Making A Case For No Case:

Judicial Oversight of Prosecutorial Choices -From In re Michael Flynn to Progressive Prosecutors

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Lawyers, legal scholars, politicians, and the public closely followed the changing developments in the Department of Justice's prosecution of former National Security Advisor, Michael Flynn. After Flynn had pled guilty to lying to the FBI, the DOJ, under Attorney General William Barr, moved to dismiss all of the charges against him. Following this, the public witnessed a multi-sided court battle involving the DOJ, the defendant, the presiding judge, a court-designated amicus curiae, multiple additional amici curiae, and the Circuit Court of Appeals. Flynn was ultimately pardoned by former President Trump.

At the heart of the legal issues raised by the DOJ's Motion to Dismiss is the important question of how to balance prosecutorial discretion against a court's oversight responsibilities. A broad-based standard for judicial oversight would have the salutary effect of guarding against dismissals based upon corrupt government motives. However, in the altogether different context of judicial review of reform-minded positions taken by the new wave of progressive prosecutors, broad-based judicial overview may bring anti-reform and undemocratic results.

This article examines the law and practice in play when a prosecutor and defendant jointly propose a particular result. It takes into account relevant issues of interpretation of criminal procedure rules, separation of powers, the integrity of the courts, and the protection of democratic values. It suggests a standard of judicial scrutiny that would

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protect us from the corrupt use of prosecutorial discretion while also protecting its exercise to achieve progressive reform.

INTRODUCTION

In the spring of 2020, lawyers for the United States Department of Justice (DOJ) moved to dismiss criminal charges against former National Security Advisor, Michael Flynn.[1] Even though he had already

[1] *In re* Flynn, 973 F.3d 74, 76 (D.C. Cir. 2020).

pleaded guilty to making false statements to FBI Agents[2] and was awaiting sentencing,[3] Flynn naturally consented to the dismissal.[4] While there are conflicting narratives,[5] many legal experts and political commentators were convinced that United States Attorney General William Barr directed the filing of the motion to dismiss in order to appease the President.[6] The presiding United States District Court Judge Emmet Sullivan[7] determined that he ought not dismiss without receiving more information and oral argument on the appropriateness of such a dismissal.[8] This resulted in a multi-sided altercation involving the DOJ, defendant, presiding judge, a court-designated amicus curiae, and the Circuit Court of Appeals.

Politics and allegations of official corruption aside, at its heart the DOJ's motion to dismiss raised the important question of how to balance prosecutorial discretion against a court's oversight responsibilities. Our

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[2] *See* 18 U.S.C. § 1001.

[3] *In re* Flynn, 973 F.3d at 76. For a detailed description of the investigation and circumstances leading to the accusations against Michael Flynn *see generally* Brief for Court Appointed *Amicus Curiae* at 3–17, United States v. Flynn, No. 17-cr-232 (D.C. Cir. June 10, 2020). Flynn initially opted to cooperate with the Office of Special Counsel's investigation and provide information about his communications with Russian officials and others during President Trump's transition. *See id.* at 17. Flynn spoke with investigators numerous times and then pleaded guilty in the Federal District Court for the District of Columbia with the understanding that he would receive leniency in exchange for his cooperation. *See id.* at 17–18. His sentencing was initially postponed in order to allow Flynn to continue his cooperation. *See id.* at 21–22. Subsequently, Flynn ceased cooperating and then filed a motion to withdraw his guilty plea. *See id.* at 22–25.

[4] *See In re* Flynn, 973 F.3d at 76.

[5] *Compare* Government's Motion to Dismiss the Criminal Information Against the Defendant Michael T. Flynn at 1–2, United States v. Flynn, No. 17-cr-232 (D.C. Cir. May 7, 2020) and Hans A. von Spakovsky, *Wrongful Michael Flynn Prosecution Blocked by Appeals Court: Legal Nightmare Should End*, HERITAGE FOUNDATION (June 29, 2020) http://www.heritage.org/courts/commentary/wrongful-michael-flynn-prosecution-blocked -appeals-court-legal-nightmare-should, *with* Brief for Court Appointed *Amicus Curiae* at 1–2, Flynn, No. 17-cr-232) and Brief of Former Federal Prosecutors and High Ranking Department of Justice Officials as *Amici Curiae* at 21–24, United States v. Flynn, No. 17-cr-232 (D.C. Cir. May 20, 2020).

[6] *See* Brief for Court Appointed *Amicus Curiae* at 57–59, Flynn, No. 17-cr-232. *See generally* Sean Illing, *11 Legal Experts Agree: There's No Good Reason for DOJ to Drop the Michael Flynn Case*, VOX (May 8, 2020) http://www.vox.com/policy-and-politics/2020/5/8/21251827/michael-flynn-russia-investigation-barr-trump-doj.

[7] Judge Sullivan was appointed to the United States District Court for the District of Columbia by President Bill Clinton in 1994. *District Judge Emmett G. Sullivan*, UNITED STATES DISTRICT COURT, DISTRICT OF COLUMBIA, http://www.dcd.uscourts.gov/content/district-judge-emmet-g-sullivan.

[8] *See* Petition for Rehearing En Banc by Judge Emmet G. Sullivan, *In re* Flynn, No. 20-5143 2020 WL 5104220, at 3 (D.C. Cir. Aug. 31, 2020).

system of government values the notion that prosecutors have discretion in choosing to pursue a criminal case, which is foundational to the executive branch.[9] At the same time, the courts that make up the judicial branch have equally-valued obligations regarding cases coming before them.[10]

The Flynn predicament brings to mind a different context in which similar issues arise, i.e., what happens when a trial or appellate court receives requests by "progressive prosecutors"[11] to take action which might be considered lenient and/or inconsistent with the government's previous position? This is likely to arise more frequently as the election of progressive prosecutors, which started in a small handful of cities,[12] shows signs of becoming a national trend.[13]

These newly-elected officials are disturbed by past examples of prosecutorial misconduct, excessive force by police, over-incarceration, unnecessary and detrimental pre-trial detentions, and systemic racism, including the use of the death penalty.[14] Additionally, they believe that a prosecutor's office's energy should focus on the root causes of crime in addition to the work of seeking convictions and punishments.[15] Their reform-minded perspective means their office frequently reverses the course set by their predecessors and seeks a court's permission to do so.

New prosecutors have proffered the following changes in ongoing litigation: (1) dismissals or downgrading of charges for particular low level and/or victimless crimes;[16] (2) recommendations of diversion programs in lieu of more traditional prosecutions;[17] (3) reversal of decision

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[9] *See infra* notes 115–19 and accompanying text.

[10] *See infra* notes 142–47 and accompanying text; U.S. CONST. art. III.

[11] *See infra* notes 36–52 and accompanying text.

[12] *See infra* note 37 and accompanying text.

[13] *See id*.

[14] *See generally* Jeremy Travis, Carter Stewart & Allison Goldberg, *Prosecutors, Democracy, and Justice: Holding Prosecutors Accountable*, 2–5 (September 2019), https://static1.squarespace.com/static/5c4fbee5697a9849dae88a23/t/5d6d8d224f45fb00014076d5/1567460643414/Prosecutors%2C+Democracy%2C+Justice_FORMATTED+9.2.19.pdf (explaining imperatives for reform); Chad Flanders & Stephen Galoob, *Introduction: Progressive Prosecutors in a Pandemic*, J. OF CRIM. L. & CRIMINOLOGY (forthcoming) (manuscript at 4–9) (available at https://ssrn.com/abstract=3605593) (same).

[15] *See id.*

[16] *See* Brennan Center for Justice, *21 Principles for the 21st Century Prosecutor*, 5–6, https://www.brennancenter.org/sites/default/files/2019-08/Report_21st_century_prosecutor.pdf, (last visited Sept. 28, 2020); *infra* notes 60–75 and accompanying text.

[17] *See infra* note 42 and accompanying text.

to seek a death penalty;[18] (4) concession of issues on appeal;[19] (5) concession of issues in post-conviction litigation;[20] (6) refraining from prosecuting or seeking certain sentences in categories of cases.[21] In virtually all of these situations, the defendant agrees with the prosecutor's recommendation, which is then brought forward for judicial review. At that point, the cases present many of the questions that confronted Judge Sullivan in the Flynn case: whether the judge, or panel of judges, has the authority or obligation to scrutinize the proposed disposition, how searching that scrutiny should be, and what standard governs when scrutiny is applied.

This article examines the law at play when a prosecutor and defendant jointly propose a particular result. Given the steady expansion of reform-minded prosecution and the obvious politicization of prosecutorial discretion at the federal level, these issues have taken on new urgency, but have not been afforded sufficient attention.[22] The fact that progressive prosecutors are democratically elected means that without adequate standards there is a distinct risk that a single judge may choose their own views on crime and punishment over those of the citizens who elected the chief prosecutor. Is this anti-democratic or is the prosecutor's successful platform no longer relevant in the assessment of a proposed result's propriety in a criminal case?

The law surrounding these issues is a bit of a hodgepodge. First, there are multiple and often competing constitutional and policy considerations. Second, criminal procedure rules and rules of professional ethics also apply. Finally, as mentioned in the preceding paragraph, it is important to consider the will of the electorate.

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[18] *See infra* notes 77–87 and accompanying text.

[19] *See infra* notes 92–112 and accompanying text.

[20] *See id.*

[21] *See infra* notes 60–112 and accompanying text.

[22] Legal scholarship and other publications on the subject of progressive prosecutors focus on election campaigns (*see, e.g.*, Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. (2019), https://escholarship.org/uc/item/2rq8t137), conflicts with police or police unions (*see, e.g.*, *id.*), conflicts with state government (*see, e.g.*, Jordan Smith, *The Power to Kill, What Happens When a Reform Prosecutor Stands Up to the Death Penalty*, THE INTERCEPT (Dec. 3, 2019, 8:31 AM) https://theintercept.com/2019/12/03/death-penalty-reform-prosecutors/), conflicts with line career prosecutors (Lauren M. Ouziel, *Democracy, Bureaucracy, and Criminal Justice Reform*, 61 B.C.L. REV. 523 (2020)), and advice on implementing agendas (*see, e.g.*, David Alan Sklansky, *The Progressive Prosecutor's Handbook*, 50 UC DAVIS L. REV. ONLINE 25 (2017) https://lawreview.law.ucdavis.edu/online/vol50/Sklansky.pdf.).

Constitutionally-speaking, a key concern is the separation of powers doctrine, particularly between the executive and judicial branches.[23] This arises when a United States Attorney, representing the Executive, prescribes a disposition[24] that is rejected or overridden by a member of the Judiciary. As discussed *infra,* constitutional separation is not absolute, but there are boundaries which need to be respected.[25] A violation of the separation between the executive and legislative branches is also possible. Members of the legislative branch may cite the "Take Care" clause in Article II, Section 3 of the Constitution in support of the notion that prosecutors may not ignore criminal statutes.[26] For example, critics have claimed that a chief prosecutor effectively repeals or amends the law—a function reserved for the legislature—by instituting a policy of not prosecuting cases of simple possession of marijuana while the statute criminalizing marijuana possession remains on the books.[27] In addition to the separation of powers doctrine, the Take Care clause is arguably inhibited by judicial control over the course of a prosecution.

Deemed as most essential, a prosecutor's discretion in *initiating* a criminal case is strongly protected.[28] Meanwhile, discretion in resolving or dropping an *existing* prosecution both at the trial and appellate stages, is less protected.

Under federal[29] and many state[30] Rules of Criminal Procedure, the dismissal of an active case by a prosecutor must receive the court's permission. Federal Rule of Criminal Procedure 48(a) requires "leave of court" for dismissal.[31] In fact, the key issue in the motion to dismiss the charges against Michael Flynn was the proper implementation of Rule 48(a).[32] Federal law regarding the purpose, interpretation, and standards of 48(a) is somewhat uncertain. As discussed *infra*, while it has been

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[23] *See infra* notes 130–51 and accompanying text.

[24] Separation of powers issues arise on the state level as well. *See generally* G. Alan Tarr, *Interpreting the Separation of powers in State Constitutions*, 59 N.Y.U. ANN. SURV. AM. L. 329 (2003) (comparing the federal and state separation of powers doctrines).

[25] *See infra* notes 134–35 and accompanying text.

[26] U.S. CONST. art. II § 3.

[27] *See infra* notes 149–51 and accompanying text.

[28] *See infra* notes 113–17 and accompanying text.

[29] Fed. R. Crim. P. 48(a).

[30] *See, e.g.*, 42 PA. STAT. AND CONS. STAT. ANN. § 8932 (West); Miss. R. Crim. P. 14.6.

[31] Fed. R. Crim. P. 48(a) ("The government may, with leave of court, dismiss an indictment, information or complaint").

[32] *See In re* Flynn, 961 F.3d 1215, 1219–21 (D.C. Cir. 2020), *rev'd*, 973 F.3d 74 (D.C. Cir. 2020).

addressed by the United States Supreme Court,[33] courts still struggle over selecting the most appropriate criteria when deciding whether to grant a motion to dismiss.[34] Furthermore, rules like 48(a) only govern adjudications of motions to dismiss. Prosecutorial actions of a different nature, such as concessions on appeal, are governed by different rules, or rules which have not been codified at all.[35]

Part I of this article describes, and provides examples of, progressive prosecutors' reform positions. It continues with specific examples of courts rejecting a variety of new prosecutorial reforms in a variety of jurisdictions. Part II discusses key legal principles and values that are implicated in, or violated by, judicial scrutiny of jointly-proposed dispositions by the prosecution and defense. These principles include prosecutorial discretion, separation of powers, and democracy. Part III analyzes Federal Rule of Criminal Procedure 48(a) and the Michael Flynn case to reveal courts' and commentators' different, and even contradictory, interpretations of the Rule. Part IV outlines perspectives on whether voter views should affect criminal law policy and enforcement. It emphasizes that judges' interference with the implementation of new, progressive policies can be enormously impactful and defeat needed change. Finally, Part V recommends a two-pronged standard, consisting of non-corruption on the one hand and protecting the court's integrity on the other, for when a court has occasion to approve or reject a disposition proposed jointly by the prosecution and defense.

I. PROGRESSIVE PROSECUTORS AND REFORM EFFORTS

A. The Wave

What started as a few isolated incidents of electing new local prosecutors[36] with progressive agendas has developed into a wave. Over the past fifteen years, citizens have elected at least fifteen new and reform-

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[33] *See* Rinaldi v. United States, 434 U.S. 22, 29–30 (1977).

[34] *See infra* notes 180–205 and accompanying text.

[35] *See* United States v. Ammidown, 497 F.2d 615, 619–20 (1973) (finding guidance from Rule 48(a) interpretations for appellate court's consideration of government's concession on appeal).

[36] At the state level, chief local prosecutors are ordinarily elected in county-wide elections. *See* Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 589 (2009). In some states, responsibility for criminal prosecutions lies within judicial districts. *See id.* In the federal system, criminal cases are prosecuted by Assistant United States Attorneys, none of whom are elected. *See Organizational Chart*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/criminal/sectionsoffices/chart (last visited Sept. 27, 2020).

minded candidates to the office of chief prosecutor.[37] These prosecutors are not carbon copies of each other. They come from varying professional backgrounds, such as former assistant prosecutors,[38] assistant public defenders,[39] private criminal defense attorneys,[40] and civil rights lawyers.[41] Nevertheless, they share most, if not all, of the following goals: improved

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[37] *See generally* Jeffrey Bellin, *Expanding the Reach of Progressive Prosecution*, 110 J. CRIM. L. & CRIMINOLOGY 707 (2020) (describing the "rise of the progressive prosecutor"). The following is a list, by county or district and year of taking office of most, but not necessarily all, successful progressive candidates. These lawyers ran on progressive platforms to varying degrees and my listing them here is not meant to convey my judgment regarding whether or not they are truly progressive. They are: Dan Satterberg, King County, WA, 2007, *see* https://www.seattletimes.com/seattle-news/satterberg-to-fill-malengs-post/; Thomas B. Wine, Jefferson County, KY, 2013, *see* https://www.wlky.com/article/tom-wine-sworn-in-as-new-commonwealth-s-attorney/3741810#; Stephanie N. Morales, Portsmouth, VA, 2015, *see* https://www.portsmouthcwa.com/commonwealths-attorney; Marilyn J. Mosby, Baltimore, Maryland, 2015, *see* https://www.stattorney.org/office/meet-marilyn-mosby; Kimberly Foxx, Cook County, IL, 2016, *see* https://www.cookcountystatesattorney.org/about/kimberly-foxx; Beth McCann, Denver, CO, 2017, *see* https://www.denverda.org/meet-the-da/; Kim Ogg, Harris County, TX, 2017, *see* https://www.houstonchronicle.com/news/houston-texas/houston/article/Ogg-takes-over-DA-s-office-with-family-ceremony-10831228.php; Aramis D. Ayala, Ninth Judicial District, FL, 2017, *see* https://www.sao9.net/aramis-d-ayala.html; Eric Gonzalez, Kings County, NY, 2018, *see* http://www.brooklynda.org/eric-gonzalez/; Lawrence S. Krasner, Philadelphia County, PA, 2018, *see* https://www.phila.gov/districtattorney/aboutus/Pages/DistrictAttorney.aspx;Rachel Rollins, Suffolk County, MA, 2019, *see* https://www.suffolkdistrictattorney.com/about-the-office/meet-district-attorney-rollins; John Creuzot, Dallas County, TX, 2019, *see* https://www.nbcdfw.com/news/local/dallas-county-da-swears-in-prosecutors-and-investigators/9641/; Jason Anderson, San Bernardino County, CA, 2019, *see* https://www.sbsun.com/2019/01/08/new-san-bernardino-county-district-attorney-swears-in/; Chesa Boudin, San Francisco, CA, 2020, *see* https://www.ktvu.com/news/chesa-boudin-sworn-in-as-san-franciscos-30th-district-attorney; Deborah Gonzalez, Western Judicial Circuit of Georgia, 2020, *see* https://www.nbcnews.com/news/latino/deborah-gonzalez-makes-history-georgia-s-first-hispanic-district-attorney-n1249744*;* George Gascon, Los Angeles, CA, 2020, *see* https://apnews.com/article/george-gascon-wins-la-district-attorney-c833851676c93caa2775d6207a27a668; Jason Williams, New Orleans, LA, 2020, *see https://thelensnola.org/2020/12/05/jason-williams-will-be-next-orleans-parish-da/.*

[38] *See, e.g.*, *Brooklyn DA Eric Gonzalez*, BROOKLYN DIST. ATTORNEY'S OFF. (2017), http://www.brooklynda.org/eric-gonzalez/.

[39] *See, e.g.*, Derek Hawkins, *Progressive Lawyer Wins San Francisco District Attorney Race, Continuing National Reform Trend*, WASHINGTON POST (Nov. 10, 2019 2:51 AM), https://www.washingtonpost.com/nation/2019/11/10/progressive-lawyer-wins-san-francisco-district-attorney-race-continuing-national-reform-trend/.

[40] *See, e.g.*, *About the District Attorney*, OFF. DIST. ATT'Y, https://www.phila.gov/districtattorney/aboutus/Pages/DistrictAttorney.aspx (last visited Sept. 27, 2020).

[41] *See, e.g.*, STATE ATT'Y NINTH JUD. DIST., https://www.sao9.net/aramis-d-ayala.html (last visited Sept. 27, 2020).

fairness, bail reform, expanded or open-file discovery, increased use of diversion programs and alternatives to incarceration, diversity in hiring, prosecution of illegal use of force by law enforcement officers, and where applicable, non-use of the death penalty.[42]

Successful progressive candidates run on platforms of reform. Rather than traditional prosecutor platforms which stress law enforcement and/or trial experience, these candidates promote changing office policies.[43] They tap into the public's desire against spending scarce resources on the prosecution of certain offenses, like the possession of marijuana for personal use.[44] They appeal to community members' disillusionment over mass incarceration and its devastating consequences for both those incarcerated and their families.[45] They address frustrations over racism and brutality by law enforcement, and the lack of justice for its victims.[46]

The recent wave of progressive prosecutors does not present identical ideologies or implementation strategies. However, there is enough overlap that models have sprung up containing best practices and advice for success.[47] One recent publication, *21 Principles for the 21st Century Prosecutor* from the Brennan Center for Justice, contains a list of specific policies and positions that would advance criminal justice reform with emphases on fairness, conviction review, and lower rates of incarceration.[48] Many reform-driven acts and policies such as restrained selection of charges, open discovery, and "employing the language of respect"[49] do not require court approval. But many more lead to dispositions which a

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[42] *See 21 Principles for the 21st Century Prosecutor*, BRENNAN CTR. JUST. (last visited Sept. 28, 2020), https://www.brennancenter.org/sites/default/files/2019-08/Report_21st_century_prosecutor.pdf; Davis, *supra* note 22 at 7; Sklansky, *supra* note 22, at 26.

[43] *See* Davis, *supra* note 22, at 7; Bruce Green & Rebecca Roiphe, *When Prosecutors Politick: Progressive Law Enforcers Then and Now*, J. CRIM. L & CRIMINOLOGY, 16–17 (forthcoming), https://ssrn.com/abstract=3596249.

[44] *See* Davis, *supra* note 22, at 12.

[45] *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

[46] *See, e.g.*, Steve Bogira, *The Hustle of Kim Foxx*, MARSHALL PROJECT (Oct. 29, 2018, 6:00 AM), https://www.themarshallproject.org/2018/10/29/the-hustle-of-kim-foxx. Foxx was elected prior to the deaths at the hands of police of Breonna Taylor, Ahmaud Arbery, George Floyd, and others. One might now anticipate an increase in the numbers of such candidates for office of district attorney.

[47] *See* BRENNAN CTR. JUST., *supra* note 42, at 4; *see* Sklansky, *supra* note 22; *see* Travis, et. al., *supra* note 14.

[48] *See* BRENNAN CTR. JUST., *supra* note 42 at 3.

[49] *See id.* at 25. This includes avoiding the use of dehumanizing words or phrases such as, "convict," "inmate," and "parolee." *See id.*

court must review and approve. For example, when a prosecutor concedes an issue on appeal or in post-conviction litigation, the appellate or post-conviction court will independently decide whether the concession is justifiable.[50] The same is true when both parties submit a guilty plea agreement to the court.[51] This provides judges with an opportunity to thwart the progressive agenda's implementation. Yet, the "how-to" models for progressive prosecutors neither anticipate nor plan for pushing these positions through court. A likely explanation is that in the past, when both parties agreed upon a resolution of a criminal case at any stage, the presiding court was ordinarily all too happy to remove the case from an overloaded docket. This is not a cynical perspective—it would be reasonable for a court to trust that when opposing sides agree, the result is balanced and fair. However, in this new era of progressive prosecutors, some courts are inclined to distrust the motives of the prosecution and even speculate that the government is fighting on the defendant's side.[52]

B. The Pushback

Progressive prosecutors were predicted to face many challenges once in office, including some which do not involve clashes with judges.[53] Researchers, such as those at the Brennan Center, have warned new chief prosecutors about alienating individual police officers or entire police departments.[54] Progressive prosecutors have been alerted to possible intra-office conflicts where veteran line-prosecutors see no need for reform and

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[50] *See, e.g.*, Sibron v. New York, 392 U.S. 40, 58 (1968); Young v. United States, 315 U.S. 257, 258–59 (1942); United States v. Ammidown, 497 F.2d 615, 619–20 (1973).

[51] *See* Fed. R. Crim. P. 11. *See also* Darryl Brown, *The Judicial Role in Criminal Charging and Plea Bargaining*, 46 HOFSTRA L. REV. 63, 80 (2017) (emphasizing that courts considering a plea agreement have an obligation to determine its voluntariness and that it serves justice).

[52] *See infra* notes 60–112 and accompanying text.

[53] *See, e.g.*, Davis, *supra* note 22, at 19–21. *See also* Nicholas Goldrosen, *The New Preemption of Progressive Prosecutors*, 2021 U. ILL. L. REV. ONLINE 150, 151–52 (Apr. 18, 2021) (calling attention to legislation aimed at restricting discretion of county prosecutors proposed and enacted in several states).

[54] *See* Davis, *supra* note 22, at 15; Chris Brennan, *U.S. Attorney Bill McSwain Spent More Than $75,000 to Slap His Name and Face on Billboards*, PHILA. INQUIRER (July 24, 2020), https://www.inquirer.com/politics/clout/us-attorney-bill-mcswain-philly-da-larry-krasner-fraternal-order-police-governor-tom-wolf-scott-wagner-20200724.html (reporting the Fraternal Order of Police was flying a banner over the beaches on the New Jersey shore calling to "dump" Philadelphia District Attorney Larry Krasner); Heather L. Pickerell, Note, *How to Assess Whether Your District Attorney is a Bona Fide Progressive Prosecutor*, 15 HARV. L. & P. REV. (forthcoming 2021) (manuscript at 5 n.17) (one file at: https://ssrn.com/abstract=3621470).

resist the new programs.[55] They have also been the subjects of recall measures.[56] Perhaps less predictably, the wave of progressive prosecutors has been harshly criticized by former President Trump[57] and attacked by former Attorney General William Barr,[58] who has described reform-oriented prosecutors as being anti-police—fueling prosecutor-police discord.[59]

The challenge that this paper focuses on is when a court must rule on, and resists or denies, the prescription offered by a progressive prosecutor—a prescription often more favorable than earlier proposals and one with which the defendant agrees. Examples of this fall loosely into several scenarios: (1) policy choices not to prosecute or to undercharge certain crimes; (2) policy choices against seeking or defending death sentences; (3) more lenient positions on bail taken in the pre-trial phase; and (4) concessions in the appeal and post-conviction phases. These scenarios are often governed by different provisions of law and are discussed below, individually.

1. Non-prosecution and undercharging

As already noted, a common policy adopted by progressive prosecutors is the decision against filing criminal charges for certain low-level offenses: most typically the personal possession of marijuana.[60] The list

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[55] *See* Ouziel *supra* note 22, at 558–63; Pickerell, *supra* note 54, at n.21.

[56] *See, e.g.*, Kent Scheidegger, *Recalling a District Attorney*, CRIME & CONSEQUENCES (Dec. 30, 2020, 4:36 PM), https://www.crimeandconsequences.blog/?p=2684#more-2684 (referring to Los Angeles District Attorney, George Gascon). Recently elected Los Angeles County District Attorney George Gascon has even been sued over his reforms. *See* Nathan Solis, *LA County Prosecutors Sue DA Gascón Over Criminal Justice Reforms*, COURTHOUSE NEWS SERV. (Dec. 30, 2020), https://www.courthousenews.com/la-county-prosecutors-sue-da-gascon-over-criminal-justice-reforms/. *See also* Katie Dowd, *Here's the Latest on the 'Recall Chesa Boudin' Campaign in San Francisco,* SFGATE (Apr. 20, 2021 4:00 AM), https://www.sfgate.com/bayarea/article/2021-04-boudin-recall-san-francisco-da-16061384.php (recall effort also underway in San Francisco).

[57] *See generally* Mona Lynch, *Regressive Prosecutors: Law and Order Politics and Practices in Trump's DOJ*, 1 HASTINGS J. CRIME & PUNISHMENT 195 (2020) (detailing the ways in which the Trump administration has attempted to thwart the agendas of reform local prosecutors).

[58] *See id.*; Michael Balsamo, *Barr Defends Police, Takes Swipe at Progressive Prosecutors*, PBS NEWS HOUR (Aug. 12, 2019, 1:48 PM), https://www.pbs.org/newshour/nation/barr-defends-police-takes-swipe-at-progressive-prosecutors.

[59] *See* Balsamo, *supra* note 58 (quoting Barr saying that progressive district attorneys, "spend their time undercutting the police, letting criminals off the hook, and refusing to enforce the law").

[60] *See, e.g.*, German Lopez, *The Trump Justice Department's War on Progressive Prosecutors*, *Explained*, VOX (August 16, 2019, 1:10 PM), https://www.vox.com/policy-and-

of prosecutors doing this continues to grow. Last year, Nashville, Tennessee District Attorney Glenn Funk stated his intention not to prosecute marijuana-possession cases.[61] This year, Harold Pryor, newly-elected State Attorney for Broward County, Florida, directed the police force to not open cases involving possession of small amounts of marijuana.[62] Ordinarily, decisions to refrain from bringing charges fit squarely within a prosecutor's total discretion.[63] Moreover, the choice not to initiate a case would rarely come before a judge.

However, Gregory Underwood, thrice-elected Commonwealth's Attorney in Norfolk, VA's experience highlights how that might not be the case.[64] In February 2019, Underwood moved to dismiss marijuana possession charges against two defendants who had been charged before the new policy was adopted.[65] The trial court denied the motion to dismiss.[66] Before the designated trial date, Underwood brought a mandamus action in Virginia's Supreme Court against the trial court judge requesting a directive that the judge dismiss the case.[67] The Virginia Supreme Court dismissed the mandamus petition,[68] finding that dismissing the marijuana charges involved a judicial act and thus it could not force the trial court to

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politics/2019/8/16/20807544/william-barr-larry-krasner-philadelphia-trump-justice-department. *See also* Bogira, *supra* note 46 (mentioning newly elected District Attorney Foxx' decision not to prosecute certain shoplifting cases as felonies).

[61] *See* Mariah Timms, *Nashville DA to Stop Prosecuting Minor Marijuana Possession Offenses Immediately*, TENNESSEAN (July 1, 2020, 12:38 PM), https://www.tennessean.com/story/news/crime/2020/07/01/nashville-da-no-more-minor-marijuana-possession-prosecutions/5356627002/.

[62] *See Broward Seeks to Reduce Prosecution for Misdemeanor Marijuana Possession: Report*, NBC 6 (Feb. 11, 2021, 1:47 PM), https://www.nbcmiami.com/news/local/broward-seeks-to-reduce-prosecution-for-misdemeanor-marijuana-possession-report/2381081/.

[63] *See infra* note 115 and accompanying text. One notable exception is that the right to equal protection in the Due Process Clause of the Fifth Amendment prevents "selective prosecution," such as a prosecution based on a standard such as race, religion or another arbitrary classification. *See* United States v. Armstrong, 517 U.S. 456, 464–65 (2006).

[64] *See* Brendan Ponton, *Virginia Supreme Court Panel: Norfolk Prosecutors Can't Just Dismiss Marijuana Cases*, 3WKTR (May 2, 2019, 10:57 PM), https://www.wtkr.com/2019/05/02/virginia-supreme-court-panel-norfolk-court-doesnt-have-to-dismiss-marijuana-charges/. Underwood was first elected in 2009 but his platform regarding not prosecuting marijuana possession was in 2017 and put into place in January 2019.

[65] *See In re* Underwood, Nos. 190497, 190498, 2019 Va. LEXIS 168 at *1 (Va. May 2, 2019).

[66] *Id*.

[67] *Id*.

[68] *Id*. at *6.

grant the prosecutor's motion via mandamus.[69]

Kim Foxx was elected District Attorney for Cook County, Illinois in 2016 on a progressive platform.[70] She reformed the enforcement of shoplifting laws by announcing that, while the statute set the threshold for felony liability at $300, she would not file felony shoplifting charges unless the value of the stolen merchandise was over $1,000.[71] Many constituents inside the city of Chicago approved of this move, but the police union and others in the suburbs were furious at Foxx.[72]

After Larry Krasner won his election to the Philadelphia District Attorney's Office, he decided that his Office would not prosecute violations of probation based upon new arrests until after those new cases were resolved.[73] After Krasner's Office refused to go forward with what it believed to be a premature accusation in a violation of probation case in September 2018, a Philadelphia trial court replaced his Office with a special prosecutor chosen from the private bar.[74] The Pennsylvania Supreme Court reversed the trial court's action, but only because it found no authority for selecting a special prosecutor from the private bar.[75] The question of whether the trial court could have appointed another Pennsylvania prosecutor was left open. Moreover, the court made clear that it did not approve of the D.A.'s unwillingness to do as the trial court instructed,[76] demonstrating the state Supreme Court's resistance to such exercise of prosecutorial discretion.

2. No death penalty

Progressive prosecutors often receive pushback for the choice not to seek death sentences.[77] In 1996, when New York State had a death penalty, Bronx County elected District Attorney Robert Johnson was disinclined to seek death sentences.[78] Because of Johnson's position, then-

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[69] *Id*. at *4–6.
[70] *See* Bogira, *supra* note 46.
[71] *See id.*
[72] *See id*. at 9–10.
[73] *See* Commonwealth v. Mayfield, No. 15 EM 2020, 2021 WL 1133197, at *2 (Pa. Mar. 25, 2021).
[74] *See id.* at *3.
[75] *See id.* at *7–8.
[76] *See id.* at *8.
[77] *See* Daniel Nichanian, *Newly Elected Prosecutors Are Challenging the Death Penalty*, THE APPEAL (Dec. 9, 2020), https://theappeal.org/politicalreport/new-prosecutors-challenging-death-penalty/.
[78] *See* Ann LoLordo, *Prosecutor Sticks to his Convictions Death Penalty: Bronx District Attorney Robert T. Johnson Opposes the Death Penalty and has Declined to Seek it in*

Governor George Pataki issued an executive order replacing D.A. Johnson with the State Attorney General to prosecute three men accused of murdering a police officer in the Bronx.[79] Johnson challenged the order as being outside of the Governor's legal authority but the Court of Appeals of New York upheld the Governor's Executive Order.[80] More recently, Aramis Ayala, the then-State's Attorney for Florida's Ninth Judicial Circuit announced that she would not seek death sentences.[81] Consequently, Ayala was removed from several murder prosecutions by the Governor's executive orders and replaced by the chief prosecutor from another circuit.[82] When Ayala challenged the executive orders, the Florida Supreme Court sided with the Governor,[83] holding that Ayala's refusal to consider seeking death was tantamount to her vetoing state law.[84] According to the court, an executive order was enforceable as long as it was not arbitrary, fanciful, or unreasonable.[85] Ayala chose not to run for reelection to a second term. Shortly before leaving office, she made a decision not to seek the death penalty in three pending murder cases.[86] Monique Worrell, Ayala's successor, also ran on a progressive platform.[87]

3. Bail reform

A common pre-trial issue addressed by progressive prosecutors is

Capital Crimes, Leading to a Showdown with New York Gov. George Pataki, BALTIMORE SUN (March 25, 1996), https://www.baltimoresun.com/news/bs-xpm-1996-03-25-1996085043-story.

[79] *See* Johnson v. Pataki, 91 N.Y.2d 214, 221 (1997).

[80] *Id*. at 228. The issue of mootness was also part of the case since by the time that Johnson appealed, one of the murder defendants had committed suicide and the prosecution of the other two was taken up in federal court. *Id.* at 222. The Court of Appeals decided that the mootness doctrine did not preclude its deciding the case. *Id.*

[81] *See* Ayala v. Scott, 224 So.3d 755, 756–57 (2017).

[82] *Id.* at 757.

[83] *Id*. at 759–60.

[84] *See id*. at 758.

[85] *Id*.

[86] *See* Greg Fox, *Ayala's Office Files Intent Not To Seek Death Penalty in 3 High-Profile Murder Cases, Records Show*, WESH (Jan 5, 2021 6:27 PM), https://www.wesh.com/article/ayalas-office-death-penalty-drops-intent/35124184.

[87] *See Monique Worrell to Replace Aramis Ayala as Orange-Osceola State Attorney*, CLICK ORLANDO (Nov. 4, 2020), https://www.clickorlando.com/results-2020/2020/11/04/monique-worrell-to-replace-aramis-ayala-as-orange-osceola-state-attorney/.

pre-trial detention and bail.[88] Bail reform has been proposed and implemented in a number of jurisdictions.[89] While multi-faceted, these changes typically involve a move away from cash or bail bonds toward imposing non-monetary conditions on released defendants, aimed at securing their return to court and the safety of their communities.[90] Despite a fair amount of general support for these policies, they have faced obstacles. For example, Chicago judges presiding at bail hearings have reportedly resisted D.A. Foxx's requests for non-monetary release conditions.[91]

4. Concessions on appeal or in post-conviction[92]

Newly-elected progressive prosecutors inherit cases with convicted defendants appealing or making collateral challenges in post-conviction actions. In those situations, prosecutors must decide whether to fully defend the validity of a conviction or concede legal issues when only a concession would be consistent with the prosecutor's reform agenda. As explained *infra*,[93] an appellate court's responsibility to decide issues regardless of concessions by parties may require an analysis that differs from that used by lower courts presented with a prosecutor's motion to dismiss.

When Larry Krasner was elected District Attorney of Philadelphia it was no secret that he did not support the death penalty.[94] After taking office, his administration stepped into the case of *Commonwealth v. Brown*.[95] Years earlier, Brown had been sentenced to death upon a jury verdict. Brown's petition for new guilt and penalty phase trials had been denied, and that denial was pending appeal in the Pennsylvania Supreme Court. D.A. Krasner filed papers in support of setting aside the death

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[88] *See* Aurelie Ouss & Megan Stevenson, *Bail, Jail, and Pretrial Misconduct: The Influence of Prosecutors* (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3335138; Flanders & Galoob, *supra* note 14, at 7.

[89] *See, e.g.*, N.J. STAT. ANN. § 2A:162-19 (2017); MD. CODE ANN., CRIM. PROC. § 4-216.1 (West 2017). For a comprehensive guide to creating bail reform and report on bail reform efforts, see COLIN DOYLE ET AL., CRIM. JUST. POL'Y PROGRAM, HARV. L. SCH., BAIL REFORM, A GUIDE FOR STATE AND LOCAL POLICYMAKERS (Feb. 2019), http://cjpp.law.harvard.edu/assets/BailReform_WEB.pdf.

[90] *See* DOYLE ET AL., *supra* note 89, at 10–26.

[91] *See* Bogira *supra* note 46.

[92] For a discussion of the respective roles of appellate and post-conviction prosecuting attorneys, *see generally* Elizabeth Webster, *The Prosecutor as a Final Safeguard Against False Convictions: How Prosecutors Assist with Exoneration*, 110 J. CRIM. L. & CRIMINOLOGY 245, 274–80 (2020).

[93] *See infra* notes 147 and accompanying text.

[94] *See* Davis *supra* note 22, at 11.

[95] 649 Pa. 293 (2018).

sentence, conceding Brown's claim that his lawyer was ineffective during the penalty phase. Nevertheless, the court upheld the death sentence holding that at trial, the office of the previous D.A. actively sought a death sentence and the jury voted to impose it. The court ruled that a new election and different point of view did not give authority for the new prosecutor to "commute a jury verdict."[96] In another case from Philadelphia, when Krasner took over the prosecution in a defendant's federal habeas corpus proceeding, his office conceded that the death sentence was unconstitutionally obtained.[97] The federal district court judge was disturbed by the change in position, designated the State Attorney General as *amicus curiae*, and directed him to file a brief and participate in an evidentiary hearing.[98]

Shortly after he took office, Jefferson County, Alabama District Attorney Danny Carr was approached by lawyers for death row inmate Toforest Johnson.[99] At that point, a trial court judge had denied Johnson's motion for a new trial and the appeal of that denial was pending. The Alabama Attorney General's Office was defending the conviction on appeal. Nevertheless, Carr was convinced that Johnson deserved a new trial and filed an amicus brief on that point in the appellate court.[100]

Last year, D.A. Foxx's office in Cook County, Illinois, agreed to set aside the double murder convictions of two men who had been convicted decades earlier for killing two teenage girls.[101] The prosecution

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[96] *See id.* at 314–29.

[97] *See* Wharton v. Vaughn, No. 01-6049, 2020 WL 733107, at *1 (E.D. Pa. Feb. 12, 2020).

[98] *See id.* at *8–9.

[99] *See* Brian Lynn, *Alabama Death Row Inmate Toforest Johnson Deserves a New Trial, Jefferson County DA Says*, MONTGOMERY ADVERTISER (June 12, 2020, 12:37 PM), https://www.montgomeryadvertiser.com/story/news/2020/06/12/jefferson-county-da-says-death-row-inmate-toforest-johnson-deserves-new-trial/3176457001/.

[100] *See id.* Several months later, both Alabama's former Attorney General and former Chief Justice of its Supreme Court expressed support for Carr's position in support of Johnson's innocence claim. *See* Beth Shelburne, *Former Alabama Attorney General and Chief Justice Support New Trial in Death Row Case*, WBRC (Mar. 9, 2021, 10:01 AM), https://www.wbrc.com/2021/03/09/former-alabama-attorney-general-chief-justice-support-new-trial-death-row-case/. Additional amici filed briefs in support of Johnson shortly thereafter. *See* Debbie Elliott, *New Eyes On Alabama Death Row Case After Integrity Review Raises Questions*, NPR (Apr. 5, 2021, 5:00 AM), https://www.npr.org/2021/04/05/983750480/new-eyes-on-alabama-death-row-case-after-integrity-review-raises-questions.

[101] *See* Megan Crepeau, *Prosecutors Agree to Drop Murder Cases Against Pair, But Judges Aren't On Board*, CHI. TRIBUNE (Nov. 27, 2020, 4:12 PM), https://www.chicagotribune.com/news/criminal-justice/ct-double-murder-convictions-controversy-20201127-dcth3zo6inhzfpsjmfknmfa7ze-story.html.

agreed to vacate the convictions due to its belief that there was perjured testimony at the trials.[102] The post-conviction motions were assigned to two different judges. One judge denied the motion while the other said that he would not dismiss without a full hearing.[103] The Chicago Tribune reporter covering the cases noted that a joint motion for dismissal "usually ends with the inmate's joyful release from custody" and that this might signal a "sea change in the way alleged wrongful convictions are handled."[104]

In 2017, the Illinois Appellate Court was confronted with a change in the Cook County Prosecutor's position on imposing a life sentence on a juvenile.[105] In 2012, the United States Supreme Court had ruled that it was unconstitutional to sentence juveniles to mandatory life in prison without possibility of parole.[106] Courts across the country began adjudicating requests for resentencing by those affected by the decision.[107] In Cook County, Adolpho Davis, who was sentenced at age 14 to life without parole, filed for a new sentencing hearing.[108] At the hearing, Foxx's predecessor argued that, while no longer mandatory, Davis should again be sentenced to life without parole and the court agreed. Foxx then took office in the midst of Davis' appeal from that sentence. After carefully considering the case and Davis' background, Foxx offered him an agreement that lowered his sentence, settled his appeal, and made him parole-eligible in just three years.[109] The appellate court accepted the arrangement.[110]

In Philadelphia, Krasner's office had a large number of similar juvenile lifer resentencing hearings on its plate.[111] Krasner's assistants reviewed each defendant's case and presented lesser sentence agreements

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[102] *See id.*
[103] *See id.*
[104] *See id.*
[105] Patrick Smith, *Sentenced As Teen To Life In Prison, Adolfo Davis Released After Precedent-Setting Legal Fight* WBEZ CHI. https://www.wbez.org/stories/sentenced-as-teen-to-life-in-prison-inmate-released-after-precedent-setting-legal-fight/d82c1fa0-a736-4d21-a3ef-c9e9b9f65224.
[106] Miller v. Alabama, 567 U.S. 460, 489 (2012).
[107] *See* John R. Mills et al., *Juvenile Life Without Parole in Law and Practice: Chronicling the Rapid Change Underway*, 65 AM. U. L. REV. 535, 556–57 (2016).
[108] *See* Bogira, *supra* note 46.
[109] *See id.*
[110] *See id.*
[111] At the time that *Miller v. Alabama* was decided, Philadelphia, PA led the nation in having the largest number of juveniles serving life without the chance of parole sentences. *See* David Love, *We're Number One!*, PHILA. CITIZEN (Mar. 30, 2017), https://thephiladelphiacitizen.org/juvenile-life-without-parole-jlwop-philadelphia/.

in many cases to various judges. Some judges accepted the agreements, but several did not.[112]

The foregoing contains examples of progressive prosecutors proposing reform-directed case dispositions for judicial approval and of judges resisting the proposals. The next Part of this article lays out the legal and ethical doctrines that make these decisions difficult for courts.

II. LEGAL DILEMMAS AND CONFLICTS

The exercise of prosecutorial discretion triggers an array of legal issues, particularly when a court questions a result jointly proposed by the prosecution and defense. However, a court's responsibility to oversee a case on its docket is considered just as inviolable as the concept of prosecutorial discretion. It has been fairly well-established that the court's judgment becomes increasingly relevant as a criminal case moves further along in the process. Thus, a prosecutor's initial decision to start a case will almost never be scrutinized by the judiciary.[113] On the other hand, acceptance of guilty plea agreements, dismissals of charges, and conviction or sentence reversals must be submitted for approval to the presiding court.[114] This section examines the legal principles and values that are considered, and may compete with one another, when a court decides whether to approve a proposed result.

A. Prosecutorial Discretion

The choice to charge someone with a crime and which crimes to charge have long been considered the most consequential acts of a prosecuting attorney. Historically, prosecutors have almost unbridled discretion in this regard.[115] First, communities want their prosecutors to use

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[112] *See* Samantha Melamed, *Philly Judges Block Krasner's Deals for Juvenile Lifers*, PHILA. INQUIRER (Apr. 6, 2018), https://www.inquirer.com/philly/news/crime/krasner-juvenile-lifer-judge-rejecting-deals-20180406.html.

[113] *See* United States v. Fokker, 818 F.3d 733, 741 (D.C. Cir. 2016) (citing United States v. Armstrong, 517 U.S. 456, 464 (1996)).

[114] *See* Fed. R. Crim. P. 11; United States v. HSBC Bank, N.A., No. 12-cr-763, 2013 WL 3306161, at *1 (E.D.N.Y. July 1, 2013). *See also* Sibron v. New York, 392 U.S. 40, 58 (1968) (holding that the court must evaluate every claim on appeal despite a concession by party).

[115] *See* ABRAHAM GOLDSTEIN, THE PASSIVE JUDICIARY, PROSECUTORIAL DISCRETION AND THE GUILTY PLEA 1–5 (1981); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 673 (2014) ("Enforcement discretion—the authority to turn a blind eye to legal violations—is central to the operation of both the federal criminal justice system and the administrative state."); Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Development*, 6 SETON HALL CIR. REV. 1 (2009); Fokker, 818 F.3d at 741.

good judgment in assessing the costs and benefits of pursuing any new criminal case. Second, many jurisdictions have crimes on the books which legislatures have not repealed but nevertheless have not been enforced by prosecutors because they no longer represent societal values.[116] There are also technical violations of criminal laws that are so insignificant that it would be absurd to launch a prosecution to address them. Finally, there are often extenuating or mitigating circumstances weighing against prosecution. If prosecutors were required to file charges for all uncovered violations, it would surely be a waste of government resources and cause defendants and witnesses unnecessary inconvenience and strife.

The American Bar Association Standards for the Prosecutor's Function provide guidance for considerations informing the decision to charge.[117] While the list of factors is wide-ranging, a prosecutor would be using discretion and subjective judgement for each factor. For instance, one factor is the motive of the complainant.[118] Another is the extent of harm caused.[119] Therefore, even standards for using discretion incorporate discretionary judgments.

The prosecution's discretion after the initiation of a criminal case raises additional considerations. Once a prosecution is underway, some court oversight is required for the case to change course. Therefore, once assigned to a court, any result—and consequences of any result—will be viewed as having the court's imprimatur. And formal criminal prosecutions must be supervised by a neutral judge with the responsibility of protecting the rights of the parties. Nevertheless, at any stage there will be some tension between this judicial responsibility and the concept of prosecutorial discretion. In his 1981 book, *The Passive Judiciary*, Abraham S. Goldstein urged the development of a "common law of prosecutorial discretion [to provide] a basis for defining the relation between judge and prosecutor more closely."[120] Goldstein recommended that judges determine the propriety, and even wisdom, of dismissals and guilty pleas based upon principles of accuracy, fairness, and reasonable interpretations of the law.[121] Rules of criminal procedure and case law currently provide for

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[116] Crimes such as blasphemy or adultery. *See, e.g.*, MASS. GEN. LAWS ch. 272 § 36 (2018); MINN. STAT. § 609.36 (2013).
[117] *See* STANDARDS FOR THE PROSECUTION FUNCTION §§ 3-4.3, 3-4.4 (AM. BAR ASS'N 2017).
[118] *See id.* § 3-4.4.
[119] *See id.*
[120] GOLDSTEIN, *supra* note 115, at 69–70.
[121] *See id.* at 68.

some judicial oversight.[122] In most contexts, however, the level and standard for oversight is unclear. In any event, when the issue emerges, a central concept is the protection of prosecutorial discretion.

B. Prosecutors' Ethical Obligations

The principle that criminal prosecutors have a unique ethical obligation to seek justice rather than merely seeking legal victory is well-known. The Supreme Court emphasized this in 1935 in *Berger v. United States*,[123] it appears in various professional ethics codes,[124] and it has been prescribed in numerous scholarly pieces.[125] In *Berger*, the Court stated the concept as follows:

> [The prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.[126]

Translated into practical terms, it dictates that when responsible for a case, the prosecuting attorney should serve the ends of justice, even when it means abandoning or "losing" the case. If the prosecutor has doubts about a case, they should consider the significance of those doubts and dismiss a case if that would be the fairer result. Likewise, the prosecutor should make justice-based decisions about disclosing evidence, offering plea agreements, conducting a trial, recommending sentences, and so forth.

Although the *Berger* Court directed "that justice shall be done," what "justice-based" or "doing justice" means in this context is not consistently clear or adequately defined.[127] Regardless, if a court refuses to

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[122] *See, e.g.*, Fed. R. Crim. P. 48(a); Young v. United States, 315 U.S. 257, 258–59 (1942).
[123] Berger v. United States, 295 U.S. 78, 88 (1935).
[124] *See, e.g.*, STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2 (AM. BAR ASS'N 2017); MODEL RULES OF PRO. CONDUCT r. 3.8 (AM. BAR ASS'N 2020).
[125] *See, e.g.*, R. Michael Cassidy, *(Ad)ministering Justice: A Prosecutor's Ethical Duty to Support Sentencing Reform*, 45 LOY. U. CHI. L. J. 981, 992 (2014); John E. Foster, *Note, Charges to be Declined: Legal Challenges and Policy Debates Surrounding Non-Prosecution Initiatives in Massachusetts*, 60 B.C. L. REV. 2511, 2527 (2019). *Cf.* Jeffrey Bellin, *Theories of Prosecution*, 108 CALIF. L. REV. 1203, 1207, 1212 (2020) (urging that the prosecutor's mission to do justice should be replaced with a mission to be a servant of the law, calling the former a "vacuous ideal"); Bellin, *supra* note 37, at 714 (suggesting an even more apt mission name: "caretaker of the criminal justice system").
[126] *Berger*, 295 U.S. at 88.
[127] *See* Bellin, *supra* note 125, at 1210, 1220. *See also* Abbe Smith, *Are Prosecutors Born or Made?*, 25 GEO. J. LEGAL ETHICS 943, 960 (2012) (maintaining that "prosecutors too often think that they alone know what justice is," but should be struggling to learn what

allow the result recommended by the prosecutor, it arguably thwarts the prosecutor's effort to carry out their ethical obligation. One such example is a prosecutor coming to believe that a police officer lied in a search warrant application during the defendant's appeal of the denial of a motion to suppress evidence seized.[128] Most would say that the prosecutor's ethical obligation is to disclose this information to the defense and not oppose the appeal. If the appellate court denies the appeal despite the prosecutor's concession,[129] it effectively blocks the prosecutor's effort to do justice. On the other hand, the prosecutor's ethical obligation can be seen as fully satisfied regardless of the ultimate outcome—the prosecutor has done all they can and cannot control the court's ultimate ruling. Nevertheless, a judicial ruling may create obstacles to the fulfillment of the prosecutor's ethical obligation to do justice.

C. Separation of Powers

This article does not attempt to provide an extensive presentation or analysis of separation of powers theories and their application. It is a broad topic with relevance in both civil and criminal contexts.[130] But some attention to it is necessary because the constitutionally-defined separate functions of all three branches of government are at issue in most questions regarding judicial oversight of prosecutorial choices.[131] Separation of powers issues are rooted in the distinctly different functions laid out in the first three Articles of the Constitution; the Take Care Clause in Article II is particularly significant in the context of prosecutorial discretion.[132]

Which of the separation of powers "fronts" is implicated depends upon the context of the judicial oversight dispute, discussed individually below. However, there is a threshold question between applying a formal or functional interpretation of constitutional separation of powers.[133]

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it is in any given situation).

[128] For coverage of the law regarding false statements in search warrant applications, *see* Franks v. Delaware, 438 U.S. 154 (1978).

[129] *See* Sibron v. New York, 392 U.S. 40, 58 (1968).

[130] *See* Rachel E. Barstow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 991–92 (2006).

[131] *See* Logan Sawyer, *Reform Prosecutors and Separation of Powers*, 72 OKLA. L. REV. 603, 615 (2020) (saying that "because they effectively exercise executive, judicial, and legislative power, prosecutors present a separation of powers nightmare in the modern criminal process").

[132] U.S. CONST. arts. I–III. Article II, Section 3 provides, *inter alia*, that the President "shall take care that the laws be faithfully executed."

[133] *See generally* Barstow, *supra* note 130; Sawyer, *supra* note 131, at 620–29; Alexander

It is largely accepted that separation of powers is not absolute.[134] How could it be? That is, the functions listed in Articles I-III are fairly general.[135] Thus, at the Founding, it was inevitable that there would be overlap among the branches, especially as the federal government grew in size and power. The doctrine may be applied with varying degrees of rigidity based on whether a formal or functional interpretation is applied. A dispute arises where an action taken by one branch of government is challenged with a claim that the act is reserved for a different branch. A court will then be asked to invalidate the act on separation of powers grounds. The formalistic approach requires a court to firmly identify which branch is responsible for acts of that nature.[136] After this difficult task, the court need only rule in favor of that branch.

The functional approach is more nuanced. A court starts from the premise that there is overlap and that some aspects of government fall within the jurisdiction of more than one branch.[137] Under this approach, a court has more flexibility and may allow what is regularly one branch's function to be exercised by another branch. The limiting principles in this analysis are to protect the central powers and core functions of each branch, but allow a degree of cross-over between branches.[138] The goal of using a functional approach is to facilitate the ability of the government as a whole to provide the most benefit to the public good.[139]

Tension between the Executive and Judicial branches is seen in the Michael Flynn case. When the Department of Justice (DOJ) moved to dismiss all charges and the trial judge chose to hold a hearing before granting the dismissal, the separation of powers between the Executive and Judicial branches was implicated.[140] The DOJ's position was that

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A. Zendeh, Note, *Can Congress Authorize Judicial Review of Deferred Prosecution and Nonprosecution Agreements? And Does it Need To?*, 95 TEX. L. REV. 1451, 1476–77 (2017).

[134] *See In re* Underwood, Nos. 190497, 190498, slip op. at *4 (Va. 2020); GOLDSTEIN, *supra* note 115, at 53.

[135] *See* U.S. CONST. arts. I–III.

[136] *See* Barstow, *supra* note 130, at 997; Sawyer, *supra* note 131, at 620–29.

[137] *See* Barstow, *supra* note 130, at 1000–01.

[138] *See id.*

[139] *See id.*; Price, *supra* note 115, at 716–17 (pointing out that "practice, as much as judicial precedent, is often an important determinant of constitutional meaning with respect to separation of powers. At least insofar as constitutional provisions are ambiguous, practice may reflect a 'gloss' on the text that has received popular approval through the political process and forms a baseline understanding of interbranch roles on which both Congress and the President may rely").

[140] *See In re* Flynn, 961 F.3d 1215, 1221–22 (D.C. Cir. 2020), *rev'd*, 973 F.3d 74 (D.C. Cir. 2020). *See also* United States v. Reyes-Romero, 327 F. Supp. 3d 855, 900 (W.D. Pa.

bringing charges and removing charges are strictly executive functions and that the judicial branch violates the separation of powers doctrine by venturing into that arena.[141] While the DOJ conceded that the Federal Rules of Criminal Procedure require court approval for dismissal of charges, its position was that because of the separation of powers doctrine, the approval role of the court is meant to be mostly perfunctory.[142] On the other hand, a prosecutor's proposed plea bargains, with or without sentencing agreements, require court approval, which, at least theoretically, courts grant after scrutinizing the proposed arrangements.[143] While these prosecutorial decisions are executive functions, since they are presented to a court in the middle, or even toward the end of a criminal proceeding, judicial oversight is expected. Thus, because the case is under the court's direction (rather than the prosecution's), the judicial function overlaps with, or even overtakes, the executive function. The court must then assess whether the proposed guilty plea is knowing and voluntary.[144] Courts also assess whether the proposed plea agreement is fair.[145] While judicial assessment of guilty plea dispositions has been an accepted part of the process for many years, it allows the court to wander into Executive Branch territory. A functional interpretation of separation of powers accepts judicial oversight because it does not take over the executive's role, but rather permits the respective roles of the Judicial and Executive branches to cooperatively bring about the most publicly-beneficial result.[146] Similarly, when a criminal conviction is on appeal, a prosecutor's

2018), *rev'd on other grounds*, 959 F.3d 80 (3d Cir. 2020) ("The effect of denying a prosecutor's motion to dismiss an indictment typically results in a conundrum in which the Judicial Branch is forcing the Executive Branch's hand in matters that are nearly exclusively within the Executive's power.").

[141] *See In re Flynn*, 961 F.3d at 1221–22. *See also* Todd David Peterson, *Federal Prosecutorial Independence*, 15 DUKE J. CONST. L. & PUB. POL'Y 217, 225 (2020). Judicial interference with decisions to charge or dismiss charges naturally leads to an even tougher issue. Even if a court denies a motion to dismiss, may the court order the prosecutor's office to proceed? Force it to take a case to its conclusion? Many say it may not. *See, e.g.*, Inmates of Attica v. Rockefeller, 477 F.2d 375, 379–80 (2d Cir. 1973). *See* Peterson, *supra* note 141, at 229–31. One option, however, is for the court to assign a special prosecutor. *See, e.g.*, Young v. U.S. *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 801–02 (1987) (saying that it is best for the local prosecuting authority to conduct a criminal case, but if it refuses, the court may appoint a private special prosecutor).

[142] *See In re Flynn*, 961 F.3d at 1221–22. *Cf.* Peterson, *supra* note 141, at 233 (claiming that separation of powers is not an issue when there is no transfer of power).

[143] *See* Santobello v. New York, 404 U.S. 257, 261–62 (1971); Fed. R. Crim. P. 11.

[144] *See* Fed. R. Crim. P. 11.

[145] *See Santobello*, 404 U.S. at 261; GOLDSTEIN, *supra* note 115, at 47–51.

[146] *See* GOLDSTEIN, *supra* note 115, at 53–58 (arguing that separation of powers need not prevent the judiciary from scrutiny of plea agreements).

concessions on issues, or failure to defend the conviction, are not determinative.[147] Despite separation of powers concerns, appellate courts usually assess a claim independently and will reject it if the court disagrees with the prosecution's argument.

Separation of powers issues between the Legislative and Executive branches most commonly arise alongside non-prosecution decisions. A prosecutor who chooses not to prosecute certain crimes or a particular cohort of offenders is often accused of usurping legislative power.[148] Whether these charging policies are announced or not, new prosecutors are accused of non-prosecution based on their personal predilections or on who their political supporters are. In all these contexts, prosecutors may be accused of prosecutor nullification.[149] Critics claim that these non-prosecution decisions nullify the legislatively-enacted penal code provisions prohibiting the conduct in question.[150] If a penal law criminalizes marijuana possession, for example, and a county prosecutor decides against ever bringing those charges, that law is *de facto* repealed in that locality. Likewise, should a prosecutor decide never to prosecute any juvenile as an adult despite being allowed to do so by state law, this decision arguably nullifies the code provisions related to transferring juvenile offenders from juvenile to adult court for certain serious crimes. Non-prosecution critics argue further that "nullification" for federal crimes is specifically prohibited by the "Take Care" Clause in Article II of the Constitution, which requires the Executive to take care that the laws promulgated by the Congress are faithfully executed.[151]

D. Protecting the Integrity of the Proceedings

A court's responsibility to protect the integrity of a proceeding before it is closely tied to separation of powers concerns,[152] yet deserves

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[147] *See* Sibron v. New York, 392 U.S. 40, 58 (1968); Montgomery v. Louisiana, 577 U.S. 190, 197 (2016) (mentioning that even though the parties agreed that the Court had jurisdiction, an *amicus* was appointed to argue against that position to help the Court determine whether the parties' position was correct).

[148] *See* Ayala v. Scott, 224 So.3d 755, 758 (Fla. 2017); see Price, *supra* note 115, at 674.

[149] *See id.*

[150] *See* Green & Roiphe, *supra* note 43, at 29.

[151] *See* Foster, *supra* note 125, at 2519; Price *supra* note 115. at 674. *See generally* Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 783–84 (2013).

[152] This is because in a criminal case, there may be times when a court's protection of its integrity and devotion to fairness will conflict with the preferences of the prosecution.

attention in its own right. An important and longstanding part of the judicial function is to prevent judicial proceedings from being tainted or corrupted.[153] Justice Louis Brandeis described the task as maintaining "respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination . . . . The court protects itself."[154] Applying this judicial obligation here, when parties jointly propose a disposition, the court must be satisfied that the integrity of the proceedings will not be compromised. Ordinarily, "integrity" refers to honesty and moral uprightness.[155] There is much agreement that a court should not accept a proposed dismissal, guilty plea, or concession when there is evidence of corrupt motivation of the parties, unfair favoritism, or bias. However, a court's assessment of a prosecutor's proposed result is greatly complicated if moral uprightness requires the court to decide if such a plan is the morally-correct one.

The court-appointed amicus in *United States v. Flynn* wrote about the values and doctrines described in Parts II.A-D.[156] In the next part, this article explains how such values are considered when a court must decide whether to grant a motion to dismiss.

III. RULE 48(A) AND *IN RE MICHAEL T. FLYNN*

Federal Rule of Criminal Procedure 48(a) provides that a prosecutor's motion to dismiss criminal charges will only be granted upon leave of court.[157] When DOJ sought dismissal of Flynn's charges, it moved under 48(a), which applies only to motions to dismiss. Rule 48(a) does not govern judicial oversight of prosecutorial positions or proposals such as guilty plea agreements, non-prosecution, or concessions during appeal and post-conviction.[158] Nevertheless, a close look at how it has

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[153] *See* McNabb v. United States, 318 U.S. 332, 342 (1943); Stone v. Powell, 428 U.S. 465, 485 (1976) (reiterating that, "courts, of course, must ever be concerned with preserving the integrity of the judicial process"); United States v. HSBC Bank U.S., N.A., No. 12-cr-763, 2013 WL 3306161, at *4 (E.D.N.Y. July 1, 2013); Brown, *supra* note 51, at 80.

[154] Olmstead v. United States, 277 U.S. 438, 483–85 (1928) (Brandeis, J. dissenting).

[155] *See Integrity*, MERRIAM WEBSTER, https://www.merriam-webster.com/dictionary/integrity (last visited Apr. 11, 2021).

[156] *See* Brief for Court Appointed *Amicus Curiae* at 7–16, United States v. Flynn (2020) (No. 17-cr-232).

[157] Fed. R. Crim. P. 48(a).

[158] *But see* United States v. Ammidown, 497 F.2d 615, 619–20 (D.C.Cir.1973) (explaining that a court's obligation when ruling on the acceptance of the prosecution's proposed guilty plea agreement is analogous to its role when passing on a Motion to Dismiss under 48(a)).

been interpreted, both before and in *Flynn*, illustrates the uncertain state of the law regarding standards for judicial oversight.

A. *In re Flynn* in a Nutshell

The DOJ's motion to dismiss charges against Michael Flynn after he had pleaded guilty and admitted his guilt multiple times under oath elevated the scope of prosecutorial discretion, and Rule 48(a) motions in particular, to front-page news.

Michael Flynn was the subject of interest during the early months of Special Counsel Robert Mueller's investigation into Russia's interference with the 2016 presidential election.[159] Eventually, Mueller announced that Flynn had agreed to cooperate with the investigation and receive a plea bargain in exchange.[160] In December 2017, Flynn pleaded guilty before Judge Sullivan in the United States District Court for the District of Columbia to making false statements to the FBI.[161] Flynn had not yet been sentenced when, on May 7, 2020, the DOJ asked Judge Sullivan to dismiss the case against Flynn pursuant to Rule 48(a).[162] By this time, Mueller had concluded his investigation and William Barr, nominated for the role of Attorney General by President Trump in 2019, was leading the Justice Department. Upon hearing the Government's motion and the agreement of Flynn's lawyers, Judge Sullivan scheduled a hearing to assist him in fulfilling his role under 48(a)—whether to grant leave of court. Given that both the Government and Flynn were in agreement, Judge Sullivan appointed retired federal judge John Gleeson as an amicus asking him to submit a brief raising available arguments in opposition to the motion to dismiss.[163] Judge Sullivan had good reason to ensure adequate scrutiny of the proposed dismissal. Unlike most cases in which the DOJ moves to dismiss charges, Michael Flynn had already pleaded guilty and admitted culpability in open court.[164] Additionally, in the days leading up to the motion, there were many reports in the press about both President Trump's potential influence on, and disagreement within, the

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[159] *See* Brief for Court Appointed *Amicus Curiae* at 6, United States v. Flynn (2020) (No. 17-cr-232).
[160] *See id.* at 17.
[161] *See In re* Flynn, 973 F.3d 74, 76 (D.C. Cir. 2020).
[162] *See id.* (stating that the DOJ moved to dismiss the case against Flynn claiming that newly discovered evidence of misconduct by the Federal Bureau of Investigation, made it such that the prosecution could no longer prove guilt beyond a reasonable doubt); *In re* Flynn, 961 F.3d 1215, 1219 (D.C. Cir. 2020), *rev'd*, 973 F.3d 74 (D.C. Cir. 2020).
[163] *See In re Flynn*, 973 F.3d at 77.
[164] *See* Brief for Court Appointed *Amicus Curiae* at 21, United States v. Flynn (2020) (No. 17-cr-232).

DOJ about whether to move to dismiss.[165]

Unhappy with Judge Sullivan's orders, Flynn's lawyers filed a mandamus petition in the D.C. Circuit requesting, *inter alia*, that Judge Sullivan's order for a hearing and briefing be vacated and that Judge Sullivan be ordered to grant DOJ's motion to dismiss.[166] While this was pending, the court-appointed amicus, John Gleeson, submitted a lengthy brief to the District Court recommending that the motion to dismiss be denied.[167] Shortly thereafter, a divided three-judge panel of the D.C. Circuit granted Flynn's request for mandamus.[168] The panel found that Judge Sullivan's order for a hearing and appointment of an amicus exceeded his authority.[169] The three-judge panel directed the dismissal of all charges.[170] Judge Sullivan, in turn, filed a Petition for Re-hearing en banc,[171] which was granted.[172] On August 31, 2020, the D.C. Circuit, sitting en banc, reversed the panel's holding and denied mandamus.[173] The en banc court determined that Flynn's mandamus petition was premature since Judge Sullivan had not completed his consideration of the DOJ's motion nor made a decision on the motion.[174] The court emphasized that the mere ordering of a hearing along with the amicus appointment did not

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[165] *See, e.g.*, Josh Gerstein & Kyle Cheney, *DOJ Drops Criminal Case Against Michael Flynn*, POLITICO (May 7, 2020 1:57 P.M.), https://www.politico.com/news/2020/05/07/top-prosecutor-in-flynn-case-abruptly-withdraws-amid-trump-attacks-243107; Adam Goldman & Katie Benner, *U.S. Drops Michael Flynn Case, in Move Backed by Trump*, N.Y. TIMES (May 7, 2020), https://www.nytimes.com/2020/05/07/us/politics/michael-flynn-case-dropped.html (noting that no career prosecutors signed the motion to dismiss); Adam Goldman & Mark Mazzetti, *Trump White House Changes Its Story on Michael Flynn,* N.Y. TIMES (May 14, 2020), https://www.nytimes.com/2020/05/14/us/politics/trump-michael-flynn.html?searchResultPosition=6 (reporting that President Trump and his allies accused the F.B.I. of framing Flynn).

[166] *See In re Flynn*, 973 F.3d at 76.

[167] *See* Brief for Court Appointed *Amicus Curiae*, United States v. Flynn (2020) (No. 17-cr-232).

[168] *See In re* Flynn, 961 F.3d 1215, 1227 (D.C. Cir. 2020), *rev'd*, 973 F.3d 74 (D.C. Cir. 2020).

[169] *See id.* at 1222.

[170] *See id.* at 1227.

[171] Petition for Rehearing En Banc by Judge Emmet G. Sullivan, *In re* Michael T. Flynn, (No. 20-51430), July 9, 2020.

[172] *See In re Flynn*, 973 F.3d at 77–78.

[173] *See id.* at 78.

[174] *See id.* at 79.

implicate any separation of powers concerns and was in line with precedent.[175] The matter was returned to Judge Sullivan for further proceedings on the DOJ's motion to dismiss.[176]

On November 25, 2020, President Trump granted Michael Flynn a full and unconditional pardon which covered the charges pending before Judge Sullivan,[177] and which Flynn accepted.[178] Consequently, on December 8, 2020, Judge Sullivan dismissed the pending indictment as moot.[179]

B. Interpretations of 48(a)

The pleadings and arguments in *Flynn* regarding Rule 48(a) display conflict and confusion about a court's role and how it should be fulfilled. These issues also present themselves outside of Rule 48(a) litigation in other contexts involving judicial scrutiny of a prosecutor's position.[180] It boils down to the following: is a judge's authority to grant leave of court to dismiss supposed to be exercised cursorily and merely as a "rubber stamp" for the government's proposal, or is it meant to have teeth and thus entail a careful assessment of the prosecutor's motion? If the latter, what should a judge examine and by what standards? Who or what is a court meant to protect when ruling on 48(a) dismissal motions?

Most analyses of the 48(a) standard rely, to a large extent, on *Rinaldi v. United States*.[181] In *Rinaldi*, the Supreme Court found that the federal district court abused its discretion when it denied the Government's 48(a) motion.[182] Several lower federal court decisions preceding

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[175] *See id. See also* United States v. Ammidown, 497 F.2d 615, 618 (D.C.Cir.1973) (noting that amicus curiae was appointed to support the position of the court when the Government did not oppose the defendant's appeal).

[176] Flynn had also asked that his case be reassigned to a different District Court judge. *See In re* Flynn, 973 F.3d 74, 78 (D.C. Cir. 2020). The en banc court denied that as well. *See id.* In the fall of 2020, hearings commenced before Judge Sullivan. *See* Eric Tucker, *Flynn Lawyer Says She Talked to Trump*, PHILA. INQUIRER, Sept. 30, 2020, at A4.

[177] *See* United States v. Flynn, No. 17-232 (EGS), 2020 WL 7230702, at *6 (D.D.C. Dec. 8, 2020).

[178] *See id.*

[179] *See id.* at *15. An opinion accompanied Judge Sullivan's Order of Dismissal in which *inter alia*, he rejected the Government's arguments on the court's role under Fed. R. Crim. P. 48(a), *see id.* at *8–9, and commented that a presidential pardon does not necessarily render a defendant innocent. *See id.* at *14.

[180] *See, e.g.*, *Ammidown*, 497 F.2d at 619–20 (applying separation of powers considerations at the appellate stage).

[181] 434 U.S. 22 (1977).

[182] *See id.* at 32. At that time Fed. R. Crim. P. 48(a) stated, "The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information

Rinaldi reflected courts' struggles with what criteria to apply when deciding 48(a) motions, with a range of broad and narrow views of the type of public interest concerns that were relevant.[183] *Rinaldi* is often cited for the proposition that the only true reason for requiring leave of court for dismissal is to protect a criminal defendant from being harassed with serial prosecutions by the Government i.e., to thwart the Government's effort to dismiss one set of charges only to file another set or other sets seriatim.[184] If that were the only standard then such a motion to dismiss should automatically be granted whenever a defendant does not object. However, this is a misrepresentation, as preventing the harassment of defendants is not the only criterion under 48(a).[185] The *Rinaldi* Court also recognized—but expressly chose not to address—the criterion of whether a court should consider if a dismissal is "clearly contrary to the public interest."[186] That standard, referenced by the *Rinaldi* Court in a footnote,[187] is considerably broader than the prevention of harassment. Moreover, in the footnote, the Court commented that though preventing harassment is quite often the main consideration, motions have been denied on more general public-interest concerns.[188]

In the decades since *Rinaldi*, 48(a)-related jurisprudence has displayed a lack of consistency. The following is a sampling of the array of stated acceptable parameters when a judge considers a 48(a) Motion to Dismiss: courts have very little discretion;[189] courts may consider many

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or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant."

[183] *Compare* United States v. Cowan, 524 F.2d 504, 512 (5th Cir. 1975), *and* United States v. Hamm 659 F.2d 624, 628 (5th Cir. 1981), *with* United States v. Doe, 101 F. Supp. 609, 610–11 (D. Conn. 1951), *and* United States v. Greater Blouse, Skirt & Neckwear Contractors Assoc., 228 F. Supp. 483, 486–87 (S.D.N.Y. 1964).

[184] *See In re* Flynn, 961 F.3d 1215, 1220 (D.C. Cir. 2020), *rev'd*, 973 F.3d 74 (D.C. Cir. 2020). *See also* United States v. Smith, 55 F.3d 157, 159 (1995) (deciding that rulings on 48(a) motions should be based solely on whether the prosecutor's motives are of good faith); Brief for Court Appointed *Amicus Curiae*, United States v. Flynn, No. 17-cr-232 at 35.

[185] *See generally* Thomas Ward Frampton, *Why Does Rule 48(a) Require "Leave of Court"?*, 73 STAN. L. REV. 28 (2020) (setting forth the history and goals of 48(a)).

[186] *See Rinaldi*, 434 U.S. at 29, n.15 (citing United States v. Cowan, 524 F.2d 504 (5th Cir. 1975)).

[187] *See id.*

[188] *See id.*

[189] *See, e.g.*, United States v. Pimentel, 932 F.2d 1029, 1033 (2d Cir. 1991); *In re Flynn*, 961 F.3d at 1220.

factors;[190] dismissal should be allowed where the evidence of guilt is insufficient;[191] dismissal should be allowed to prevent harassment of the defendant;[192] decision should be based upon whether the prosecution is motivated by good faith;[193] and dismissal should be denied when it is clearly contrary to the manifest public interest.[194] This variety of standards reflects courts' awareness that separation of powers is an important doctrine and that the exercise of judicial authority over a choice made by the executive branch may be fraught.

Judge Gleeson's amicus brief in *In re Flynn* exemplified a robust attempt to articulate a workable standard of Rule 48(a) and provided a comprehensive description of how 48(a) has been understood. He gleaned that regardless of whether a defendant joins in a prosecutor's motion to dismiss, the prosecutor must state non-pretextual reasons for dismissal, must demonstrate good faith, and may not abuse prosecutorial power.[195] At the same time, the court must ensure the dismissal will not expose the defendant to harassment, or the public to injustice.[196] Finally, Judge Gleeson pointed out that while performing this function, the court may not second-guess the prosecutor's policy decisions.[197]

C. In the State Courts

There is a fairly wide range of rules and standards among states regarding a court's role when a prosecutor moves to dismiss charges.[198]

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[190] *See, e.g.*, In re Richards, 213 F.3d 773, 786–87 (3d Cir. 2000). *See generally* United States v. Ammidown, 497 F.2d 615, 622 (D.C. Cir. 1973) (stating the court's views on the appropriate doctrines governing trial judges considering whether to deny or approve a prosecutor's motion to dismiss).

[191] *See In re* Flynn, 961 F.3d 1215, 1221 (D.C. Cir. 2020), *rev'd*, 973 F.3d 74 (D.C. Cir. 2020) (noting that "insufficient evidence is a quintessential justification for dismissing charges"). *See also* United States v. Ammidown, 497 F.2d 615, 623 (D.C. Cir. 1973).

[192] *See In re Flynn*, 961 F.3d at 1224; *In re* United States, 345 F.3d 450, 452–53 (7th Cir. 2003); Mary Miller, Note, *More Than Just a Potted Plant: A Court's Authority to Review Deferred Prosecution Agreements Under the Speedy Trial Act and Under its Inherent Supervisory Power*, 115 MICH. L. REV. 135, 168–69 (2016). *Cf.* Brief for Court Appointed *Amicus Curiae*, United States v. Flynn, No. 17-cr-232 at 29 (stating that there is no basis to believe that Rule 48(a) exists solely to prevent the harassment of a defendant).

[193] *See, e.g.*, United States v. Smith, 55 F.3d 157, 159 (4th Cir. 1995).

[194] *See, e.g.*, United States v. Reyes-Romero, 327 F. Supp. 3d 855, 897 (W.D. Pa. 2018) (citing *In re* Richards, 213 F.3d 773, 787 (3d Cir. 2000)).

[195] *See* Brief for Court Appointed *Amicus Curiae*, United States v. Flynn, No. 17-cr-232 at 32–38.

[196] *See id.* at 35.

[197] *See id.* at 36–37.

[198] *See* Joseph A. Thorp, *Nolle-And-Reinstitution: Opening the Door to Regulation of Charging Powers*, 71 N.Y.U. ANN. SURV. 429, 449–51 (2016). For a bit of history on

In some states, criminal procedure rules do not require court approval for a prosecutor to dismiss charges.[199] In other states, where leave of court is required,[200] the court's role is nevertheless, quite limited. For example, New Hampshire law directs judges to deny a prosecutor's dismissal motion only upon a finding of bad faith.[201] Illinois' rule dictates that dismissal should be permitted unless it is deemed "capricious or vexatiously repetitious or that the entry of a *nolle prosequi* will prejudice the defendant."[202] The Governor of Virginia recently signed legislation requiring a court to grant a motion to dismiss made by the Commonwealth with the defendant's consent unless it was the result of bribery or unlawful bias toward a victim.[203]

In other states, a murkier interest of justice standard is employed. California and Iowa rules require court approval for dismissal by the prosecution and direct judges to grant the motion "in furtherance of justice."[204] Additionally, Mississippi law clearly contrasts its Rule 48(a)(1) with the federal rule with statements that a Mississippi judge has much more power and discretion than a federal judge.[205]

The law in both state and federal jurisdictions focuses more on the level of judicial oversight embodied in their rules than on criteria or standards for that oversight. Motions to dismiss under Federal Rule 48(a), or its state equivalents, only cover judicial oversight of one particular prosecutorial action. As mentioned *supra*, judges assume greater oversight during later stages of a criminal case. Despite that, the oversight issues at the varying stages have several things in common. They all bring up prosecutorial discretion and separation of powers concerns, along with unclear criteria or standards for application.

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states' positions on judicial approval of dismissals *see* United States v. Cowan, 524 F.2d 504, 509–10 (5th Cir. 1975).

[199] *See, e.g.*, Vt. R. Crim. P. 48(a); State v. Jones, 157 Vt. 553, 556 (1991); D.C. Super. Ct. Crim. R. 48(a)(1); Ferrell v. United States, 990 A.2d 1015, 1018–19 (D.C. Ct. App. 2010).

[200] *See, e.g.*, 42 PA. CONS. STAT. § 8932.

[201] *See* State v. Allen, 150 N.H. 290, 293 (2003).

[202] *See* People v. Murray, 713 N.E.2d 814, 817 (Ill. App. Ct. 1999).

[203] *See* 2020 Va. Acts 1st Sp. Sess. ch. 21 (H.B. 5062) (amending VA Code Ann. § 19.2-256.6).

[204] *See* CAL. PENAL CODE § 1385(a) (West 2019); Iowa R. Crim. P. 2.33(1); State v. Brumage, 435 N.W.2d 337, 341 (Iowa 1989).

[205] *See* Bell v. State, 168 So. 3d 1151, 1155–56 (Miss. Ct. App. 2014).

IV. THE INTERSECTION OF DEMOCRACY, PROSECUTORIAL DISCRETION, AND THE JUDICIARY

Part I set forth instances in which courts have been reluctant, or simply refused, to accept a new government position conceding an issue, withdrawing or reducing charges, or reversing its position on imposing a death sentence. When this occurs, there is a possibility that a judge will substitute their view of the public interest for the views of a democratically-elected official.[206] This implicates the debate over whether, or to what extent, the criminal system should respond to the will of the electorate.[207]

On the one hand, democratization of our criminal prosecution system implies that majoritarianism should guide the enforcement of our criminal laws.[208] Criminal laws are written by democratically elected legislators, but this is inadequate because the will of state legislatures does not necessarily reflect more localized views about crime and how the exercise of prosecutorial discretion impacts people's lives. District Attorneys elected in county-wide elections are in a better position to implement policies desired by the residents of those localities.

On the other hand, there is fear that it is unwise to put criminal justice reform decision-making into the hands of the masses.[209] One concern is simply that voters who opt for a prosecutor candidate based on the candidate's reform platform lack the experience and expertise needed to choose what is best.[210] These commentators point out that choices about enforcing the criminal laws should be left to those who have studied the complicated problem of crime and punishment and to bureaucrats who have years of institutional experience to inform their policy choices.[211]

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[206] Two qualifiers are required here. First, admittedly, this will not always be the case. A prosecutor's request or concession may be rejected because the court suspects bad faith or corruption. Second, throughout history, many judicial decisions have been influenced by the decision-maker's political viewpoint to a greater or lesser degree. It may be argued that this is simply the same thing and a regrettable but unavoidable part of our judicial system. However, it could be said that it is more deliberately undemocratic when a court denies the implementation of a reform of law enforcement program which won the day in an election.

[207] *See generally* Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U.L. REV. 1367 (2017) (setting forth and analyzing the conflicting visions of democratization and bureaucratization of criminal justice).

[208] *See* Sawyer, *supra* note 131, at 630–31; Ouziel, *supra* note 22, at 540, 551; Foster, *supra* note 125, at 2534–35.

[209] *See* Kleinfeld, *supra* note 207; Ouziel, *supra* note 22, at 523, 527.

[210] *See* Rachel E. Barkow, *Prisoners of Politics: Breaking the Cycle of Mass Incarceration*, 104 MINN. L. REV. 2625 (2020).

[211] *See id.*

Another concern is that the democratization of criminal justice may not be an effective pathway to desirable reform. In his recent article, Professor John Rappaport warns that more democratic participation in criminal law enforcement policy may not actually result in a more egalitarian system.[212] He questions the assumption that a majority of community members will elect officials with anti-incarceration and anti-racism platforms. In another recent piece, Professors Rebecca Roiphe and Bruce Green voice concern over the perceived tension between populism and professionalism, and advise that heeding popular calls for certain results may require sacrifices of duties to the profession.[213]

The foregoing is only a sketch of the scholarly conversation on this subject. It is, however, important background information for considering the role of the judiciary in allowing or thwarting reform measures. For better or worse, as set forth *supra*,[214] we see progressive prosecutor candidates nationwide winning races increasingly often. Once elected, they initiate reform policies, many of which require court approval. If the court denies the request for a change in the course of litigation based on a general reference to the public's interest, then the electorate's preferences are overridden by the judiciary. This is particularly undemocratic, because while judges are popularly elected in many jurisdictions, judicial candidates do not run on platforms that address law enforcement issues such as the evils of mass incarceration in the same way that prosecutorial candidates do.[215] Thus, an elected judge will not ascend to the bench with a mandate for, or against, change and reform.

V. TOWARD A PROTECTIVE AND WORKABLE STANDARD

The recent events in the Flynn case, and the issues confronting the new wave of progressive prosecutors, present very different political issues associated with judicial oversight. Those near one end of the political spectrum rooted for judicial interference with the DOJ's plan to exonerate Michael Flynn, while those near the other end were against it, citing principles of prosecutorial discretion. The former group cited evidence, including Flynn's guilty plea and admissions under oath, that Flynn was

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[212] *See* John Rappaport, *Some Doubts About "Democratizing" Criminal Justice*, 87 CHI. L. REV. 711, 739–74 (2020).

[213] *See* Green & Roiphe *supra* note 43, at 35–36.

[214] *See supra* Part I.A.

[215] *See generally* MODEL CODE OF JUD. CONDUCT, r. 4.1 (A)(13) (AM. BAR ASS'N 2020) (prohibiting candidates for judicial office from making pledges or commitments regarding issues that are likely to come before the court).

guilty as charged.[216] They attributed the DOJ's motion to dismiss to the President's directives—or at least his influence.[217] Many members of the public, political and legal commentators, and a number of former federal prosecutors,[218] accused the DOJ of collaborating with the President on the Flynn case in violation of the DOJ's function as independent counsel for the best interests of the nation.[219] Moreover, the White House was accused of trying to reward Flynn for his loyalty and lack of cooperation with the investigation of Russia's interference in the 2016 presidential election.[220] In this context, Judge Sullivan's careful consideration of the DOJ's 48(a) motion appears quite necessary. At the very least, judicial oversight of the DOJ's change of course should seek to uncover corrupt motives if they exist.

This also arises in the context of a newly-elected prosecutor facing judicial scrutiny when promoting results which advance the policies that their constituents support. The lack of a clear standard for judicial scrutiny means that a judge—whether elected or appointed—may reject the new prosecutor's position simply because the judge believes the public's interest is more in line with the previous prosecutor's position. Of course, the court may not state its troubling goal so explicitly.[221] In fact, it is the lack of a clear standard which facilitates a vague explanation. Clear criteria for what the court may and may not consider would be a step in the right direction. But, before tackling the question of criteria, it makes sense to identify the primary values and concerns that judicial scrutiny is designed to protect.

A. What We Need Protection From

Part II, discussed four doctrines that should be considered and balanced in the question of a court exercising control over a proposed disposition agreed upon by the prosecution and defense. This Part returns to that discussion by asking precisely what judicial oversight should guard against.

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[216] *See supra* note 165 and accompanying text.
[217] *See id.*
[218] *See* Brief of Former Federal Prosecutors and High Ranking Department of Justice Officials as *Amici Curiae*, United States v. Michael T. Flynn, No. 17-cr-232 (D.D.C., May 20, 2020).
[219] *See e.g.*, *id.* at 21–24.
[220] *See id.* at 24; *see, e.g.*, Gerstein & Cheney, *supra* note 165.
[221] *See, e.g.*, Commonwealth v. Brown, 649 Pa. 293, 325 (2018) (stating that, "[e]lections alone cannot occasion efforts to reverse the result of judicial proceedings obtained by the prior office holder").

This article already described the existing confusion over the criteria and standards a court should utilize in its oversight of a jointly-presented case resolution.[222] However, there appears to be concurrence on two factors: (1) scrutiny of such agreements or compromises for evidence of corrupt motives including harassment of a defendant or dispensing favor for improper reasons,[223] and (2) not allowing the integrity of a court to be compromised by being complicit in the wrongs specified in factor (1). Types of improper or corrupt motives run the gamut from political favoritism, to bribery, and preferential treatment for members of certain races, ethnicities, or social classes.[224]

There is obvious overlap between the two general factors, especially since a court protects its integrity by scrutinizing the proposed plan for evidence of corruption. Nevertheless, there are two distinct interests at stake. One is that the system relies on the judiciary to check the power of the executive and prevent certain forms of abuse. Requiring judicial oversight of criminal case dispositions at any stage aims to protect the public from suffering the results of corrupt practices that otherwise would remain hidden. Where both sides in a criminal case come together to urge a resolution, absent judicial review, there is no one to challenge the propriety of the proposal. Second, all members of the judicial branch have a substantial interest in promoting trust in the system.[225] Its legitimacy depends on it.

These dangers alone should define the limits of judicial oversight in this context. A standard that encourages courts to also consider the "manifest public interest" has superficial appeal as it seems protective of vulnerable rights and feelings of well-being.[226] However, it assigns courts wide discretion to determine what is in the public's best interest. As with many legal concepts, there is opportunity to refine the definition of "public interest" through case law, statutes, and commentaries. However, those attempts will likely prove inadequate because the field is too

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[222] *See supra* notes 180–205 and accompanying text.
[223] *See id.*
[224] *See* United States v. Smith, 55 F.3d 157, 159 (4th Cir. 1995); United States v. Salinas, 693 F.2d 348, 352–53 (5th Cir. 1982).
[225] There are already many levels of mistrust in the judiciary. *See generally* Tom R. Tyler, *Public Mistrust of the Law: A Political Perspective*, 66 U. CINN. L. REV. 847, 848–52 (1998) (describing research revealing public lack of confidence in courts); NAT'L CONF. PUB. TR. & CONFIDENCE IN JUST. SYS., NATIONAL ACTION PLAN: A GUIDE FOR STATE AND NATIONAL ORGANIZATIONS 7–36 (1999) (describing the same as above). Rubber stamping corrupt deals will only make matters worse.
[226] *See supra* notes 183–97 and accompanying text.

wide.[227] Must a judge, applying a general public interest standard to a proposed plea deal or agreement to settle issues on appeal, consider whether it will protect community members from crime?[228] If so, what and whose criteria and social theories should be applied? Does the proposed resolution reflect equitable principles? Must the judge consider how best to rehabilitate a defendant?

This again raises the troubling phenomenon of judges interfering with the new ideals of criminal law enforcement advanced by progressive prosecutors. As described in Part I.B, we have begun to see judicial denials of dismissals and concessions under the rationale that a new viewpoint runs contrary to the previous prosecutor's chosen course—one based in longstanding policies—and therefore the new viewpoint is not in the manifest interest of the public.[229] The potential impact of this level of discretion cannot be overstated. Many recently-elected local prosecutors won because of the public's desire for important social change. Their moves to address mass incarceration, violence by law enforcement, and systemic racism in criminal justice may constitute the building blocks of that social change. From this perspective, a framework for judicial oversight which permits judges to interfere with upwelling new policies is unacceptable.

B. One Standard

Standards for judicial oversight of dispositions which are the product of the concurrent view of the prosecution and defense stem from several sources. For instance, criminal procedure rules such as Federal Rule of Criminal Procedure 48(a) govern motions to dismiss charges after formal charging.[230] A court's evaluation of a proposed plea agreement is deemed part of its responsibilities under Federal Rule of Criminal Procedure 11, or the state law equivalent.[231] During the appellate or post-conviction stages, courts refer to precedent requiring a full judicial evaluation

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[227] *But see* United States v. Ammidown, 497 F.2d 615, 622 (D.C. Cir. 1973), where the Court of Appeals narrowed the protection of the public interest factors to, "one or more of the following components: (a) fairness to the defense, such as protection against harassment; (b) fairness to the prosecution interest, as in avoiding a disposition that does not serve due and legitimate prosecutorial interests; (c) protection of the sentencing authority reserved to the judge."

[228] *See, e.g.*, *id.* at 618, where trial judge had refused reduced charge guilty plea agreement because the crime was heinous and the available sentence a "tap on the wrist."

[229] *See supra* notes 60–110 and accompanying text.

[230] *See supra* Parts III.A and III.B.

[231] *See Ammidown*, 497 F.2d at 618–19; *see also* Commonwealth v. Willis, 471 Pa. 50, 51 (1977) (exemplifying a state court equivalent to Rule 11).

despite a party's concession as part of the traditional judicial function.[232] In addition, appellate courts must be careful not to allow the parties' agreements to create precedent on a matter of law.[233] In light of these varying standards, a threshold question is whether the degree of judicial oversight should vary depending upon the stage of the proceedings at which a disposition is presented. I suggest that, with one exception,[234] it should not.

A practical and protective approach to sanctioning jointly agreed upon dispositions is to limit courts' inquiries to corruption and potential for tarnishing the integrity of the court. The clear removal of a more general "public interest" standard prevents a presiding court from occupying an inappropriate or even impossible position. Requiring jurists to decide whether the public is served by proposed results in criminal cases creates a true separation of powers problem.[235] Additionally, when a prosecutor acts in accordance with their constituents' policy preferences, judicial interference based on the court's own judgement of the public interest is offensive to, if not destructive of, the democratic process.

A standard that requires ruling out corrupt motives for a proposed disposition (non-corruption) admittedly raises a definitional problem, but identifying a workable definition for corruption is not as difficult as defining "public interest." Nevertheless, one must ask how corruption should be defined in this context. It is tempting to say, as some do about the word obscenity, that we know it when we see it.[236] But certainly that is of little utility. The dictionary defines corruption as powerful people behaving dishonestly, fraudulently, or illegally.[237] Such characterizations are useful when a court must decide whether to disallow a certain disposition of a criminal case. But, at the risk of adding ambiguity to the standard, corruption should have a broader meaning. It should also cover disposition proposals which are based on factors outside of what the law

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[232] *See supra* note 147 and accompanying text.

[233] *See* Sibron v. New York, 392 U.S. 40, 58 (1968).

[234] *See infra* note 243 and accompanying text. I do not suggest applying this standard to judicial review or interference with a prosecutor's choice not to prosecute a category of crimes or to forego seeking a certain type of sentence as those present themselves to the judiciary, if at all, when the chief executive of the jurisdiction takes some action to block that decision. *See supra* notes 148–51 and accompanying text.

[235] *See* United States v. Ammidown, 497 F.2d 615, 622 (D.C. Cir. 1973) (recognizing that "trial judges are not free to withhold approval of guilty pleas . . . merely because their conception of the public interest differs from that of the prosecuting attorney").

[236] *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J. concurring).

[237] *See Corruption*, MERRIAM WEBSTER, https://www.merriam-webster.com/dictionary/corruption (last visited Apr. 15, 2021).

demands.[238] The circumstances surrounding the Flynn case demonstrate why the expanded definition is necessary. If, as alleged, the DOJ under Attorney General Barr moved to dismiss all charges because the President wanted to reward Flynn's assistance in a cover-up and/or keep Flynn from cooperating against the President, it would mean the DOJ relied on factors outside of what the law allows. While the nefarious bases for DOJ's moving to dismiss the case against Flynn likely also reveal dishonesty[239] and illegality,[240] that is less clear and more difficult for a court to discern. Less high-profile examples of factors outside of what the law allows might include rewarding friends or powerful persons,[241] retaliating against enemies, or attempting to hide official misconduct. A two-pronged standard of non-corruption on the one hand and protecting the court's integrity (judicial integrity) on the other, protects the legal principles discussed in Part II. Arguably, any amount of judicial oversight infringes upon the valued custom of prosecutorial discretion. However, there is no value in protecting a prosecutor's discretion when it is tainted by corruption. At the same time, the proposed standard preserves a prosecutor's discretion to make case- and policy-related decisions consistent with their honest judgment.

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[238] In other words, a corrupt motivation for a proposed disposition would be one based upon considerations not relevant to or proper for such decisions. There are factors commonly understood to be appropriate when the government chooses to recommend dismissal or a plea agreement or to concede an issue on appeal. They include, strength of the evidence, degree of harm caused, availability of witnesses, and mitigating factors such as a defendant's remorse or rehabilitation. Factors deviating from this vein, depending upon the circumstances, may be deemed corrupt. The concept of a basis for a decision being outside of what the law demands is used in the analogous situation of assessing unfair prejudice in the admission of proffered evidence at trial. "Unfair" prejudice ensues when a jury is lured into deciding a case on the basis of factors different from what the law allows. *See* Fed. R. Evid. 403, Advisory Comm. Notes; Old Chief v. United States, 519 U.S. 172, 180 (1997).

[239] *See* Brief for Court Appointed *Amicus Curiae*, United States v. Flynn, No. 17-cr-232 at 50.

[240] The criminal offense of Obstruction of Justice is one possible illegal act suggested by the facts. *See* U.S. DEP'T OF JUST., REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION Vol. I at 192 (2019) (stating "Three basic elements are common to the obstruction statutes pertinent to this Office's charging decisions: an obstructive act; some form of nexus between the obstructive act and an official proceeding; and criminal (i.e., corrupt) intent").

[241] *See* Leon R. Yankwich, *Increasing Judicial Discretion in Criminal Proceedings*, 1 F.R.D. 746, 752 (1941) (citing United States v. Woody, 2 F.2d 262, 262 (D. Mont. 1924) (positing that the reasons offered by the government for dismissal, "savor altogether too much of some variety of prestige and influence (family, friends, or money) that too often enables their possessors to violate the laws with impunity; whereas persons lacking them must suffer all the penalties")).

Furthermore, a prosecutor's ethical obligation to seek justice will not be jeopardized by some judicial control because a change in position to prevent or remedy an injustice, an essential element of prosecutorial discretion that must be preserved, is not a corrupt motive. Such a justification is undoubtedly within what the law allows and even encourages. As to separation of powers requirements, this two-pronged standard defines the judiciary's role as one that is more in line with checking abuse of power by another branch,[242] as opposed to intruding on its function.

The last principle covered in Part II addresses the protection of the judiciary's integrity which is sufficiently protected by the second prong of the proposed standard. It is unnecessary for a court to independently determine whether a disposition promotes the public's interest in order to protect the court's integrity. In fact, courts tarnish their own integrity when judges substitute their own view of the public's best interests for those of either the prosecutor or voters. The integrity of the judiciary is sufficiently protected as long as it is permitted to check for corruption through an appropriate inquiry. In addition, the proposed standard's judicial integrity prong offers an extra level of protection for circumstances that do not rise to the level of corruption but nonetheless compromise the court's integrity by presenting questionable motives with which a court cannot risk being complicit.

There is one exception to this recommendation of a two-pronged standard which would apply in an appellate proceeding where opposing parties offer a stipulation to the resolution of a pure question of law. In that rare instance, the court's role should be enhanced because the outcome may produce legal precedent which was not decided upon by the court.[243] Where, on appeal, a prosecutor withdraws a claim, withdraws a defense to a claim, or asks a court to vacate a conviction, it will seldom lead to a decision from the court which would suggest that the court accepted a legal doctrine based solely on the wishes of the opposing parties. Therefore, the non-corruption/judicial integrity standard will be easily administrable in all stages of a case.

CONCLUSION

This article seeks to address several concerns. First, to expose the lack of clear standards related to judicial oversight of prosecutorial discretion, primarily in cases where the prosecution and defense agree on an issue. Such ambiguity creates confusion, a large portion of which arises

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[242] *See* Barstow, *supra* note 130, at 993–94.
[243] *See* Sibron v. New York, 392 U.S. 40, 58 (1968).

from cases involving motions to dismiss under Federal Rule of Criminal Procedure 48(a). There are also examples of confusion when leave of court is sought in other contexts such as the entry of a guilty plea, or concession of an appellate issue.

Second, this article aims to prescribe a uniform standard that would apply in 48(a) proceedings and to other motions or proposed orders, thus avoiding confusion. Proposed criteria take into account the separation of powers, courts' integrity, ethical implications, and democratic concerns.

The DOJ's strategy to exonerate Michael Flynn sought to hamstring Judge Sullivan's inquiry into whether there were corrupt motives at hand.[244] The inclination of those suspicious of the DOJ's motives was to urge considerable room for Judge Sullivan to be satisfied that dismissing the charges against Flynn was in the interests of justice.[245] However, an interest of justice standard presents definitional problems when prosecutors earnestly propose dispositions which advance policies they were elected to pursue, while judges block them based upon their own views of what justice requires. This article offers a more circumscribed inquiry which allows room for judicial interference with corruption.

Efforts to progressively reform law enforcement will likely continue to grow, and with them, we will see the issues raised in this article more often. This article proposes that the law embrace a standard of judicial scrutiny that would protect the public from corrupt use of prosecutorial discretion while also protecting the exercise of that discretion to achieve progressive reform.

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[244] The various pleadings in the case demonstrate much disagreement on the law. *See, e.g.*, Brief of *Amicus Curiae* of Citizens United, Citizens United Foundation, et. al, United States v. Michael T. Flynn, No. 17-cr-232, 2020 WL 4345176; Brief of Majority Leader Mitch McConnell and Senators Tom Cotton, Mike Braun, et. al, United States v. Michael T. Flynn, No. 17-cr-232, 2020 WL 2857118; Brief of Federal Practitioners as *Amici Curiae*, United States v. Michael T. Flynn, No. 17-cr-232, 2020 WL 2924537; Brief of the Chairman and Members of the Committee on the Judiciary, U.S. House of Representatives as *Amici Curiae* in Support of Neither Party, United States v. Michael T. Flynn, No. 17-cr-232; Petition for Rehearing En Banc by Judge Emmet G. Sullivan, *In re* Flynn, No. 20-5143 2020 WL 5104220; Brief for Court Appointed *Amicus Curiae*, United States v. Flynn, No. 17-cr-232; Brief of Former Federal Prosecutors and High Ranking Department of Justice Officials as *Amici Curiae*, United States v. Michael T. Flynn, No. 17-cr-232.

[245] *See, e.g.*, Brief for Court Appointed *Amicus Curiae*, United States v. Flynn, No. 17-cr-232; Brief of Former Federal Prosecutors and High Ranking Department of Justice Officials as *Amici Curiae*, United States v. Michael T. Flynn, No. 17-cr-232.