

Prosecutorial Discretion Is Grounded in Law

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As Attorney General Robert Jackson warned in this very hall 85 years ago, the same powers that enable the federal prosecutor to pursue justice also create the potential for grave injustice.¹

ATTORNEY GENERAL MERRICK GARLAND (JANUARY 16, 2025)

Introduction

District Attorney Kimberly Foxx aptly notes the importance of prosecutorial discretion.² But instead of focusing on what discretion is, she focuses on “*who*” has this power of discretion.³ Implicit in the concept of discretion is the fact that there can be no abuse of discretion as this would be antithetical to the very concept and word—discretion. But does this mean that prosecutors are above the law? My answer is no. Although not the focus of her talk, DA Foxx appears to agree with this premise.⁴ So, my aim here is to add to her discussion of “*who*” is using discretion, the questions of *what* is discretion, and *when* is something no longer within the confines of discretion.

It all comes down to the law. Prosecutorial discretion is grounded in law, but so too is prosecutorial misconduct. Distinguishing these two concepts—prosecutorial discretion and prosecutorial misconduct—is important for understanding what is encompassed within prosecutorial discretion. Likewise, recognizing that prosecutorial misconduct is impermissible under law does not infringe on a prosecutor’s rightful discretionary power.

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1. Attorney General Merrick B. Garland Farewell Address (Jan. 16, 2025), <https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-farewell-address>

2. Kimberly Foxx, *Keynote Address: Symposium on Discretion in the Legal System*, 30 BERKELEY J. CRIM. L. 213, 214-15 (2025).

3. *Id.* (exploring “not what is discretion, but who gets to yield that discretion.”)

4. Kim Foxx does state that she is “not of the belief that there should be such unfettered power without checks.” *Id.* at 215.

This Essay looks first at prosecutorial discretion, noting the many powers provided to prosecutors. It then notes that one of these key powers, the ability to charge those who commit crimes, has a unique constitutional position that ranks higher than many other rights provided to defendants by the Constitution. This is because the grand jury requirement for charging has never been incorporated to the States. Finally, this Essay distinguishes the vast powers of a prosecutor from prosecutorial acts that fall into the realm of prosecutorial misconduct. Thus, prosecutorial powers are extremely broad, but there are limits, and the law provides that boundary line.

The Breadth of Prosecutorial Discretion

Prosecutorial discretion remains within the sole purview of state or federal prosecutors.⁵ A prosecutor has broad discretion to pick and choose who will face criminal charges,⁶ what criminal charges will be levied,⁷ and whether to dismiss specific counts in a charging document.⁸ Although a defendant may decide not to accept a plea agreement, prosecutors have the sole discretion to offer the agreement and the contours of that agreement.⁹ Who will receive a 5K1.1 Motion from the federal government, allowing for a lesser sentence for substantial cooperation, rests in the hands of the federal prosecutor.¹⁰ Absent a prosecution motion, a court has no authority in the federal system to provide for this sentence reduction benefit.¹¹

5. See generally Carissa Byrne Hessick & Rick Su, *The (Local) Prosecutor*, 2023 WIS. L. REV. 1669 (2023) (discussing the state variations on prosecutor powers); Miriam Aronia Krinsky, Justin Murray & Maybell Romero, *New Directions in Prosecutorial Reform*, 60 AM. CRIM. L. REV. 1369 (2023) (providing a historical review of prosecutorial powers); Vida Johnson, *Whom Do Prosecutors Protect*, 104 B.U. L. REV. 289 (2024) (evaluating methods of reviewing prosecutors); but see Todd David Peterson, *Federal Prosecutor Independence*, 15 DUKE J. CONST. L. & PUB. POL'Y 217 (2020) (discussing challenges to federal prosecutorial independence).

6. See Justin Murray, *Prosecutorial Reform and the Myth of Individualized Enforcement*, WASH. U. L. REV. (forthcoming 2025).

7. See Ellen S. Podgor, *Race-ing Prosecutors' Ethics Codes*, 44 HARV. C.R.-C.L. L. REV. 461 (2009) (examining prosecutorial charging in the context of the Jena Six case).

8. See Alexandra Natapoff, *Misdemeanor Declination: A Theory of Internal Separation of Powers*, 102 TEX. L. REV. 937 (2024) (discussing the gatekeeping function of declining charges in misdemeanor cases). It should be noted that the judiciary does provide a check on federal prosecutors' discretion to dismiss charges: Rule 48 of the *Federal Rules of Criminal Procedure* provides that "[t]he government may, with leave of court, dismiss an indictment, information, or complaint." Fed. R. Crim. P. 48 (emphasis added).

9. See Lucian Dervan & Vanessa A. Edkins, *Victims of Coercive Plea Bargaining: Defendants Who Give False Testimony for False Pleas*, 72 AM. U. L. REV. 1919 (2023).

10. See U.S. Sentencing Guidelines, 5K1.1—Substantial Assistance to Authorities (April 12, 2025) <https://www.ussc.gov/guidelines/guidelines-archive/2011-5k11> ("Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.").

11. See Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. REV. 105, 149 (discussing how a government 5K1.1 motion is an extension of their charging and bargaining discretion).

The scope of prosecutorial discretion is extensive, as the Supreme Court allows prosecutors to omit the presentation of exculpatory evidence when presenting a case to a grand jury.¹² Judges have their hands tied when a prosecutor presents a deferred prosecution agreement to a court, even when the court finds the agreement too lenient for the alleged misconduct.¹³ In each of these scenarios, prosecutors have extraordinary powers of discretion.

The breadth of a prosecutor's charging power is particularly noteworthy in some states, as one of the few remaining constitutional amendments not incorporated to the States relates to prosecutorial charging. Prosecutors in some states can charge individuals through an "Information" charging document.¹⁴ Thus, they are not required to use the grand jury charging process that results in the issuing of an indictment.¹⁵ This allows an individual state attorney the ability to present a charge against an individual or corporation, without first receiving a vote from the grand jury: a group of lay individuals who assess whether there is probable cause that the individual or corporation has committed the offense.¹⁶ This unique prosecutorial charging ability is allowed in several states that have not required the use of a grand jury for charging individuals.¹⁷

The Constitution provides accused individuals with many rights and liberties: For example, those accused of crimes in all but petty offenses have a right to a jury trial.¹⁸ Likewise, an indigent defendant has the right to attorney representation if imprisonment is imposed.¹⁹ There are also prohibitions against

12. See *United States v. Williams*, 504 U.S. 36, 52 (1992) (holding that a prosecutor does not need to present substantial exculpatory evidence to a grand jury).

13. See *United States v. Fokker Services B.V.*, 818 F.3d 733, 741 (D.C. Cir. 2016) (holding that a court does not have authority to disapprove a deferred prosecution agreement because it believes that the government has been too lenient).

14. See *Hurtado v. California*, 110 U.S. 516, 538 (1884) (holding that a conviction for first degree murder did not violate the Constitution when the charge was via an Information as opposed to an Indictment). In *Hurtado*, the Court was focused on whether a failure to use a grand jury presentment or indictment could provide due process. The Court stated,

Tried by these principles, we are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information, after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law.

Id. at 538.

15. See *id.*

16. See *id.*

17. See Daniel Taylor, Which States Use Criminal Grand Juries?, FindLaw (Mar. 21, 2019), <https://www.findlaw.com/legalblogs/criminal-defense/which-states-use-criminal-grand-juries/>.

18. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 162 (1968) (incorporating the right to a jury trial to the states). Several Supreme Court cases draw the line of when there is a right to a jury trial in the states. See *Baldwin v. New York*, 399 U.S. 66, 73 (1970) (explaining the right to a jury trial when the accused have charges carrying a maximum possible penalty of six months); *Blanton v. City of North Las Vegas*, 489 U.S. 538, 543-44 (1989) (examining what constitutes a serious offense).

19. "In all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defense." U.S. CONST. AMEND. VI. See *Gideon v. Wainwright*, 372 U.S. 335, 345

illegal searches and seizures.²⁰ Defendants have a constitutional right to confrontation and a right to compulsory process.²¹ They also have the right to a speedy trial²² and not to be tried excessively in violation of double jeopardy.²³ Defendants also cannot be subject to excessive fines.²⁴ All of these rights, as well as others, serve as bedrock constitutional principles in both state and federal law and apply to States through judicial incorporation.

The right to a grand jury process in charging is one of the few constitutional provisions not incorporated to the States.²⁵ State prosecutors in some states have the charging power to proceed with an Information charging document despite the Fifth Amendment's clause that precludes requiring a person "to answer for a capital, or otherwise crime, unless on a presentment or indictment of a Grand Jury."²⁶ The fact that a right to a grand jury has not been incorporated to the States, although not initially grounded in prosecutorial discretion, sends a message about the importance of this discretionary power, especially in charging.

Thus, the vast power of prosecutors is seen not only in the many cases that rely on prosecutors to decide issues of who will be charged, what they will be charged with, when the charges will be filed, and where the cases will be presented. That power is further heightened by the fact that a constitutional right to a grand jury has not been incorporated as applicable to the States.

Prosecutorial Misconduct

Although prosecutors have enormous power firmly cemented in legal jurisprudence, they do not have "unfettered" discretion.²⁷ Discretionary

(1963) (overturning *Betts v. Brady*, 316 U.S. 455 (1942), in holding that the right to counsel applies in state cases).

20. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated..." U.S. CONST. AMEND. IV.

21. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." U.S. CONST. AMEND. VI (emphasis added).

22. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial..." *Id.*

23. "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. AMEND. V.

24. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. AMEND. VIII.

25. The Court's holding in *Hurtado* has not been overturned by the Court, and thus the grand jury right has not been subject to incorporation. *See* 110 U.S. at 535.

26. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger..." U.S. CONST. AMEND. V.

27. *United States v. Batchelder*, 442 U.S. 114, 125 (1979).

decisions cannot violate existing law.²⁸ The dichotomy between a discretionary decision and a decision that violates law becomes the separating line between discretionary decisions and those that constitute misconduct.

In determining what activities violate law, the obvious starting point is whether the prosecutor is using their charging power to fit the alleged conduct into an existing statutory crime. Criminal activities need to be encompassed within a statutory prohibition.²⁹ Alleged criminal conduct with no legal basis in existing statutory law cannot be charged.³⁰ Prosecutors may pick and choose crimes that match the existing evidence, but a statutory crime must exist as a starting point.³¹ Absent the law, there can of course be no basis for charging an individual.³² But the law provides other restrictions on prosecutorial discretion. These can be seen in many cases where prosecutors have crossed the line and engaged in prosecutorial misconduct.

Violations of law are plentiful when examining discretionary decisions, and many have complained that overcriminalization seldom constrains these decisions.³³ That said, prosecutorial misconduct can occur when a prosecutor selectively charges an individual while not charging others who are similarly situated.³⁴ But the courts have required defendants to show that the prosecutorial charging action had a discriminatory effect and was motivated by a discriminatory purpose (a high bar to clear at an early stage of proceedings).³⁵ Selective prosecutions are nominally a restraint on charging power, but in reality, these cases are lost because of the level of proof required for success. Although the standard gives enormous deference to prosecutors, courts will occasionally

28. See *Oyler v. Boles*, 368 U.S. 448, 457 (1962).

29. This concept is rooted in the fundamental principle of “*nullum crimen sine lege*,” or “no crime without law.” See generally Beth Van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO L.J. 119 (2008) (discussing the origins of this principle).

30. *Id.*

31. “The final basic premise of the criminal law is that conduct is not criminal unless forbidden by law which gives advance warning that such conduct is criminal.” WAYNE R. LAFAVE & JEN DAVID OHLIN, *CRIMINAL LAW*, 7TH ED. HORNBOOK SERIES, at 11 (2023).

32. *Id.*

33. See, e.g., Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703 (2005) (discussing the scope of overcriminalization); Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537 (2012) (discussing how to counteract overcriminalization); Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747 (2005) (looking at whether there is an overcriminalization problem); Sanford H. Kadish, *The Crisis of Overcriminalization*, 7 AM. CRIM. L. Q. 17 (1968) (discussing the growing problem of overcriminalization).

34. See, e.g., *Wayte v. United States*, 470 U.S. 598, 608 (1985) (holding that to be successful on a selective prosecution claim, the petitioner had to show a “discriminatory effect and that it was motivated by a discriminatory purpose.”).

35. *Id.* Proving this becomes a substantial problem as discovery may not be provided to present the argument. See *United States v. Armstrong*, 517 U.S. 456, 457 (1996) (finding that “[t]o establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted”).

decide a prosecutor engaged in misconduct by selectively charging a particular individual.

Other violations of law that rise to the level of prosecutorial misconduct can include charges that violate double jeopardy,³⁶ failures to timely provide due process by omitting material exculpatory discovery to the defendant,³⁷ and specific improprieties that occur when a prosecutor oversteps appropriate lines in delivering a closing argument.³⁸ But all of these actions go to prosecutorial misconduct that are firmly grounded in law. Some of these restraints may come from the U.S. Constitution, and others from statutes or rules of evidence. Each act of misconduct becomes prohibited under law because of constitutional provisions, such as the Due Process and Equal Protection Clauses, or statutes, such as the Jencks Act,³⁹ or statutory requirements to properly preserve evidence.⁴⁰ A prosecutor who crosses a line and commits prosecutorial misconduct by violating the statute can face a court dismissal of the charges.⁴¹

In addition to law, prosecutors are also bound, as attorneys, to ethical mandates. These rules include explicit requirements, such as those found in the Model Rules of Professional Conduct, that detail the special responsibilities of a prosecutor.⁴² And although violations of ethics rules can reach a level of

36. “[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb....” U.S. CONST. AMEND. V.

37. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that the prosecution is required to provide material exculpatory evidence to the defense). A violation of law may also be an ethical violation. For example, the ABA Model Rules of Professional Conduct require the government to “make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal...” Model Rules of Pro. Conduct r.3.8(d) (A.B.A. 2025).

38. *See Griffin v. California*, 380 U.S. 609, 615 (1965) (finding it improper when a prosecutor steps over the constitutional line against a defendant’s right not to incriminate him or herself).

39. 18 U.S.C. § 3500 (requiring providing witness statements to the defense after the witness has testified).

40. *See* 18 U.S.C. § 3600A—Preservation of Biological Evidence.

41. *See Oregon v. Kennedy*, 456 U.S. 667, 674 (1982) (finding prosecutorial overreach that results in a mistrial can be the basis for a dismissal when it is intended to provoke the defendant into requesting a mistrial).

42. The ABA’s ethical rules explicitly provide prosecutors with special responsibilities under Rule 3.8, which states:

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged

disbarment or suspension, the discretionary role of a prosecutor is not prohibited, unless it falls outside the bounds of the law, such as violating due process.⁴³ Norms, like those found in the *ABA Criminal Justice Standards: Prosecution Function*⁴⁴ also offer guidance to those in the prosecution role, such as not using politics in decision-making.⁴⁵

When a prosecutor crosses the line, or is asked to cross the line, in performing what may, at first glance, appear as a discretionary role, issues can arise as to whether the prosecutor should commit the act, resign, or consider other

mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

(g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) promptly disclose that evidence to an appropriate court or authority, and

(2) if the conviction was obtained in the prosecutor's jurisdiction,

(i) promptly disclose that evidence to the defendant unless a court authorizes delay, and

(ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Model Rules of Pro Conduct. 3.8 (A.B.A. 2025).

43. See, e.g., *Bruton v. United States*, 391 U.S. 123, 136-37 (1968) (finding that limiting instructions are insufficient when a defendant is tried jointly with a co-defendant and the co-defendant's confession which inculcates the defendant is admitted without providing the defendant the opportunity for cross-examination).

44. ABA CRIM. JUST. STANDARDS: PROSECUTION FUNCTION 4TH ED. (A.B.A. 2017), available at https://www.americanbar.org/groups/criminal_justice/resources/standards/prosecution-function/.

45. *Id.* Standard 3-1.6 explains: "A prosecutor should not use other improper considerations, such as partisan or political or personal considerations, in exercising prosecutorial discretion." *Id.*

alternatives.⁴⁶ In this regard, it is important to consider what falls within prosecutorial discretion and what would be considered misconduct.⁴⁷

Conclusion

There are also practical considerations that constrain prosecutors, such as limited funding, public responses to prosecutorial directives, evidentiary weaknesses in cases, and internal guidelines like those found in the Justice Manual. But these are constraints that still leave open discretionary decision-making by specific prosecutors. Maneuvering within a system that includes these practical considerations is within the sole province of the elected or appointed prosecutor. Thus, although there may be practical considerations that influence a prosecutor's decisions, the prosecutor is the one with the ultimate power to decide the emphasis of their policy within these limits.

So, in reaffirming District Attorney Kim Foxx's astute observations about "who" is using the discretion, it is important to recognize that the concept of discretion is grounded in law. It includes legal jurisprudence that provides for a prosecutorial power that allows for discretion, but likewise limits this power when it exceeds the law. That law may be statutes or Court interpretation, but until modified by a legislature or the courts, it remains binding on prosecutors. In laying out these outer bounds, the courts distinguish the realm of prosecutorial discretion from prosecutorial misconduct. The line between discretion and misconduct is not one that prosecutors can haphazardly decide for themselves. Our judicial bodies and ethics review boards provide necessary oversight when concerns arise.

Prosecutors who exceed their discretion and commit acts of legal misconduct cannot claim that such acts are within their discretion. It is therefore an important part of prosecutorial discretion that one recognizes that there are limits, and that those limits are ones encompassed within law.

46. This issue has been raised with regard to requests by members of the Department of Justice to have local federal prosecutors dismiss the federal case pending against New York City Mayor Eric Adams. Claims have been made as to "whether the Justice Department's motion to dismiss the Adams case was in the public interest or merely a pretext for securing the mayor's cooperation with the Trump administration's anti-immigration policies." Benjamin Weisner, *Judge Sets Wednesday Court Hearing to Weigh Dropping Eric Adams Case*, N.Y. TIMES (Feb. 17, 2025), <https://www.nytimes.com/2025/02/17/nyregion/judge-dale-ho-adams-corruption-case.html>.

47. Prosecutors handling the prosecution of New York City Mayor Eric Adams felt it necessary to offer resignations. Letter from Danielle Sassoon to Attorney General Pam Bondi (Feb. 12, 2025) (Re: Eric Adams, 24 Cr. 556 (DEH)), <https://s3.documentcloud.org/documents/25526481/sassoon-letter.pdf>. The government response was to accept her resignation. Letter from Emil Bove, Acting Deputy Attorney General, to Danielle Sassoon (Feb. 13, 2025) (Re: United States v. Eric Adams, 24 Cr. 556 (DEH)), <https://s3.documentcloud.org/documents/25530099/bove-response-to-sassoon-resignation-full.pdf>.