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REPRESENTING THE PEOPLE OF ILLINOIS:
PROSECUTORIAL POWER AND ITS LIMITATIONS

James R. Kavanaugh*

The State’s Attorney possesses broad discretionary authority to prosecute all violations of Illinois law. In this Article, Mr. Kavanaugh analyzes the sources and application of this authority with specific emphasis on the State’s Attorney’s role in the charging process, grand jury proceedings, plea bargaining and sentencing. The author also suggests certain legal and ethical limitations on the use of these powers to ensure that the prosecutor maintains the proper balance between the roles of advocate and seeker of justice.

The qualities of a good prosecutor are as illusive and impossible to define as those which mark a gentleman. And those who need to be told would not understand it anyway. A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizens’ safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.1—Robert H. Jackson, Associate Justice, United States Supreme Court.

Organized society has developed a system of laws restraining individual activity and providing for a resultant penalty when these laws are violated. In Illinois, the State’s Attorney is empowered2 to commence and prosecute a violation of these laws, be it felony or misdemeanor,3 on behalf of the People.4 The exercise of the State’s Attorney’s power has limitations and guidelines provided by statute, case law and professional ethics. This Article will analyze the powers of the Illinois prosecutor and the sources of those powers, emphasizing those specific areas where the prosecutorial power is most frequently applied. In addition, this Article will analyze the legal and ethical limitations on the use of these powers.

* Chief of the Criminal Bureau, Cook County State’s Attorney’s Office; B.S., University of Detroit; J.D., John Marshall Law School. This Article is dedicated to those prosecutors, present and past, who have shared with me, either directly or through the conduit of generations of prosecutors, their brotherhood, experience, knowledge, professionalism and ethical fibre—my thanks.

3. Id.
The Power To Prosecute

The office of State's Attorney is constitutionally created, and endowed with broad executive powers that cannot be encroached upon by either the legislature or the judiciary. Those powers are considered to be vested not only in the personage of the elected State's Attorney but also in each of his duly appointed Assistants.

Because the office of State's Attorney is of constitutional creation, its functions are thus subject to both the proscriptions and the protections which inure to governmental officers under the constitutional doctrine of the separation of powers. In juxtaposition to the other governmental branches' inability to encroach on the executive power of the prosecutor is their corollary ability, inherent in the tri-partite form of Illinois government, to exercise Constitutional checks and balances on the executive function of the prosecutor.

An analysis of the judicial interpretations of prosecutorial powers is crucial because of the inherent importance of any constitutionally created office and because the Illinois Constitution itself gives almost no guidance to the breadth of such power. The 1970 Illinois Constitution, like the 1870 Constitution, simply provides for the office’s existence, the manner of filling the prosecutor’s position, the year of election, the term of office, and the requirements for eligibility to the office. The only aspect of the office to “be provided for by law” was the salary of the office holder.

The source of the State’s Attorney’s power is puzzling in that the 1970 Constitution places the provision authorizing the existence of the office under the Judicial Article, even though the courts have said that the State’s Attorney, while exercising some “quasi-judicial powers,” is a member of the executive branch of government.

5. ILL. CONST. art. 6, § 19; People v. Pohl, 47 Ill. App.2d 232, 197 N.E.2d 759 (1964).
10. ILL. CONST. art. 6, § 19.
Further, the Illinois Supreme Court has designated the State’s Attorney as a “county officer.”13 Section Four of the 1970 Illinois Constitution14 speaks specifically of “county officers,” but does not name the office of State’s Attorney as one of them. A subsection of Article VII, Section Four, however, does state that “County officers shall have those duties, powers and functions provided by law and those provided by county ordinance,” in addition to those “derived from common law or historical precedent unless altered by law or county ordinance.”15 A reading of this subsection, along with two other provisions may clarify the nature of the State’s Attorney’s office.

Article II, Section 2 of the 1970 Illinois Constitution states that: “the enumeration in this Constitution of specified powers and functions shall not be construed as a limitation of powers of state government.”16 Section 9 of the Transition Schedule states that “the rights and duties of all public bodies shall remain as if this Constitution has not been adopted with the exception of such changes as are contained in this Constitution.”17 The Commentators to the Smith-Hurd Illinois Constitution noted that the 1970 revisions “[did] not change the common law or statutory duties of the State’s Attorneys.”18 An analytical reading of the above three sections demonstrates that this conclusion is indeed correct. The Illinois State’s Attorney is, thus, a constitutional officer19 exercising the common law powers of the prosecutor.20 Through legislative authority, he is endowed with discretionary powers in the execution of the law21 on behalf of the People.22 In addition, the State Attorney’s office is vested with some portion of the sovereign power of the State.23

15. ILL. CONST. art. 7, § 4(d).
16. ILL. CONST. art. 2, § 2.
17. ILL. CONST. Transition Schedule, § 9.
18. ILL. CONST. art. 6, § 19, (Smith-Hurd) constitutional commentary at 532.
Having looked broadly at the sources of the State’s Attorney’s powers, it is now appropriate to delve into specific exercises of those powers in some “high-visibility” areas. Juxtaposed to this analysis will be an examination of the legal and ethical limitations on the use of such powers.24

**DISCRETION IN CHARGING**

One aspect of that power—discretion in charging—is the gravamen of these comments. The power of the State’s Attorney to commence and prosecute all criminal actions is set forth by Illinois statute.25 The United States Supreme Court has also recognized that power.26 The Illinois Supreme Court has made clear that the State’s Attorney is indeed empowered with the discretion to determine what offenses can and should be charged. The court has stressed that:

> The State’s Attorney is the representative of the People and has the responsibility of evaluating the evidence and other pertinent factors and determining what offense can properly and should properly be charged. The kind of determination committed to the discretion of the State’s Attorney by the statute . . . is not, in our opinion, an unconstitutional delegation of authority.27

This discretion has been recognized as exclusive in nature, beyond interference even by the courts. The courts do not have the authority to: 1) foreclose the filing of a complaint by the prosecutor;28 2) prevent the re-filing of a case unless double jeopardy has attached;29 3) refuse to allow the filing or dismissal of an indictment based on a

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24. Space limitations obviously preclude analysis of all specific uses of prosecutorial power and the restrictions placed on those powers by law and ethics. The areas of analysis chosen were those areas which had in combination the attributes of common use, common abuse, reader interest, and author’s interest—not necessarily in that order. A pithy caveat is here set forth as a good embarkation point for the analysis which follows.

Among his other endeavors, the public prosecutor strives to maintain an upright stance in the stained halls of criminal justice. He correctly senses that the people demand more of him than diligent, workmanlike performance of his public chores. Virtue is the cherished ingredient in his role: the honorable exercise of the considerable discretionary power with which our legal system has endowed his office. Daily, the ethical fibre of the prosecutor is tested—and through him, in large measure, the rectitude of the system of justice.


26. Vogel v. Gruaz, 110 U.S. 311 (1884). It is interesting to see the Court’s recognition of the prosecutor-witness privileged communication doctrine in this case.


previous finding of no probable cause in the case;\textsuperscript{30} or 4) foreclose
the change in election of the charges prior to jeopardy attaching.\textsuperscript{31}
Furthermore, a court cannot dismiss charges for alleged "delay" when
the statutory speedy trial provision has not been violated,\textsuperscript{32} and cannot
dismiss a properly stated charge because it believes that another
is more appropriate.\textsuperscript{33}

In rejecting an attempt by a trial court to amend or reduce the
prosecutor's charge, an Illinois reviewing court noted the broad
discretion of the executive office and warned that the judiciary may not
substitute its own discretionary power for that of the State's Attorney.\textsuperscript{34} The court held that "the State's Attorney's Office is a part of
the executive branch. It is clear that the judicial department may not
take as its own discretionary powers vested in an executive officer."\textsuperscript{35}

Prosecutors groping through dusty tomes for the case "on all
fours," with some obscure legal point, who perhaps have mumbled
intonations of an unkind nature about the ineptness of reviewing
courts, should be quick to discern the wisdom of the court's decision
not to encroach upon the prosecutorial charging discretion. The
judiciary has wisely chosen not to share in the awesome weight of
responsibility for exercising the charging power. For the benefit of
the unexperienced in the field of prosecution, some fleshing out of
that proposition is in order. It is not until theory becomes practice
that the rub of having the powerful discretion in charging becomes
apparent. You, the reader, for the purpose of effect, should imagine
yourself to be the State's Attorney who is still lighting his pipe with
campaign matches bearing his name and various crime fighter and
justice slogans. Your first few days in office might bring you the fol-
lowing charging decisions:

\textbf{Monday:} The national representative of a rape crisis group and
thirty followers are at your office door with a rape victim. They
demand prosecution of a defendant the police have in custody. The
16 year old white victim says that she was raped at gun point two
months ago but was so embarassed and frightened that she didn't

\begin{itemize}
  \item \textsuperscript{30} People v. Kent, 54 Ill.2d 161, 295 N.E.2d 710 (1972).
  \item \textsuperscript{31} People v. Hoover 12 Ill. App.3d 25, 297 N.E.2d 400 (1973); People v. Guido, 11 Ill.
                  App.3d 1067, 297 N.E.2d 18 (1973); People v. Jackson, 132 Ill. App.2d 1059, 271 N.E.2d 673
  \item \textsuperscript{32} People v. Green, 8 Ill. App.3d 737, 290 N.E.2d 12 (1972); People v. Barksdale, 110 Ill.
  \item \textsuperscript{33} People v. Long, 126 Ill. App.2d 103, 261 N.E.2d 437 (1970).
  \item \textsuperscript{34} People v. Botramel, 5 Ill. App.3d 196, 282 N.E.2d 484 (1972).
  \item \textsuperscript{35} People v. Botramel, 5 Ill. App.3d 196, 199, 282 N.E.2d 484, 486 (1972). See generally,
\end{itemize}
tell anyone. Today she saw the offender on the street and called the local rape crisis group who convinced the police to make the arrest. The alleged rape victim has never seen the black defendant before the rape but is absolutely positive about the identification. There is no other evidence.

Tuesday: The vice reporter for the local newspaper is on the phone. He is calling from the church hall, which the police have raided pursuant to a newsman’s tip and found 200 church members, the pastor and a curate all unmistakably engaged in gambling at a “Las Vegas” fund raiser night for the sick of the parish. The reporter hands the phone to the police chief who needs advice.

Wednesday: A ten-year veteran policeman with an exemplary record who had never fired his gun in the line of duty shot and killed a suspect fleeing from an arrest for a felony. The suspect had broken into a garage to retrieve a bike he sold to the garage owner for which full payment had not been made. The suspect orally confessed in front of several witnesses before he ran. The officer yelled “halt” and fired a warning shot. The suspect, a 15 year old whose hands were cuffed behind his back, was shot in the back as a result of the second shot. The homicide commander calls for advice.

Thursday: A nine year old is found partially dismembered in a smoking garbage can. The next day, following an anonymous tip, the police arrested and questioned a suspect, on parole for child murder. He is found to have human but untypeable blood spots on his shoes. Before his lawyer arrives the defendant has given a full written confession which, as the lawyer accurately points out, lacks a crucial “Miranda” warning. There is no oral confession. A 10 year old boy had seen the suspect near the garbage can on the night of the crime. You have no other evidence. The Chief of Police has just announced to the wire services that his men have cracked the murder and that the suspect has confessed.36

In exercising his discretion in charging, the prosecutor is routinely subjected to pressures from all sides. He is wise to consider the expectations and demands of the victims, witnesses, police, press, public, judiciary, defense counsel, and defendants. Additional factors he is faced with include the overloaded court docket, the nature of the crime, the defendant’s background, the difficulty and probability of conviction, and the availability of prosecutorial resources. While it certainly can be argued that some of these factors should play no role in the exercise of the charging discretion, it cannot be disputed that such pressures exist.

Recognizing the potential for abuse of prosecutorial discretion, a number of commentators have suggested means of providing a check

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36. Each case has the injected element of obvious media interest and coverage. The element of pressure for decision from the “fourth estate” exists here to eliminate any “Pontius Pilate handwashing.” Benign abandonment of the charging decision to the police is unavailable in the exercise.
upon such abuse. One proposal has been to develop and publish specific prosecutorial standards, thereby permitting judicial review of both the standards and prosecutors' adherence to them.\(^{37}\) Another proposal is that the court require statistical data concerning the law in question in order to determine whether it has been selectively enforced. If selective enforcement were demonstrated, the court could then make an \textit{in camera} inspection of the prosecutor's file and subject the prosecutor to testimonial examination.\(^{38}\)

These commentators, however, have directed their attention almost exclusively to prosecutorial discretion exercised in the federal system. However, major differences exist between the offices of District Attorney and States Attorney. In the federal system, the prosecutor is often under relatively little compulsion to prosecute because of the nature of the crime. The bulk of the federal criminal law consists of crimes which are \textit{malum prohibitum} and not \textit{malum in se}. Most of these crimes are covert and have no definable victim. Also, the prosecutorial branch of the federal government largely controls the direction of its enforcement personnel's investigative activities.

The state prosecutor, on the other hand, deals with all of the common law crimes. Because he is elected rather than appointed, the state prosecutor is under relatively great pressure to prosecute those crimes which generate strong public indignation. The police who bring the robbed, raped, burgled, and murdered victims to his prosecutorial doorstep are independent of his direction. Although his discretion theoretically allows him the power to reject prosecution and to say to the victim, the police and the public, "Sorry, we have a big push on this year for kidnappers only," doing so is certainly not feasible. The state prosecutor is typically presented with victim, witnesses, and police, and must, without unnecessary delay,\(^{39}\) answer the basic charging questions of whether, what, and who to charge.

In answering these questions, the state prosecutor currently can expect very little practical guidance from the courts. There is a wealth of decisions concerned with the mechanical and procedural defects in charging,\(^{40}\) some general admonitions,\(^{41}\) and a few cases

\(^{37}\) Note, \textit{Reviewability of Prosecutorial Discretion: Failure to Prosecute} 75 \textit{COLUM. L. REV.} 130 (1975). The primary emphasis relates to review of prosecutorial discretion exercised by federal agencies. It does, however, make valuable comparisons to the criminal prosecutorial use of discretion.


\(^{40}\) See Ill. Ann. Stat., ch. 38, \S\S\ 3-3, 3-4, 3-5, 103-5, 111-1, 114-1 (Smith-Hurd 1972).

\(^{41}\) See cases cited at notes 3-10 and accompanying text \textit{supra}. \textit{See also} Oyler v. Boles, 368 U.S. 448 (1962). The case concerns mandatory sentencing of persons to a life term after a fourth conviction. The Court denied the prisoner's equal protection-due process arguments.
dealing with discriminatory enforcement. However, the courts clearly, and appropriately, have declined to formulate definite standards for the exercise of the charging discretion.

The practical value of such guidelines as the American Bar Association Standards, the National Prosecution Standards and the Illinois Code of Professional Responsibility is also strictly limited. Perhaps what these standards do accomplish is the condemnation of prosecutorial discretion not motivated toward the public purpose of the office. Ideally, a prosecutor would charge all those who will later be found guilty of criminal conduct and never charge those who would later be found not guilty. But doing so is clearly unrealistic. All of the guidelines implicitly recognize the impossibility of prosecuting all criminals, and explicitly reject any obligation to refrain from prosecuting an individual who might possibly be found innocent at a trial. The appropriate balance is difficult to achieve.

The A.B.A. Standards suggest that the charging discretion may

42. "It is the State's Attorney's duty to see that justice is done not only to the public at large but to the accused as well." People v. Pohl, 47 Ill. App.2d at 242, 197 N.E.2d at 765. In commenting on discrimination in the charging decision, a California court stated:

Appellant now in effect argues from this that equal protection should also be extended to any person to enable him to commit a crime on a basis of equality with all other persons. While all persons accused of a crime are to be treated on a basis of equality before the law, it does not follow that they are to be protected in the commission of a crime. It would be unconscionable, for instance, to excuse a defendant guilty of murder because others have murdered with impunity. The remedy for equal enforcement of the law in such instances does not lie in the exoneration of the guilty at the expense of society.


44. NATIONAL DISTRICT ATTORNEYS ASSOCIATION, NATIONAL PROSECUTION STANDARDS (1977) (hereinafter cited as NATIONAL PROSECUTION STANDARDS).


46. ABA STANDARDS, THE PROSECUTION FUNCTION. Standard 3.9 provides:

(A) It is unprofessional conduct for a prosecutor to institute or cause to be instituted criminal charges when he knows that the charges are not supported by probable cause.
be affirmatively used when there is reasonable support in evidence for the charge and when there is probable cause. It further suggests that the prosecutor give no weight to personal or political advantage or disadvantage or a desire for a high record of convictions. However, the prosecutor may charge even though he has a reasonable doubt. The standards also suggest that a prosecutor may decline to prosecute, even though the evidence would support a conviction, whenever it is consistent with the public interest. The Illinois Code provides that the prosecutor may charge where probable cause exists. The National Prosecution Standards suggest that the decision to prosecute should

(B) The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that evidence may exist which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his discretion are:

(I) The prosecutor's reasonable doubt that the accused is in fact guilty;
(II) The extent of the harm caused by the offense;
(III) The disproportion of the authorized punishment in relation to the particular offense or the offender;
(IV) Possible improper motives of a complainant;
(V) Reluctance of the victim to testify;
(VI) Cooperation of the accused in the apprehension or conviction of others;
(VII) Availability and likelihood of prosecution by another jurisdiction.

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

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

(E) The prosecutor should not bring or seek charges greater in number or degree than he can support with evidence at trial.

47. ISBA STANDARD, D.R. 7-103(A). This section provides:

(A) A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause.

48. NATIONAL PROSECUTION STANDARDS, Standards 9.0-9.4 These Standards provide:

Standard: 9.1
Authority to Charge.
The process of determining and initiating criminal charges is the responsibility of the prosecutor. Within his discretion the prosecutor shall determine what charges should be filed, how many charges should be filed, and how charges should be presented.

Standard: 9.2
Responsibility of Charging.
The prosecutor has the responsibility to see that the charge selected adequately describes the offense or offenses committed and provides for an adequate sentence for the offense or offenses.
be made in the best interests of justice, listing fifteen factors which \textit{may} be considered in making the decision. The author suggests that as nobly stated as these forays into the proper use of prosecutorial discretion are, they are of no great help in reaching the answers to the three charging questions which must be answered in a particular case.

A common element in the A.B.A., National, and Illinois standards, the goal of never charging an innocent person, is ethically satisfied if the prosecutor has available a quantum of evidence equalling "probable cause." 49 No maximum quantum of proof or evidence is stated.\textsuperscript{50} The problem with these nebulous standards is that they require an insufficient quantum of proof before charging, in that evidence sufficient to demonstrate probable cause is not adequate to defeat a defendant's motion for directed verdict. Instead, a standard for charging which requires at least enough evidence to avoid a directed verdict should be followed. The following standard is suggested as a criterion

\textit{Standard: 9.3}

Considerations of Charging.

The prosecutor is not obligated to file all possible charges which available evidence might support. The prosecutor may properly exercise his discretion to present only those charges which he considers to be consistent with the best interests of justice. Among the factors which the prosecutor may consider in making this decision are:

1. The nature of the offense;
2. The characteristics of the offender;
3. The age of the offense;
4. The interests of the victim;
5. Possible improper motives of a victim or witness;
6. A history of non-enforcement of a statute;
7. Likelihood of prosecution by another criminal justice authority;
8. Aid to other prosecuting goals through non-prosecution;
9. Possible deterrent value of prosecution;
10. Undue hardship caused to the accused;
11. Excessive cost of prosecution in relation to the seriousness of the offense;
12. The probability of conviction;
13. Recommendations of the involved law enforcement agency; and

\textit{Standard: 9.4}

Restrictions

A. The prosecutor shall file only those charges which he believes can reasonably be substantiated by admissible evidence at trial.
B. The prosecutor shall not attempt to utilize the charging decision only as a leverage device in obtaining guilty pleas to lesser charges.

\textsuperscript{49} See notes 46-48 supra.

\textsuperscript{50} In Bordenkircher v. Hayes, 98 S. Ct. 663, 668 (1978), the Court stated, "In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charges to file or bring before a grand jury, generally rests entirely within his discretion."
suggested as a criterion for guiding the prosecutor in the exercise of the charging discretion: charge those defendants with those crimes for which there exists sufficient evidence to prove every element of the crime charged, unless there is a substantial doubt that evidence needed to prove the elements of a prima facie case will either not be admitted or not be believed.

THE GRAND JURY: THE PROSECUTOR’S ROLE

The grand jury is an entity in the criminal justice system that was developed in England and eventually incorporated into our criminal justice system under the Constitution of the United States. The federal constitutional requirement that serious crimes be charged only through use of the grand jury has been held not to apply to state prosecutions. Recent surveys indicate that twenty-four states still require grand jury indictment, a procedure whereby the decision to prosecute is based upon a grand jury’s determination of probable cause. However, twenty states offer the option of charging by information, a procedure whereby the decision to prosecute is made not by a grand jury but by the prosecutor acting alone. Article I, Section 7 of the Illinois Constitution provides for the mandatory use of grand jury indictment unless the General Assembly abolishes or limits its use. No person can be “held to answer” for serious crimes unless that individual was initially charged by the grand jury or probable cause had been found at a preliminary hearing.

The Illinois Supreme Court’s interpretation of this provision permits the grand jury to overrule a finding by the preliminary hearing court that no “probable cause” exists. This grand jury process is sought at the prosecutor’s discretion.

In our opinion the language of the constitutional provision, as well as the history of its evolution, negates any thought that its purpose was to attach finality to a finding of no probable cause, or to estab-

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52. U.S. CONST. amend. V.
A. Where the prosecutor is authorized to act as legal advisor to the grand jury the prosecutor may appropriately explain the law and express his opinion on the legal significance of the evidence but he should give due deference to its status as an independent legal body.
B. The prosecutor should not make statements or arguments in an effort to influence grand jury action in a manner which would be impermissible at trial before a petit jury.
lish mutually exclusive procedures so that grand jury proceedings would be barred if an accused had been discharged upon preliminary hearing. . . . We know of no Illinois authority, however, which holds that an order releasing an accused for want of probable cause is appealable, or that it is in any way conclusive upon the prosecution.55

The prosecutor appears to have the further option of seeking an indictment without first going through the preliminary hearing process, even though the defendant has already been charged by complaint for preliminary examination.56 The prosecutor must, however, take "prompt"57 action to exercise the option of choosing between a preliminary hearing or a grand jury probable cause determination. In People v. Howell,58 the Illinois Supreme Court expressed deep concern over the People's failure to afford defendants a prompt probable cause determination.

Similarly, in Gerstein v. Pugh,59 the United States Supreme Court scrutinized a Florida prosecutor's use of discretion in filing an information and holding an accused for trial with neither preliminary hearing rights nor grand jury action. Gerstein again recognized the legal principle that a grand jury's indictment conclusively determines the existence of probable cause and acts as a substitute for the magistrate's judgment in a preliminary hearing.60 If the defendant has already been charged, the Illinois prosecutor who desires to have the grand jury make the probable cause determination should seek this determination "promptly."61

Recent statutory enactments have greatly reduced the use of grand jury proceedings in Illinois. On October 1, 1975, amendments to the Criminal Code of Procedure62 eliminated the need for grand jury indictment where a preliminary hearing has been held in accordance with the law63 and has found probable cause of at least one offense64 arising from the transaction or the conduct of the defendant. This statutory change became popularly known as the "by-pass" statute since its

58. Id. at 122, 324 N.E.2d at 406.
60. Id. at 117 n.19.
61. Cook County prosecutors have opted not to use grand jury indictments after the defendant has been charged unless there is a true bill returned before the first date set for preliminary hearing or unless the defendant contributes to or causes the delay of the preliminary hearing.
use "by-passes" the need for grand jury action. This legislation has greatly reduced the role of the grand jury as a "charging body." As a result, greater time is now available for its investigatory and reporting functions.

Judicial interpretation affords the prosecutor broad discretion in the use of the grand jury's power of inquiry into violations of the criminal law. Particularly important is the decision of the United States Supreme Court in United States v. Calandra in which the Court held


66. Id. In that same legislative session the duties of the grand jury were changed to add provisions that gave statutory direction to the State's Attorney to inform the grand jury of its right to subpoena persons against whom a bill of indictment is being sought. ILL. REV. STAT. ch. 38, § 112-4(b) (1975). The second paragraph of that new enactment provides for the "right to counsel" for those persons already charged or against whom an indictment is being sought. It provides further for admonitions to such a person not dissimilar from those required for defendants in custodial interrogation. Id.

For non-charged persons it would appear that this later legislative directive overreaches the constitutional requirements found in United States v. Mondujano, 425 U.S. 564 (1976). The argument can be made, however, that since the Illinois Constitution allows the legislature to abolish or limit the use of the grand jury, ILL. CONST. of 1970, art. I, § 7, then it follows that restrictions of this nature are within the purview of the legislative function.

67. In United States v. Calandra, 414 U.S. 338 (1974), the Supreme Court noted that:

Traditionally the grand jury has been accorded wide latitude to inquire into violations of criminal law. No judge presides to monitor its proceedings. It deliberates in secret and may determine alone the course of its inquiry. The grand jury may compel the production of evidence, the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials. It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime.


In reference to the investigatory powers of the grand jury, the United States Supreme Court was rather expansive in describing the breadth of the power: "[T]he investigation of crime by the grand jury implements a fundamental governmental role of securing the safety of the person and property of the citizen. . . ." Branzburg v. Hayes, 408 U.S. 665, 700 (1971).

The Branzburg Court further stated that:

The role of the grand jury as an important instrument of effective law enforcement necessarily includes an investigatory function with respect to determining whether a crime has been committed and who committed it. . . . When the grand jury is performing its investigatory function into a general problem area . . . society's interest is best served by a thorough and extensive investigation." Wood v. Georgia, 370 U.S. 375, 392 (1962). A grand jury investigation is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed." United States v. Stone, 429 F.2d 138, 140 (2nd Cir. 1970). Such an investigation may be triggered by tips, rumors, evidence proffered by the prosecutor, or the personal knowledge of the grand jurors. . . . It is only after the grand jury has examined the evidence that a determination of whether the proceedings will result in an indictment can be made . . . .

Id. at 701-02.
that a grand jury witness cannot invoke the exclusionary rule. Granting such a privilege, the Court stated, would cause undue interference with the effective discharge of the grand jury’s duties. Likewise, the Court has held that the exclusionary rule which prevents the admission at trial of any evidence derived from illegal searches or seizures is inapplicable to grand jury proceedings and does not bar the prosecutor from asking questions based on information derived from the alleged breach of Fourth Amendment rights.

Illinois reviewing courts have also dealt with the scope of prosecutorial use of the grand jury. For example, the courts have determined that subpoenas issued by the grand jury which are unrestricted in the scope of production may be reviewed by the trial court and either quashed or limited. Furthermore, the prosecutor need not establish “probable cause” in order to have the grand jury subpoena witnesses to testify. The prosecutor, through use of the grand jury, can compel voice or handwriting exemplars without infringing on Fourth, Fifth or Fourteenth Amendment rights or the rights guaranteed under the correlative provisions of the Illinois Constitution. The prosecutor’s use of the grand jury to inquire into offenses does not create the right to conduct an investigation into the personal affairs of citizens where there is no charge or offense involved. However, he can compel witnesses to testify before a grand jury subject to the contempt power of the court. These powers may be exercised even when the answer would be self-accusatory, as long as immunity is granted after application pursuant to statute.

As with the exercise of charging discretion, the prosecutor shoulders the responsibility for the exercise of the grand jury discretion.

69. Id. at 349.
74. People v. Rockola, 346 Ill. 27, 178 N.E. 384 (1931); ILL. REV. STAT., ch. 38, § 106-1 (1977); Many of the difficult questions concerning prosecutorial discretion in the use of the grand jury arise out of the function allowed in federal grand juries called “use immunity.” See Kastigar v. United States, 406 U.S. 441 (1972). Because the Illinois statute grants only “transactional immunity” and not “use immunity,” the prosecutorial discretion in the investigatory function of the grand jury is substantially less than that of federal grand juries. The lessening of the power reduces discretion and the potential for abuse. See People ex rel. Cruz v. Fitzgerald, 66 Ill.2d 546, 363 N.E.2d 835 (1977).
tion. Very little of that discretion is subject to review. However, the ultimate review of such discretion occurs when the issues are brought to trial, but the possible remedy is only partially effective. A verdict of not guilty granted to a defendant who had been charged through prosecutorial abuse of the grand jury is perhaps a vindication of the system of criminal justice, but not of the prosecutorial abuse.

In our hypothetical situations, it is evident that various standards provide the prosecutor little guidance in determining the appropriate use of the grand jury. For instance, in the case of the young rape victim, should you point out in your “legal advisor” capacity that your experience leads you to believe that with only a “one on one” identification by a white female of a black male, coupled with a two month delay in “outcry” and no corroboration, there is little chance of a conviction. Is this “evidence which tends to negate guilt” or lack of evidence which would show guilt? Should you “advise” the grand jury? If yes, what would your advice be?

In the child dismemberment killing, assume that no motion to suppress the confession had been filed. If the preliminary hearing results in a finding of probable cause without the use of the confession, the decision would have to be made whether to present the case to the grand jury in an effort to screen out this case with a “no bill of indictment.” If “no probable cause” had been found at the preliminary hearing, should the grand jury be presented with either the unsuppressed confession or the defendant’s conviction as “evidence” to sustain a true bill of indictment in an effort to overrule the preliminary hearing court judge? The defendant, you might rationalize, could take the stand and make the conviction admissible. The confession hasn’t been suppressed. Even if it was suppressed, you may be able to use it for impeachment purposes if the defendant takes the stand at trial.

In the police shooting example, assume that a finding of “no probable cause” was rendered on the charge of involuntary manslaughter at the preliminary hearing. Should you seek an indictment if you believe the shooting was not “justified”? If so, how would you explain the amount of force a police officer is allowed under statute to use when confronted with a fleeing forcible felon? Should you inform the grand jury of the preliminary hearing court’s finding of no probable cause? Does case law or ethical standards give specific answers to the use of these broad powers?

Considering that the prosecutor controls the exercise and option to use these rather broad powers of the grand jury, he should be circumspect and cautious in their application. Good faith use of the powers must be maintained so that the citizens he is protecting are
not harassed by vexacious charges. Additionally, he must insure that the secrecy of the proceedings is scrupulously observed.

The American Bar Association Standards perceive the role of the prosecutor as a legal adviser to the grand jury. In reference to the quality and scope of evidence at the grand jury proceedings, the A.B.A. Standards suggest that the prosecutor present only evidence which he believes would be admissible at trial. However, the standards go on to recognize that in “appropriate cases,” summarizing the admissible evidence is proper. Evidence known to the prosecutor which would negate guilt, under these standards, should be disclosed to the grand jury.

In reference to the practice of the subpoena and immunity powers, the American Bar Association Standards encourage the prosecutorial practice of informing potential defendants called before the grand jury that they may be charged and therefore “should seek legal counsel.” Provisions of the Illinois statute provide for this practice as a matter of legislative direction. The National Prosecution Stan-

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76. ILL. REV. STAT. ch 38, § 112-16 (1975).
77. A.B.A. STANDARDS, The Prosecution Function, Standard 3.5. This Standard provides:
   (A) Where the prosecutor is authorized to act as legal advisor to the grand jury he may appropriately explain the law and express his opinion on the legal significance of the evidence but he should give due deference to its status as an independent legal body.
   (B) The prosecutor should not make statements or arguments in an effort to influence grand jury in a manner which would be impermissible at trial before a petit jury.
   (C) The prosecutor’s communications and presentations to the grand jury should be on the record.
78. Id. at Standard 3.6.
80. Id. at Standard 3.6.
   (A) The precise scope of grand jury investigatory functions should be determined by each state.
   (B) Witnesses before grand jury investigating panels should be allowed the assistance of counsel, unless and until immunity is granted. Counsel should not accompany the witness into the grand jury room during the testimony, but should only be available for consultation outside the grand jury room.
   (C) State law should provide that upon petition from two or more prosecutors, a grand jury be impaneled to investigate matters of a special nature, and to bring charges based upon that investigation based on activities within all the counties joining the petition.
   (D) Where grand jury reporting is provided for, the reporting function should be governed by the following procedures:
dards echo the A.B.A. Standards on all the above-mentioned provisions except for the provision on legal advice. The National Standards merely “allow” for informing potential defendants that they should

1. The grand jury may submit to the court by which it was impaneled a report:
   (a) Concerning misconduct, nonfeasance or neglect in public office by a public
   servant as the basis for a recommendation of removal or disciplinary action; or
   (b) Stating that after investigation of a public servant it finds no misconduct,
   nonfeasance or neglect in office by that individual provided that such public
   servant has requested the submission of such report; or
   (c) Proposing recommendation for legislative, executive or administrative action
   in the public interest based upon stated findings.

2. The court to which such report is submitted shall examine it and the minutes
   of the grand jury and, except as otherwise provided in subdivision (4) four, shall
   make an order accepting and filing such report as a public record only if the court
   is satisfied that it complies with the provisions of subdivision (1) one and that:
   (a) The report is based upon facts revealed in the course of an investigation and
   is supported by the preponderance of the credible and legally admissible evi-
   dence; and
   (b) When the report is submitted pursuant to paragraph (a) of subdivision (1)
   one, that each person named therein was afforded an opportunity to testify
   before the grand jury prior to the filing of such report, and when the report is
   submitted pursuant to paragraph (b) or (c) of subdivision (1) one, it is not criti-
   cal of an identified or identifiable person.

3. The order accepting a report pursuant to paragraph (a) of subdivision (1) one,
   and the report itself, must be sealed by the court and may not be filed as a public
   record, or be subject to subpoena or otherwise be made public until at least
   thirty-one days after a copy of the order and the report are served upon each
   public servant named therein, until the affirmation of the order accepting the
   report, or until reversal of the order sealing the report, or until dismissal of the
   appeal of the named public servant by the appellate division, whichever occurs
   later. Such public servant may file with the clerk of the court an answer to such
   report, not later than twenty days after service of the order and report. Such an
   answer shall plainly and concisely state the facts and law constituting the defense
   of the public servant to the charges in said report, and except for those parts of
   the answer which the court may determine to be scandalously or prejudicially and
   unnecessarily inserted therein, shall become an appendix to the report. Upon the
   expiration of the time set forth in this subdivision, the prosecuting attorney shall
   deliver a true copy of such report, and the appendix if any, for appropriate ac-
   tion, to each public servant or body having removal or disciplinary authority over
   each public servant named therein. The determination by the court as to whether
   a report is in compliance with the requirement of this standard, and should be
   filed as a public record, or whether it should remain sealed for any reason, in-
   cluding prejudice to an on-going criminal matter, should be subject to appellate
   review.

4. Upon the submission of a report pursuant to subdivision (1) one, if the court
   finds that the filing of such report as a public record, may prejudice fair consider-
   ation of a pending criminal matter, it must order such report sealed and such
   report may not be subject to subpoena or public inspection during the pendency
   of such criminal matter, except upon order of the court.

5. Whenever the court to which a report is submitted pursuant to paragraph (a) of
   subdivision (1) one is not satisfied that the report complies with the provisions of
   subdivision (2) two, it may direct that additional testimony be taken before the
   same grand jury, or it must make an order sealing such report, and the report
seek legal advice and do not state an affirmative duty of the prosecutor to do so.\textsuperscript{82}

The Illinois Supreme Court in \textit{People ex rel. Sears v. Romiti}\textsuperscript{83} reaffirmed approval of total hearsay indictments.\textsuperscript{84} More importantly, it defined the limitations on judicial inquiry as to prosecutorial action in the grand jury.\textsuperscript{85} Quoting from \textit{Costello v. United States},\textsuperscript{86} the \textit{Romiti} court rejected the contention that an indictment is open to challenge because only hearsay evidence was presented to the grand jury or that indictments were open to challenge on the grounds of inadequacy or incompetency of evidence. The court held that a hearing to determine this issue is not authorized by statute.\textsuperscript{87}

The decision in \textit{People ex rel. Sears} serves to re-emphasize the need for a high self-imposed ethical standard if the prosecutor is to faithfully execute the charge of representing all the people. The largely unfettered and unreviewable discretion to use the grand jury places a heavy moral burden on the user of that power. The prosecutor's dual role as advocate and as administrator and seeker of justice must be delicately balanced. Only through judicious use of grand jury discretion can a prosecutor build community confidence in this citizen-participative function of the justice system.

\textbf{THE GUILTY PLEA AND SENTENCING:  
THE PROSECUTOR'S ROLE}

As axiomatic as it may sound, it must be stated that the prosecutor does not plead defendants guilty. Further, he does not sentence defendants. The prerogative of pleading guilty to a crime is one which is the defendant's choice—not a choice of the court or the prosecutor.

\begin{footnotesize}

\textbf{A.B.A. Standards, The Prosecution Function, Standard 3.6 provides:}

(E) The prosecutor should not compel the appearance of a witness before the grand jury whose activities are the subject of the inquiry if the witness states in advance that if called he will exercise his constitutional privilege not to testify, unless the prosecutor intends to seek a grant of immunity according to the law.

\textsuperscript{82}. See note 81 \textit{supra}.

\textsuperscript{83}. \textit{People ex rel. Sears v. Romiti}, 50 Ill.2d 51, 277 N.E.2d 705 (1971).


\textsuperscript{85}. 50 Ill.2d at 59-61, 277 N.E.2d at 709-10.


\textsuperscript{87}. 50 Ill.2d at 55; 277 N.E.2d at 707.
\end{footnotesize}
Sentencing for the crime pleaded to is a prerogative of the court.\textsuperscript{88} However, this is not to say that the prosecutor does not play an important role in the plea of guilty.

As a representative of the People, the prosecutor confers with the defense when the defendant desires to plead guilty,\textsuperscript{89} and sometimes reaches an agreement as to what a "proper" sentence should be. This agreement, when presented to the court, is no more than a recommendation and is not binding on the court.\textsuperscript{90} Further, the prosecutor, as a part of the plea process, may reduce the charge pending to a less serious charge, dismiss certain counts and charges, agree not to commence other charges against the defendant,\textsuperscript{91} or any combination of the above. This power results from the prosecutor's function as the officer responsible for all indictments and prosecutions in which the People of the State or county have an interest.\textsuperscript{92} How-

\textsuperscript{88} People v. Congleton, 16 Ill. App.3d 1003, 308 N.E.2d 156 (1974); People v. Kadlecek, 391 Ill. 470, 63 N.E.2d 497 (1945).

\textsuperscript{89} Ill. Sup. Ct. R. 402.

\textsuperscript{90} Bordenkircher v. Hayes, 98 S.Ct. 663 (1978). This recent decision reaffirms the decisions of Blackledge v. Allison, 430 U.S. 63 (1977); Santobello v. New York, 404 U.S. 257 (1971); Brady v. United States, 397 U.S. 742 (1970); and Boykin v. Alabama, 395 U.S. 238 (1969). The Court distinguished the facts in Bordenkircher from the "vindictive" abuse of prosecutorial discretion found in Chaffin v. Stynchombe, 412 U.S. 17 (1973) or in North Carolina v. Pearce, 395 U.S. 711 (1969). The Court in Bordenkircher found that "in the 'give-and-take' of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer." 98 S. Ct. at 668. See also Ill. Rev. Stat. ch. 38, § 1005-4-4 (Supp. 1977); NATIONAL PROSECUTION STANDARDS, The Prosecution Function, Standard 16.1. This Standard provides:

A. Where it appears that the interest of the state in the effective administration of criminal justice will be served, the prosecutor, while under no obligation to negotiate any criminal charges, may engage in plea negotiations for the purpose of reaching an appropriate plea agreement. This should be done only through defense counsel, except when the accused is not eligible for or does not desire appointment of counsel and has not retained counsel.

B. The prosecutor, in reaching a plea agreement, may agree to one or more of the following dispositions, depending on the circumstances of the case:

1. To make or not oppose favorable recommendations concerning the sentence which may be imposed if the accused enters a plea of guilty or nolo contendere; or

2. To seek or not to oppose dismissal of the offense charged if the accused enters a plea of guilty or nolo contendere to another offense reasonably related to the accused's conduct; or

3. To seek or not oppose dismissal of other charges or potential charges against the accused if the accused enters a plea of guilty or nolo contendere.

C. Similarly situated defendants should be afforded equal plea agreement opportunities.


ever, any agreement reached between the prosecutor and the defense can never reach fruition unless it receives the approval of the court, since it is the court, not the prosecutor, which must sentence.\textsuperscript{93}

The prosecutor's role must be put in the proper perspective. Some critics of plea bargaining, or pleading guilty generally, seem to have an abiding conviction that the guilty plea process or the prosecutor's discretion in the area is the genesis of all defendants' problems and perhaps all the problems in the criminal justice system.\textsuperscript{94} One prevailing criticism is that prosecutors, through the use of their discretion, often penalize defendants who choose to refuse the agreements tendered by the prosecutor. The claim is that the defendant who refuses and is subsequently convicted, is sentenced to a term longer than that contemplated at the plea discussion. The prosecutor recommends a further penalty after a trial and the judge often gives it. Therefore, it appears that the defendant is penalized for exercising his right to trial.\textsuperscript{95} It must be remembered, however, that it is the court

\textsuperscript{93} The plea agreement and recommendation will be considered, for the purposes of this paper, as including all the options listed in the material and cases in notes 30 to 35 supra.

\textsuperscript{94} One commentator charged (before finishing the first paragraph of his article and without citation or authority) that of all executive and judicial discretion "none is potentially more dangerous than that of the public prosecutor." Comment, \textit{Prosecutorial Discretion — A Re-Evaluation of the Prosecutor's Unbridled Discretion and Its Potential for Abuse}, 21 \textit{DEPAUL L. REV.} 485, 485 (1971). The comment went on to say (again in the opening paragraph and again with citation to no authority) that the inherent potential for abuse by the prosecutor's office "... ominously threatens the adversary system of justice." \textit{Id.} at 485. According to this commentator, the area of plea bargaining best exemplifies the prosecutor's potentially abusive discretion.


The now retired Justice of the Illinois Supreme Court, Walter V. Schaefer, made a statement which was actually a precursor of that which was to become the law of the land:

These cases illustrate some of the problems that may result from a 'negotiated' plea—a plea of guilty to a lesser offense entered by agreement with the prosecution, for example, or one entered after an understanding has been reached as to the sentence that the prosecution will recommend. These and other problems could be eliminated by a rule that would prohibit any differentiation between a sentence imposed after a plea of guilty and one imposed after trial. Such a rule, however, would invite speculation without risk upon the mischances of a trial. As stated by Professor A.R.N. Cross, 'If a plea of guilty were not, at least on occasions, to affect sentence, it is difficult to see why the professional criminal should ever plead guilty.' See Cross, \textit{Paradoxes in Prison Sentences} (1965). Moreover, such a rule would require a sentencing judge to ignore in every case the defendant's knowledge of his own guilt, however clearly that knowledge might have been established, and to disregard the assumed psychological effect on an acknowledgement
that sentences. A mere showing that the sentence recommended by
the prosecutor and imposed by the court is greater than the one re-
jected during plea negotiations does not amount to a demonstration of
prosecutorial abuse.

Fairness, albeit a nebulous quality, should be a goal sought by the
prosecutor in his relations with the defendant at all stages in the

of guilt as an important step in the process of reformation. In the present state of
our knowledge of human psychology it is at least doubtful that judges should be
required, in every case, to disregard that assumption when imposing sentence.
People v. Darrah, 33 Ill.2d 175, 180, 210 N.E.2d 478, 481 (1965).

Subsequent challenges to the process of granting a "benefit of the bargain" to the
defendant who admitted his guilt by plea of guilty eventually reached the United
States Supreme Court. The Constitutional challenge was that his Fifth Amendment
right had been violated by the pressure of the lenient sentence for a plea as op-
posed to the greater sentence which might result after a trial. Justice White,
speaking for the majority in reference to this challenge, stated:

Brady's claim is of a different sort: that it violates the Fifth Amendment to influ-
ence or encourage a guilty plea by opportunity or promise of leniency and that a
guilty plea is coerced and invalid if influenced by the fear of a possibly higher
penalty for the crime charged if a conviction is obtained after the State is put to
its proof.

Insofar as the voluntariness of his plea is concerned, there is little to differen-
tiate Brady from (1) the defendant, in a jurisdiction where the judge and jury
have the same range of sentencing power, who pleads guilty because his lawyer
advised him that the judge will very probably be more lenient than the jury; (2)
the defendant, in a jurisdiction where the judge alone has sentencing power, who
is advised by counsel that the judge is normally more lenient with defendants
who plead guilty than with those who go to trial; (3) the defendant who is permit-
ted by prosecutor and judge to plead guilty to a lesser offense included in the
offense charged; and (4) the defendant who pleads guilty to certain counts with
the understanding that other charges will be dropped. In each of these situations,
as in Brady's case, the defendant might never plead guilty absent the possibility
or certainty that the plea will result in a lesser penalty than the sentence that
could be imposed after a trial and a verdict of guilty. We decline to hold, how-
ever, that a guilty plea is compelled and invalid under the Fifth Amendment
whenever motivated by the defendant's desire to accept the certainty or proba-
bility of a lesser penalty rather than face a wider range of possibilities extending
from acquittal to conviction and a higher penalty authorized by law for the crime
charged . . . But we cannot hold that it is unconstitutional for the State to extend
a benefit to a defendant who in turn extends a substantial benefit to the State and
who demonstrates by his plea that he is ready and willing to admit his crime and
to enter the correctional system in a frame of mind that affords hope for success
in rehabilitation over a shorter period of time than might otherwise be necessary.

A contrary holding would require the States and Federal Government to forbid
guilty pleas altogether, to provide a single invariable penalty for each crime de-
finite by the statutes, or to place the sentencing function in a separate authority
who has no knowledge of the manner in which the conviction in each case was
obtained. In any event, it would be necessary to forbid prosecutors and judges to
accept guilty pleas to selected counts, to lesser included offenses, or to reduce
charges. The Fifth Amendment does not reach so far.

criminal process. His sentencing recommendations should be rendered with fairness and justice. The conversion of these abstruse goals into concrete action is the prosecutor's greatest difficulty. While the National Prosecutor Standards exhort the prosecutor to zealously guard the rights of individual defendants, he must nevertheless place the rights of society in a paramount position. The National Standards suggest specific criteria for use as guidelines by the prosecutor but provide little practical assistance in assigning weights to all of these factors and their infinite number of combinations. It is impossible to arrive at an objectively "correct" and consistent system for sentencing recommendations.

Because the prosecutor is both administrator of justice and advocate, he has a duty to seek justice, not merely to convict. Severity of sentence is not to be the prosecutor's index of effectiveness. It is

96. NATIONAL PROSECUTOR STANDARDS, Standard 1.3(d) provides:

The prosecutor should consider all available models of control of human behavior from the standpoint of the ultimate benefit to society. The prosecutor should at all times be zealous in the desire to protect the rights of individuals, but must place the rights of society in a paramount position in exercising prosecutorial discretion in individual cases and in the approach to the larger issues of improving the law and making the law conform to the needs of society.

97. A.B.A. STANDARDS, THE PROSECUTION FUNCTION, Standard 1.1. This Standard provides:

(A) The office of prosecutor, as the chief law enforcement official of his jurisdiction, is an agency of the executive branch of government, which is charged with the duty to see that the laws are faithfully executed and enforced in order to maintain the rule of law.

(B) The prosecutor is both an administrator of justice and an advocate; he must exercise sound discretion in the performance of his functions.

(C) The duty of the prosecutor is to seek justice, not merely to convict.

(D) It is the duty of the prosecutor to know and be guided by the standards of professional conduct as defined in codes and canons of the legal profession, and in this report. The prosecutor should make use of the guidance afforded by an advisory council of the kind described in ABA Standards, The Defense Function, Section 1.3.

(E) In this report the term "unprofessional conduct" denotes conduct which is or should be made subject to disciplinary sanctions. Where other terms are used, the standard is intended as a guide to honorable professional conduct and performance. These Standards are not intended as criteria for the judicial evaluation of alleged misconduct of the prosecutor to determine the validity of a conviction; they may or may not be relevant in such judicial evaluation, depending upon all the circumstances.

98. Id. at Standard 6.1. This Standard provides:

(A) The prosecutor should not make the severity of sentences the index of his effectiveness. To the extent that he becomes involved in the sentencing process, he should seek to assure that a fair and informed judgment is made on the sentence and to avoid unfair sentence disparities.
not ordinarily within the province of the prosecutor to make any specific recommendation as to sentencing. Therefore, if a prosecutor refrain from making sentence recommendations, it would be difficult to charge him with vindictiveness for recommending a harsher sentence than the one rejected by the defendant during pretrial negotiations.

If the prosecutor's office is going to make recommendations as to sentencing after trial, it would be appropriate to stress at the plea negotiations that the prosecutor's plea recommendation is one made in contemplation of giving the defendant the "benefit of the bargain." The prosecutor might, for example, state at the plea conference what he believes is an appropriate sentence. However, he would explain that were the defendant to plead guilty he would recommend a shorter period of time. If negotiations proved fruitless and defendant went to trial and was convicted, a recommendation of the original sentence would on its face demonstrate a lack of vindictiveness. This approach does not offer protection from the vindictive prosecutor who could still inflate what he believed to be an appropriate sentence during plea negotiations. The safeguard against this practice is of course the sentencing court which acts independently of the prosecutor in rendering fair and impartial sentences.

According to one survey, approximately 75% of the prosecutors polled participate to some extent in the sentence recommendation process. Thus, the potential for vindictive post-trial sentence recommendations is clear and the prosecutor who does recommend must zealously guard against this tendency. The prosecutor who achieves objectivity, and has developed a reputation for that objectivity, can play a valuable role in offsetting defense counsel's recommendations by representing the victim's and society's point of view at sentencing.

(B) Where sentence is fixed by the judge without jury participation, the prosecutor ordinarily should not make any specific recommendation as to the appropriate sentence, unless his recommendation is requested by the court or he has agreed to make a recommendation as the result of plea discussions.

(C) Where sentence is fixed by the jury, the prosecutor should present evidence on the issue within the limits permitted in the jurisdiction, but he should avoid introducing evidence bearing on sentence which will prejudice the jury's determination of the issue of guilt.

99. Id. at Standard 6.1 (B).
102. It is the author's personal position and the Cook County Prosecutor's Office policy that during plea negotiation the prosecutor should state his assessment of a proper sentence for the crime and his reduced recommendation in return for a guilty plea. After a trial on the merits, the
One discernible area of abuse which has been criticized by reviewing courts is the practice of not following through on the prosecutorial promise made in plea negotiation. The Supreme Court has commented that the plea negotiation process "must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."\(^{103}\) The principle of the "unfulfilled" promise is followed by Illinois courts.\(^{104}\) This same principle of fulfillment of plea agreements is inherent, though not explicitly stated, in the National Prosecution Standards\(^ {105}\) and the American Bar Association Standards.\(^ {106}\)

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\(^{105}\) NATIONAL PROSECUTION STANDARDS, Standard 16.4. This Standard provides:

(A) A prosecutor should not make any promise concerning the sentence which will be imposed or concerning a suspension of sentence; the prosecutor may properly advise the accused of the position he will take concerning disposition.

(B) A prosecutor should avoid implying a greater power to influence the disposition of a case than prosecution actually possesses.

(C) If the prosecutor finds he is unable to fulfill an understanding previously agreed upon in plea negotiations, the prosecutor should give notice promptly to the accused and cooperate in securing leave of the court for the accused to withdraw any plea and take other steps as would be appropriate to restore the accused and the state to the position they were in before the understanding was reached or plea made.

\(^{106}\) A.B.A. STANDARDS, THE PROSECUTION FUNCTION, Standard 4.3. This Standard provides:

(A) It is unprofessional conduct for a prosecutor to make any promise or commitment concerning the sentence which will be imposed or concerning a suspension of sentence; he may properly advise the defense what position he will take concerning disposition.

(B) A prosecutor should avoid implying a greater power to influence the disposition of a case than he possesses.

(C) If the prosecutor finds he is unable to fulfill an understanding previously agreed upon in plea discussions, he should give notice promptly to the defendant and cooperate in securing leave of the court for the defendant to withdraw any plea and take other steps appropriate to restore the defendant to the position he was in before the understanding was reached or plea made.
Returning once again to the fact situations, assume that in each case an affirmative charging decision has been made. Further assume that you, the prosecutor, are engaged in a defense requested plea negotiation.

In the case of the 16 year old rape victim the defense attorney tells you, “My guy will take one year flat for a reduction to aggravated battery.” You have developed some personal doubts as to whether or not the defendant committed the crime. You are aware that a jury is not likely to convict this defendant, and that the judge who is to try this case would consider the evidence not only insufficient but almost humorous. You do not know whether the defense is aware of the trial judge’s attitude. The 26 year old defendant’s record indicates multiple arrests and one misdemeanor conviction reduced from indecent liberties to contributing to sexual delinquency. Joining the women’s action group in the courtroom is a Time magazine correspondent who is following the case. The rape victim believes that emasculation or a death sentence is the appropriate penalty for this defendant. Should you agree to reduce and recommend one year on a plea to aggravated battery in this case when you feel rather certain that your evidence will fail? Rephrased, is it ethical to go to trial or to agree to a plea where you have personal doubts about the defendant’s guilt?

While pondering this case you are called to the phone. The spokesman for the 14 lawyers who variously represent the 200 “Las Vegas Night” arrestees informs you that Judge Farwright will not accept pleas for a disposition of supervision unless your office so recommends. The spokesman further informs you that the parishioners are agreed to the disposition, except that they will request a jury trial and fully exercise their voir dire rights—600 peremptory challenges—unless the pastor and curate are nolle prossed. There are hundreds of cases on the court call for more serious charges than the gambling case. The Black and Latino media have equated the “parish gambling” to the “numbers” and “bolita” gambling that takes place in their communities. Their attitude is that, “if you prosecute one group, you must prosecute the other.” The judge, the lawyers, the priests, the parishioners, the Blacks, the Latinos and the Archbishop of the diocese all await your exercise of discretion.

The case law and the various standards do not provide “answers” to these situations. As with charging and grand jury discretion, the case

107. The various situations described are not the paraphernalia of an active imagination. Each of the fact situations set forth has been changed slightly in non-substantial part from actual occurrences, but they have happened in Cook County, Illinois.
law and ethical provisions are not intended to give answers but only direction. The goal is to achieve a balance between the role of advocate and that of seeker of justice.\textsuperscript{108} The guidelines provided by case law, and the various standards should be widely disseminated. Hopefully publication of these comments will also, in some measure, help to achieve this goal.

CONCLUSION

To the extent that the prosecutor exercises discretion in charging, in grand jury use or in sentencing, he must balance different and often times divergent interests. He must consider the effect of what he does not only on the defendant, but on potential defendants; not only on the victim, but on potential victims; and, indeed, on the system of justice and society as a whole. The prosecutor should resist succumbing to political pressures, personal ambition, peer pressures, a desire to be liked by the court or the defense bar or the public, competitiveness, fear of defeat at trial, vindictiveness, sentimentality, or leniency, whenever these influences would upset a proper balance in the exercise of his vast discretionary powers.

\textsuperscript{108} In Attorney General v. Tufts, 239 Mass. 458, 132 N.E. 322 (1921), the court’s opinion spoke succinctly concerning the prosecutor’s power and its use:

The powers of a district attorney under our laws are very extensive. They affect to a high degree the liberty of the individual, the good order of society, and the safety of the community . . . . Powers so great impose responsibilities correspondingly grave. They demand character incorruptible, reputation unsullied, a high standard of professional ethics and sound judgment of no mean order . . . . A district attorney cannot treat that office as his selfish affair. It is a public trust. The office is not a private property, but is to be held and administered wholly in the interests of the people at large and with an eye single to their welfare.

\textit{Id.} at 489, 132 N.E. at 326.