

# HUMAN DIGNITY: THE CLANDESTINE FACTOR IN PROSECUTORIAL DISCRETION

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Justice and human dignity have an organic and symbiotic relationship. The American Bar Association's Functions and Duties of the Prosecutor Standard 3-1.2(a) outlines that "[t]he prosecutor is an administrator of justice . . . [and] should exercise sound discretion and independent judgement in the performance of the prosecution function."<sup>1</sup> The ABA standards further prohibit improper bias<sup>2</sup> and proscribe a duty to report and respond to prosecutorial misconduct.<sup>3</sup> ABA Standard 3-1.2(b) states: "The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict."<sup>4</sup> Although rarely openly discussed, I ask now, is it possible to "do justice" while still addressing the human dignity of the criminally accused, the alleged victim, as well as the community? This essay will query whether human dignity plays a role in the prosecutor's daily decisions about justice, and more specifically in the prosecutor's most significant function—the decision to charge or not to charge. Further, if it does play a role, in what manner and in which cases does it

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<sup>1</sup> CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION STANDARD 3-1.2(A) (AM. BAR ASS'N, 4TH ED. 2015) [hereinafter ABA Prosecutorial Standards].

<sup>2</sup> Tamara F. Lawson, *A Fresh Cut in an Old Wound - A Critical Analysis of the Trayvon Martin Killing: The Public Outcry, The Prosecutor's Discretion, and the Stand Your Ground Law*, 23 U. FLA. J. L. & PUB. POL'Y 271, 293 (2012). See also Martha A. Myers & John Hagan, *Private and Public Trouble: Prosecutors and the Allocation of Court Resources*, 26 SOC. PROBS. 439, 441-47 (1979).

<sup>3</sup> See, e.g., *United States v. Olsen*, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, J. dissenting) ("[T]here is an epidemic of Brady violations abroad in the land. Only judges can put a stop to it").

<sup>4</sup> ABA Prosecutorial Standards, *supra* note 1, at 3-1.2(b).

operate? Should concerns of human dignity ultimately determine the outcome?

ABA Standard 3-4.4 provides a laundry list of relevant factors prosecutors should consider in their charging decisions. The exercise of prosecutorial discretion picks up where police discretion left off. Therefore, even questions regarding the fairness of the original criminal investigation and the equity exercised by the police should be considered here. If one looks closely, this list of factors requires prosecutors to address head-on the human dignity of all parties involved or related to the crime and reconcile the moral, not only the legal underpinnings supporting the decision to charge. Standard 3-4.4 factors include:

- (i) the strength of the case;
- (ii) the prosecutor's doubt that the accused is in fact guilty;
- (iii) the extent or absence of harm caused by the offense;
- (iv) the impact of prosecution or non-prosecution on the public welfare;
- (v) the background and characteristics of the offender, including any voluntary restitution or efforts at rehabilitation;
- (vi) whether the authorized or likely punishment or collateral consequences are disproportionate in relation to the particular offense or the offender;
- (vii) the views and motives of the victim or complainant;
- (viii) any improper conduct by law enforcement;
- (ix) unwarranted disparate treatment of similarly situated persons;
- (x) potential collateral impact on third parties, including witnesses or victims;
- (xi) cooperation of the offender in the apprehension or conviction of others;
- (xii) the possible influence of any cultural, ethnic,

- socioeconomic or other improper biases;
- (xiii) changes in law or policy;
- (xiv) the fair and efficient distribution of limited prosecutorial resources;
- (xv) the likelihood of prosecution by another jurisdiction; and
- (xvi) whether the public's interests in the matter might be appropriately vindicated by available civil, regulatory, administrative, or private remedies.

The relevance of these factors and how they address the human dignity concerns of the accused, the victim, and the affected community, are complex, unresolved, and kept in the shadows. This lack of resolution creates controversy, yet it is seldom discussed.

As a former criminal prosecutor, I relate to Professor Anthony Alfieri's description of prosecutors as "sociolegal agents"<sup>5</sup> and the importance of their decision-making both to approve or decline charges.<sup>6</sup> These charging decisions do more than impact the individual charged; they influence the social order in their respective communities.<sup>7</sup> In addition to charging decisions,<sup>8</sup> the prosecutor's narrative—his or her storytelling and framing of the facts, as well as the victim's identity, influence how the jury will ultimately react to

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<sup>5</sup> Anthony V. Alfieri, *Race Prosecutors, Race Defenders*, 89 Geo. L. J. 2227, 2229 (2001).

<sup>6</sup> MODEL RULES OF PROF'L CONDUCT R. 3.8 (2006) (Special Responsibilities of a Prosecutor).

<sup>7</sup> Tamara F. Lawson, "Whites Only Tree," *Hanging Nooses, No Crime?: Limiting the Prosecutorial Veto for Hate Crimes in Louisiana and Across America*, 174, 155 (2008) ("The events of Jena High School are troubling for many reasons; however, the "whites only tree" and the corresponding nooses expose only part of the Jena story, its local high school, its local history and its local prosecutor"). See also Andrew E. Taslitz & Carol Steiker, *Introduction to the Symposium: The Jena Six, the Prosecutorial Conscience, and the Dean Hand of History*, 44 HARV. C.R.-C.L. L. REV. 275, 276 (2009).

<sup>8</sup> Joshua Kleinfeld, *A Theory of Victim Criminalization*, 65 STAN. L. REV. 1087, 1125 (2013) ("Likewise we today officially proclaim that anyone who commits the same act with the same state of mind will face the same punishment, but under the surface we make adjustments for favored and disfavored victims. Our theories say victims don't matter. Our practice says they do").

the case and how the community will accept or reject its verdict.<sup>9</sup> As Henry Hart articulates, in *The Aims of Criminal Law*,<sup>10</sup> a key component of criminal prosecution is community condemnation of a defendant's behavior.<sup>11</sup>

David Luban, in *Folktales of International Justice*,<sup>12</sup> and Helena Cobban, in *Amnesty After Atrocity*,<sup>13</sup> ask key questions which are at the heart of criminal justice system, human dignity, and the exercise of discretion. Luban asks *who holds the right to punish*,<sup>14</sup> and Cobban inquires into *who gets to decide what the punishment will be*.<sup>15</sup> In deciding who holds the right to punish and what should that punishment be, one must seriously consider the sociolegal consequences of the prosecutor's charging decisions in important cases and the impact on the victim and the larger community. Overcharging a case may itself be a punishment, and one without due

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<sup>9</sup> Anthony V. Alfieri, *Race Prosecutors, Race Defenders*, 89 Geo. L. J. 2227, 2229 (2001) ("For both interpretive agents [prosecutor and defender], the discretion captured in the narrative and storytelling serves to mold the individual identity of defendants and victims, as well as the collective identity of their families and communities."). See generally RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 45 (2001) (discussing the use of storytelling in the courtroom and how "the narrative side of lawyering can enable lawyers representing the poor and disenfranchised to achieve a better brand of justice"); *id.* at 39-44 (discussing the use of storytelling and counter-storytelling to debunk myths the dominant racial group may have about the racial minority group).

<sup>10</sup> Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROBS. 401 (1958).

<sup>11</sup> *Id.* at 404.

<sup>12</sup> David Luban, *Folktales of International Justice*, 98 AM. SOC'Y INT'L L. PROC. 182, (2004) (citing Grotius for the question: "Who holds the right to punish? In Grotius's terms, is it "the injured individual" or "any other person"?).

<sup>13</sup> HELENA COBBAN, AMNESTY AFTER ATROCITY?: HEALING NATIONS AFTER GENOCIDE AND WAR CRIMES 7 (2007).

<sup>14</sup> Luban, *supra* note 12, at 183.

<sup>15</sup> HELENA COBBAN, *supra* note 13. However, Cobban, in contrast to Luban, considers through illustrations of the post-atrocity amnesty compromises of South Africa and Mozambique compared to the Western-style prosecutorial approach for Rwanda by the UN through the ICTR, that maybe the actual victims should decide the punishment, and not the "international community." *Id.* Cobban discusses that restorative punishment including a combination of amnesty and truth telling may well prove to be the preferred result/resolution over retributive sanctions. *Id.*

process. In contrast, the prosecutor's veto<sup>16</sup> authority not to file charges can trigger negative or vigilante responses by the community that may indeed lead to more harm.<sup>17</sup> In other words, whose voice should receive dominant attention when answering Luban's and Cobban's threshold questions regarding the exercise of discretion?

After all, "doing justice" is not such a simple analysis.<sup>18</sup> It often depends on the lens through which one looks at the case:

It is hard to label prosecutors' decisions as clearly good or bad, just or unjust. Achieving justice is the prosecutor's duty, but it is debatable if justice is achieved in any particular case. The query requires one to analyze the prosecutor's dual objectives of rigorously enforcing the law and ensuring that all charges filed can be proven beyond a reasonable doubt. Most cases and their charging decisions are straightforward and uneventful: identify the crime, charge the crime, and then move on to next case. But nothing in law is really that simple, and not all crimes that are identified are charged. That is what makes charging decisions discretionary, and ultimately controversial. In actuality, there are fundamental policy goals that drive decisions to charge and decisions not to charge. Further, these policy goals often change depending on the politics of the current prosecutor in power, including that prosecutor's vision and priorities. Thus, the purely legal issues are not the sole factors considered when making charging decisions.<sup>19</sup>

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<sup>16</sup> Lawson, *supra* note 7, at 185.

<sup>17</sup> Frank H. Wu, *Burning Shoes and the Spirit World: The charade of Neutrality*, 44 HARV. C-R.-C.L. L. REV. 313, 315 (2009) (discussing reframing racially biased episodes in terms of an equality model, either assimilation or multiculturalism).

<sup>18</sup> Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 18 (1998) (highlighting that prosecutorial discretion decisions are "almost always exercised in private").

<sup>19</sup> Lawson, *supra* note 2, at 284-85.

While individual prosecutor's personalities can clearly influence a charging decision, it is critical that the decisions are not made by a one-dimensional process. Rather, it is necessary that the decision-making process examines all factors and circumstances, in order to make certain that the prosecutor acts as a true "minister of justice."<sup>20</sup>

As context for our discussion of human dignity and the exercise of discretion, consider the case of Aaron Swartz.<sup>21</sup> Aaron Swartz, a 26 year old computer programmer, killed himself after what has been argued by some to be overzealous charging decisions by federal prosecutors.<sup>22</sup> Attorney General Eric Holder was called to testify before the Senate Judiciary Committee<sup>23</sup> regarding the charging decisions made against Swartz for crimes associated with his downloading files from the MIT computer network. The severity of the felony charges and the potential of 35 years in prison connected to the indictment arguably caused Swartz to commit suicide. Swartz hung himself in his apartment. The news of this case raised the question of zealousness in the use of prosecutorial discretion to charge, and to charge the maximum. Professor Lawrence Lessig wrote a notable essay in response to the prosecution of Swartz entitled

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<sup>20</sup> Ellen S. Podgor, *Race-ing Prosecutors' Ethics Codes*, 44 HARV. C.R.-C.L. L. REV. 461, 461 (2009) (arguing that prosecutorial discretion means considering all of the facts and circumstances surrounding a so-called criminal act; rather than just matching elements to a statute); Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243 (2011) (considering the question of whether a prosecutor's exercise of discretion not to charge a legitimate and provable case should be seen as a sub-species of the otherwise valid prosecutorial discretion or as an invalid departure from prosecutorial duties).

<sup>21</sup> U.S. v. Swartz, 945 F.Supp.2d 216 (D. Mass. May 13, 2013).

<sup>22</sup> Marcella Bombardieri, *The Inside Story of MIT and Aaron Swartz*, THE BOSTON GLOBE (Mar. 30, 2014), <https://www.bostonglobe.com/metro/2014/03/29/the-inside-story-mit-and-aaron-swartz/YvJZ5P6VhaPJusReuaN7SI/story.html>.

<sup>23</sup> Justice Department Oversight, *Cornyn's Questions About Aaron*, C-SPAN (Mar. 6, 2013), <http://www.c-span.org/video/?c4373899/cornyns-questions-aaron> (during the Senate Judiciary Committee Hearing on the alleged zealous prosecution of Aaron Swartz for computer crimes, Attorney General Holder responds to Senator Cornyn's questions and explains the facts of the case and basis for the prosecutor's exercise of discretion).

*Prosecutor as Bully.*<sup>24</sup>

Although Swartz' indictment was extensive, Holder testified that Swartz was initially offered to plead guilty and serve only 3 months in jail prior to the federal indictment. When that offer was rejected Swartz was charged with multiple felony counts under the Federal Computer Fraud and Abuse Act. What were initially two counts of fraud and two counts of accessing and damaging protected computers with minor jail time in state court became multiple felony counts in federal court risking up to 35 years in prison. Yet, Holder continued to explain to the Senators that, even after the formal federal indictment, Swartz was offered again to plead guilty with the potential of six months or less in jail and the opportunity to argue for probation. Swartz rejected these plea offers.

In response to Holder's explanation, Senator John Cornyn of Texas asked Holder, "[W]hy would a prosecutor make such a low plea offer of a few months in jail if such serious charges were really warranted?" Holder responded that he thought this practice was a good use of prosecutorial discretion. Holder went on to describe that it is appropriate for the prosecutor to look at the actual conduct of the defendant, irrespective of the statutory maximums, and fashion an appropriate, lower sentence.

ABA Standard 3-4.4(d) states: "The prosecutor should not file or maintain charges greater in number or degree than can reasonably be supported with evidence at trial and are necessary to fairly reflect the gravity of the offense or deter similar conduct."<sup>25</sup> This standard suggests that Swartz' case is an example where the zeal to convict on the maximum felonies was not only pursued, but prioritized. It may even be an example of a breach of the prosecutorial duty to do justice. It further speaks to the reality that human dignity is often the under-considered and clandestine factor in the equation of pursuing justice. The lack of proportionality between Swartz' crime and proposed

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<sup>24</sup> Lawrence Lessig, *Prosecutor as bully*, LESSIG.ORG (Jan. 12, 2013), <http://www.lessig.org/2013/01/prosecutor-as-bully/>. See also Michelle Dean, *The Case of Aaron Swartz*, THE NATION (Jan. 18, 2013), <https://www.thenation.com/article/case-aaron-swartz/>.

<sup>25</sup> ABA Prosecutorial Standards, *supra* note 1, at 3-4.4(d).

punishment begs the question of the purpose of our justice system and whether human dignity is intended to be considered.

Not all crimes are prosecuted, but when they are pursued, human dignity must be a forefront concern. The exercise of discretion presents a paradoxical dilemma which threatens morals and law. Human dignity must be revisited as a real factor, at the forefront of the decision-making, and not as a seldom-discussed clandestine issue. *Matthew 7:12* states: "In everything, do to others what you would have them do to you, for this sums up the Law and the Prophets." In parallel with Scripture, our Catholic social teaching encourages a continued vigilance for human dignity and a continued conversation, in order to truly impact justice.