

University of Kentucky

UKnowledge

---

Law Faculty Scholarly Articles

Law Faculty Publications

---

1988

## Victims in the Criminal Process: A Utilitarian Analysis of Victim Participation in the Charging Decision

Sarah N. Welling

University of Kentucky College of Law, [swelling@uky.edu](mailto:swelling@uky.edu)

Follow this and additional works at: [https://uknowledge.uky.edu/law\\_facpub](https://uknowledge.uky.edu/law_facpub)



Part of the [Criminal Law Commons](#), and the [Criminal Procedure Commons](#)

[Right click to open a feedback form in a new tab to let us know how this document benefits you.](#)

---

### Recommended Citation

Sarah Welling, *Victims in the Criminal Process: A Utilitarian Analysis of Victim Participation in the Charging Decision*, 30 Ariz. L. Rev. 85 (1988).

This Article is brought to you for free and open access by the Law Faculty Publications at UKnowledge. It has been accepted for inclusion in Law Faculty Scholarly Articles by an authorized administrator of UKnowledge. For more information, please contact [UKnowledge@lsv.uky.edu](mailto:UKnowledge@lsv.uky.edu).

---

## Victims in the Criminal Process: A Utilitarian Analysis of Victim Participation in the Charging Decision

### Notes/Citation Information

Arizona Law Review, Vol. 30, No. 1 (1988), pp. 85-117

# VICTIMS IN THE CRIMINAL PROCESS: A UTILITARIAN ANALYSIS OF VICTIM PARTICIPATION IN THE CHARGING DECISION

Sarah N. Welling\*

## INTRODUCTION

Crime victims are currently being given the right to participate in criminal prosecutions at both the sentencing<sup>1</sup> and plea bargaining stages.<sup>2</sup> These are important steps in a criminal prosecution, but both the sentence and the plea bargain are dependent on the initial charging decision which determines what crime is to be prosecuted or whether there is to be any prosecution at all.<sup>3</sup> As a prerequisite to both a plea bargain or a sentence, the charging decision is the crux of the prosecution.<sup>4</sup>

Given the importance of the charging decision, and the fact that some jurisdictions have granted victims a right to participate in plea bargains and sentencing, should victims also have a right to participate in the charging decision? Although providing information to victims about the charging decision has been endorsed,<sup>5</sup> there is resistance to victim participation in the decision.<sup>6</sup> This resistance to victim participation is implicit,<sup>7</sup> without expla-

---

\* Associate Professor of Law, University of Kentucky. B.A. 1974, University of Wisconsin; J.D. 1978, University of Kentucky.

1. See, e.g., CAL. CONST. art. 1, § 28. See generally Mcleod, *Victim Participation at Sentencing*, 22 CRIM. L. BULL. 501, 507 & n.22 (1986). Cf. Booth v. Maryland, 107 S. Ct. 2529 (1987) (introduction of victim impact statement at sentencing phase of capital case violates the Eighth Amendment).

2. See, e.g., MINN. STAT. ANN. § 611A.03(1) (West Supp. 1985); R.I. GEN. LAWS § 12-28-3(14) (Supp. 1985).

3. The charging decision actually includes two discrete decisions: the decision whether to prosecute the case at all and the decision of which offenses to charge. These decisions will be treated together in this article because the law defining who makes these decisions and the law defining within what constraints these decisions are made is the same, and for an analysis of victim participation there is no reason to distinguish these decisions.

4. See generally ABA STANDARDS ON THE PROSECUTION FUNCTION, Std. 3-3.9 commentary (1971) ("The charging decision is the heart of the prosecution function."); Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1524 (1981) ("The core of the prosecutor's power is charging, plea bargaining, and . . . initiating investigations.")

5. See, e.g., President's Task Force on Victims of Crime, Final Report, Prosecutors' Recommendation 1 (1982).

6. See U.S. DEP'T. OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION, Part B ("Initiating and Declining Prosecution") and Part C ("Selecting Charges") (1980): neither Part makes any reference to the victim; President's Task Force, *supra* note 5, which makes eight recommendations for prosecutors and concludes only that prosecutors should keep victims informed of the charging decision; NAT'L JUDICIAL COLLEGE, CONFERENCE ON VICTIMS, PARTICIPANTS' MANUAL, Issue II.B.(1) (the College considered the question, should the court consider a statement from the victim

nation.<sup>8</sup> While the resistance to the idea of victim participation may simply be the product of a conservative bias against change, it is more likely born of suspicion that the concern for victims' rights is a pretext to limit defendants' rights and implement prosecution oriented changes in the system.<sup>9</sup>

This Article examines whether victims should be accorded a right to participate formally in the charging decision. The perspective is primarily utilitarian, the premise being that if victim participation is, on balance, useful, there is no reason to reject it. The Article begins by assessing the costs and benefits of victim participation in the charging decision. The first section analyzes the parties' interests in the charging decision, and the impact establishing a victim's participation right has on those interests. The second section examines the current role of victims in the charging decision. The third section analyzes the source of the charging decision, the prosecutor, and limits on the prosecutor's discretion. The fourth section defines a method of according victims a right to participate in the charging decision. The Article concludes that victim participation in the charging decision can be useful if the right to participate in the decisionmaking process is carefully designed.

## INTERESTS IN THE CHARGING DECISION AND THE IMPACT OF VICTIM PARTICIPATION ON THOSE INTERESTS

### *The Victim's Interests*

The victim's only direct interest in the substance of the charging decision is a feeling of catharsis or vindication when the defendant is charged with a crime. Although victims may feel some vindication when the defend-

---

on a decision not to prosecute? The College's response to this question was apparently no, because its final recommendations specifically endorsed victim participation in seven stages of the prosecution but omitted mention of victim participation at charging. The rationale for this omission is revealed in a comment of the College following the question. The comment states: "The refusal of the public prosecutor to pursue a given case is a matter of legitimate concern, but it does not seem to be a problem that is susceptible of resolution by the court . . . . It would seem that his refusal to properly discharge duties should be met with a political response."; ABA GUIDELINES FOR FAIR TREATMENT OF VICTIMS AND WITNESSES (1984) (Guideline 10 states that victims "in serious cases should have the opportunity to consult with the prosecutor prior to dismissal of the case. . . ." The implication is that victims should be consulted regarding dismissal but not the original charging decision.). With the possible exception of the National Judicial College, none of these positions against victim participation was explicit.

Two commentators have reached the same conclusion. Professor Goldstein concludes that victims should not participate formally in the initial charging decision. Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L.J. 515 (1982). Professor Goldstein notes, however, that informal participation remains available: "[T]here is nothing to prevent a prosecutor from routinely inviting the victim (and his counsel) to a pre-charge conference and soliciting his views on what the charge should be." *Id.* at 557 n.88. Professor Hall has also considered this question. He does not advocate a formal role for the victim at the charging stage, and notes that the decision to prosecute should be influenced by the victim's attitudes only within guidelines promulgated to assure fairness. Hall, *The Role of the Victim in the Prosecution and Disposition of a Criminal Case*, 28 VAND. L. REV. 931, 981-82 (1975).

7. See *supra* note 6.

8. The only exception to this dearth of explanation are the National Judicial College, see *supra* note 6, and Professor Goldstein; the reason for Professor Goldstein's conclusion that victims should not participate formally is apparently based on separation of powers concerns. Goldstein, *supra* note 6, at 553 n.76 & 557 n.88.

9. See Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937 (1985).

ant is charged, from the system's perspective, this feeling is unjustified because, until conviction, the defendant is presumed to be innocent. Aside from this feeling of vindication, the victim has no interest in the charging decision, per se; whether an action is filed and selection of the charges are decisions with no direct impact on the victim.

But the victim does have an indirect interest in the charging decision because the conviction and sentence are dependent upon the charging decision, and victims have significant interests in the conviction and sentence. With regard to sentencing, the victim has a financial interest because restitution is usually a possibility.<sup>10</sup> Another interest in the sentence is psychological. The victim may desire retribution in the form of a severe sentence.<sup>11</sup> The victim may also wish to incapacitate the defendant: if the sentence includes incarceration, the defendant will no longer be a threat to the victim. With regard to the conviction, the victim's interests are twofold. First, the conviction sets limits on the potential sentence and therefore implicates the victim's sentencing interests. Second, the conviction decision itself carries a symbolic significance for the victim because it is society's judgment that the person who harmed the victim is criminal. Thus the victim has an indirect interest in the substance of the charging decision because it affects both the conviction and sentencing decisions.<sup>12</sup>

These indirect interests in the charging decision are somewhat susceptible to alternative protection by victim participation at later stages. However, such later participation is not complete protection because the victim's interests in the conviction and sentencing stages may already have been compromised or foreclosed by the charging decision.

Analysis of the victim's interests in the substance of the charging decision indicates that these interests are best served when the defendant is prosecuted on the most serious charges.<sup>13</sup> Serious charges are themselves the most rewarding symbolically, and serious charges allow a serious conviction and sentence, which is again rewarding symbolically. Moreover, the more serious the charges, the greater is the possibility that the sentence will satisfy the victim's interests in restitution, retribution and incapacitation.

Aside from the substance of the charging decision, the victim also has an interest in the process by which the charging decision is made. A victim who is consulted regarding the charges, and who feels like an important participant in the process of reaching a charging decision, will likely feel better

---

10. See, e.g., 18 U.S.C. § 3579(a)(2) (1982). See generally Anderson & Woodard, *Victim and Witness Assistance: New State Laws and the System's Response*, 68 JUD. 221, 226-27 (1985).

11. See, e.g., Davis, Kunreuther & Connick, *Expanding the Victim's Role in the Criminal Court Disposition Process: The Results of an Experiment*, 75 J. CRIM. L. & CRIMINOLOGY, 491, 500 (1984) ("Failure of the court to punish defendants severely enough was the most frequently cited reason for dissatisfaction with case outcomes, mentioned by 70% of victims.").

12. Cf. President's Task Force, *supra* note 5, Recommendation 1, commentary ("The victim, not the state, is directly aggrieved by violent crime, and has an unquestionably valid interest in the prosecution his complaint initiates.").

13. Of course, this assumes that the victim wants a prosecution to proceed. This assumption is reasonable because pursuing a prosecution is most consistent with the victim's interests. However, some victims may prefer to avoid the possible trauma or inconvenience of a trial. These victims are often in a position to stop the prosecution simply by refusing to cooperate. See Hall, *supra* note 6, at 970.

served by the criminal justice system than one who is excluded from the process and treated as irrelevant.<sup>14</sup>

Victim participation at the charging stage allows the victim an opportunity to protect victim interests. First, the victim could encourage the prosecutor to pursue the case and to file the most serious charges justified, thereby serving the victim's interests in the substance of the decision as described above. Second, regardless of how the decision is resolved, the victim may feel less alienated for having played a role in the decision making process.

### *The Defendants' Rights and Interests*

#### *a. Rights*

Defendants have few rights in the charging decision. They have the right to challenge the charging decision as unsupported by sufficient evidence,<sup>15</sup> as unconstitutional if retaliatory<sup>16</sup> or discriminatory,<sup>17</sup> and, as some cases suggest, as unethical if not made in good faith or not based upon appropriate charging considerations.<sup>18</sup>

Victim participation in the charging decision would not violate any of these rights because only the prosecutor, as the exclusive source of charging,<sup>19</sup> has the power to violate the rights of the defendant with regard to charging. Yet the question remains whether victim participation in the charging decision would render violations of these rights by the prosecutor more likely. As to the defendant's right to have the charges supported by sufficient evidence, victim participation in the charging decision might lead to more charges being filed that are not supported by sufficient evidence. Assuming that victims will generally encourage the prosecutor to file the most severe charges possible,<sup>20</sup> prosecutors may respond to victims' urgings by filing aggressively in cases where the evidence is marginal. However, the defendant's rights would not be impaired because the prosecutor's charging decision is routinely screened for sufficiency of the evidence by a grand jury or in a preliminary hearing.<sup>21</sup> Thus the charging decision is checked for sufficiency of the evidence as a matter of course, and the defendant's rights would always be protected.

Victim participation would not render the prosecutor's charging deci-

---

14. Cf. NAT'L JUDICIAL COLLEGE, *supra* note 6, Issue II.B.(7), *Background* ("Victims are very disturbed by plea negotiations in which the prosecutor and defense counsel take it upon themselves to compromise the case against the defendant, sometimes in flagrant disregard of the facts of the seriousness of the crime as perceived by the victim."); Davis, Kunreuther & Connick, *supra* note 11, at 492-93 ("Victims may become frustrated and angry when they see that an assault against them may be treated only as disorderly conduct, that prosecutor and defense attorney appear to collaborate rather than act as adversaries, that their cases receive only a few minutes of the court's time, or that after pleading guilty, the defendant may be home before they are.").

15. See *infra* notes 148-55 and accompanying text.

16. See *infra* notes 163-66 and accompanying text.

17. See *infra* notes 156-63 and accompanying text.

18. See *infra* notes 167-70. This right is not well defined and has resulted in no dismissals of charges.

19. See *infra* text accompanying note 127.

20. Analysis of the victim's interests indicates that the victim's interest is to endorse filing of the most serious and most numerous charges. See *supra* text accompanying note 13. Therefore, it is a reasonable assumption that most victims will seek the most serious and numerous charges.

21. See *infra* notes 149-52 and accompanying text.

sion more likely unconstitutional as retaliatory or discriminatory. Victim input into the charging decision would be unrelated to the likelihood of the prosecutor retaliating against the defendant for exercising his or her rights.<sup>22</sup> Likewise, victim input would have no tendency to encourage the prosecutor to rely on criteria that are discriminatory under the equal protection clause.

With regard to the defendant's right that the charging decision be made ethically and in good faith, assessment of the impact of victim participation is more difficult. First, the right exists only as dicta in a few cases and is so ill-defined that a meaningful analysis is problematical.<sup>23</sup> The case that most specifically defines this right<sup>24</sup> relies on DR 7-105 of the Model Rules of Professional Conduct which provides that it is unethical to threaten criminal action in order to procure advantage in a civil case.<sup>25</sup> Victim participation in the charging decision would not make the prosecutor more likely to threaten criminal action to procure a civil advantage. If the prosecutor is in a position to gain a civil advantage by threatening criminal charges, that situation will exist regardless of whether the victim has a right to participate in the charging decision.<sup>26</sup> Thus, the impact of victim participation will be neutral and would not encourage the prosecutor to make charging decisions in bad faith. Accordingly, victim participation in the charging decision would neither violate the defendant's rights directly, nor make violation of those rights by the prosecutor more likely. Although victim participation in the charging decision would not interfere with any of the defendant's rights, it would almost certainly interfere with the defendant's interests.

#### b. *Interests*

The defendant's main interest in the charging decision is to convince the prosecutor to adopt a non-criminal disposition of the case<sup>27</sup> or, failing that, to encourage the prosecutor to minimize the charges in order to limit the possible sentences. To accomplish these goals, the defendant's interest is in minimizing the incriminating information available to the prosecutor and in ensuring that the prosecutor has all the exculpatory and mitigating information. These are, of course, just interests and not rights: the defendant has no right to minimize the incriminating information to which the prosecutor is exposed; nor does the defendant have a right to present exculpatory or mitigating information to the prosecutor.

The impact of victim participation on the defendant's interests will be harmful if the victim provides incriminating information to the prosecutor;

---

22. See *infra* text accompanying notes 163-66.

23. See *infra* notes 167-70 and accompanying text.

24. MacDonal v. Musick, 425 F.2d 373 (9th Cir. 1970), discussed *infra* note 167.

25. MODEL CODE OF PROFESSIONAL RESPONSIBILITY D.R. 7-105 (1982).

26. In this kind of conflict the prosecutor has always had the discretion to allow the victim to participate; the only question is whether the victim should have a right to participate. Practically, the question will only arise when the prosecutor tries to file charges without consulting the victim.

At any rate, as to this right to have the charging decision made ethically and in good faith, it cannot be presumed that information supplied by the victim would necessarily constitute the "contaminating influence," Sinclair v. State, 363 A.2d 468, 478 (Md. 1976), of which courts are wary.

27. One common type of non-criminal disposition is pretrial diversion. See generally Y. KAMISAR, W. LAFAYE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 881-82 (6th ed. 1986).

but the defendant's interest in minimizing the incriminating information provided to the prosecutor is not an interest worthy of protection. It is bad policy to limit the information available to the prosecutor; theoretically, more information provided to a decision maker results in a better decision. The defendant should not be permitted to preclude the victim from consulting with the prosecutor simply because the victim may provide incriminating information.<sup>28</sup>

A victim has no power to prevent a defendant from presenting exculpatory information. Thus, a defendant's interest in presenting exculpatory information will not be affected by victim participation.

Beyond the victim and the defendant, the prosecutor and society also have an interest in the charging decision. Their interests often overlap because the prosecutor's formal role is to represent society.<sup>29</sup> Yet, because at other times their interests are distinct,<sup>30</sup> the discussion below examines the interests of the prosecutor and of society separately.<sup>31</sup>

### *The Prosecutor's Interests*

The prosecutor's principal interest in the substance of the charging decision is to file the broadest, the most serious, and the greatest number of charges that are supported by the evidence.<sup>32</sup> Such overcharging benefits the prosecutor in two ways. First, because it exerts pressure on the defendant to enter a plea bargain and thereby not risk conviction at trial on all the charges, overcharging helps the prosecutor achieve favorable and speedy disposition of a large volume of cases. Second, overcharging allows the prosecutor to maximize flexibility in plea bargaining or in proving the charges at trial since it preserves the broadest range of possible convictions.<sup>33</sup>

The prosecutor's secondary interest in the charging decision is not in the substance of the decision but in the process by which it is made. This interest is to make the decision as quickly as possible. Prosecutors generally work with small budgets and heavy caseloads. Time is at a premium, so prosecutors are not free to allocate excessive time to reviewing files and de-

---

28. The prosecutor has always had the discretion to allow the victim to express an opinion, so the question only arises where the prosecutor is resistant to victim consultation. Assuming the prosecutor is resistant but the victim wants to express his or her views on the charging decision, the defendant's interest in limiting the incriminating information given to the prosecutor should not be the factor to tip the balance and deny the victim the right to consult with the prosecutor.

29. See *United States v. Bess*, 593 F.2d 749 (6th Cir. 1979); ABA STANDARDS RELATING TO PLEAS OF GUILTY, Std. 14-3.1(d), *Commentary* (1971) ("The duty of the prosecutor is to act in the best interests of society at large. . . ."); Abrahamson, *Redefining Roles: The Victims' Rights Movement*, 1983 UTAH L. REV. 517, 537; Budewitz, *State Legislation in Aid of Victims and Witnesses of Crime*, 10 J. LEGIS. 394, 395-96 (1983); Henderson, *supra* note 9, at 980-81.

30. See *United States v. LeFevre*, 483 F.2d 477 (3d Cir. 1973); Gittler, *Expanding the Role of the Victim in a Criminal Action*, 11 PEPPERDINE L. REV. 117, 144-45 (1984) (if conflict arises between society's interests and the victim's interests, prosecutor must give priority to society's interests); Goldstein, *supra* note 6, at 555; McDonald, *Towards a Bicentennial Revolution in Criminal Justice*, 13 AM. CRIM. L. REV. 649, 650 (1976).

31. The prosecutor has many interests which are consistent with those of society or the victim. The interests discussed below are not exhaustive of the prosecutor's interests, and the discussion is not meant to imply that the prosecutor is not interested in restitution, retribution or incapacitation.

32. U.S. DEP'T OF JUSTICE, *supra* note 6, at Part C ("Selecting Charges").

33. ABA STANDARDS RELATING TO THE PROSECUTION FUNCTION, Std. 3-3.9 (1971).



bating charging decisions. For the same reasons, the prosecutor's interest is to make the charging decision without time consuming interference from others.

As to the prosecutor's interest that the charges filed be the broadest and most serious supported by the evidence, the impact of victim participation would be minimal. The victim's interests indicate that the victim will also generally seek to have the most serious charges filed.<sup>34</sup> Thus, the prosecutor and the victim have the same interest in the substance of the charges, albeit for different reasons.<sup>35</sup> Because victims and prosecutors have consistent interests at the charging stage, the impact of victim participation on the substance of the prosecutor's decision would be negligible.<sup>36</sup>

Regarding the process of reaching the charging decision, the interests of the prosecutor and victim diverge. The prosecutor wants the simplest process to achieve the quickest decision. Of course, the amount of additional time consumed by victim participation would depend on the type of participation right defined, but there will inevitably be some impact. On this point, victim participation conflicts with the interest of the prosecutor. From the prosecutor's perspective, victim participation would be benign as to the substance of the charging decision, but would entail some costs for the process of making the decision.

It must be recalled that the prosecutor is always free to allow the victim to participate if the prosecutor chooses. The only situation where a victim's right to participate would have any practical impact is where the prosecutor wants to make the charging decision without consulting the victim. Thus, the only situations changed by granting victims a participation right are those in which the prosecutor is resistant to victim participation, otherwise the victim would already have been consulted.

### *Society's Interests*

Society has numerous interests in the substance of the charging decision. Society's primary interest is that charging decisions be consistent and fair, not arbitrary, and not based upon inappropriate factors.<sup>37</sup> A second interest is that the charging decision implement society's enforcement priorities.<sup>38</sup> A third interest is that the charging power be used wisely to allocate scarce resources, so the limited funds available are used efficiently and the decisions are economically rational.<sup>39</sup> Another societal interest is that the

---

34. See *supra* text accompanying note 13.

35. This difference in reasons results in a divergence of interests at the conviction stage. For example, where a guilty plea based on a plea bargain is contemplated, the prosecutor can be expected to endorse the plea bargain to save time and avoid risk, whereas victims do not have the same concerns and might prefer to pursue the most serious conviction and sentence possible regardless of the time commitment.

36. Victim participation might even benefit the prosecutor in that it would encourage the victim to become involved in the prosecution. Of course, the prosecutor who wants to involve the victim in the prosecution has always had the discretion to do so.

37. See Goldstein, *supra* note 6, at 554-55; Hall, *supra* note 6, at 982.

38. See, e.g., U.S. DEP'T OF JUSTICE, NATIONAL PRIORITIES FOR THE INVESTIGATION AND PROSECUTION OF WHITE COLLAR CRIMES (1980).

39. This societal interest in securing maximum returns for each dollar spent is another expression of the prosecutor's interest in making the decision quickly and therefore cheaply.

charging power be used to file test cases and make new law;<sup>40</sup> such test cases ensure the creative evolution of common law to reflect the state's needs. Finally, if the charges filed are novel and generate publicity, the mere filing of charges, even without a conviction, may have a deterrent effect on crime.<sup>41</sup>

Victim participation would not infringe directly on the societal interests in the substance of the decision because the prosecutor would remain the exclusive source of the charging decision. However, a different question is whether victim participation would make the prosecutor less likely to serve society's interests effectively. The answer depends, to some extent, on the individual prosecutor; but discounting individual variations, any possible systemic impact must be considered. Victim participation may affect society's interest that the charging decisions be fair and consistent. Victim participation would introduce into the charging decision a new variable, the victim, who has the potential for causing more variation in charging decisions.<sup>42</sup> Victims will presumably represent a range of enthusiasm for asserting a participation right. The result may be that insistent victims encourage prosecution whereas silent or affirmatively reluctant victims will discourage it.<sup>43</sup> As for the other interests of society mentioned above, there is no reason to conclude that victim participation would have a detrimental impact; victim participation is irrelevant to society's other interests.

The process of making the charging decision should be simple and quick. As the prosecutor's client, society loses if the prosecutor has to spend more time reaching a charging decision.

Victim participation in the charging decision would also introduce two benefits for society independent of the interests examined above. First, victim participation would allow victims to feel important. As noted above, this is good for victims, but it is also good for society. If victims feel irrelevant and alienated, they may not cooperate in reporting and prosecuting crime, and the system, which is dependent on citizen participation, would function less effectively as a result.<sup>44</sup> Second, victim participation might bol-

---

40. See, e.g., *People v. Warner-Lambert, Inc.*, 51 N.Y.2d 295, 434 N.Y.S.2d 159 (Ct. App. 1980).

41. For example, in the recent prosecution of director John Landis and others in California for manslaughter in connection with the filming of "The Twilight Zone," the jury returned a verdict of not guilty. Prosecutor D'Agostino's reaction was, "[But] if we have succeeded in saving one life and deterring one director . . . the prosecution was successful." *Lexington Herald-Leader*, June 30, 1987, at A5.

42. Hall, *supra* note 6, at 981. Cf. *Booth v. Maryland*, 107 S. Ct. 2529, 2533-34 (1987) (ability of victims to be articulate and persuasive in expressing their grief is dangerous for jury to consider in death penalty cases).

43. The Court's reliance on the alleged arbitrariness that can result from the differing ability of victims' families to articulate their sense of loss is a makeweight consideration: No two prosecutors have exactly the same ability to present their arguments to the jury; no two witnesses have exactly the same ability to communicate the facts; but there is no requirement in capital cases that the evidence and argument be reduced to the lowest common denominator.

*Booth*, 107 S. Ct. at 2540-41.

44. Congress has stated, "The Congress finds and declares that . . . without the cooperation of victims . . . the criminal justice system would cease to function. . . ."; 18 U.S.C. § 1501 (1982); W. VA. CODE § 61-11A-1 (Supp. 1985) (identical legislative finding); *Food Fair Stores, Inc. v. Joy*, 283 Md. 205, 215, 389 A.2d 874, 880 (Ct. App. 1978) (prosecutor is "bound to recognize, in exercising his prosecutorial discretion, that in our present day society no prosecutor can meet his responsibilities to the public without the cooperation and support of private citizens."). But see Gittler, *supra*

ster public confidence, for even if the victim did not agree with the final charging decision, the public would know that the victim had been consulted and given a chance to express his or her view. Thus, participation might give the charging decision more legitimacy in the public's perception, and society might feel more confidence in charging decisions.

### *Summarizing the Costs and Benefits*

The victim's interests in the substance of the charging decision are secondary. The vindication the victim might feel as a result of charges being filed should probably not be encouraged as a policy matter because it conflicts with the presumption of innocence. The victim's other interests in the substance of the charging decision are indirect: they exist only by reference to the conviction and sentencing stages. These interests are partially protected by participation at these later stages. Both the victim and the prosecutor favor filing serious charges, and the victim's interest is protected because it is consistent with that of the prosecutor.

Thus, the victim's interest in the substance of the charging decision is susceptible to partial alternative protection, and is already represented by the prosecutor. Yet there remains the victim's interest in the process by which the decision is made. For the victim, participation in the process, regardless of the result, may be beneficial in that the victim will more likely be satisfied with his role in the decision. This interest in the process by which the decision is made is not objectionable as a policy matter, nor is it otherwise protected.

From the defendant's perspective, no rights are violated by victim participation. The defendant's interest in minimizing the incriminating information provided to the prosecutor, while impaired by victim participation, is not worthy of protection. The defendant's interest in providing exculpatory information to the prosecutor is not affected because the defendant is still free to do so at the prosecutor's discretion. Therefore, no persuasive reason exists from defendants' perspective to deny victims a participation right.

The prosecutor has two main interests in the charging decision: filing the most serious and the greatest number of charges, and using the quickest, simplest decisional process. On the substance of the charging decision, the victim's interests are consistent with the prosecutor's interests, so victim participation would be no drawback from the prosecutor's perspective. But the time consumed by the victim's right to participate would interfere with the prosecutor's interest in a speedy, streamlined process. Therefore, victim participation, while not detrimental to the substance of the charging decision, would be detrimental to the decision-making process because of the additional time consumed.

From society's perspective, victim participation could have two negative impacts. Charging decisions may be increasingly inconsistent and the

---

note 30, at 145-49. Gittler concludes that, "The available data . . . is [sic] not really sufficient to reach any definite conclusion about the causal links, if any, between victim non-cooperation in the prosecution of alleged offenders, victim dissatisfaction with the criminal justice system, and victim participation in criminal proceedings." *Id.* at 149.]

process of making the charging decision may become more complicated and time-consuming. However, the process of victim participation will also generate two benefits: the function of the criminal justice system will be fostered because participation minimizes victim alienation, and public confidence in the system will be bolstered by knowledge of victim consultation regarding any charges filed or not filed.

The case for victim participation in the charging decision is not conclusive. Such participation has drawbacks. Whether the benefits of victim participation would outweigh the detriments depends on the type of participation right established.

### CURRENT STATUS OF VICTIMS IN THE CHARGING DECISION

Victims currently play no formal role<sup>45</sup> in the charging decision.<sup>46</sup> Statutes authorizing prosecution make no mention of victims,<sup>47</sup> nor do internal

---

45. Of course, the extent to which the victim participates informally in the charging decision is a different question. Individual prosecutors vary in their willingness to defer to victims' preferences. While it is difficult to identify the informal and often unarticulated practices of prosecutors on this issue, Professor Hall has conducted a study of prosecutors in Nashville, Tennessee which indicated that victims seeking prosecution were influential on the decision to charge in serious felony cases but had relatively little influence in nonserious cases, while victims opposing prosecution were not influential on serious felonies (except rape) but were generally heeded in nonserious cases. Hall, *supra* note 6, at 946-53.

A recent survey of prosecutors in Kentucky indicates the informal influence of victims on prosecutors' charging decisions: 70% of prosecutors reported that victims encouraging prosecution affected their decision to file charges, and 100% of prosecutors reported that victims discouraging prosecution affected their decision to file charges. Only 14% reported that victims had no effect. S.D. ARNOLD, *THE RIGHTS OF THE VICTIM IN THE CRIMINAL JUSTICE SYSTEM* 12 (unpublished manuscript on file with the ARIZONA LAW REVIEW).

Other recognition of informal victim participation includes the ABA STANDARDS ON THE PROSECUTION FUNCTION, Std. 3-3.9(b)(v) (1971) (reluctance of victim to testify is factor to consider in declining prosecution); Note, *Prosecutorial Discretion in the Initiation of Criminal Complaints*, 42 SO. CAL. L. REV. 519, 530 (victim status as subjective variable in decision to prosecute) (victim approach of prosecutor's supervisor as affecting decision to prosecute) (1969). But see Goldstein, *supra* note 6, at 527 (views of victim rarely solicited, much less attended to; "[P]rosecutors . . . [are] inattentive to the victim's preferences about critical decisions to be made, including the decision on charges to be brought. . . ."); Thomas & Fitch, *Prosecutorial Decision Making*, 13 AM. CRIM. L. REV. 507, 513-14 (1976), where the authors list 11 factors which studies have shown influence prosecutors' charging decision, and the preference of the victim is not among the factors listed.

One interesting type of informal victim input into the charging decision arose in *Commonwealth v. Dunlap*, 474 Pa. 155, 377 A.2d 975 (1977), where the prosecutor also represented the victim in a civil action arising out of the same facts as the criminal action. The victim's relationship as the prosecutor's client would likely encourage the prosecutor to file criminal charges, and to file the most serious ones, to procure an advantage in the civil action. See *id.* at 978 (Roberts, J., dissenting and quoting the dissenting opinion of Hoffman, J., from *Commonwealth v. Dunlap*, 233 Pa. Super. 38, 46, 335 A.2d 364, 368 (1975): "[A]n attorney would be hard-pressed to abandon prosecution of a defendant when a criminal conviction would be proof of the alleged tort in the civil suit. . . .").

46. See Goldstein, *supra* note 6, at 548:

The victim's complaint may give rise to the prosecution and his testimony may be essential to sustain it, but he has no formal relation to the criminal case. The prosecutor alone is said to represent the public interest in criminal law. He has been endowed by the courts with a broad and virtually unreviewable discretion in these matters of charging and dismissal. . . . *Id.*

See generally McDonald, *supra* note 30, at 651-61 (chronicles the historical decline of the victim's role in criminal prosecutions).

47. See statutes cited *infra* notes 128-31.

guidelines issued by the executive branch.<sup>48</sup> When victims have resorted to the courts to challenge the prosecutor's charging decision, they have received no relief. Reasons for the courts' rejection of victim participation are examined below.

### *The Courts' Reluctance to Review Charging Decisions*

Victims have been denied relief because of the courts' traditional reluctance to review prosecutors' charging decisions,<sup>49</sup> a reluctance which is frequently expressed in strong terms.<sup>50</sup> The reason generally cited by the courts for their refusal to review the charging decision is that review would be unconstitutional under the separation of powers doctrine.<sup>51</sup> The prosecu-

48. See, e.g., U.S. DEP'T OF JUSTICE, *supra* note 6, Part B, *Initiating and Declining Prosecution* (lists considerations for declining prosecution and makes no mention of victim); and Part C, *Selecting Charges* (lists considerations in selecting charges and makes no mention of victim). Cf. President's Task Force, *supra* note 5, Prosecutors' Recommendation 1.

49. See *Wayte v. United States*, 470 U.S. 598, 608 (1985) (describing courts as "properly hesitant to examine the decision whether to prosecute"); *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375 (2d Cir. 1975) (discussion of courts' reluctance to review charging decisions); *Spillman v. United States*, 413 F.2d 527, 530 (9th Cir. 1969) (court "cannot inquire into the motives of the United States Attorney for prosecuting this appellant"); *Newman v. United States*, 362 F.2d 479, 480 (D.C. Cir. 1967); *Ray v. Department of Justice*, 508 F. Supp. 724, 725 (E.D. Mo. 1981); *Pugach v. Klein*, 193 F. Supp. 630, 634 (S.D.N.Y. 1961); *Vorenberg*, *supra* note 4, at 1546 (discussing the "hands-off approach of the courts").

50. See, e.g., *Wayte*, 470 U.S. at 607 (decision to prosecute is "particularly ill-suited" to judicial review); *Newman*, 382 F.2d at 480 ("Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made. . . ."); *Ray*, 508 F. Supp. at 725 ("well-settled" that initiation of federal criminal prosecution is discretionary decision with Executive Branch "not subject to judicial compulsion"); *New York v. Muka*, 440 F. Supp. 33, 36 (N.D.N.Y. 1977) (U.S. Attorney possesses "an absolute and unreviewable discretion as to what crimes to prosecute"); *Pugach*, 193 F. Supp. at 634 ("[I]t is . . . clear beyond question that it is not the business of the Courts to tell the U.S. Attorney to perform what they conceive to be his duties.").

Some courts have gone so far as to characterize the prosecutor's charging discretion as unreviewable. See, e.g., *United States v. Kysar*, 459 F.2d 422, 424 (10th Cir. 1972) ("[U.S. Attorney] has the power to prosecute or not to prosecute; this decision is not reviewable by any court."); *Muka*, 440 F. Supp. at 36 (U.S. Attorney possesses "absolute and unreviewable discretion as to what crimes to prosecute"). This language is hyperbole. Courts are reluctant to review the prosecutor's charging decision, see *supra* note 49, but there are situations when courts will do so, see *infra* text accompanying notes 148-71. Thus it is inaccurate to label the prosecutor's charging discretion as unreviewable. The courts' use of this term does, however, indicate the breadth of the prosecutor's charging discretion and the courts' reluctance to review that discretion.

51. See, e.g., *United States v. Greene*, 697 F.2d 1229, 1235 (5th Cir. 1983); *United States v. Torquato*, 602 F.2d 564, 569 (3d Cir. 1979) ("The concept of separation of powers underlies the courts' concern that the prosecutorial function be relatively untrammelled."); *United States v. Johnson*, 577 F.2d 1304, 1307 (5th Cir. 1978); *United States v. Cowan*, 524 F.2d 504, 512-15 (5th Cir. 1975); *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 379 (2d Cir. 1973) ("The primary ground upon which this traditional judicial aversion to compelling prosecutions has been based is the separation of powers doctrine."); *United States v. Cox*, 342 F.2d 167, 171 (5th Cir.) (en banc); *Pugach*, 193 F. Supp. at 634.

State courts also recognize the separation of powers concern. See, e.g., *People v. Baron*, 130 Ill. App. 588, 591, 264 N.E.2d 423, 425-26 (1970), where the court stated:

Article III of the Illinois Constitution divides the powers of the government among the legislative, executive and judicial departments, and provides that neither of these departments shall exercise powers belonging to either of the other departments.

The State's Attorney's office is a part of the executive branch of the government, and the powers exercised by that office are executive powers. A judge or court cannot exercise the powers of the executive branch of our government. . . . Thus, the court erred in designating the felony charge as a misdemeanor and in treating it as such. This order was void as a judicial encroachment upon the executive power of the State's Attorney.

tor is part of the executive branch, and the judiciary feels constrained to resist interfering with the executive's charging discretion,<sup>52</sup> at least when the decision is not unconstitutional, unethical, or based on insufficient evidence.<sup>53</sup>

Although courts usually rely on the separation of powers principle, they have occasionally cited other reasons for their refusal to review prosecutors' charging decisions. One reason is that the extreme breadth of the prosecutor's charging discretion is desirable to preserve flexibility.<sup>54</sup> The theory is that the prosecutor needs significant flexibility to react to all the diverse circumstances involved in the alleged commission of a crime.<sup>55</sup> Specifically, a prosecutor needs the freedom to screen out weak cases<sup>56</sup> and to use common sense when making the charging decision.<sup>57</sup> So the prosecutor, who necessarily works with limited resources,<sup>58</sup> must be accorded wide charging discretion in order to achieve individualized, and therefore more responsive and effective, justice.<sup>59</sup>

Recently the U.S. Supreme Court endorsed the courts' reluctance to review prosecutors' charging decisions and described additional reasons to decline such review.<sup>60</sup> The Court characterized the decision to prosecute as "particularly ill-suited to judicial review" because the factors the prosecutor considers in deciding to file charges are not susceptible to the kind of analy-

---

*See also* Hoines v. Barney's Club, Inc., 28 Cal. 3d 603, 611, 620 P.2d 628, 633, 170 Cal. Rptr. 42, 47 (1980) (relying on separation of powers doctrine as basis for interpretation of statute which leaves judgment of whether to prosecute with prosecutor); *People ex rel. Leonard v. Papp*, 386 Mich. 672, 194 N.W.2d 673 (1972).

On the separation of powers principle as the basis for the courts' refusal to review charging discretion, *see generally* Vorenberg, *supra* note 4, at 1546-47; Note, *Reviewability of Prosecutorial Discretion: Failure to Prosecute*, 75 COLUM. L. REV. 130, 136-38 (1975).

52. The courts' commitment to the separation of powers principle is reflected in the firm language they use. *See Johnson*, 577 F.2d at 1307 ("The doctrine of separation of powers, inherent in our tripartite constitutional scheme of government, prohibits free judicial interference with the exercise of the discretionary powers of the attorneys of the United States over criminal prosecutions.") (citations omitted); *Cox*, 342 F.2d at 171 ("[A]s an incident of the constitutional separation of powers, the courts are not to interfere with the free exercise of the discretionary powers of the attorney of the United States. . . ."); *United States v. Ahmad*, 347 F. Supp. 912, 927 (M.D. Pa. 1972), *aff'd*, 482 F.2d 171 (3rd Cir. 1973) ("[I]n compliance with the doctrine of separation of powers, the judiciary is not to become the overseer of the executive in the exercise of its discretion in the prosecution of criminal cases"); *Papp*, 386 Mich. at 684, 194 N.W.2d at 699 ("For the judiciary to claim power to control the institution and conduct of prosecutions would be an intrusion on the power of the executive branch of government and a violation of the constitutional separation of powers.").

53. *See infra* text accompanying notes 148-70.

54. *See Spillman*, 413 F.2d at 530 ("The United States Attorney must be given wide latitude in order to effectively enforce the federal criminal laws."); *United States v. Shober*, 489 F. Supp. 393, 405 (E.D. Pa. 1979); *People v. Gallegos*, 644 P.2d 920, 930-31 (Colo. 1982); *see generally* ABA STANDARDS ON THE PROSECUTION FUNCTION, Std. 3-3.9 *Commentary* (1971); Breitel, *Control in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427, 428-35 (1960).

55. *See Abrams, Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1, 3 (1971) ("The need for discretion arises in part because of the difficulty of encompassing within necessarily general rules the myriad circumstances that may be deemed relevant to a pending decision.").

56. Vorenberg, *supra* note 4, at 1547-48.

57. *Id.* at 1551-52.

58. *Id.* at 1548-49. *See also infra* note 141.

59. *See LaFave, The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532, 533-49 (1970) (reasons for charging discretion include limitations in available enforcement resources, and the need to individualize justice); Note, *supra* note 51, at 144.

60. *Wayte v. United States*, 470 U.S. 598, 607 (1985).

ses courts make.<sup>61</sup> The Court also noted that judicial supervision would entail "systemic costs" because the supervision would cause delay, have a chilling effect on law enforcement, and would undermine prosecutorial effectiveness by revealing enforcement policy.<sup>62</sup>

Other reasons have been cited by the courts in support of their reluctance to review charging decisions. These reasons include the lack of any record of how the charging decision was made,<sup>63</sup> the lack of any defined standards to apply in the review process,<sup>64</sup> and the necessity of secrecy to protect the potential defendant.<sup>65</sup>

---

61. *Id.*

62. *Id.* This last factor has been called "unearned deterrence" by Professor Vorenberg. Vorenberg, *supra* note 4, at 1549-51. See also Note, *supra* note 51, at 141.

This discussion of reasons to decline judicial review omits mention of the constitutional restraint—the separation of powers doctrine. This omission is unusual since most courts rely on this restraint to decline review of the charging decision. See *supra* note 51. As Professor Vorenberg noted with prescience four years before *Wayte* was written, "The hands-off approach of the courts seems to reflect their view, based on the other arguments [outlined herein] rather than on constitutional restraints, that it would be unwise to interfere with prosecutors' ability to manage the business of criminal justice." Vorenberg, *supra* note 4, at 1546.

63. See *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 380 (2d Cir. 1973):

In the normal case of review of executive acts of discretion, the administrative record is open, public and reviewable on the basis of what it contains. The decision not to prosecute, on the other hand, may be based upon the insufficiency of the available evidence, in which event the secrecy of the grand jury and of the prosecutor's file may serve to protect the accused's reputation from public damage based upon insufficient, improper, or even malicious charges. *In camera* review would not be meaningful without access by the complaining party to the evidence before the grand jury or U.S. Attorney. Such interference with the normal operations of criminal investigations, in turn, based solely upon allegations of criminal conduct, raises serious questions of potential abuse by persons seeking to have other persons prosecuted. Any person, merely by filing a complaint containing allegations in general terms (permitted by the Federal Rules) of unlawful failure to prosecute, could gain access to the prosecutor's file and the grand jury's minutes, notwithstanding the secrecy normally attaching to the latter by law. See Rule 6(e), F.R.Cr.P.

See generally Vorenberg, *supra* note 4, at 1568 (lack of general rules or record of action as "most important" explanation for courts' reluctance to oversee prosecutors' decisions); Note, *supra* note 51, at 139-40 ("A persistent, although not insurmountable, technical barrier to review of decisions not to prosecute is the difficulty courts have in ascertaining the basis of the prosecutorial decision.").

64. See *Rockefeller*, 477 F.2d at 380:

Nor is it clear what the judiciary's role of supervision should be were it to undertake such a review. At what point would the prosecutor be entitled to call a halt to further investigation as unlikely to be productive? What evidentiary standard would be used to decide whether prosecution should be compelled? How much judgment would the United States Attorney be allowed? Would he be permitted to limit himself to a strong "test" case rather than pursue weaker cases? What collateral factors would be permissible bases for a decision not to prosecute, e.g., the pendency of another criminal proceeding elsewhere against the same parties? What sort of review should be available in cases like the present one where the conduct complained of allegedly violates state as well as federal laws? See generally, Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 Law & Contemp. Probl. 64 (1948). With limited personnel and facilities at his disposal, what priority would the prosecutor be required to give to cases in which investigation or prosecution was directed by the court?

See generally Vorenberg, *supra* note 4, at 1569 n.148: "On the rare occasions when courts explain why they decline to review prosecutorial discretion, they do sometimes note the absence of any judicially discoverable guidelines or standards for the use of discretion that might permit judicial review." *Id.* (citations omitted).

65. See *Rockefeller*, 477 F.2d at 380 (secrecy of grand jury and prosecutor's file may serve to protect accused's reputation from damage based on insufficient, improper or malicious charges). See generally Note, *supra* note 51, at 141-42.

One final "barrier" to judicial review of the charging decision which has been cited by courts is

In addition to these reasons, commentators have identified fresh policy objections to judicial review of the charging decision. One objection is that the prosecutor needs freedom to decline to prosecute certain individuals in exchange for their cooperation in the prosecution of others.<sup>66</sup> Another is that the prosecutor needs the flexibility to offer plea bargain terms that are sufficiently desirable to the defendant to render the defendant's guilty plea voluntary.<sup>67</sup> Finally, one commentator argues that the decision to prosecute should not be subject to judicial review because such review would interfere with the development of internal controls.<sup>68</sup>

### *Denial of Standing*

Beyond this general reluctance to review charging decisions, the courts have found an additional reason not to review charging decisions at the request of victims. When the victim files an action seeking review of the prosecutor's charging decision, courts have often concluded that the victim has no standing to challenge the charging decision. The leading case is *Linda R. S. v. Richard D.*,<sup>69</sup> wherein the mother of an illegitimate child sued to enjoin the local district attorney from refusing to prosecute the father for non-support.<sup>70</sup> The Court dismissed the case for lack of standing and stated:

The Court's prior decisions consistently hold that a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution. . . . [In] American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.<sup>71</sup>

With this broad language the Court established that private citizens lack standing either to compel or to restrain the prosecution of another. Because the "private citizen" who challenged the prosecutor in this case was the victim,<sup>72</sup> the case also established that victims are to be treated no differ-

---

analyzed in Note, *supra* note 51, at 134-36. That barrier is that an agency's decision not to prosecute would constitute a negative order which would lack the finality and formality required for judicial review under the Administrative Procedure Act. This barrier to judicial review is not dealt with in detail herein because problems specific to administrative criminal actions are adequately covered in that work.

66. Vorenberg, *supra* note 4, at 1542-44.

67. *Id.* at 1553-54.

68. Abrams, *supra* note 55, at 52.

69. 410 U.S. 614 (1973).

70. The case involved a state criminal statute which made it a misdemeanor to refuse to supply child support. The district attorney declined to prosecute the father for non-support because the Texas courts had interpreted this statute to apply only to parents of legitimate children, and the child in question was illegitimate. The complaint asserted that this was a "discriminatory application" of the statute, probably in an attempt to fit the case within those where courts have been willing to review charging decisions to ensure equal protection. See *infra* notes 156-62 and accompanying text. However, this effort was unsuccessful. The Court stated:

The proper party to challenge the constitutionality of Article 602 would be a parent of a legitimate child who has been prosecuted under the statute. Such a challenge would allege that because the parents of illegitimate children may not be prosecuted, the statute unfairly discriminates against the parents of legitimate children.

*Id.* at 619 n.5.

71. *Id.* at 619.

72. The plaintiff was the mother of the child, so she was at least an indirect victim of the crime of non-support.



ently from any other private citizen for purposes of standing to challenge the prosecutor's charging decision.

Later in its opinion, the Court seemed to limit the holding as it might apply to victims. The Court stated:

Appellant does have an interest in the support of her child. But given the special status of criminal prosecutions in our system, we hold that appellant has made an insufficient showing of a direct nexus between the vindication of her interest and the enforcement of the State's criminal laws.<sup>73</sup>

This language suggests that victims do not lack standing categorically; rather, this particular victim failed to make an adequate showing of the required direct nexus between the plaintiff/victim's interest and enforcement of the criminal laws.<sup>74</sup> Nevertheless, as the cases below indicate, no court has ever granted a victim standing to challenge a prosecutor's charging decision.

In *Inmates of Attica Correctional Facility v. Rockefeller*,<sup>75</sup> the inmates of Attica prison filed a mandamus action to compel state and federal officials to prosecute corrections officers for brutality during the prison uprising.<sup>76</sup> On the standing question, the Court reviewed *Linda R. S.* and concluded that the *Attica* facts were distinguishable in two respects. First, there was a more direct nexus shown in *Attica* between the plaintiffs' personal interest in avoiding harm and the criminal prosecution: In *Attica*, a successful prosecution would serve to deter the corrections officers from harming the plaintiffs/victims whereas, in *Linda R. S.*, a successful prosecution would serve only to jail the child's father and not to support the child.<sup>77</sup> The second

---

73. *Linda R. S.*, 410 U.S. at 619.

74. Professor Goldstein points out that a direct nexus between the victim's injury and the criminal action could easily have been established if the defendant's sentence had been carefully shaped: The Court believed the plaintiff's only hope for support payments lay in the "speculative" effect a jail sentence might have on the defendant's conduct. Yet, in 1973, when the case was decided, the defendant might have been ordered to make child support payments upon conviction for nonsupport under two Texas procedures: (1) He could have been ordered to make child support payments as a condition of probation; (2) The judge could have ordered him to serve a sentence during off-hours and on weekends so that he could continue his employment and designate a portion of his wages for the support of his dependents. It appears, therefore, that if the district attorney had prosecuted the defendant, the Texas court could have ordered him to pay child support in the criminal case and there would have been a "direct nexus between the vindication of [the victim plaintiff's] interest and the enforcement of the state's criminal law.

Goldstein, *supra* note 4, at 551 (footnotes omitted). The Court was apparently determined to find that the victim had no standing.

75. 477 F.2d 375 (2d Cir. 1973).

76. *Id.* at 375-77.

77. The court stated:

Thus a more immediate and direct danger of injury resulting from nonenforcement is presented here than in *Linda R. S.*, where the Court stressed that the only result of the relief sought by the illegitimate child's mother would be the jailing of the child's father, not the support of the child. Where a successful prosecution, however, would serve to deter the accused from harming the complainant rather than merely supply a penal inducement to perform a duty to provide assistance, the complaining person does show a more direct nexus between his personal interest in protection from harm and the prosecution.

*Id.* at 378.

The same deterrence rationale could be used to argue that jailing the father in *Linda R.S.* would deter him from refusing to provide support in the future. This is the same as the inmates not being

distinction noted by the court was the existence of allegations in the complaint that there had been selective and discriminatory prosecution because 37 inmates, but no corrections officers, had been indicted.<sup>78</sup> After describing these distinctions, and noting that the standing issue raised "troublesome questions," the Second Circuit concluded it did not have to decide the standing question because relief would be denied on the merits.<sup>79</sup> Thus, all of the standing discussion was dicta. The court's analysis in distinguishing *Linda R. S.* and finding a more direct nexus suggests a willingness to analyze the standing of victims on a case by case basis rather than denying standing to victims categorically, but no decision was rendered on this point.

The Supreme Court again confronted the standing issue, but in a somewhat different context, in *Leeke v. Timmerman*.<sup>80</sup> In *Leeke*, the victims were inmates of a South Carolina prison who filed a Section 1983 action against state corrections officials.<sup>81</sup> The inmates had provided information to a magistrate regarding the brutality of prison guards during a disturbance. The magistrate concluded that probable cause existed and announced his intent to issue arrest warrants for the guards. Thereafter, state officials decided they would not seek indictments against the guards and the officials wrote to the magistrate asking that the arrest warrants not be issued. The magistrate accordingly declined to issue the warrants. The complaint alleged that the officials had conspired in bad faith, and sought to have the arrest warrants issued.<sup>82</sup>

In a *per curiam* decision, the Court concluded that *Linda R. S.* controlled and that the plaintiffs/victims had no standing. The Court found that, like *Linda R. S.*, *Leeke* involved a "questionable nexus" between the plaintiffs' injuries (beatings) and the defendants' conduct (providing information to a magistrate).<sup>83</sup> The Court reasoned that, even assuming criminal prosecution could provide a remedy for the beatings, the issuance of an arrest warrant is not the beginning of a prosecution but is "simply a prelude

---

cured or compensated for their injuries. All criminal deterrence is future-oriented and will not cure the current harm.

78. The court stated:

It may also be argued that since 37 inmates have been indicted for crimes relating to the events at Attica in September 1971, without any indictment having been filed against any of the accused state officials, the complaint alleges a sufficient threat of selective and discriminatory prosecution of the plaintiff inmates to meet the standing requirements discussed in *Linda R.S. v. Richard D.*

*Rockefeller*, 477 F.2d at 378.

79. The court stated:

Thus in order to determine whether plaintiffs have standing to sue we would be required to resolve troublesome questions. However, we need not decide the issue of standing because we believe that even if they may properly present their claims for judicial resolution, they seek relief which cannot, in this case at least, be granted either against the state or federal prosecuting authorities.

*Id.* at 379. Cf. Hall, *supra* note 6, at 966: "The [*Attica*] court concluded that the inmates did have standing under a federal mandamus statute to compel the United States Attorney to investigate and institute prosecutions against state officials." *Id.* (footnote omitted). In view of the language quoted from *Attica*, it is unclear how Professor Hall reached this conclusion.

80. 454 U.S. 83 (1981).

81. *Id.*

82. *Id.* at 84-85.

83. *Id.* at 86.

to actual prosecution.”<sup>84</sup> And, because the decision to prosecute remained solely within the prosecutor’s discretion, the mere issuance of an arrest warrant could logically provide no relief.<sup>85</sup>

*Leeke* is distinguishable from the other standing cases in that the relief sought is not the filing of criminal charges but the issuance of an arrest warrant. But the case is valuable because it provides the most recent standing analysis, and the Court reiterated its position that there was an insufficient nexus. *Leeke*, therefore, supports the conclusion that victims don’t lack standing categorically, but rather have, in the cases to date, merely failed to establish a sufficient nexus between the harm they suffered and relief in the form of a criminal prosecution.

In *Sackinger v. Nevins*,<sup>86</sup> the plaintiff was a prisoner who filed a pro se petition which the court treated as a mandamus action. The petition asked *inter alia* that the sheriff and district attorney be ordered to file criminal charges against a prison guard who had allegedly struck the plaintiff with a key ring.<sup>87</sup> At the oral argument, the plaintiff/victim withdrew his request for this particular relief so the court did not rule on the issue. However, the court did discuss the issue. The court characterized the plaintiff’s withdrawal as “well advised”<sup>88</sup> and implied that it would have denied the request to direct the sheriff or district attorney to file charges. The court announced it had discovered no law, statutory or decisional, which would support such a request.<sup>89</sup> The court concluded that *Leeke v. Timmerman* controlled the issue, so the plaintiff had no standing.<sup>90</sup>

Two points are interesting about *Sackinger*. First, the court’s reliance on *Leeke v. Timmerman* is inexplicable considering that *Linda R. S.* had just been decided and was more on point.<sup>91</sup> Second, *Sackinger* is interesting because, like the *Attica* case, resolution of the standing question was unnecessary to the decision, and yet the court discussed it anyway. Unlike the

---

84. *Id.*

85. *Id.* at 87.

Justices Brennan, Marshall and Blackmun dissented in favor of plenary review. They argued that the Court mischaracterized the plaintiff’s injury: the injury was not the beatings but the deprivation of their constitutional right of access to the courts. Thus there was a “substantial nexus” between the plaintiffs’ injury and defendants’ acts, and *Linda R. S.* was “wholly inapposite.” *Id.* at 89.

86. 114 Misc. 2d 454, 451 N.Y.S.2d 1005 (Sup. Ct. 1982).

87. *Id.* at 461, 451 N.Y.S.2d at 1007.

88. *Id.* at 462, 451 N.Y.S.2d at 1010.

89. *Id.*

90. *Id.* at 461, 451 N.Y.S.2d at 1010. The court stated:

This court is of the opinion that [*Leeke v. Timmerman*] embraces broadly the issues raised relative to the obligation of the sheriff and district attorney to file criminal charges. The decision to file, or not file criminal charges, like the decision to issue warrants, or not issue warrants, is within the discretion of the party involved.

*Id.* (citation omitted).

91. *Linda R. S.*, discussed *supra* in text accompanying notes 69-74, was a better precedent for *Sackinger* because *Linda R. S.* and *Sackinger* both were actions to compel the prosecutor to file criminal charges. In contrast, the *Leeke* case, discussed *supra* in text accompanying notes 80-82, was an action to compel the issuance of an arrest warrant. The *Leeke* Court noted this distinction when it stated, “[T]he issuance of an arrest warrant in this case is simply a prelude to actual prosecution. Respondents concede that the decision to prosecute is solely within the discretion of the prosecutor.” *Leeke*, 454 U.S. at 86-87.

Second Circuit, however, the New York court intimated it would deny standing.

In *Commonwealth v. Malloy*,<sup>92</sup> a case which arose in an unusual posture, the court reached the same conclusion that victims lack standing. In *Malloy*, informations charging theft and conspiracy were dismissed for insufficient evidence. When the district attorney refused to appeal or to authorize an appeal, the victim/complainant himself filed a notice of appeal.<sup>93</sup> The court quashed the appeal on the basis that the parties to a criminal action are the state and the defendant, and the victim, as a nonparty, has no standing to appeal. The court stated: "Criminal prosecutions are not to settle private grievances but are to rectify the injury done to the Commonwealth. The individual who is the victim of a crime only has recourse in a civil action for damages."<sup>94</sup> Thus, the courts have consistently denied victims the right to challenge the charging decision on the basis that victims have no standing.<sup>95</sup>

### *Denial on the Merits*

Assuming a court has overcome its reluctance to review charging decisions, and assuming the victim has survived the standing analysis, the relief sought by victims is denied on the merits. The courts will act only to halt a prosecution, never to compel one. Victims are usually seeking to compel a prosecution that the prosecutor has declined,<sup>96</sup> and the response of the courts has been a consistent denial of relief.<sup>97</sup> The specific basis for the denial is that mandamus is not available,<sup>98</sup> or that no cause of action to compel prosecution exists.<sup>99</sup>

Courts have often concluded that mandamus will not lie to compel prosecution.<sup>100</sup> The most comprehensive consideration of mandamus relief is found in *Inmates of Attica v. Rockefeller*<sup>101</sup> wherein the Second Circuit affirmed the dismissal of the complaint for failure to state a claim. Regarding the mandamus of state prosecutors, the court found state officials under no duty to prosecute;<sup>102</sup> on the contrary, under New York law, the prosecu-

---

92. 304 Pa. Super. 297, 450 A.2d 689 (1982).

93. *Id.* at 691.

94. *Id.* at 693.

95. Although the courts have concluded victims have no legal interest which would confer standing to compel the prosecution of another, the President's Task Force states that when a crime occurs, the victim, not the state, is directly aggrieved and has an "unquestionably valid interest" in the prosecution. President's Task Force, *supra* note 5, Prosecutors' Recommendation 1, *Commentary*.

96. *See, e.g.*, cases discussed *supra* at text accompanying notes 69-95, all of which were attempts by victims to compel prosecution; Hall, *supra* note 6, at 971 ("[T]here are very few reported cases in which a victim attempts to stop criminal prosecution. . . .") (footnote omitted). However, victims do occasionally seek to block a prosecution; three such cases are discussed at *id.* at 971-72.

97. *See also* Hall, *supra* note 6, at 968 ("[T]he courts thus far are unanimous in holding that mandamus will not issue to compel prosecution.").

98. *See infra* notes 100-17 and accompanying text.

99. *See infra* notes 118-22 and accompanying text.

100. *See* LaFave, *supra* note 59, at 538 ("If a specific instance of nonenforcement is challenged in the courts by way of a mandamus action, the usual response is that the matter rests with the executive rather than the judicial branch of government." (footnote omitted). *See generally* Hall, *supra* note 6, at 968-70.

101. 477 F.2d 375 (2d Cir. 1973).

102. *Id.* at 377.

tor has discretion whether to prosecute and this discretion "is not subject to review in the state courts."<sup>103</sup> As to the mandamus against the U.S. Attorney, the court noted that the statute authorized mandamus only to compel an officer "to perform a duty owed to the plaintiff," and not to direct the exercise of discretion.<sup>104</sup> The court noted that courts had uniformly refrained from overturning the discretionary decisions of federal authorities not to prosecute.<sup>105</sup> This reluctance, the court explained, was based not only on the separation of powers doctrine but also on other problems inherent in the courts' adopting the role of "superprosecutors."<sup>106</sup> Essentially, this case holds that mandamus is not available because the prosecutor has no duty to the victim.

In *Milliken v. Stone*,<sup>107</sup> the plaintiffs were American shipowners who filed a complaint seeking to compel the U.S. Attorney to prosecute British shipowners for transporting liquor in violation of the National Prohibition Act.<sup>108</sup> The complaint actually requested that the U.S. Attorney be enjoined from failing to prosecute the British shipowners but the court stated that, in substance and effect, the plaintiffs were seeking mandamus to compel the U.S. Attorney to enforce the Act.<sup>109</sup> The court dismissed the action on the grounds that the federal courts had no power to compel enforcement of the penal laws.<sup>110</sup>

In *Pugach v. Klein*,<sup>111</sup> a state prisoner filed an application for mandamus to compel the U.S. Attorney to prosecute state law enforcement officials for putting a wiretap on his telephone in violation of federal law. The court denied the application on the ground that it did not have jurisdiction to issue original writs of mandamus.<sup>112</sup> The court went on to state that, even if jurisdiction existed, it would still deny the mandamus because federal courts have no power to interfere with the U.S. Attorney's exercise of charging discretion.<sup>113</sup> The court stated:

The court cannot compel [the U.S. Attorney] to prosecute a complaint, or even an indictment, whatever his reason for not acting. . . . Nor is there a residual power in private citizens to take law enforcement into their own hands when the United States Attorney does not prosecute, for any, or for no reason.<sup>114</sup>

---

103. *Id.* at 382.

104. *Id.* at 379.

105. *Id.* ("[F]ederal courts have traditionally and, to our knowledge, uniformly refrained from overturning, at the instance of a private person, discretionary decisions of federal prosecuting authorities not to prosecute persons. . . .").

106. *Id.* at 379-80. These other problems are discussed *supra* at text accompanying notes 63-65.

107. 7 F.2d 397 (S.D.N.Y. 1925).

108. *Id.* at 398. Of course, the crimes defined by the Prohibition Act were consensual crimes, so it is difficult to identify any specific victim. Here the plaintiffs, American shipowners, were suffering financially because they were prosecuted for transporting liquor while British shipowners were not. Whether this qualifies them as victims is debatable.

109. *Id.* at 399.

110. *Id.* *Accord*, *Ray v. Department of Justice*, 508 F. Supp. 724, 725 (E.D. Mo. 1981).

111. 193 F. Supp. 630 (S.D.N.Y. 1961).

112. *Id.* at 633-34.

113. Thus like the discussion of standing in *Rockefeller* and *Sackinger*, (discussed *supra* at text accompanying notes 75-79 and 86-90 respectively) this discussion of mandamus was unnecessary to the decision.

114. *Pugach*, 193 F. Supp. at 635.

In *Powell v. Katzenbach*,<sup>115</sup> the plaintiff filed a pro se action "in the nature of mandamus" against the U.S. Attorney General to compel prosecution of a national bank and several individuals for criminal conspiracy.<sup>116</sup> The Court of Appeals affirmed the dismissal of the complaint for failure to state a claim, explaining that the decision to prosecute is within the Attorney General's discretion and mandamus will not lie to control the exercise of this charging discretion.<sup>117</sup>

Without relying on the unavailability of the specific mandamus remedy, the courts have also denied the victim's right to compel prosecution on the more general ground that no such right exists. In *Manning v. Municipal Court of Roxbury District*,<sup>118</sup> the plaintiff/victim sought to charge Baltimore Orioles pitcher Ross Grimsley with assault and battery with a deadly weapon when he was hit on the head with a baseball thrown by Grimsley. A complaint was initially issued, but the court dismissed it for lack of probable cause, and the district attorney declined to present the case to a grand jury. The plaintiff/victim then sued the judge, asking that the judge be required to find probable cause or to hold a new hearing, and the district attorney, asking that the district attorney be required to proceed with prosecution.<sup>119</sup> The trial judge dismissed the complaint and was affirmed on appeal. The court reasoned that a victim has "no right" to challenge a judicial determination regarding probable cause.<sup>120</sup> A criminal complaint is issued in the interest of the state, not the victim; the victim's remedy lies in a civil action. The court quoted with approval from *Linda R. S.*, but the decision did not otherwise mention or rely on the concept of standing.<sup>121</sup>

As to the defendant district attorney in *Manning*, the court stated that he had wide discretion in charging and could refuse to prosecute based on his own judgment without appeal to or approval by another.<sup>122</sup> In other words, the plaintiff/victim had no right to challenge the charging decision.

The victim's right to participate in the charging decision has also arisen in other contexts.<sup>123</sup> The posture of the cases vary, but the result is always

---

115. 359 F.2d 234 (D.C. Cir. 1965).

116. This is a brief *per curiam* decision. The court did not specify what type of conspiracy was involved; it said only that it was a conspiracy under Title 18 of the U.S. Code. *Id.* Moreover, the court did not identify the plaintiff, so it is impossible to determine whether the plaintiff was the victim of the crime.

117. *Id.* at 235. In addition to these cases, see also *Sackinger v. Nevins*, 114 Misc. 2d 454, 451 N.Y.S.2d 1005 (Sup. Ct. 1982) which is discussed in this Article as a standing case, see *supra* text accompanying notes 86-90, but which also deals with a denial of mandamus-type relief on the basis that such relief is not available to compel performance of a discretionary act. *Sackinger*, 114 Misc. 2d at 461, 451 N.Y.S.2d at 1010.

118. 372 Mass. 315, 361 N.E.2d 1274 (Sup. Ct. 1977).

119. *Id.* at 316, 361 N.E.2d at 1275.

120. *Id.* at 317, 361 N.E.2d at 1276. The facts of this case are similar on this point to *Commonwealth v. Malloy*, 304 Pa. Super. 297, 450 A.2d 689 (1982), discussed *supra* at text accompanying notes 92-95. In both cases, criminal charges were dismissed due to insufficient evidence. The cases differ in the victim's response: in *Manning* the victim sued the judge and prosecutor to compel prosecution whereas in *Malloy* the victim sought to appeal the court's finding that the evidence was insufficient.

121. *Manning*, 361 N.E.2d at 1276.

122. *Id.*

123. See, e.g., *New York v. Muka*, 440 F. Supp. 33 (N.D.N.Y. 1977). *Muka* sought to file a federal criminal information against several unidentified individuals. It is unclear whether *Muka* was the victim of the alleged crimes because the opinion does not identify the crimes or the potential

the same. Regardless of whether the victim tries to file criminal charges herself,<sup>124</sup> or tries to appeal dismissal of the charges himself,<sup>125</sup> or more commonly files a civil action to compel the prosecutor to file charges,<sup>126</sup> the courts refuse victims any relief. Different reasons may be cited for the denial, but the result is consistent. Victims have no formal role in the charging decision and the courts have resisted attempts to establish one.

#### IMPLEMENTATION OF VICTIM PARTICIPATION IN THE CHARGING DECISION

Assume a jurisdiction has decided to incorporate victims into the charging decision. Considering the existing law, how should this be done? May existing limits on prosecutorial discretion be used to implement victim participation or must new limits be devised?

##### *The Charging Decision is Made by the Prosecutor with Few Limits on Discretion*

The charging decision is currently made exclusively by the prosecutor.<sup>127</sup> The prosecutor's initial source of authority is statutes which establish

---

defendants. The court struck the filing stating, "It is well settled that a private citizen has no right to prosecute a federal crime." 440 F. Supp. at 36. This case is reminiscent of *Commonwealth v. Malloy*, see *supra* notes 92-95 and accompanying text, where the victim tried to file his own appeal: here the victim tried to file her own charges. Sometimes victims forego trying to force the prosecutor to act and strike out on their own. *Muka* is part of the continuing saga of the same Betty O. Muka involved in *People v. Muka*, 421 N.Y.S.2d 438 (Sup. Ct. 1979). See *infra* note 171. In that case, the court stated that Muka had demanded prosecution of various public officials on 333 charges. Muka's tenacity seems inexplicable unless she was at least indirectly victimized by these public officials.

See also *Fleetwood v. Thompson*, 358 F. Supp. 310 (N.D. Ill. 1972), wherein the plaintiff prisoner filed a civil rights action claiming *inter alia* that he had been deprived of his civil rights by federal prosecutors when they declined to commence perjury prosecutions against witnesses who had testified against the plaintiff. (Presumably the allegedly perjured testimony was responsible for the plaintiff's incarceration, so he would qualify as a "victim" of perjury.) The court dismissed the complaint for failure to state a claim. The court stated that since U.S. Attorneys could not be compelled to prosecute, there had been no deprivation of civil rights when they declined to do so. *Id.* at 311.

See also Note, *supra* note 51, at 152-53 (referring to the courts' "failure to find in criminal statutes any private rights with respect to public enforcement.") (footnote omitted). In this Note, the author states that "In recent years, some courts have begun to recognize that private citizens affected by violations of the criminal law have a private right to invoke its public sanctions. . . ." *Id.* Two points should be made regarding this statement. First, nowhere does the author mention *Linda R. S.*, wherein the United States Supreme Court broadly denied victims standing. See *supra* text accompanying notes 69-74. It is unclear why this case is not mentioned, since it was decided just two years before the note was published and it suggested there were no private rights. Second, all the more recent cases, at least since 1975, deny victims any private right to invoke public sanctions. See *supra* text accompanying notes 69-123. So the quoted statement does not identify a trend. In fact, the author's contradictory statement six pages later ("[T]he courts will in all likelihood continue to view with hostility requests for review in relation to criminal matters. . . ." *Id.* at 159 turned out to be the correct prediction.

124. *New York v. Muka*, 440 F. Supp. 33 (N.D.N.Y. 1977).

125. *Commonwealth v. Malloy*, 304 Pa. Super. 297, 450 A.2d 689 (1982).

126. See *supra* text accompanying notes 69-121.

127. The charging decision (*i.e.*, the initial decision whether to file charges) should be distinguished from the decision to dismiss pending charges. *United States v. Cowan*, 524 F.2d 504, 509 (5th Cir. 1975); *United States v. Cox*, 342 F.2d 167, 183 (5th Cir. 1965) (Brown, J., concurring). Court approval is required for the prosecutor to dismiss charges in the federal system and in most states. See F. R. Cr. P. 48(a) ("United States attorney may by leave of court file a dismissal of an

the office of prosecutor and authorize the prosecutor to prosecute all crimes.<sup>128</sup> Some of these statutes explicitly permit the prosecutor to exercise discretion in deciding which cases to prosecute,<sup>129</sup> some statutes are silent on discretion,<sup>130</sup> and some statutes make prosecution mandatory.<sup>131</sup> But, in spite of the mandatory language in this latter type of statute, and in spite of the mandatory language used in criminal codes generally,<sup>132</sup> courts have concluded that it is within the prosecutor's discretion to initiate or decline prosecution<sup>133</sup> and to choose which offense to charge.<sup>134</sup>

---

indictment, information or complaint . . ."); KY. R. CR. P. 9.64; OHIO R. CR. P. 48(A); State v. LeMatty, 263 N.W.2d 559, 561 (Iowa App. 1977) (statute requires court approval where prosecutor seeks dismissal of criminal case); Note, *Restructuring the Plea Bargain*, 82 YALE L.J. 286, 307 n.73 (1972) ("In most jurisdictions, the prosecutor cannot *nolle prosequi* a charge . . . without first obtaining judicial approval."). Court approval is not universally required, see ABA STANDARDS RELATING TO PLEAS OF GUILTY, Std. 14-3.1 *History of Standard* (1979) ("In some jurisdictions the prosecutor has discretion, regardless of court approval, to dismiss charges against the defendant."); Y. KAMISAR, W. LAFAVE & J. ISRAEL, *supra* note 27, at 930 (noting split of authority as to whether court approval is required to enter a *nol pros*); see generally Note, *Prosecutor's Discretion*, 103 U. PA. L. REV. 1057 (1955). In the jurisdictions where a court order is required for dismissal, the courts are deferential to the prosecution's position on dismissal. See *United States v. Perate*, 719 F.2d 706, 710 (4th Cir. 1983); *United States v. Hamm*, 659 F.2d 624, 629 (5th Cir. 1981); *State v. Aubol*, 244 N.W.2d 636 (Minn. 1976). Nonetheless, in these jurisdictions a court order is required, so the decision to dismiss charges is distinguishable from the decision to file charges because the decision to dismiss is not made exclusively by the prosecutor.

Also distinguishable from the charging decision is the decision to amend pending charges. Like the dismissal of charges, amendment of charges generally requires court approval. See, e.g., F. R. CR. P. 7(e) (court may allow amendment); KAN. STAT. ANN. § 22-3201(4) (same). Federal courts usually sustain prosecution motions to amend criminal charges, see *Government of Canal Zone v. Burjan*, 596 F.2d 690 (5th Cir. 1979); *United States v. Goldstein*, 386 F. Supp. 833 (D. Del. 1973). States, however, disagree on how to treat prosecution motions to amend criminal charges. Compare *State v. Pruett*, 213 Kan. 41, 47, 515 P.2d 1051, 1057 (1973) (trial judge has no right to substitute his judgment for that of the prosecutor on amendment of the charges absent some compelling reason to protect the defendant) with *State v. Haner*, 95 Wash. 2d 858, 864-65, 631 P.2d 381, 385 (1981) (no abuse of discretion for trial judge to deny prosecution motion to amend charges). Regardless of the standard applied, the court order requirement means that the decision to amend charges does not rest exclusively with the prosecutor. In that respect, the decision to amend is distinguishable from the initial charging decision.

128. See, e.g., 28 U.S.C. § 547 (1966); CAL. GOV. CODE § 26500 (1987); N.Y. COUNTY LAW § 700(1) (1972); 16 PA. STAT. ANN. § 1402 (1987); KY. REV. STAT. § 15.725(1) (1985); TENN. CODE ANN. § 8-7-103 (1980).

129. See, e.g., CAL. GOV. CODE § 26500 (1987) ("The public prosecutor shall attend the courts, and within his or her discretion shall initiate and conduct on behalf of the people all prosecutions. . .").

130. See, e.g., MD. CODE, art. 10 § 34 (the state's attorney "shall prosecute and defend . . . all cases in which the state may be interested."); N.Y. COUNTY LAW § 700(1) (1972); 16 PA. STAT. ANN. § 1402 (1987) (the district attorney "shall sign all bills of indictment and conduct in court all criminal and other prosecutions. . ."); TENN. CODE ANN. § 8-7-103 (1980) ("It shall be the duty of each district attorney general: (1) To . . . prosecute on behalf of the state in every case in which the state is a party, or in anywise interested.").

131. See, e.g., 28 U.S.C. § 547 (1966) ("[E]ach United States attorney . . . shall — (1) prosecute for all offenses against the United States. . ."); KY. REV. STAT. § 15.725(1) (1985) ("The Commonwealth's attorney shall . . . have the duty to prosecute all violations of the criminal and penal laws. . .").

132. All criminal statutes are drafted in mandatory terms. See, e.g., 18 U.S.C. § 1201(a) (1984) ("Whoever unlawfully . . . kidnaps . . . any person . . . shall be punished by imprisonment. . ."); 18 U.S.C. § 1955(a) (1984) ("Whoever conducts . . . an illegal gambling business shall be fined not more than \$20,000 or imprisoned not more than five years, or both."). See Note, *Prosecutorial Discretion in the Initiation of Criminal Complaints*, 42 S. CAL. L. REV. 519, 521 (1969) (criminal codes have no express provision for discretion).

133. See *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 381 (2d Cir. 1973) (mandatory language in 28 U.S.C. § 547 has "never been thought to preclude the exercise of prosecutorial discretion"); *People v. Gallegos*, 644 P.2d 920, 930 (Colo. 1982) (en banc) (criminal



## The prosecutor's discretion in the charging decision is broad.<sup>135</sup> The

statutes are drafted in mandatory terms but prosecutor retains charging discretion); *State v. Lee*, 87 Wash. 2d 932, 933-34, 558 P.2d 236, 237 (1976) (mandatory habitual criminal statute subject to implicit reasonableness standard governing prosecutor's exercise of discretion in initiating proceedings); Note, *supra* note 51, at 152 (mandatory language of criminal statutes has not been construed to restrict prosecutorial discretion). Even where the statute provides that the prosecutor is "authorized and required" to institute prosecutions, e.g., 42 U.S.C. § 1987 (1982) (emphasis added), courts have endorsed "the normal assumption of executive discretion." *Rockefeller*, 477 F.2d at 381; see also *Moses v. Kennedy*, 219 F. Supp. 762, 765 (D.D.C. 1963), *affirmed*, 342 F.2d 931 (D.C. Cir. 1965).

For the more general proposition that the decision to prosecute is within the prosecutor's discretion, see *United States v. Batchelder*, 442 U.S. 114, 119 (1979); *United States v. Torquato*, 630 F.2d 564, 569 (3d Cir. 1979) ("The choice of whom to prosecute and the strategy of prosecution are generally matters left wholly to the government's control."); *United States v. Johnson*, 577 F.2d 1304, 1307 (5th Cir. 1978); *United States v. Hall*, 559 F.2d 1160, 1163 (9th Cir. 1977); *United States v. Kysar*, 459 F.2d 422, 424 (10th Cir. 1972); *Ray v. Department of Justice*, 508 F. Supp. 724, 725 (E.D. Mo. 1981); *Fleetwood v. Thompson*, 358 F. Supp. 310, 311 (N.D. Ill. 1972); *Hoines v. Barney's Club, Inc.*, 28 Cal. 3d 603, 611, 620 P.2d 628, 633, 170 Cal. Rptr. 42, 47 (1980); *Estepbar v. Municipal Court*, 5 Cal. 3d 119, 485 P.2d 1140, 95 Cal. Rptr. 524 (1971); *Commonwealth v. McKinney*, 594 S.W.2d 884 (Ky. 1979); *State v. Spicer*, 299 N.C. 309, 311, 261 S.E.2d 893, 895 (N.C. 1980) (district attorneys' discretion "encompasses the discretion to decide who will or will not be prosecuted"); *People v. DiFalco*, 44 N.Y.2d 482, 406 N.Y.S.2d 279, 377 N.E.2d 732, (1978); *Commonwealth v. Malloy*, 304 Pa. Super. 297, 302, 450 A.2d 689, 691-92 (1982) ("The prosecutor is under no compulsion to prosecute every alleged offender, and the decision to prosecute or not to prosecute is a matter within his discretion.").

134. *United States v. Batchelder*, 442 U.S. 114 (1979). In *Batchelder*, the defendant was convicted of receiving a firearm in violation of 18 U.S.C. § 922(h) (1982) and sentenced to the maximum term of five years allowed for that crime by 18 U.S.C. § 924(a) (1984). The court of appeals reversed and remanded for resentencing. The basis for this reversal was that § 922(h) and another statute, 18 U.S.C. § 1202(a) (1984) contained identical elements as to a convicted felon receiving a firearm, and since § 1202(a) allowed a maximum sentence of only two years, this maximum applied as well to convictions under § 922(h). The Supreme Court reversed, and stated, "Just as a defendant has no constitutional right to elect which of two applicable federal statutes shall be the basis of his indictment and prosecution neither is he entitled to choose the penalty scheme under which he will be sentenced." *Batchelder*, 442 U.S. at 125. (citations omitted). See also *United States v. Sedovic*, 679 F.2d 1233, 1236 (8th Cir. 1982); *United States v. Hamm*, 659 F.2d 624, 628 n.13 (5th Cir. 1981); *Hutcherson v. United States*, 345 F.2d 964 (D.C. Cir. 1965), *cert. den.*, 382 U.S. 894 (1965); *Deutsch v. Aderhold*, 80 F.2d 677, 678 (5th Cir. 1935); *Metcalf v. Municipal Court*, 125 Cal. App. 3d 303, 307, 178 Cal. Rptr. 47, 49 (Ct. App. 1981) (sole discretion to select nature of charge rests with prosecutor); *State v. Darden*, 171 Conn. 677, 682, 372 A.2d 99, 102 (1976) (prosecutor has "great responsibility and broad discretion with respect to selecting an appropriate charge"); *People v. McCollough*, 57 Ill. 2d 440, 313 N.E.2d 462 (1974); *People ex rel. Leonard v. Papp*, 386 Mich. 672, 194 N.W.2d 673 (1972); *State v. Thornton*, 9 Wash. App. 699, 703, 514 P.2d 179, 182 (Ct. App. 1973) (whether deadly weapon charge is indicted is within prosecutor's discretion); ABA STANDARDS ON THE PROSECUTION FUNCTION, Std. 3-3.9, *Commentary* (1971) (prosecutor is entitled to use multiple charges, to "charge broadly").

135. *Cowan*, 524 F.2d at 513 (executive is "absolute judge" of whether a prosecution should be initiated); *United States v. Shober*, 489 F. Supp. 393, 405 (E.D. Pa. 1979) (prosecutor's charging discretion is "exceedingly broad"); *In re Grand Jury of S.D. Alabama*, 508 F. Supp. 1210, 1214 (S.D. Ala. 1980) ("It is the exclusive authority and absolute discretion of the U.S. Attorney to decide whether to prosecute a case."); *People v. Gallegos*, 644 P.2d 920, 930 (Col. 1982) (en banc) (prosecutor's charging discretion is "uniquely broad"); *Manning v. Municipal Court*, 372 Mass. 315, 318, 361 N.E.2d 1274, 1276 (1977) (prosecutor has "wide discretion" in charging); *State v. Spicer*, 299 N.C. 309, 311, 261 S.E.2d 893, 895 (1980) (same); *People v. DiFalco*, 44 N.Y.2d 482, 377 N.E.2d 732 (1978) (prosecutor has "broad discretion" in charging); K.C. DAVIS, *DISCRETIONARY JUSTICE* 225 (1969) (prosecutor has "huge discretionary power" at charging stage); Goldstein, *supra* note 6, at 548 (prosecutor "has been endowed by the courts with a broad and virtually unreviewable discretion in [the matter of] charging. . ."); LaFave, *supra* note 59, at 533 (prosecutor has traditionally exercised "considerable discretion in deciding whether or not to prosecute"); Vorenberg, *supra* note 4, at 1525 ("Decisions whether and what to charge, . . . have been left in prosecutor's hands with very few limitations."); Note, *supra* note 132, at 521 (prosecutor has traditionally enjoyed "virtually unlimited" discretion to abstain from prosecution and to prosecute selectively).

Finally, in assessing the breadth of the prosecutor's charging discretion, one court has deter-

few limits which exist on the prosecutor's charging discretion can be divided into those enforced in the courts and those which draw their enforcement from other sources.

a. *Limits on Prosecutorial Discretion Imposed by Sources Outside the Courts*

There are four limits on the prosecutor's charging decision imposed by forces outside the courts. The first limitation exists in the criminal statutes themselves. Common law crimes are largely extinct. As a result the prosecutor may not charge a crime unless the conduct falls within a criminal statute.<sup>136</sup> This limit is defined by the legislature when the penal code is drafted.<sup>137</sup> However, because legislators draft penal codes in general and often ambiguous language,<sup>138</sup> the initial decision as to what constitutes criminal conduct is effectively left to the prosecutor. Moreover, many criminal statutes overlap,<sup>139</sup> and this overcriminalization gives the prosecutor wider choice at the charging stage.<sup>140</sup>

A second limit on the prosecutor's charging discretion, which is imposed by the legislature, is the level of funding the legislature allocates to prosecutors' offices. This pursestring limit has a significant practical impact on charging decisions.<sup>141</sup>

The third limit on the prosecutor's charging discretion, is internal guidelines, a limit which is self-imposed by the executive.<sup>142</sup> These internal guidelines have been adopted recently in response to pressure to limit prosecutorial discretion and to reveal the bases for charging decisions.<sup>143</sup>

mined that it is error if the prosecutor fails to exercise discretion. *See* *State v. Pettitt*, 93 Wash. 2d 288, 296, 609 P.2d 1364, 1368 (1980) (in prosecuting habitual criminals, use of fixed formula instead of discretion is error; remanded for resentencing based on recommendation "reached through the exercise of prosecutorial discretion.").

136. *State v. Lee*, 87 Wash. 2d 932, 558 P.2d 236 (1976) (decision to prosecute must be based on prosecutor's ability to meet proof required by the statute); *Vorenberg*, *supra* note 4, at 1542.

137. This limit ultimately depends on the courts for enforcement in that a prosecutor who files charges not based on a criminal statute will have the charges dismissed by the court. Nonetheless, this limit is defined primarily by the legislature when it enacts the criminal statutes.

138. *See, e.g.*, 18 U.S.C. § 371 (1983), the basic federal conspiracy statute, which has generated considerable case law interpreting its very general terms. *See* ABA STANDARDS ON THE PROSECUTION FUNCTION, Std. 3-3.9 *Commentary*; *Vorenberg*, *supra* note 4, at 1567 ("A major source of excess prosecutorial power is the loose drafting and overly casual definition of conduct as criminal that characterize the nation's penal codes."); Note, *supra* note 132, at 533 (charging discretion as result of, *inter alia*, ambiguity in statutes and fact that statutes are general mandates).

139. *See, e.g.*, 18 U.S.C. § 922(h) (1982) and 18 U.S.C. APP. § 1202(a) (1983), which overlap as applied to a convicted felon receiving a firearm. This redundancy was discussed in *United States v. Batchelder*, 442 U.S. 114 (1979) and *United States v. Bass*, 404 U.S. 336 (1971).

140. *See generally* LaFave, *supra* note 59, at 533 ("legislative overcriminalization" as reason for breadth of charging discretion).

141. *See generally* *Vorenberg*, *supra* note 4, at 1542-43.

142. *See, e.g.*, U.S. DEP'T OF JUSTICE, *supra* note 6, Part B ("initiating and Declining Prosecution") and Part C ("Selecting Charges"), U.S. ATTORNEYS' MANUAL §§ 9-27.000-9-27.760 (1977), discussed in *Vorenberg*, *supra* note 4, at 1543-44. *See also* Hutcherson v. *United States*, 345 F.2d 964 (D.C. Cir. 1965) (Bazelon, J., dissenting, relying on and quoting U.S. Attorneys' Manual guidelines). *See generally* *Abrams*, *supra* note 55.

143. *See* ABA STANDARDS ON THE PROSECUTION FUNCTION, Std. 3-25 (1971) (prosecutor should develop statement of policies and procedures to guide discretion); Note, *supra* note 132, at 542 ("Enforcement policy should be formalized, published and subject to both public and judicial review.").

The efficacy of such self-imposed guidelines in limiting discretion has been questioned,<sup>144</sup> mainly because the guidelines are non-binding.<sup>145</sup>

The fourth limit on the prosecutor's charging discretion is the political pressure to make popular or at least tolerable charging decisions.<sup>146</sup> This pressure is imposed by the general population through its voting right.<sup>147</sup>

Of these four limits, internal guidelines and political pressure on the prosecutor may operate in a given case either to preclude, or to compel, prosecution. In contrast, the requirement of a criminal statute, and the existence of funding limits, would operate only to prohibit a prosecution, never to compel one.

#### b. *Limits on Prosecutorial Discretion Imposed by the Courts*

There are four limits on the prosecutor's charging discretion which depend for their enforcement on the courts. The initial limit on the prosecutor's charging discretion is the requirement that there be sufficient evidence to charge a crime.<sup>148</sup> The criminal justice system contemplates that the prosecutor's charging decision is screened at least once for sufficiency of the evidence before trial.<sup>149</sup> If the charging instrument is an indictment, this screening is performed by a grand jury<sup>150</sup> when the indictment is issued or

144. See Vorenberg, *supra* note 4, at 1545:

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

See also *id.* at 1573:

This power has devolved on the prosecutors by default. Like most of us, they tend to have confidence in their own judgment, competence, and fairness, and, as most of us would, they have hung onto their power. Some prosecutors currently may make minor concessions in the form of nonbinding statements of policy, but if a balance of control over criminal administration by the prosecutor and by other agencies is to be achieved, change will almost certainly require reform from outside the prosecutorial ranks.

145. See, e.g., U.S. DEP'T OF JUSTICE, *supra* note 6, Part A.5 ("The principles set forth herein . . . are intended solely for the guidance of attorneys for the government. They are not intended to, do not and may not be relief upon to create a right or benefit, substantive or procedural, enforceable at law by a party to litigation with the United States.")

146. See Milliken v. Stone, 7 F.2d 397, 399 (S.D.N.Y. 1925) (remedy for U.S. Attorney's refusal to prosecute is with executive and ultimately with people); State v. Clark, 47 Or. App. 389, 615 P.2d 1043 (1980) (district attorney answers to electorate), *aff'd*, 630 P.2d 810 (Ore. 1981). See also NAT'L JUDICIAL COLLEGE, *supra* note 6, Issue II.B.(1).

147. State prosecutors are generally elected, so this limit operates directly on them. Federal prosecutors are appointed by the President so they are affected by political pressure only indirectly.

148. See State v. Darden, 171 Conn. 677, 372 A.2d 99, 102 (1976) (discretion and power of state's attorney limited "in usual and lawful manner by the facts which the prosecutor may be reasonably expected to prove at trial."); State v. Lee, 87 Wash. 2d 932, 934, 588 P.2d 236, 237-38 (Wash. 1976) (decision to prosecute must be based on prosecutor's ability to meet the proof required by the statute). See generally Vorenberg, *supra* note 4, at 1537.

149. See generally Vorenberg, *supra* note 4, at 1537.

150. The screening function performed by the grand jury is included here as a "court enforced" limit because when the grand jury acts to screen indictments for sufficiency of the evidence rather than to investigate crime, the grand jury functions more as an arm of the court rather than a prosecutorial entity. However, the controversy on defining the theoretical and actual role of the grand jury is beyond the scope of this Article, and no view on this issue is intended by the inclusion of grand jury screening as a "court enforced" limit.

refused;<sup>151</sup> if the charging instrument is an information, the screening is done by the court at a preliminary hearing.<sup>152</sup> This control on charging discretion is reiterated in ethical standards which provide that it is unethical for the prosecutor to institute criminal proceedings in the absence of probable cause.<sup>153</sup> Other recognized charging guidelines echo this requirement that the evidence reach a certain level before charges are filed.<sup>154</sup> Disagreement exists as to the efficacy of this evidence requirement as a limitation on charging discretion.<sup>155</sup>

The second limit on the prosecutor's charging discretion is constitutional.<sup>156</sup> Selective prosecution is well-accepted,<sup>157</sup> but the selection cannot deliberately be based upon "an unjustifiable standard such as race, religion, or other arbitrary classification."<sup>158</sup> Such discriminatory enforcement is unconstitutional as a denial of equal protection.<sup>159</sup> Thus, where laundries op-

---

151. For example, in the federal system, all felonies must be prosecuted by indictment. U.S. CONST. amend. V. So if the U.S. Attorney presents a case to the grand jury with a recommended charge which it refuses, the prosecutor's charging decision has been limited by the grand jury. However, the limit does not apply in reverse; even if the grand jury issues an indictment, the prosecutor is not required to pursue it. *See* *United States v. Cox*, 342 F.2d 167 (5th Cir. 1965), discussed *infra* note 173.

152. *See* F. R. CR. P. 5(a) (screening by judiciary for showing of probable cause). *See also* *Manning v. Municipal Court*, 372 Mass. 315, 361 N.E.2d 1274 (1977) (complaint dismissed for failure to establish probable cause); *Commonwealth v. Malloy*, 304 Pa. Super. 297, 450 A.2d 689 (1982) (informations dismissed for failure to establish *prima facie* case).

153. MODEL CODE OF PROFESSIONAL RESPONSIBILITY D.R. 7-103(A) (1982).

154. *See* ABA STANDARDS ON THE PROSECUTION FUNCTION, Std. 3-3.9(a) (1971) (unprofessional for prosecutor to institute criminal charges when it is known the charges are not supported by probable cause). The U.S. Dep't of Justice, Principles of Federal Prosecution require that sufficient evidence exist before discretionary issues are considered, *see* U.S. DEP'T OF JUSTICE, *supra* note 6, at Part B.1.(b) (if attorney for the government has probable cause to believe a person committed a federal offense, he should consider whether to commence prosecution).

155. *Compare* LaFave, *supra* note 59, at 538 (reasonably effective controls exist to ensure no prosecutions are begun based upon less than sufficient evidence) with Vorenberg, *supra* note 4, at 1556 ("[T]he grand jury and preliminary hearing do not significantly limit the prosecutor's control.").

156. The existence of constitutional limits on the prosecutor's charging discretion is readily recognized by the courts. *See, e.g.,* *United States v. Batchelder*, 442 U.S. 114, 125 (1979) ("Selectivity in the enforcement of criminal laws is, of course, subject to constitutional constraints."); *Bordenkircher v. Hayes*, 434 U.S. 357, 366 (1978) ("And broad though [the prosecutor's] discretion may be, there are undoubtedly constitutional limits on its exercise."); *United States v. Johnson*, 577 F.2d 1304, 1308 (5th Cir. 1978) ("The concept that the Constitution limits the prosecutor's discretion is not new to our jurisprudence."); *State v. Clark*, 291 Or. 231, 245, 630 P.2d 810, 819 (1981) (discretion of district attorney held to constitutional limits).

157. *Oyler v. Boles*, 368 U.S. 448, 456 (1962) (government is permitted "the conscious exercise of some selectivity" in enforcement of the criminal laws); *United States v. Taylor*, 693 F.2d 919 (9th Cir. 1982) (selective enforcement of failing to register for draft upheld); *United States v. Torquato*, 602 F.2d 564, 568-70 (3d Cir. 1979); *Johnson*, 577 F.2d at 1308-09; *United States v. Shober*, 489 F. Supp. 393, 405 (E.D. Pa. 1979); *State v. Lee*, 87 Wash. 2d 932, 936-37, 558 P.2d 236, 239 (1976) (selective enforcement of habitual criminal statute upheld); Note, *supra* note 132, at 524 ("The power of the District Attorney to selectively prosecute individuals and groups has not been significantly limited by the judiciary.").

158. *Wayte v. United States*, 470 U.S. 598, 608 (1985); *Oyler v. Boles*, 368 U.S. 449, 456 (1962).

159. *Batchelder*, 442 U.S. at 124; *Oyler v. Boles*, 368 U.S. 449 (1962); *United States v. Torquato*, 602 F.2d 564 (3d Cir. 1979); *United States v. Johnson*, 577 F.2d 1304 (5th Cir. 1978); *United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974) (describing two elements of a discriminatory prosecution claim); *Ward v. State*, 414 A.2d 499 (Del. 1980); *People v. Walker*, 252 N.Y.S.2d 96, 200 N.E.2d 779 (1964); *State v. Spicer*, 299 N.C. 309, 261 S.E.2d 893 (1980); *State v. Clark*, 47 Or. App. 389, 630 P.2d 810 (1981). *See generally* Vorenberg, *supra* note 4, at 1539-41; Note, *supra* note 132, at 536-42.

erated by Caucasians were granted licenses but laundries operated by Asians were denied licenses on the basis of race, a Chinese launderer's conviction for operating without a license was reversed.<sup>160</sup> This limit is well recognized by the courts,<sup>161</sup> but it is not well used; prosecutors' charging decisions are rarely reversed on this basis.<sup>162</sup>

The third limit imposed on the prosecutor's charging discretion is also constitutional. This limit is often referred to as a ban on "prosecutorial vindictiveness"<sup>163</sup> or "retaliatory prosecution."<sup>164</sup> Specifically, a prosecutor cannot use the charging power to penalize a defendant for exercising constitutional rights; such retaliation violates due process guarantees.<sup>165</sup> Thus, where a prosecutor added six counts to a ten count indictment after the defendant opposed the state's motions for joinder of charges and revocation of bond, the court dismissed the extra six counts.<sup>166</sup>

The fourth limit on charging discretion is the prosecutor's duty to act ethically and in good faith.<sup>167</sup> Courts indulge a presumption that prosecu-

160. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

161. See cases cited *supra* note 157.

162. See *Vorenberg*, *supra* note 4, at 1539-41 & n.71 (*Yick Wo* was "first and last time" the United States Supreme Court struck down a prosecution for invalid selection of a target; Supreme Court opinions "have generated an almost unbroken line of cases upholding prosecutors' powers to decide who and how to charge."). See also *Wayte v. United States*, 470 U.S. 598 (1985) (refusing to dismiss prosecution on equal protection grounds for failure to show discriminatory purpose).

163. See, e.g., *Thigpen v. Roberts*, 468 U.S. 27 (1984); *Blackledge v. Perry*, 417 U.S. 21, 27 (1974); *Jackson v. Walker*, 585 F.2d 139 (5th Cir. 1978); *In re Grand Jury of the Southern District of Alabama*, 508 F. Supp. 1210, 1214 (S.D. Ala. 1980).

164. *Vorenberg*, *supra* note 4, at 1541.

165. *Blackledge v. Perry*, 417 U.S. 21 (1974) (due process violation where defendant who was convicted on misdemeanor charges and took successful appeal was reindicted on felony charges); *United States v. Motley*, 655 F.2d 186, 188-90 (9th Cir. 1981) (prosecution on more serious charges after defendant successfully moves for mistrial violates due process); *Jackson v. Walker*, 585 F.2d 139 (5th Cir. 1978); *In re Grand Jury of the Southern District of Alabama*, 508 F. Supp. 1210, 1214 (S.D. Ala. 1980); *State v. Selva*, 444 N.E.2d 329 (Ind. App. 1983); *Worthington v. State*, 409 N.E.2d 1261, 1269 (Ind. App. 1980) (prophylactic rule limits prosecutorial discretion in "seeking new indictments or in conducting retrials when such actions carry with them the opportunity of retaliation for a defendant's exercise of a statutory right that has due process implications."). See generally *Vorenberg*, *supra* note 4, at 1541-42.

In *United States v. Goodwin*, 457 U.S. 368 (1982), the prosecutorial vindictiveness doctrine was limited to apply a presumption of prosecutorial vindictiveness only to changes in charging decisions made after an initial trial. The Court's rationale was that at the pretrial stage, vindictiveness was very unlikely, and at that early stage, the prosecutor should remain free to use broad discretion. The prosecutorial vindictiveness doctrine still applies to limit charging decisions at the pretrial stage, but at that stage there is no presumption of vindictiveness as there is with post-trial charging decisions.

166. *State v. Selva*, 444 N.E.2d 329 (Ind. App. 1983).

167. See, e.g., *MacDonald v. Musick*, 425 F.2d 373 (9th Cir. 1970). *MacDonald* was initially charged with drunk driving. The prosecution filed a motion to dismiss the charge, but when *MacDonald* refused to stipulate that probable cause for the charge existed, the prosecution withdrew its motion to dismiss the drunk driving charge and added a charge of resisting arrest. At trial, *MacDonald* was acquitted of drunk driving but convicted of resisting arrest, and he filed a petition for habeas corpus. The court granted habeas corpus on the basis that *MacDonald's* custody was unconstitutional because the state had interfered with *MacDonald's* federal civil rights claim under 42 U.S.C. § 1983 (1979) when it threatened to and did revive the resisting arrest charge. The actual reading of this case is similar to the "vindictiveness" cases discussed *supra* in text accompanying notes 163-66, in that the defendant was penalized in the charging decision for exercising a constitutional right, but on the way to this conclusion, the court commented that the prosecutor's charging decision was "improper" under ABA CODE OF PROFESSIONAL RESPONSIBILITY D.R. 7-105 (1982), which provides that it is unethical to threaten criminal action to procure advantage in a civil case.

tions are undertaken in good faith,<sup>168</sup> but, if a party can produce evidence of overreaching or bad faith, courts are willing to review the charging decision.<sup>169</sup> The impact of this limit is slight because no decisions are reported wherein the charging decision was reversed on this basis.<sup>170</sup>

Thus, the courts are willing to limit charging discretion only if the pros-

---

*MacDonald*, 425 F.2d at 376. See also *Commonwealth v. Dunlap*, 477 Pa. 155, 160, 377 A.2d 975, 978 (Pa. 1977) (Roberts, J., dissenting).

Another case mentioning the prosecutor's duty to charge ethically and in good faith is *Boyd v. United States*, 345 F. Supp. 790 (E.D.N.Y. 1972). The plaintiffs sued, *inter alia*, the U.S. Attorney General and Department of Justice for constitutional and statutory violations in entering into a consent agreement regarding fair housing violations of a particular realtor. The court noted that "It is hardly necessary to add that the doctrine of prosecutorial discretion has never insulated conduct from review on charges of bad faith, fraud or illegality." *Id.* at 793. The court then stated that despite the plaintiffs' "valid premise," there was no bad faith or collusion in this case, and the complaint was dismissed for failure to state a claim. *Id.* See also *Sinclair v. State*, 278 Md. 243, 363 A.2d 468 (1976) (decision to prosecute must "be in accord with the fair and impartial administration of justice, untainted by any contaminating influence.").

Sometimes the initial charge which is allegedly unethical is part of a plea bargain. See *United States v. Crisona*, 440 F. Supp. 24 (S.D.N.Y. 1977), wherein the defendant was not charged until 26 months after the alleged crime. The defendant moved to dismiss the indictment, alleging a violation of due process because the prosecution used the potential charge to try to persuade the defendant to cooperate in an unrelated action. The court found the delay did not violate due process because the defendant established no prejudice. *Id.* at 26. The court also noted, however, that the motion to dismiss the indictment was "legally inadequate" because bartering an incipient criminal charge for cooperation in other matters was not necessarily "misbehavior." The court stated:

It is within the sound discretion of the United States Attorney to determine which cases shall be brought against which defendants; in the absence of overreaching or deceit (which is not here averred), it is an entirely proper use of that discretion to forego a potential prosecution where, in the opinion of the United States Attorney, an inculcated party's aid in other matters outweighs the benefits of his prosecution.

*Id.* at 26.

Thus the court recognized that overreaching or deceit are forbidden, but because neither was present here, the court declined to dismiss the charges.

Similarly, in *United States v. Paiva*, 294 F. Supp. 742 (D.D.C. 1969), the defendant had an agreement to cooperate with the government in the prosecution of others in exchange for not being indicted. The defendant was eventually indicted anyway, and he moved to dismiss the indictment, alleging that he was the victim of a broken bargain since he had cooperated. The court reviewed the agreement and dismissed the indictment. The court stated:

All that is held here is that if, after having utilized its discretion to strike bargains with potential defendants, the Government seeks to avoid those arrangements by using the courts, its decision so to do will come under scrutiny. If it further appears that the defendant, to his prejudice, performed his part of the agreement while the Government did not, the indictment may be dismissed.

*Id.* at 747. Accord, *In re Rook*, 276 Or. 695, 556 P.2d 1351 (1976) (prosecutor answerable for unethical conduct in plea bargaining).

168. *United States v. Hoover*, 727 F.2d 387, 389 (5th Cir. 1984) ("[T]here is a presumption that a criminal prosecution is undertaken in good faith."); *United States v. Saade*, 652 F.2d 1126, 1135 (1st Cir. 1981) (referring to the burden of proof necessary to overcome the presumption of good faith).

169. *MacDonald*, 425 F.2d at 375-76; *Boyd v. United States*, 345 F. Supp. 790 (E.D.N.Y. 1972), quoted *supra* note 167. Cf. *Sebba, The Victim's Role in the Penal Process: A Theoretical Orientation*, 30 AM. J. COMP. L. 217, 221 (1982) (in Israel, complainant denied prosecution may appeal to the court which will interfere only where prosecutor's discretion was exercised in bad faith or for extraneous motives).

170. In *MacDonald v. Musick*, discussed *supra* note 167, the court granted relief in the form of habeas corpus. The court did cite D.R. 7-105 and did state that the charging decision was "improper," but unethical conduct was not the basis for the decision; the court specifically stated:

We are aware, however, that not everything that may happen to a defendant in a state court is ground for issuance of a writ of habeas corpus by a federal court, no matter how much we may disapprove. It must appear that the petitioner " \* \* \* is in custody in violation of the Constitution or laws . . . of the United States \* \* \* ." We think that this is such a case.

ecution is unconstitutional, unethical or based on insufficient evidence. Courts have occasionally implied the existence of other miscellaneous limits on the prosecutor's charging decision,<sup>171</sup> but the limits discussed above are the only limits established to date. No general cause of action for abuse of discretion exists.<sup>172</sup>

As this review of the law indicates, court-imposed limits upon prosecutorial charging discretion are few, and their practical impact is slight. Moreover, the four limits imposed by the courts operate only to prohibit prosecution; none operates to cause a court to compel prosecution.<sup>173</sup> Courts consistently refuse to compel a prosecution on any theory.<sup>174</sup>

---

*MacDonald*, 425 F.2d at 376 (citations omitted). In *Boyd*, discussed *supra* note 167, the court declined to reverse the charges because it found "no bad faith or collusion."

In *Crisona* and *Paiva*, the courts reached different results, but as noted *supra* in note 167, these are primarily plea bargain cases where the question was the validity of the government's agreement.

171. For example, the criminal law itself has been invoked as a limit on the prosecutor's charging discretion. See *MacDonald v. Musick*, 425 F.2d 373 (9th Cir. 1970) (court implies that prosecutor's charging decision is extortion); *Boyd v. United States*, 345 F. Supp. 790, 793 (E.D.N.Y. 1972) (prosecutorial discretion may be reviewed on grounds of fraud or illegality). As noted *supra* in note 170, both are talk only. The most interesting case illustrating the limiting potential of the criminal law is *People v. Muka*, 72 A.D.2d 649, 421 N.Y.S.2d 438 (Sup. Ct. 1979). In that case Muka filed 333 criminal complaints against public officials and demanded that the local district attorney prosecute them. When the district attorney declined, Muka effected a citizens arrest of the district attorney for refusal to prosecute. Police then arrested Muka and charged her with unlawful imprisonment of the district attorney. Muka's defense was that she was legally restraining the district attorney because he was under arrest for failure to prosecute. This argument caused the court to remark that "The mere refusal of a district attorney to prosecute a complaint is not a crime." *Id.* at 440.

As to other limits on the charging decision, one court has found it to be an abuse for the prosecutor to fail to use discretion in deciding whether to file habitual criminal charges against a defendant. In *State v. Pettitt*, 93 Wash. 2d 932, 609 P.2d 1364 (1980), the prosecutor had relied on a fixed formula in deciding to file habitual criminal charges. The appellate court remanded the case for resentencing. In other words, the court found that one limit on the prosecutor's charging discretion was that it must be used.

One final limit on charging discretion is that charging decisions cannot be incompetent or a violation of the prosecutor's oath. If they are, the court may remove the prosecutor from office. See Hall, *supra* note 6, at 970-71, and cases discussed therein.

172. Vorenberg, *supra* note 4, at 1539 (describing "the lack of a judicially recognized basis" to challenge the prosecutor's charging discretion). But cf. *State v. Pettitt*, 93 Wash. 2d 932, 609 P.2d 1364 (1980), described *supra* note 171 (abuse of discretion for prosecutor to fail to use discretion).

173. Regarding the sufficiency of the evidence, see, e.g., *United States v. Cox*, 342 F.2d 167 (5th Cir. 1965). In *Cox*, the grand jury returned an indictment which the U.S. Attorney refused to sign. The court held that the signature was required for the indictment to be valid, but that the U.S. Attorney had no duty to sign it. Therefore, the U.S. Attorney could effectively reject the indictment by refusing to sign it. So even though there was sufficient evidence as determined by the grand jury, the U.S. Attorney was still not compelled by the court to prosecute the case. The court stated, "The discretionary power of the attorney for the United States in determining whether a prosecution shall be commenced or maintained may well depend upon matters of policy wholly apart from any question of probable cause." *Id.* at 171. Accord, ABA STANDARDS ON THE PROSECUTION FUNCTION, Std. 3-3.9 (1971) (prosecutor may decline to prosecute, even though evidence is sufficient, based on considerations of seven listed factors). But cf. *State ex rel. Forsythe v. Coate*, 558 P.2d 647, 649 (Mont. 1976) (if defendant held to answer after preliminary examination and prosecutor decides not to file information, prosecutor must file a written statement of reasons for not proceeding; if court rejects reasons, court may direct prosecutor to proceed with case).

174. See *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 379 (2d Cir. 1973) (federal courts have "uniformly refrained" from compelling prosecution at the instance of a private person); *United States v. Cox*, 342 F.2d 167 (5th Cir. 1965); *Pugach v. Klein*, 193 F. Supp. 630, 635 (S.D.N.Y. 1961) ("The court cannot compel [the U.S. Attorney] to prosecute a complaint, or even an indictment, whatever his reasons for not acting."). See discussion *supra* in text accompanying notes 95-126.

### *Defining Victim Participation as a Right to Consult with the Prosecutor*

Considering the current structure of the charging decision, the most feasible method of incorporating victims in the process is to establish a victim's right to consult with the prosecutor. This approach can be designed to minimize the drawbacks and maximize the benefits of victim participation identified above. This right is described below.

#### *a. Right to Consult*

The victim could be granted a right to consult<sup>175</sup> with the prosecutor in a pre-charge conference.<sup>176</sup> There, the victim could express his views on the charging decision orally<sup>177</sup> or in writing.<sup>178</sup> While the victim will presumably not be aware of all the available charges, he or she will, no doubt, have general views. An expression of such views would be sufficient to exploit the benefits of victim participation identified above because this general expression allows the victim to feel like a critical participant in the process. This feeling benefits the victim, and public confidence in charging decisions is fostered, thus society also benefits. And, because the process is expeditious, it will not absorb undue amounts of time and energy. Finally, the generality of the victim's views does no harm to the victim's interest because the victim's interest in the substance of the charging decision is protected by consistency with the prosecutor's interests.

The victim's participation right should be limited to a right to consult with the prosecutor. Therefore, if the prosecutor were to make a charging decision in conflict with the victim's desires, the victim would have no right to appeal and challenge the substance of that decision. This limit is important for many reasons. First, the significant benefits of victim participation derive from the process of participation as opposed to any impact the victim would have on the substance of the charging decision. Once the victim is incorporated into the process, no additional benefits are gained by giving the victim rights in the substance of the decision. Actually, giving the victim a right to challenge the substance of the charging decision has important drawbacks: Such a right would inhibit the prosecutor's discretion. The many benefits of broad charging discretion have been examined,<sup>179</sup> and it is foolish to risk those benefits by giving victims a right to challenge the prosecutor's charging decision.

On a more practical level, there is currently no limit on the prosecutor's

---

175. A lesser right would be a victim's right to information—to be informed of the charging decision. See *supra* note 5. While victims might appreciate this right, it would serve none of the interests served by participation.

176. See Goldstein, *supra* note 6, at 515 n.88.

177. Oral expression would involve a meeting or telephone conference between the victim and prosecutor.

178. Written expression could take the form of a letter to the prosecutor. The mechanics of the consultation could be arranged so that the victim was notified in a letter from the prosecutor's office of the right to consult with the prosecutor. The letter should inform the victim that the consultation may be by personal conference, by telephone or by letter at the victim's option. The letter notifying the victim of these options should also contain a date after which it will be presumed the victim has waived the consultation right.

179. See *supra* text accompanying notes 54-62 and 66-68.



discretion which might be used to support a victim's challenge of the charging decision. None of the current limits on prosecutorial discretion would apply. Nor, for several reasons, are limits imposed by the courts available. Courts are generally reluctant to review the charging decision at all. In addition, when it is the victim seeking the prosecution, courts deny victims standing to challenge the charging decision. Finally, where courts have reviewed the decision, they refuse to grant victims the order compelling prosecution they seek. Although courts have occasionally entered orders prohibiting prosecution, they uniformly refuse to compel prosecution. Because victims generally seek to compel prosecution, they will be denied relief. Formidable barriers preclude use of the courts as an enforcement tool for the victim's remedy.

Similarly, the limits on prosecutors' charging discretion imposed from sources other than the courts are poor vehicles for a victim's remedy. Of the four limits identified above, only two limits, internal guidelines and political pressure, would be available to compel prosecution. These two limits have other drawbacks. Internal guidelines are not binding and political pressure is dependent on too many unpredictable variables such as the temporal proximity of an election, adequate publicity, the existence of competition for the office, and the impact of other issues in the campaign.<sup>180</sup> Thus, a drastic change in the law would be required before victims could find a method to implement a challenge to the substance of the charging decision.

Finally, victims should have no right to challenge the substance of the prosecutor's decision because such a right would consume too much time. This is exactly the kind of costly impact that would tip the balance against a victims' participation right at all. Because the benefits of participation are marginal, time and effort absorbed in implementating the participation must be negligible or the right should be denied.

#### b. *Remedy for Denial of Right to Consult*

Currently, victim participation in the charging decision is discretionary with the prosecutor. If consultation with the prosecutor is redefined as a right of the victim, there must be a remedy for denial of the right. Two possible remedies to secure the right are examined.

If the victim were given a right to consult the prosecutor, the effect would be to impose a duty on the prosecutor to consult the victim before making the charging decision. One approach to a remedy would be to define the prosecutor's duty to consult with the victim as an ethical duty.<sup>181</sup> If the

---

180. *But see* U.S. DEP'T OF JUSTICE, *supra* note 6, Issue II.B.(1).

181. The ethical duty could be imposed by the state supreme court. Both the Model Rules and the Code of Professional Responsibility already include special provisions relating to prosecutors. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY D.R. 7-103 (1980). The state supreme court could merely add a new section to these provisions which would impose a duty on the prosecutor to consult with the victim before making the charging decision.

Alternatively, the legislature could adopt a statute imposing an ethical duty on prosecutors to consult with victims before making the charging decision. If the legislature was reluctant to take this approach because of the inherent power doctrine, the legislature could instead adopt a statute imposing on prosecutors not an ethical duty *per se* but rather a plain statutory duty. The ethics codes

prosecutor failed to discharge this duty by consulting with the victim, the victim's remedy would be to report the failure to the appropriate disciplinary body which could then take normal steps to handle ethical violations. This sanction would provide no relief to the particular victim not consulted, but should be sufficient to deter prosecutors from ignoring victims.

A second approach would be to define a charging decision made without victim consultation as an abuse of discretion by the prosecutor and give the victim a cause of action. The victim could file an action alleging that the prosecutor abused his or her discretion by not consulting with the victim. If such an abuse had occurred and the case had not progressed beyond the point where charges could be amended, the court could enforce the victim's right to be consulted. But, the victim would still have no right to challenge the substance of the final decision as an abuse of discretion.

There is a significant drawback to this latter approach. The drawback is that the law would have to be changed dramatically because no cause of action for abuse of discretion in the charging decision exists.<sup>182</sup> Although some commentators have lately endorsed review of the charging decision on an abuse of discretion standard,<sup>183</sup> courts seem disinclined to implement it. They continue to resist review of the charging decision.<sup>184</sup> As a new cause of action which the courts are reluctant to establish, this remedy would require too many difficult and dramatic changes in the law to be attractive. Such a radical change, to establish a remedy for a right which on balance is only marginally attractive, would tip the balance against the victims' right to participate in the charging decision.

### CONCLUSION

The interests of the victim, the defendant, the prosecutor, and society in the charging decision indicate that the case for victim participation is a close one. The benefits of victim participation in charging include the victim's feeling of being a part of the criminal justice process. Another benefit is that public confidence in charging decisions is bolstered by knowledge of victim participation in the process. The detriments of participation are that the process is slowed, and that the possibility of inconsistency in charging decisions is increased. Any participation right must be formulated with these pros and cons in mind. The main benefits of victim participation derive from the process of participation as opposed to any impact the participation would have on the substance of the decision. Therefore, the victim should be accorded a right to be heard, but the victim should have no right to determine the substance of the charging decision. Defining the participation right

---

already require that prosecutors comply with the law, so noncompliance with the law as defined in the statute would amount to an ethical violation. If a court reviewed the statute and found it to be a violation of the inherent powers doctrine but was persuaded that the substance of the statute was valuable, the court could decide to impose the ethical obligation itself. On the other hand, if the court found the statute to be a violation of the inherent powers doctrine and further disagreed that a duty to consult with victims should be imposed, the court would have the last word and no victims' consultation right could be enacted.

182. See *supra* text accompanying note 172.

183. See, e.g., Note, *supra* note 51.

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

within this limit exploits the benefits of victim participation because victims feel they have had their say and thus victim alienation is minimized. Moreover, a right to participate in the process, but not to challenge the substance, minimizes the danger of inconsistency in charging decisions as a result of victim participation because it denies the victim undue influence upon the substance of the decision. Finally, the defined consultation right is simple and expeditious and therefore minimizes the time consumed. A consultation right defined in this way succeeds in exploiting the benefits and defeating the drawbacks of victim participation.

One final point about victim participation is important. Where victims in a particular jurisdiction have been granted a right to participate in sentencing and plea bargaining, the case for a right to participate in the charging decision is strengthened in the name of consistency. In jurisdictions that have made the decision to grant victims a participation right at other stages, victim participation in the charging decision is consistent with the current structure and would contribute to a coherent system.

Victims have recently been the focus of media and scholarly attention.<sup>185</sup> Often the concern expressed is that victims are unfairly ignored by the criminal justice system.<sup>186</sup> The law cannot afford to ignore popular sentiment and intuitive notions of justice without risking credibility and efficacy. Of course, if popular sentiment calls for the violation of rights, the role of the law is to control that inclination. But, the victim's participation right defined herein creates no danger of infringing upon any legal or moral right: The ultimate power regarding the substance of charging decisions remains with the prosecutors. Yet several benefits are realized. Structured as suggested, the victim's right to participate in the charging decision does not cater to society's baser instincts, nor is it a masquerade to limit defendant's rights under the guise of concern for victims. Rather, it has social utility.

---

185. See *Booth v. Maryland*, 107 S. Ct. 2529, 2542 (1987) ("Recent years have seen an outpouring of popular concern for what has come to be known as victims' rights . . .") (Scalia, J., dissenting). See, e.g., *Morris v. Slappy*, 461 U.S. 1, 14 (1982); Victim and Witness Protection Act of 1982, 96 Stat. 1248 (1982), codified in various sections of Title 18, U.S.C.; President's Task Force, *supra* note 5, Final Report. See generally Henderson, *supra* note 9, at 949-50 (describing the "enormous political, media, and legal attention" recently devoted to victims' rights).

186. See, e.g., *Booth*, 107 S. Ct. at 2542. ("Recent years have seen an outpouring of popular concern for what has come to be known as victims' rights . . . . Many citizens have found one-sided and hence unjust the criminal trial in which a parade of witnesses comes forth to testify to the pressures beyond normal human experience that drove the defendant to commit his crime, with no one to lay before the sentencing authority the full reality of human suffering the defendant has produced. . . .") (Scalia, J., dissenting); *Morris*, 461 U.S. at 14 ("The court wholly failed to take into account the interest of the victim. . . . [I]n the administration of criminal justice, courts may not ignore the concerns of victims.").

