discriminatory Purpose: Rethinking Equal Protection Doctrine*, 61 N.Y.U. L. REV. 334, 351-54 (1986).

⁴⁴⁹ See *Washington*, 426 U.S. at 241 (1976) (distinguishing jury selection cases on the basis of the presumption of discriminatory intent that may be made with proof of systematic exclusion of a particular group from juries).

decide *Batson* under the equal protection clause at all. *Batson* did not raise an equal protection challenge to his conviction; rather, he challenged it only under the sixth amendment's fair cross section guarantee.⁴⁵⁰ That guarantee, which was the basis for a number of post-*Swain* decisions allowing defendants to challenge the prosecutor's discriminatory use of peremptory challenges in a particular case,⁴⁵¹ does not require a showing of purposeful discrimination by the prosecutor.⁴⁵²

Thus, the approach the Court took in *Batson* to combat prosecutors' indiscriminate use of peremptories to strike black jurors in cases involving black defendants was not doctrinally inescapable. The question remains whether there are any doctrinally sound, nonintent-based alternatives that the Court could have employed. The most obvious is a rule requiring some level of racial balance on all petit juries hearing cases against black defendants. Such a rule, however, would conflict with the longstanding principle that "[d]efendants are not entitled to a jury of any particular composition."⁴⁵³ The Court, however, could have utilized two other nonintent-based approaches. First, the Court might have followed Justice Marshall's suggestion in *Batson* and banned the use of peremptory challenges in criminal cases, at least by the prosecutor.⁴⁵⁴ As a doctrinal matter, this result could have been achieved under the sixth amendment's fair cross section guarantee without the need to rely upon the existence of purposeful discrimination on the part of the

⁴⁵⁰ See *Batson v. Kentucky*, 106 S. Ct. 1712, 1716 n.4 (1986); *id.* at 1729-30 (Stevens, J., concurring); *id.* at 1731-34 (Burger, C.J., dissenting). This may well have been because *Batson* assumed that any equal protection challenge would be unavailing in light of *Swain*.

⁴⁵¹ See, e.g., *McCray v. Abrams*, 750 F.2d 1113 (2d Cir. 1984), *vacated and remanded*, 106 S. Ct. 3289 (1986) (in light of *Batson*); *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978); *Riley v. State*, 496 A.2d 997 (Del. 1985), *cert. denied*, 106 S. Ct. 3339 (1986); *State v. Neil*, 457 So. 2d 481 (Fla. 1984); *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979).

⁴⁵² See *Duren v. Missouri*, 439 U.S. 357, 368 n.26 (1979) (In contrast to equal protection challenges to jury selection and composition in which discriminatory purpose is an essential element of the violation, "in Sixth Amendment fair-cross-section cases, systematic disproportion itself demonstrates an infringement of the defendant's interest in a jury chosen from a fair community cross section. The only question is whether there is adequate justification for this infringement."); *id.* at 371 (Rehnquist, J., dissenting) ("The difference [between jury challenges based on the equal protection clause and those based on the sixth amendment] apparently lies in the fact, among others, that under equal protection analysis *prima facie* challenges are rebuttable by proof of absence of intent to discriminate, while under Sixth Amendment analysis intent is irrelevant, but the State may show 'adequate justification' for the disproportionate representation of the classes being compared.").

⁴⁵³ *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975); see *Fay v. New York*, 332 U.S. 261, 288-89 (1947) ("The defendant's right is a neutral jury. He has no constitutional right to friends on the jury.").

⁴⁵⁴ See *Batson*, 106 S. Ct. at 1728-29 (Marshall, J., concurring).

prosecutor.⁴⁵⁵ It is true that the sixth amendment's cross-section guarantee had previously been held applicable only to the selection of the venire, the larger pool of jurors from which the petit jury is chosen, and not to the composition of the petit jury itself.⁴⁵⁶ Nevertheless, it would have been a modest extension of the cross-section guarantee, and arguably less of a break with precedent than *Batson's* repudiation of *Swain*, to hold, as had a number of state and federal courts,⁴⁵⁷ that while "the Sixth Amendment does not require any action to ensure that the representative character of the venire be carried over to the petit jury . . . the Amendment simply prohibits the state's systematic elimination of the possibility of such a carry-over."⁴⁵⁸ Because the peremptory challenge was readily and frequently used against blacks to prevent this desired carry-over,⁴⁵⁹ its elimination would be justified unless its retention served a "significant state interest."⁴⁶⁰

The most obvious such interest would be the peremptory's role in ensuring an impartial jury for the prosecution as well as for the defense.⁴⁶¹ The fact that the peremptory has never been found constitutionally necessary to preserve a defendant's right to an impartial jury⁴⁶² deflates this interest considerably, although it would not be without some substance if the defendant's right to exercise peremptories were preserved intact. It could be argued, however, that even the state's interest in preserving some parity in its ability to strike hostile jurors is insufficient to justify the continued availability of peremptories to the prosecutor. As a practical matter, the availability of peremptories is almost certainly more important to a criminal defendant than to the pros-

⁴⁵⁵ See *supra* notes 450-52 and accompanying text.

⁴⁵⁶ See, e.g., *Lockhart v. McCree*, 106 S. Ct. 1758, 1765 (1986); *Duren*, 439 U.S. at 363-64 & n.20; *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975).

⁴⁵⁷ See *supra* note 451.

⁴⁵⁸ *McCray v. Abrams*, 750 F.2d 1113, 1129 (2d Cir. 1984) (citing *Ballew v. Georgia*, 435 U.S. 223 (1978) (extending the cross-section guarantee to even a valid venire because the group called for the petit jury was so small as to limit the possibility that a fair cross-section might be called)), *vacated and remanded*, 106 S. Ct. 3289 (1986) (in light of *Batson*).

⁴⁵⁹ See, e.g., *Batson v. Kentucky*, 106 S. Ct. 1712, 1726-27 (1986) (Marshall, J., concurring) (cataloging cases that compiled figures showing the pervasiveness of the practice); Note, *McCray v. Abrams: An End to the Abuse of the Peremptory Challenge?*, 59 ST. JOHN'S L. REV. 603, 616 n.66 (1985) (providing statistical studies evidencing the systematic exclusion of minorities from juries).

⁴⁶⁰ *Duren*, 439 U.S. at 367-68; see Note, *Rethinking Limitations on the Peremptory Challenge*, 85 COLUM. L. REV. 1357, 1360, 1374-76 (1985) (advocating preservation of the peremptory challenge cleansed of its discriminatory predilections because it serves the important purpose of removing partial jurors).

⁴⁶¹ See *Swain v. Alabama*, 380 U.S. 202, 219 (1965) (noting that one of the functions of the peremptory challenge is "to eliminate extremes of partiality on both sides").

⁴⁶² See *supra* note 235 and accompanying text.

ecutor. This fact is implicitly recognized in the common practice of granting defendants a greater number of peremptories than prosecutors.⁴⁶³ Studies show that 25% to 30% of the members of the federal and state jury pools believe a defendant is probably guilty once indicted,⁴⁶⁴ while only 5% have animosity toward the government.⁴⁶⁵ Moreover, given the prosecutor's position as representative of the state, it may well be appropriate to deny the prosecutor the ability to strike jurors not sufficiently biased to be struck for cause, while preserving that opportunity for defendants whose stake in the criminal trial is far more personal and substantial.⁴⁶⁶

It is thus possible to construct a reasonable argument for the elimination of the prosecutor's peremptories under the sixth amendment's cross section guarantee.⁴⁶⁷ The result, however, smacks too much of "throwing the baby out with the bath water," and raises obvious congruence concerns. Although the Court did not define the constitutional interest at stake in *Batson* with precision, it is indisputably tied to eliminating race as a factor in jury selection. A defendant does not have a cognizable interest in preventing prosecutors from exercising peremptory challenges for other reasons. Thus, unless there are no workable mechanisms, intent-based or otherwise, for preventing prosecutors from exercising their peremptories on the basis of race, the complete elimination of the prosecutor's peremptories is unwarranted.

The second nonintent-based alternative that the Court could have utilized is less drastic. Under equal protection and sixth amendment principles, the Court might have rationalized the process by which prosecutors exercise their peremptory challenges. More specifically, the Court could have barred the prosecutor's use of peremptories against minority jurors who, during voir dire, satisfactorily answer a group of questions, agreed upon prior to jury selection by counsel and the trial judge, designed to test (a) any inclination a prospective minority juror

⁴⁶³ For example, Rule 24(b) of the Federal Rules of Criminal Procedure grants the defendant 10 peremptories in a felony trial but allows the government only six. FED. R. CRIM. P. 24(b).

⁴⁶⁴ See *Proposed Amendments to the Federal Rules of Criminal Procedure: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 254 (1977) (containing supplemental data submitted by Jay Schulman, Coordinator, National Jury Project, entitled *Studies of Federal and State Prospective Jurors' Tendency to Equate an Indictment With Probable Guilt*).

⁴⁶⁵ *Id.* at 4 (testimony of Jay Schulman, Coordinator, National Jury Project).

⁴⁶⁶ See Note, *supra* note 239, at 1787.

⁴⁶⁷ A ban on the prosecutor's use of peremptories has been suggested by several commentators. See, e.g., J. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 167 (1977); Brown, McGuire & Winters, *The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse*, 14 NEW ENG. L. REV. 192, 234 (1978).

may have to favor the defendant because of their shared race, (b) any feelings the prospective juror may have against the prosecution of members of her race for the crime charged, and (c) any other case-related basis articulated by the prosecutor on which the prosecutor planned to exercise peremptory challenges.⁴⁶⁸ Although the procedure does inject the issue of race into the voir dire, the Court has recognized that questioning prospective jurors concerning their racial biases is constitutionally required in certain circumstances,⁴⁶⁹ and indeed, so held in a case decided the same day as *Batson*.⁴⁷⁰ Moreover, a prosecutor who wanted to avoid the insinuation of racial issues into the voir dire and the trial could simply agree to omit questions in categories (a) and (b) from the voir dire of prospective minority jurors, and still retain the right to peremptorily strike minority jurors based on their unsatisfactory answers to questions in category (c). Under *Batson*, it may well be that the only sure way for a prosecutor to avoid raising the specter of racial bias during voir dire is to forego peremptorily challenging any minority juror.

The suggested procedure has substantial benefits. It ensures the existence of both an adequate basis for the exercise of peremptory strikes against minority jurors and an adequate record of the reasons for the strikes. It obviates the prospect of post hoc rationalization by the prosecutor as well as the need for the judiciary to make awkward deter-

⁴⁶⁸ See, e.g., *United States v. Tucker*, 773 F.2d 136, 142 (7th Cir. 1985) (prosecutor was justified in striking all four black members of the venire because the crimes with which the defendants were charged, wire fraud and submitting false statements to a federally insured bank, revolved around a "complicated commercial transaction, and the four blacks happened to have very little education or commercial experience"), *cert. denied*, 106 S. Ct. 3338 (1986).

⁴⁶⁹ See *Turner v. Murray*, 106 S. Ct. 1683, 1686-87 (1986) (when defendant is charged with a capital crime and there is a "constitutionally significant likelihood that, absent questioning about racial prejudice, the jurors would not be indifferent as they stand unsworn"); *Rosales-Lopez v. United States*, 451 U.S. 182, 192 (1981) (when "requested by a defendant accused of a violent crime and where the defendant and the victim are members of different racial or ethnic groups"); *Ristaino v. Ross*, 424 U.S. 589, 595 (1976) (when "an impermissible threat to the fair trial guaranteed by due process is posed by a trial court's refusal to question prospective jurors specifically about racial prejudice during voir dire"); *Ham v. South Carolina*, 409 U.S. 524, 527 (1973) (when well-known, black civil rights activist being tried for possession of marijuana claimed racially motivated frame-up by police, "the essential fairness required by the Due Process Clause" justified such questioning).

⁴⁷⁰ In *Turner*, the Court held that "a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias." 106 S. Ct. at 1688. Although handed down on the same day, there is obviously some tension between *Turner's* recognition that, because of their race, white jurors may be biased against a black defendant charged with killing a white victim, see *id.* at 1687, and *Batson's* refusal to recognize that, because of their race, black jurors may be biased in favor of such a defendant, see *Batson v. Kentucky*, 106 S. Ct. 1712, 1719 (1986).

minations concerning the prosecutor's sincerity in justifying challenged strikes. It is also likely to limit the range of reasons for which prosecutors might strike minority jurors, for in the relative calm before jury selection begins, prosecutors are less likely to articulate, and judges are less likely to accept, flimsy or idiosyncratic concerns as valid areas for voir dire.

There are two possible objections to this scheme, one that raises practical concerns and another that creates congruence problems. The first is that the proposal will expand the scope of voir dire because, in order to retain maximum latitude in their exercise of peremptories, prosecutors will request voir dire into any and all conceivable bases upon which they might strike a juror. There are several responses to this objection. First, most prosecutors would use the procedure in good faith and have little interest in needlessly extending the voir dire. Indeed, because defendants generally have more strikes,⁴⁷¹ the defense is likely to benefit more than the prosecution from an expanded voir dire, a fact not likely to be lost on prosecutors. Second, judges obviously have discretion to rule out areas of inquiry that are too remotely related to the case. Finally, it is unclear that any increased amount of voir dire under the suggested scheme would be much greater than that *Batson* is apt to generate; for *Batson* gives prosecutors who desire to strike black jurors an incentive to subject them to extensive voir dire in order to unearth some reason that could justify the strike.

The second objection is that, although less egregiously than eliminating the prosecutor's peremptories entirely, the limits imposed on the prosecutor's use of peremptories will bar their exercise in some instances where the defendant's interest does not require it. More specifically, the proposed scheme may prevent prosecutors from exercising peremptories on intuitive bases that do not lend themselves to articulation prior to jury selection or substantiation during voir dire, such as a juror's "anti-authoritarian personality." This type of challenge is so likely to prompt objection, elude persuasive justification, and result in a finding of discriminatory intent that prosecutors are apt to steer clear of it under *Batson*. Thus, conceding that some range of constitutionally permissible challenges will be denied the prosecutor under the proposed nonintent-based scheme, it may not be markedly different from that which results under *Batson*.

⁴⁷¹ See *supra* note 463.

F. *The Double Jeopardy Bar to Retrial
After a Mistrial Due to Prosecutorial Misconduct*

There is little in the nature of the double jeopardy guarantee or in double jeopardy doctrine that dictates a focus on prosecutorial intent. The double jeopardy guarantee is principally designed to prevent a defendant from being tried or punished twice for the same crime. Double jeopardy doctrine is, accordingly, concerned with delineating the situations in which a second trial or prosecution is permissible. The focus of a double jeopardy inquiry thus tends to be objective: Did jeopardy attach during the first proceeding?⁴⁷² Is the second charge brought against the defendant the "same offense" as the first crime for which she was tried?⁴⁷³ Was the second prosecution instituted by a "separate sovereign"?⁴⁷⁴ Was the trial judge's "dismissal" in the first trial "related to factual guilt or innocence"?⁴⁷⁵ Indeed, the fact that there is no doctrinal imperative to make the resolution of double jeopardy claims turn on the prosecutor's intent is demonstrated by the analysis applicable in situations where a mistrial is declared without the defendant's request or consent. Such a situation differs from that of *Oregon v. Kennedy*⁴⁷⁶ only by the absence of the defendant's explicit acquiescence in the mistrial declaration. There, the constitutionality of a retrial turns on whether the mistrial was a "manifest necessity,"⁴⁷⁷ a question that depends on an objective evaluation of the circumstances under which the mistrial was declared.

While the prosecutorial misbehavior that *Kennedy* reaches—actions motivated by a desire to provoke a mistrial—presents

⁴⁷² See, e.g., *Tibbs v. Florida*, 457 U.S. 31, 41 (1982) (whether retrial is barred when conviction is based on weight of evidence); *United States v. Sanford*, 429 U.S. 14, 15-16 (1976) (per curiam) (whether prosecution is barred when hung jury caused mistrial); *Serfass v. United States*, 420 U.S. 377, 387-94 (1975) (whether double jeopardy clause bars an appeal by the state following a pretrial order dismissing an indictment).

⁴⁷³ See, e.g., *Illinois v. Vitale*, 447 U.S. 410, 415-16 (1980) (inquiring whether statute at issue required proof of fact that the statute under which defendant had been convicted did not establish the "same offense"); *Brown v. Ohio*, 432 U.S. 161, 166-69 (1977) (same); *Blockburger v. United States*, 284 U.S. 299, 303-04 (1932) (same).

⁴⁷⁴ See, e.g., *Heath v. Alabama*, 106 S. Ct. 433, 437-39 (1985) (two states that seek to prosecute a defendant are actually separate sovereigns); *Waller v. Florida*, 397 U.S. 387, 390-95 (1970) (ruling that a municipality and the state in which it is found are separate sovereigns); *Abbate v. United States*, 359 U.S. 187, 195-96 (1959) (finding that state and federal governments are separate sovereigns); *Bartkus v. Illinois*, 359 U.S. 121, 128-29 (1959) (same).

⁴⁷⁵ See, e.g., *United States v. Scott*, 437 U.S. 82, 92, 94-95 (1978) (discussing whether a dismissal followed by a government appeal would require further proceedings relating to factual guilt or innocence); *United States v. Jenkins*, 420 U.S. 358, 369-70 (1975) (same).

⁴⁷⁶ 456 U.S. 667 (1982).

⁴⁷⁷ See *supra* notes 285-90 and accompanying text.

the type of prosecutorial trial activity most pristinely at odds with double jeopardy values, it by no means represents the only instance in which those values are implicated by a prosecutor's improper trial behavior. Indeed, there is much to be said for the notion that the double jeopardy ramifications of a prosecutor's improprieties should be determined without any reference to the prosecutor's state of mind in engaging in them. To the extent that a defendant has a cognizable interest in "a single, fair adjudication of his guilt or innocence,"⁴⁷⁸ that interest is compromised no less by negligent or stupid prosecutorial behavior that improperly and substantially threatens the jury's impartiality than by behavior specifically intended by the prosecutor to undermine a fair trial.⁴⁷⁹ From the defendant's standpoint, the detrimental effect on the value of a verdict from the first tribunal sworn to decide her case is the same.

The adoption of an intent-based standard that very few defendants will be able to meet when seeking to bar retrial in the wake of a mistrial is likely driven by a reluctance to immunize defendants from prosecution as a result of prosecutorial errors at trial.⁴⁸⁰ "[T]he defendant's double jeopardy interests, however defined, do not go so far as to compel society to so mobilize its decisionmaking resources that it will be prepared to assure the defendant a single proceeding free from harmful governmental or judicial error."⁴⁸¹ That is why retrial is generally permitted after a reversal on appeal. It is possible, however, to formulate a nonintent-based model for determining the permissibility of a retrial following a defendant's successful mistrial motion that would both protect a defendant's interest in having her case decided by the first tribunal chosen to hear it, and avoid conferring a windfall immunity on the defendant.

Such a model would take into account (1) the magnitude of the misconduct and (2) the availability of alternative remedies. With respect to the first attribute, misconduct objected to by the defendant and amounting to plain error would constitute a necessary threshold for any

⁴⁷⁸ *Green v. United States*, 451 U.S. 929, 931 (1981) (Marshall, J., dissenting from the denial of certiorari).

⁴⁷⁹ Prior to *Kennedy*, several lower courts had recognized that grossly negligent prosecutorial misconduct at trial could bar retrial after a defense request for a mistrial. See, e.g., *United States v. Martin*, 561 F.2d 135, 140 (8th Cir. 1977); *United States v. Kessler*, 530 F.2d 1246, 1256 (5th Cir. 1976); see also Comment, *The Double Jeopardy Clause and Mistrials Granted on Defendant's Motion: What Kind of Prosecutorial Misconduct Precludes Reprosecution?* 18 Duq. L. Rev. 103, 131-33 (1979).

⁴⁸⁰ See Note, *Double Jeopardy: An Illusory Remedy for Governmental Overreaching at Trial*, 29 BUFFALO L. REV. 759, 772-73 (1980).

⁴⁸¹ *United States v. Jorn*, 400 U.S. 470, 484 (1971) (Harlan, J., plurality opinion).

double jeopardy bar to retrial.⁴⁸² Prosecutorial improprieties that clearly tread on established constitutional rights such as the right to remain silent are most apt to rise to this threshold.⁴⁸³ However, highly prejudicial errors of nonconstitutional proportions, such as the unauthorized introduction of clearly improper evidence of "other crimes" committed by the defendant, might also reach this level.⁴⁸⁴

The plain error requirement achieves several double jeopardy-related aims. Because plain errors must be sufficiently egregious to require reversal despite the defendant's failure to object to them at trial,⁴⁸⁵ conditioning the availability of double jeopardy relief on the existence of error of such proportions ensures that a defendant will not be immunized from further prosecution unless the prosecutor's behavior renders reversal on appeal and a resulting second trial highly probable. It also obviates the prospect that retrial will be barred because of prosecutorial mistakes of a strategic or tactical nature.⁴⁸⁶ Finally, because plain errors are those that any competent prosecutor would know are errors, the plain error requirement guarantees that retrial will be barred only where there is a significant level of prosecutorial culpability in making the error.

With respect to the remedy requirement of the model, even if a

⁴⁸² See Ponsoldt, *supra* note 293, at 98-99. The model is not framed to require that the error actually constitute plain error, because such a determination technically encompasses a finding that, viewed in the context of all of the evidence presented at trial, the error to which the defendant did not object was, in fact, harmful. See *United States v. Young*, 470 U.S. 1, 16 n.14 (1985). In some mistrial situations, especially those occurring before the close of the prosecutor's case, this determination would be premature.

⁴⁸³ Although constitutional error is "not necessarily reversible error," *United States v. Shue*, 766 F.2d 1122, 1132 (7th Cir. 1985), constitutional error is reversible error "unless it is harmless beyond a reasonable doubt." *Id.* (citing *Harrington v. California*, 395 U.S. 250 (1969); *Chapman v. California*, 386 U.S. 18 (1967)); see also 3A C. WRIGHT, *FEDERAL PRACTICE AND PROCEDURE* § 856 (2d ed. 1982) (constitutional errors are more easily noticed than less serious, nonconstitutional errors).

⁴⁸⁴ Because of the prejudicial capacity of "other crimes" evidence, jurisdictions may have special procedures designed to give the defendant an opportunity to object to, and obviate the need for, its introduction. See, e.g., *United States v. Figueroa*, 618 F.2d 934, 938-42 (2d Cir. 1980). So long as she follows accepted procedures for introducing the evidence, a prosecutor does not commit error of the magnitude of plain error simply by offering "other crimes" evidence that the judge finds inadmissible. Where, however, the prosecutor introduces "other crimes" evidence without following established procedures and without giving the defendant an adequate opportunity to object outside of the jury's hearing, or introduces the evidence in the face of the judge's ruling to exclude it, the introduction of the "other crimes" evidence may rise to the level of plain error.

⁴⁸⁵ See *FED. R. CRIM. P.* 52(b); 3A C. WRIGHT, *supra* note 483, at § 851.

⁴⁸⁶ To the extent that there are questions as to whether a prosecutor's misconduct constitutes ordinary rather than plain error, factors such as prior warnings to the prosecutor by the trial judge and the prosecutor's request for clarifying rulings could be taken into account. See *United States v. Roberts*, 640 F.2d 225, 228 (9th Cir. 1981) (Norris, J., dissenting).

prosecutor's misconduct rises to the level of plain error, retrial would be barred only if the defendant could carry the burden of persuading the court that the misconduct cannot be remedied by devices short of a mistrial, such as curative instructions, the striking of testimony, or the exclusion of evidence.⁴⁸⁷ Placing the burden on the defendant to persuade the court⁴⁸⁸ that curative alternatives to a mistrial would be unavailing helps ensure the propriety of the mistrial declaration and ensures against windfall immunization. It also furthers double jeopardy values. The less certain that remedies short of a mistrial would be ineffective, the more likely that the defendant's election to abort the trial by requesting or consenting to a mistrial is a meaningful decision that vindicates her double jeopardy interests.

The fact that a prosecutorial error is sufficiently serious to amount to plain error if not objected to does not mean that the error is incapable of rectification if a timely challenge is made at trial.⁴⁸⁹ For example, an instruction emphasizing the importance of a defendant's privilege against self-incrimination coupled with an admonition to the prosecutor in front of the jury generally should suffice to remedy any harm caused by a prosecutor's allusion to a defendant's failure to testify. Some such errors, however, may not be rectifiable. For example, in a situation where the defendant's guilt turns on the particulars of a transaction witnessed only by the defendant and the prosecutor's key witness and the prosecutor indicates that the defendant's failure to testify and refute the witness's account confirms the credibility of the witness and the validity of the prosecutor's case, it may be impossible to remedy the effects of the prosecutor's allusion to the defendant's failure to take the stand.

⁴⁸⁷ See, e.g., *United States v. Kessler*, 530 F.2d 1246, 1258 n.22 (5th Cir. 1976) (finding that the harm caused by the prosecutor's misconduct to be so pervasive that it could not be cured by any jury instructions). Indeed, the fact that the prosecutorial error may be remedied by other curative mechanisms is itself a sufficient reason to deny the request for a mistrial. See II A. AMSTERDAM, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES § 420 (1984).

⁴⁸⁸ The use of the word "persuade" is deliberate. The efficacy of curative devices rests on their predicted effect on the jury. Yet the jury cannot be asked directly how it would react to various remedial options. Thus, although courts are occasionally willing to make blanket judgments as to the potency of certain curative devices, see *Bruton v. United States*, 391 U.S. 123, 135-37 (1968) (holding that instructions to jury to disregard incriminating extrajudicial statements were insufficient to prevent the jury from considering such evidence), presentations concerning the effectiveness of remedial alternatives to a mistrial usually take the form of arguments from facts already presented at trial, rather than the presentation of additional facts bearing directly on the effectiveness of other remedies.

⁴⁸⁹ This is why a plain error by the prosecutor that is unchallenged at trial should not bar retrial, even though under plain error principles, the error requires reversal of the defendant's conviction.

After hearing the prosecution and defense presentations concerning alternative means of correcting the prosecutorial error, a court may make one of three possible determinations. First, the court may make an affirmative finding that other remedial alternatives would rectify the error, in which case the mistrial should be denied. Second, the court may find that, although the defense has not carried its burden of persuasion, it has made a showing that there is some prospect of taint. In this instance, the court may grant the defendant the option of proceeding with the trial or opting for a mistrial, with the express condition that a retrial is permissible. Because the defendant has not convincingly demonstrated that the trial is infected beyond repair, allowing her the choice of continuing with it or starting another gives full play to the defendant's interest in "retain[ing] primary control over the course to be followed in the event of such error."⁴⁹⁰ Finally, the court may find that the defense has carried its burden of persuasion on the question of alternative remedies, so that the mistrial should be granted and retrial barred.⁴⁹¹

A nonintent-based approach like the one proposed would spur the creation of more concrete rules governing impermissible prosecutorial practices at trial. It would generate a corpus juris delineating which errors are sufficiently severe to amount to plain error. The proposed scheme, moreover, would produce more visible decisions concerning the effectiveness of curative alternatives to a mistrial. This increased visibility would hopefully prompt more systematic study of the efficacy of remedies such as curative instructions. Even if such study were not initiated, such decisions would nevertheless promote greater rationality and consistency in the application of procedures to remedy

⁴⁹⁰ *Oregon v. Kennedy*, 456 U.S. 667, 676 (1982) (quoting *United States v. Din- itz*, 424 U.S. 600, 609 (1976)).

⁴⁹¹ Appellate review of a trial court's decision to deny a mistrial or to allow a retrial after a mistrial should be deferential because of the factual nature of the trial court's decision. Such review would take one of two forms. First, if a mistrial is granted but retrial is allowed, the appellate court would review the trial court's denial of the defendant's motion to bar retrial on double jeopardy grounds. See *Abney v. United States*, 431 U.S. 651, 660-61 (1977); *United States v. Jorn*, 400 U.S. 470, 479-80 (1971); *Green v. United States*, 355 U.S. 184, 187-89 (1957). If the appellate court determines that it was error to permit retrial, it may correct the error simply by reversing the trial court and barring retrial. Second, if a mistrial is denied, appellate review will focus on the defendant's conviction. Where the appellate court finds that the trial court erred in not granting a mistrial and barring reprosecution, it is not sufficient simply to reverse the defendant's conviction. Reprosecution should be barred in this instance as well, even though the defendant has received a verdict from the first tribunal empaneled to hear her case. Not only would it be anomalous to put the defendant in a worse position because of the trial court's error, but compelling a defendant to undergo a second, unnecessary trial is one of the harms that the double jeopardy clause seeks to prevent. See *supra* note 303.

prosecutorial error.

CONCLUSION

The current corpus juris challenging the constitutionality of prosecutorial behavior is characterized by an unexplained, unsystematic focus on the prosecutor's intent. This preference for an intent-based analysis inheres in examinations of prosecutorial behavior throughout the criminal process, from the filing of charges to the completion of the trial and afterward. It is evident through a cross section of prosecutorial actions, including selective prosecution, prosecutorial vindictiveness in charging, abuse of the grand jury process, the prosecutor's duty to provide the defendant with exculpatory evidence, the prosecutor's use of discriminatory peremptory challenges, and the double jeopardy bar to retrial. Only challenges to the prosecutor's grand jury presentation have resisted this mode of constitutional analysis.

This preference has created a number of difficulties for defendants who intend to exercise various constitutional guarantees. The intent focus has also created systemic costs not offset by the systemic benefits it generates. Consequently, the case for using intent-based analysis to define a prosecutor's constitutional obligations is largely a residual one, dependent upon the unavailability of realistic, nonintent-based alternatives that protect the constitutional interest at stake in a reasonably precise way. Simply put, objective restraints should be utilized unless they are not feasible, either for doctrinal or practical reasons, and these reasons should be examined critically. In effect, the current preference for intent-based constitutional regulation of prosecutorial behavior should be reversed.

A preliminary inquiry indicates that in a number of areas in which courts have reflexively couched constitutional restraints in terms of prosecutorial intent, there are doctrinally sound alternatives that do not turn on the prosecutor's thoughts. This is true of selective prosecution claims other than those based on race, claims of prosecutorial vindictiveness in charging, challenges to a prosecutor's discriminatory use of peremptory challenges, and double jeopardy claims based on prosecutorial misconduct at trial. Nevertheless, certain challenges to prosecutorial behavior, including some claims of abuse of grand jury process and race-based selective prosecution claims, apparently require an inquiry into the prosecutor's motivation. In the latter instance, however, the drawbacks of intent-based analysis can be substantially ameliorated through the use of objectifying presumptions.

There is an irony in the constitutional regulation of prosecutorial behavior. It is the enormous power prosecutors wield that likely drives

judicial concern over their intentions and motives; for their purity of heart is fervently to be wished. It is, however, precisely because prosecutors wield so much power that the restraints which limit exercise of that power must be more discernable and objective.