NOTE

PROSECUTORIAL DISCRETION AS AN ETHICAL NECESSITY: THE ASHCROFT MEMORANDUM'S CURTAILMENT OF THE PROSECUTOR'S DUTY TO "SEEK JUSTICE"

Amie N. Ely†

INTRODUCTION ......................................................... 238

I. PROSECUTORIAL DISCRETION ................................. 241
   A. Prosecutorial Discretion Under the Common Law .................. 241
   B. Modern Standards and Rules Governing Prosecutorial Discretion .......................... 243
      2. Model Standards: ABA Standards for Criminal Justice Relating to the Prosecution Function ............... 246
      3. Ethical Rules ............................................. 248
         a. ABA Model Rules of Professional Conduct ................. 248
         b. ABA Model Code of Professional Responsibility ............ 249
   C. The Attorney General Cannot Exempt Federal Prosecutors from Ethical Requirements ....... 250

II. THE ASHCROFT MEMORANDUM ................................. 252
   A. The Terms .................................................. 252
   B. Distinguishing the Thornburgh Memorandum ......................... 259

III. PROSECUTORIAL ETHICS AND THE ASHCROFT MEMORANDUM ........................................ 263
   A. Charging and Pursuing the Most Serious, Readily Provable Offense ......................... 267
   B. Required Opposition to Downward Departures ....................... 268
   C. A Brief Response to the "Justice Requires Uniformity" Argument ................. 271

† B.A., Oberlin College, 1999; candidate for J.D., Cornell Law School, 2005. I would like to thank Professor Paige Anderson, Professor Stephen F. Smith at the University of Virginia Law School, and the attorneys with whom I worked as a summer intern at the U.S. Attorney's Office for the Southern District of New York in 2003. The views here are, of course, my own, as are any mistakes.
D. If Uniformity is Necessary, Why Make an
Exception for Fast-Track Programs? ................. 274
E. The Potential Impact of Blakely v. Washington ...... 275
CONCLUSION .................................................. 277

INTRODUCTION

The accomplishment of justice should not be the fortuitous residue of the
process in which the prosecutor participates; it should be the guiding princi-
ple for every aspect of the prosecutorial function. ¹

As the only attorneys charged with seeking justice,² prosecutors
play an important role and carry a unique burden in our justice sys-
tem.³ They are administrators of justice,⁴ representing a sovereign
whose interest "is not that it shall win a case, but that justice shall be
done."⁵ As Robert H. Jackson explained to a group of U.S. Attorneys
over sixty years ago, "the citizen's safety lies in the prosecutor who
temps 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."⁶

When Deputy Attorney General James Comey⁷ was the U.S. Attor-
ney for the Southern District of New York, he would tell every new
prosecutor: "Don't you ever say something you don't completely be-
lieve. I'm not even talking about shades of gray. If you don't 100

¹ Kenneth J. Melilli, Prosecutorial Discretion in an Adversary System, 1992 BYU L. REV. 669, 702. Melilli was a prosecutor for five years, three and a half of which were as an
Assistant U.S. Attorney in the District of Columbia. Id. at 669 n.1.
as the only participants who must adhere to a special duty beyond that of
representing zealously their "client." This higher duty has been variously
phrased to require the prosecutor "to seek justice, not merely to convict,"
and "to serve as a minister of justice and not simply [as] an advocate.
(citations omitted) (second alteration in original)). But see William H. Simon, Ethical Dis-
ccretion in Lawyering, 101 HARV. L. REV. 1083, 1090–91 (1988) (proposing that other attorney
should also "seek justice," adopting "a style of ethical judgment for private lawyers
analogous to that familiarly associated with judges of prosecutors").
⁴ ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, THE PROSE-
cUTION FUNCTION § 3-1.2(b) (1992) [hereinafter ABA STANDARDS], available at http://
⁵ See Berger, 295 U.S. at 88.
(1940–41).
⁷ See Al Kamen, One Show Turkey and a Lot of Fowl, WASH. POST, Dec. 10, 2003, at A29;
Siobhan Roth & Vanessa Blum, Summoned to Main Justice at Time of Exodus, SCRUTINY, N.Y.
L.J., Oct. 7, 2003, at 1. Comey has a "reputation[ ] for placing high value on prosecutorial
integrity." Gary Fields & Greg Hitt, Ashcroft Gives Up Role in Inquiry into CIA Leak, WALL ST.
percent believe it, don’t you dare say it. That’s why being a prosecutor is so great: You don’t have to make arguments you don’t believe in.”

He told law students interning at the Southern District of New York that he could “hire smart all day,” but that intelligence alone was not enough. Because prosecutors have the ability to ruin lives, he explained, he looked for people who could exercise this power with discretion and sensitivity.

A few weeks later, U.S. Attorney General John Ashcroft stripped the discretion that federal prosecutors need to do justice. In a memorandum to all federal prosecutors, Ashcroft directed them to “charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case” with limited exceptions. Furthermore, the Attorney General instructed that a prosecutor “must not request or accede to a downward departure except in the limited circumstances specified in [the] memorandum” unless the attorney received permission from her superior.

Almost immediately, former Attorney General Janet Reno spoke against Ashcroft’s leap towards harsh uniformity: “To see that justice is done, there has got to be the ability to focus on what’s the right thing to do in a particular case, and the right thing to do may not be the ultimate charge.” And while a spokesman for Comey suggested that “it [there was] no real deviation from the Southern District’s longstanding policy” regarding charging offenses, the missive from Washington seemed likely to hinder the discretion that he suggested was a key component of the federal prosecutor’s job. The Ashcroft Memorandum could easily force a prosecutor to “make arguments [she doesn’t] believe in.”

This Note examines the various ethical considerations that guide prosecutors in exercising their discretion and the ways in which the

---


10 See id.


13 See id. at 6.


16 See Smith, supra note 8.
Ashcroft Memorandum curtails that discretion.\textsuperscript{17} The goal is to evaluate the extent to which abiding by the Ashcroft Memorandum's requirements may force a prosecutor to behave unethically.\textsuperscript{18} Part I.A surveys prosecutorial discretion as conceived by the common law, courts, and commentators. Part I.B examines prosecutorial discretion as described by the U.S. Attorneys' Manual, the American Bar Association's Standards for Criminal Justice Relating to the Prosecution Function, and the American Bar Association's Model Rules of Professional Conduct.\textsuperscript{19} Part I.C then analyzes former Attorney General Richard Thornburgh's failed attempt to exempt federal prosecutors from ethical requirements. Part II.A evaluates the mandates of the Ashcroft Memorandum and considers whether a prosecutor is able to fulfill her\textsuperscript{20} ethical obligations given the circumscription of her decision-making powers. Part II.B examines the differences between the guidelines set forth by Attorney General Thornburgh and the Ashcroft

\textsuperscript{17} Rather than suggesting that unfettered discretion is an intrinsic "good" in the administration of justice, this Note addresses only the potential tension between prosecutors' ethical guidelines and a system that affords them little discretion. For a critique of the dangers of too much discretion, see James Vorenberg, Decent Restraint of Prosecutorial Power, 94 Harv. L. Rev. 1521, 1523 (1981), which describes the scope of prosecutorial power at that time as "both inconsistent with the fair and effective administration of justice and unnecessary to serve the purposes offered to justify it." For an analysis of reckless and discriminatory exercise of prosecutorial discretion, see, e.g., Angela J. Davis, The American Prosecutor: Independence, Power, and the Threat of Tyranny, 86 Iowa L. Rev. 393, 408, 438 (2001), which suggests that "[o]rdinary prosecutors have the same power and discretion afforded [Whitewater Independent Counsel] Kenneth Starr" and that "[t]he breadth of prosecutorial discretion and the prevalence of prosecutorial misconduct demonstrate the importance of effective mechanisms of accountability."

\textsuperscript{18} At the same time, prosecutors should not simply be "free to follow their own lights" in every case. See David Robinson, Jr., The Decline and Potential Collapse of Federal Guideline Sentencing, 74 Wash. U. L.Q. 881, 889 (1996) (quoting Janet Reno's reply to Senator Hatch; for further explanation see infra note 167). Instead, a prosecutor should be permitted to recognize and weigh the mitigating factors of each case. Most cases would likely result in the prosecutor choosing to pursue the "most serious, readily provable offense or offenses that are supported by the facts of the case," which is not inconsistent with the Ashcroft Memorandum's requirements. See Ashcroft Memorandum, supra note 12, at 2. As "most of the safeguards of our legal system exist for atypical cases," the fact that these "outlier" cases might call for decisions more nuanced than those permitted by the letter of the Ashcroft Memorandum should not be dismissed. See Albert W. Alschuler, The Failure of Sentencing Guidelines: A Plea for Less Aggregation, 58 U. Chi. L. Rev. 901, 905 (1991).

\textsuperscript{19} Peter Krug explained where the "forms in which written criteria" for prosecutorial discretion were available; he also discussed legislative guidelines, which this Note will not address. See Peter Krug, Prosecutorial Discretion and Its Limits, 50 Am. J. Comp. L. 643, 650-652 (2002). As "[t]he rules state courts develop . . . are largely based on the American Bar Association's templates[,] the Model Code of Professional Responsibility and the Model Rules of Professional Conduct," most, if not all, federal prosecutors must abide by some version of one of these two ethical guidelines. Lesley E. Williams, The Civil Regulation of Prosecutors, 67 Fordham L. Rev. 9441, 9443 (1999) (footnotes omitted); see also infra Part I.C (describing a congressional mandate instructing federal prosecutors to abide by the ethical requirements of the jurisdictions in which they practice).

\textsuperscript{20} Throughout this Note, I will refer to the prosecutor as female and the defendant or his attorney as male.
Memorandum. Parts III.A and III.B consider the Ashcroft Memorandum's requirements that prosecutors charge and pursue the most serious offense and oppose downward departures, and conclude that the Memorandum will, in some circumstances, force prosecutors to choose between abiding by the Memorandum's requirements and fulfilling their ethical obligations. Next, Parts III.C and III.D address arguments that justice requires uniformity among all similar crimes regardless of the defendant's culpability. Finally, Part III.E considers whether the concerns in this Note will be obviated if Blakely v. Washington and its progeny invalidate the Federal Sentencing Guidelines, and concludes that, regardless of the sentencing scheme, prosecutors must be afforded sufficient discretion to fulfill their ethical mandate to "seek justice."

I

PROSECUTORIAL DISCRETION

In some cases, the application of the criminal laws to a particular individual, though supported by probable cause, is unwarranted in light of the individual's lack of culpability. The prosecutor must recognize when the circumstances of a person's situation are such that prosecution would "do more harm than good."22

A. Prosecutorial Discretion Under the Common Law

The duty to seek justice is the "long-understood role of the prosecutor in every jurisdiction"23 and is realized by prosecutors with "the power to criminally charge."24 Prosecutors' authority to charge is governed by the Constitution, statutes, and court opinions. While prosecutors have exclusive authority to prosecute, they are not generally required to do so in every case.25 Prosecutorial discretion is not unlimited, but rather is constrained by "norms of equality and rationality that are difficult to enforce in the courts."26 Violations of these norms include discriminatory prosecution and complete nonenforcement of

21 This comparison is necessary to briefly rebut claims that the Ashcroft Memorandum is "largely a restatement of the policy issued 14 years ago by then-Attorney General Dick Thornburgh." Mark Corallo, Director of Public Affairs, U.S. Department of Justice, Letter to the Editor, Ashcroft is Obligated to Seek Uniformity, CINCINNATI POST, Nov. 6, 2003, at 19A.
26 Id. at 11.
a category of crime. Problems of proof often defeat defendants' charges of discriminatory prosecution, however, and victims have difficulty obtaining standing to compel prosecution or proving that a prosecutor has engaged in total nonenforcement of a particular crime.

Thus, prosecutors face many occasions to exercise their discretion and have traditionally enjoyed great deference in wielding that discretion. In fact, prosecutors often determine which persons should be investigated; often choose the methods of investigation and what information to seek as evidence; decide whom to charge with what offense; whom to use as witnesses; and whether (and on what terms) to enter into plea bargains and grant immunity.

When deciding whether to prosecute a person, prosecutors traditionally weighed factors such as the role he played in and his motivations for entering into a criminal venture, as well as his background, criminal history, and the specific circumstances surrounding the violation. Government interests also traditionally played a role in prosecutors' charging decisions. For example, the willingness of the accused to assist the prosecutor in building cases against others could lead to dismissal or reduction of the charges if the governmental interest in successfully prosecuting others outweighed the interest in convicting the accused. Other factors, such as the impact of the offense on the victim and the community, the relative importance of the case, and the public attitude about the prosecution could also affect the prosecutor's charging decision.

In colonial days and through the 1800s a "prosecutor had unlimited discretion to enter a nolle prosequi without any court involvement." The nolle was inherited from sixteenth century England, where the Attorney General would use it to rein in a private prosecutor's frivolous or unsubstantiated charges, as well as meritorious charges that interfered with a state prosecution. The nearest ana-

---

27 See id. at 9-10.
28 Id.
30 Id. at 807.
31 See Subin et al., supra note 22, §§ 5.3(a), 5.4(a).
32 See id. § 5.3(c) (citation omitted).
33 Id.
34 “To be unwilling to prosecute.”
35 State v. Mucci, 782 N.E.2d 133, 139 (Ohio Ct. App. 2002) (explaining further that "the legislators and courts of this state and the federal government have acted to take this unlimited postindictment discretion away from the prosecutor"); see also In re Richards, 213 F.3d 773, 782 (3d Cir. 2000) ("Absent a controlling statute or rule to the contrary, this power [to enter a nolle prosequi] resides solely in the prosecutor's hands until the impanelment and swearing of a jury."); cf. State v. Sonneland, 494 F.2d 469, 471 (Wash. 1972) (holding that a statute abrogated the discretion to dismiss a prosecution that a prosecuting attorney traditionally enjoyed at common law).
36 See Goldstein, supra note 25, at 12.
logue to the nolle in the contemporary federal system is Federal Rule of Criminal Procedure 48(a), which permits the Attorney General to dismiss an indictment, information, or complaint by leave of the trial judge, who often requires that the government provide some rationale for the dismissal request. On the other hand, some commentators and judges suggest that courts have no power to force continued prosecution of cases that prosecutors do not believe warrant prosecution—including cases where the prosecutor does not believe she can prove the charges at trial. This suggests a functional return to the traditional discretion afforded by nolle prosequi.

B. Modern Standards and Rules Governing Prosecutorial Discretion


Guidelines promulgated by the Department of Justice in the U.S. Attorneys’ Manual (Manual) suggest that prosecutors enjoy “broad discretion in such areas as initiating or foregoing prosecutions, selecting or recommending specific charges, and terminating prosecutions by accepting guilty pleas . . . .” The Manual offers suggestions meant to “provid[e] guidance rather than to mandat[e] results” and is intended to assure the public and individual defendants that prosecutors will make decisions “rationally and objectively on the merits of each case.” Recognizing that the system’s success hinges upon “the character, integrity, sensitivity, and competence of those men and women who are selected to represent the public interest in the Federal

\[\text{\tiny See id. at 17-19.}\]

\[\text{\tiny See id. at 20.}\]


The manner in which Federal prosecutors exercise their decision-making authority has far-reaching implications, both in terms of justice and effectiveness in law enforcement and in terms of the consequences for individual citizens. A determination to prosecute represents a policy judgment that the fundamental interests of society require the application of the criminal laws to a particular set of circumstances—recognizing both that serious violations of Federal law must be prosecuted, and that prosecution entails profound consequences for the accused and the family of the accused whether or not a conviction ultimately results. Other prosecutorial decisions can be equally significant. Decisions, for example, regarding the specific charges to be brought, or concerning plea dispositions, effectively determine the range of sanctions that may be imposed for criminal conduct.

\[\text{\tiny Id. § 9-27.001.}\]

\[\text{\tiny Id.}\]

\[\text{\tiny Id.}\]
criminal justice process,” the Manual explains that “the prosecutor has wide latitude in determining when, whom, how, and even whether to prosecute for apparent violations of Federal criminal law.”

The Manual further explains that all federal prosecutors should “be guided by a general statement of principles that summarizes appropriate considerations to be weighed, and desirable practices to be followed, in discharging their prosecutorial responsibilities.” Also, “it is not intended that reference to these principles will require a particular prosecutorial decision in any given case,” but rather that the Manual will help prosecutors determine how best to exercise their authority while performing their duties. Toward this end, the Manual offers federal prosecutors guidelines to help them determine whether to file charges against an accused.

Probable cause that the accused committed the charged crime is an absolute prerequisite to filing charges. Federal prosecutors should consider several additional factors when determining whether to initiate prosecution, including whether a substantial federal interest is served by prosecuting, whether another jurisdiction would effectively prosecute, and whether an “adequate non-criminal alternative to prosecution” is available.

Considerations relevant to ensuring that an adequate federal interest exists to prosecute include: priorities of federal law enforcement; the deterrent effects of prosecuting the accused; the nature and seriousness of the crime; the criminal history of the accused, his individual culpability and his willingness to cooperate in other investigations or prosecutions; and “[t]he probable sentence or other consequences if the person is convicted.”

---

42 Id.
43 Id. § 9-27.110 cmt.
44 Id. (emphasis added). Furthermore, [a]though these principles deal with the specific situations indicated, they should be read in the broader context of the basic responsibilities of Federal attorneys: making certain that the general purposes of the criminal law—assurance of warranted punishment, deterrence of further criminal conduct, protection of the public from dangerous offenders, and rehabilitation of offenders—are adequately met, while making certain also that the rights of individuals are scrupulously protected.
45 Id. § 9-27.120 cmt.
46 Id. § 9-27.200 cmt.
47 Id. § 9-27.220.
48 Id. § 9-27.230. Regarding culpability, the comment clarifies that “[i]f for example, the person was a relatively minor participant in a criminal enterprise conducted by others, or his/her motive was worthy, and no other circumstances require prosecution, the prosecutor might reasonably conclude that some course other than prosecution would be appropriate.” Id. § 9-27.230 cmt. 4. The comment also adds another consideration, “The Person’s Personal Circumstances,” which permits prosecutors deciding whether to bring
To assess whether another jurisdiction can effectively prosecute the accused, a prosecutor should consider whether the other jurisdiction has a strong interest in prosecuting, its willingness to effectively prosecute, and the likely sentence it will give the accuser if he is convicted.\textsuperscript{49} A prosecutor may decline to pursue criminal charges where noncriminal sanctions adequately reflect the culpability of the accused and are likely to be imposed, and the effect of the noncriminal disposition does not militate against federal law enforcement interests.\textsuperscript{50} These noncriminal dispositions include subjecting the defendant to civil or administrative remedies or assigning him to a pretrial diversion program.\textsuperscript{51}

When deciding whether to bring charges, prosecutors may not discriminate on the basis of the race, religion, beliefs, sex, national origin, or political affiliation of an accused, except when these characteristics are a defined element of the crime.\textsuperscript{52} For instance, the race of the offender and his victim might be appropriate considerations in determining whether to prosecute a civil rights violation.\textsuperscript{53} Finally, the prosecutor cannot consider her personal feelings about the accused, the victim, or the acquaintances of the accused, or the effect of prosecuting on the attorney’s personal or professional life.\textsuperscript{54} To ensure that any such inappropriate considerations do not affect prosecutors’ charging decisions, they must record their reasons to prosecute or to decline prosecution.\textsuperscript{55}

While prosecutors “should resist” departures forbidden by the Sentencing Guidelines, the Manual does not require them to oppose departures that the guidelines permit.\textsuperscript{56} Prosecutors should make sentencing recommendations when required to do so by the terms of a plea agreement or in “unusual cases” where there is “good reason to

\textsuperscript{49} Id. § 9-27.240.

\textsuperscript{50} See id. § 9-27.250.

\textsuperscript{51} Pretrial diversion programs “divert certain offenders from traditional criminal justice processing into a program of supervision and services administered by the U.S. Probation Service.” Id. § 9-22.000.

\textsuperscript{52} Id. § 9-27.260.

\textsuperscript{53} See id. § 9-27.260 cmt.

\textsuperscript{54} Id. § 9-27-260 cmt.

\textsuperscript{55} See id. § 9-27.270. A prosecutor’s reasons to prosecute or decline prosecuting, however, are not generally discoverable. To prove selective prosecution, a defendant must show that the prosecutorial policy had a discriminatory effect and was motivated by a discriminatory purpose. See United States v. Armstrong, 517 U.S. 456, 465 (1996). To gain access to the files necessary to prove the discriminatory purpose, the defendant must first present “some evidence tending to show the existence of the essential elements of a selective prosecution claim,” or make “a credible showing of different treatment of similarly situated persons.” Id. at 470 (quoting United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974)).

\textsuperscript{56} See id. § 9-27.745.
anticipate the imposition of a sanction that would be unfair to the defendant or inadequate in terms of society's needs . . . ."\textsuperscript{57} In such a case, the "public interest warrants an expression of the government's view concerning the appropriate sentence."\textsuperscript{58} Thus, even if the court has not asked for her opinion, a prosecutor might either recommend probation where "imprisonment plainly would be inappropriate" or recommend imprisonment rather than probation if that would be the more appropriate punishment.\textsuperscript{59} Prosecutors must bear in mind, however, that the "primary responsibility for sentencing lies with the judiciary," and, therefore, they should not routinely make sentencing recommendations.\textsuperscript{60}

One provision in the Manual suggests the degree to which the Ashcroft Memorandum represents a departure from the discretion historically afforded local U.S. Attorneys: "Although these materials are designed to promote consistency in the application of Federal criminal laws, they are not intended to produce rigid uniformity among Federal prosecutors in all areas of the country at the expense of the fair administration of justice."\textsuperscript{61} This language mirrors Robert H. Jackson's 1940 exhortations to the U.S. Attorneys assembled in the Great Hall of the Department of Justice:\textsuperscript{62}

Your responsibility in your several districts for law enforcement and for its methods cannot be wholly surrendered to Washington, and ought not to be assumed by a centralized Department of Justice. It is an unusual and rare instance in which the local District Attorney should be superseded in the handling of litigation, except where he requests help of Washington.\textsuperscript{63}

2. \textit{Model Standards: ABA Standards for Criminal Justice Relating to the Prosecution Function}

The American Bar Association Standards for Criminal Justice Relating to the Prosecution Function\textsuperscript{64} (ABA Standards) also implicate

\textsuperscript{57} Id. § 9-27.730 cmt.
\textsuperscript{58} Id. § 9-27.730.
\textsuperscript{59} Id. § 9-27.730 cmt.
\textsuperscript{60} Id. but see United States v. Green, Nos. CR. A. 02-10054-WGY, CR. A. 01-10469-WGY, CR. A. 99-10066-WGY, 2004 WL 1381101, at *32–33 (D. Mass. June 18, 2004) (suggesting prosecutors have "effective control over criminal sentencing").
\textsuperscript{61} Id. § 9-27.140 cmt. (emphasis added). A "coordinated prosecutive response" is, however, necessary when prosecuting terrorism matters. Id. § 9-2.156. The Manual further provides that "[i]n situations in which a modification or departure is contemplated as a matter of policy or regular practice, the appropriate Assistant Attorney General and the Deputy Attorney General must approve the action before it is adopted." The text most likely addresses "fast-track" programs. See, e.g., infra note 193; infra Part III.D.
\textsuperscript{63} Jackson, supra note 6, at 3–4.
\textsuperscript{64} ABA STANDARDS, supra note 4.
broad discretion for prosecutors in their charging decisions. While the Department of Justice has not adopted the ABA Standards as official policy, the Manual recognizes that courts look to them to determine prosecutors' ethical obligations and recommends that prosecutors become familiar with them.\textsuperscript{65} The ABA Standards describe prosecutors as "administrat[or]s of justice," "advocate[s]," and "officer[s] of the court,"\textsuperscript{66} and emphasize that "the duty of the prosecutor is to seek justice, not merely to convict."\textsuperscript{67} They also encourage prosecutors to be reformers, actively working to remedy "inadequacies or injustices in the substantive or procedural law."\textsuperscript{68} Furthermore, prosecutors are subject to the laws, ethical codes, and traditions governing their jurisdictions.\textsuperscript{69}

Moreover, the ABA Standards recommend that prosecutors' offices promulgate "general policies to guide the exercise of prosecutorial discretion" so as to "achieve a fair, efficient, and effective enforcement of the criminal law."\textsuperscript{70} According to the ABA Standards, prosecutors should not misrepresent factual or legal matters to the court,\textsuperscript{71} and have an affirmative obligation to disclose legal authority that they know is "directly adverse" to their position if defense counsel has not already made the tribunal aware of such authority.\textsuperscript{72}

The ABA Standards additionally suggest that the prosecutor consult with victims before deciding whether to prosecute the accused, pursue a plea bargain, or dismiss charges already filed against the defendant.\textsuperscript{73} Nevertheless, the prosecutor retains the initial and primary responsibility to decide whether to institute criminal proceedings against a defendant.\textsuperscript{74} In making this decision, she should consider available noncriminal dispositions even if there is probable cause to press criminal charges—particularly if the defendant is a first-time offender and the offense is minor.\textsuperscript{75} Even when the prosecutor chooses

\textsuperscript{65} See Manual, supra note 39, § 9-2.101.
\textsuperscript{66} Id. § 3-1.2(b).
\textsuperscript{67} Id. § 3-1.2(c).
\textsuperscript{68} Id. § 3-1.2(d).
\textsuperscript{69} See id. § 3-1.2(c); see also infra Part I.C.
\textsuperscript{70} Id. § 3-2.5(a). Compare Memorandum from Richard Thornburgh, Attorney General, to Federal Prosecutors (Mar. 13, 1989), reprinted in 1 Fed. Sent. Rep. 421 (1989) [hereinafter Thornburgh Memorandum] (describing the guidelines for prosecutors as necessary to "make sentences under the Sentencing Reform Act fair, honest, and appropriate"), available at 1989 WL 258729, with Ashcroft Memorandum, supra note 12 (describing the Thornburgh Memo as ensuring "principles of equity, fairness and uniformity" and concluding that "[f]undamental fairness requires that all defendants prosecuted in the federal criminal justice system be subject to the same standards and treated in a consistent manner").
\textsuperscript{71} See ABA Standards, supra note 4, § 3-2.8(a).
\textsuperscript{72} Id. § 3-2.8(d).
\textsuperscript{73} See id. § 3-3.2(h).
\textsuperscript{74} Id. § 3-3.4(a).
\textsuperscript{75} See id. § 3-3.8(a).
to bring charges, however, she “is not obliged to present all charges which the evidence might support.”

Factors she should consider in exercising this discretion include “the disproportion of the authorized punishment in relation to the particular offense or the offender,”

her reasonable doubt about the guilt of the accused, and the amount of harm caused by the offense. The prosecutor should not bring more or greater charges “than can reasonably be supported with evidence at trial or than are necessary to fairly reflect the gravity of the offense.” Furthermore, supervisors should not compel prosecution when there is reasonable doubt about the guilt of the accused. Finally, the ABA Standards encourage prosecutors to make themselves available for individual plea discussions, and to announce a general willingness to dispose of charges though plea bargains.

Once at trial, the prosecutor has a duty as an officer of the court to “strict[ly] adher[e] to codes of professionalism.” If the defendant is convicted, “[t]he prosecutor should not make the severity of sentences the index of . . . her effectiveness.” In addition, she should provide the court with any information relevant to the sentence for the presentence report and inform the court and defense counsel of all unprivileged mitigating information of which she is aware, either at or before sentencing. If the prosecutor chooses to comment on the sentence, “she should seek to assure that a fair and informed judgment is made on the sentence and to avoid unfair sentence disparities.”

3. Ethical Rules

a. ABA Model Rules of Professional Conduct

The Model Rules of Professional Conduct recognize that prosecutors are not only advocates, but also “minister[s] of justice” with a responsibility to ensure that the defendant receives “procedural justice”

---

76 See id. § 3-3.9(b).
77 Id. § 3-3.9(b)(iii).
78 See id. § 3-3.9(b)(i).
79 See id. § 3-3.9(b)(ii). Other factors the prosecutor should consider include the motives of the complainant, the victim’s willingness to testify, the defendant’s cooperation in apprehending or convicting others, and the possibility of prosecution in another jurisdiction. See id. § 3-3.9(b)(iv)–(vii).
80 Id. § 3-3.9(f).
81 Id. § 3-3.9(c).
82 See id. § 3-4.1(a).
83 Id. § 3-5.2(a).
84 Id. § 3-5.1(a).
85 Id. § 3-6.2(a).
86 Id. § 3-6.2(b).
87 Id. § 3-6.1(a).
and that sufficient evidence supports a guilty verdict. While responsibility may differ by jurisdiction, many states have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function. Thus, prosecutors must refrain from prosecuting charges not supported by probable cause, disclose all evidence negating the defendant’s guilt or mitigating the offense, and provide all unprivileged mitigating information to both the court and defense counsel at sentencing. Furthermore, as with all lawyers, if a prosecutor “knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer’s conduct.”

b. ABA Model Code of Professional Responsibility

The ABA Model Code of Professional Responsibility sets aspirational standards called “Ethical Considerations” and binding “Disciplinary Rules.” The Code recognizes that “[t]he responsibilities of a lawyer may vary” depending on the particular obligations she may have, including those stemming from “service as a public prosecutor.”

---

89 See id.
90 See Model Rules, supra note 88, R. 3.8(a).
91 See id. R. 3.8(d). Other prosecutorial responsibilities include “mak[ing] reasonable efforts to assure” that the defendant knows he has the right to counsel and has been given the opportunity to obtain counsel. Id. R. 3.8(b). The Rules also require prosecutors to refrain from seeking a waiver of important prejudicial rights from an unrepresented defendant, avoid subpoenaing lawyers regarding client behavior except in certain circumstances, and refrain from making extrajudicial comments that might prejudice the defendant. See id. R. 3.8(c), (e), (f).
92 See id. R. 1.2(e); cf. Model Rules, supra note 88, R. 1.2 (abrogating Rule 1.2(e) and, instead, instructing in Rule 1.4(a)(5) that “[a] lawyer shall consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law”). A government attorney’s client may be “an agency official, the agency itself, the government as a whole, or the ‘public interest.’” Catherine J. Lancot, The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions, 64 S. Cal. L. Rev. 951, 955 (1991).
93 See Frank S. Bloch et al., Filling in the ‘Larger Puzzle’: Clinical Scholarship in the Wake of The Lawyering Process, 10 Clinical L. Rev. 221, 228 n.25 (2003) (explaining that attorneys “were supposed to strive to follow the ethical considerations, but they were not considered binding” (quoting John S. Dzienvorski, Professional Responsibility Standards, Rules and Statutes: 2003–04 Abridged Ed. 553 (2003)))). But see, e.g., Freeport-McMoRan Oil & Gas Co. v. Fed. Energy Reg’l Comm’n, 962 F.2d 45, 47 (D.C. Cir. 1992) (invoking Model Code of Professional Responsibility EC 7-14 to scold a government civil lawyer who suggested that the government lawyers had no obligations beyond those of private attorneys).
The Ethical Considerations state that a prosecutor's "duty is to seek justice, not merely to convict."\textsuperscript{95} Similarly, a lawyer's duty to represent her client zealously does not diminish her obligation to "avoid the infliction of needless harm" and treat others involved in the legal process with respect.\textsuperscript{96} Thus, she should use restraint when exercising discretionary powers\textsuperscript{97} and "refrain from instituting or continuing litigation that is obviously unfair."\textsuperscript{98} If a prosecutor has no discretionary power, she should recommend against continuing unfair litigation.\textsuperscript{99}

The Disciplinary Rules constrain a prosecutor's discretion in less ambitious—but more prescriptive—terms and require a prosecutor not to institute charges when she "knows or it is obvious that the charges are not supported by probable cause."\textsuperscript{100} Furthermore, she must disclose to the defendant or defense counsel any exculpatory evidence and any evidence that mitigates the degree of the offense or lessens the defendant's punishment.\textsuperscript{101}

Finally, ABA Model Code Ethical Considerations counsel lawyers to strive to improve the legal system.\textsuperscript{102} Because laws should be "just, understandable, and responsive to the needs of society,"\textsuperscript{103} lawyers should participate in the legislative process to improve the system "without regard to the general interests and desires of clients or former clients."\textsuperscript{104}

C. The Attorney General Cannot Exempt Federal Prosecutors from Ethical Requirements

In a 1989 memorandum, Attorney General Thornburgh insisted that to protect federal interests he needed the power to exempt federal prosecutors from certain rules.\textsuperscript{105} He thus instructed that subordinate federal prosecutors were exempt from "local and state rules . . . [that] frustrate the lawful operation of the federal government."\textsuperscript{106} Most federal courts disagreed, however, holding that the memorandum did not shield federal prosecutors from state and local

\textsuperscript{95} Id. EC 7-13.
\textsuperscript{96} Id. EC 7-10.
\textsuperscript{97} See id.
\textsuperscript{98} Id. EC 7-14.
\textsuperscript{99} Id.
\textsuperscript{100} Id. DR 7-103(A).
\textsuperscript{101} Id. DR 7-103(B).
\textsuperscript{102} See id. EC 8-1–8-9.
\textsuperscript{103} Id. EC 8-2.
\textsuperscript{104} Id. EC 8-1.
\textsuperscript{105} Memorandum from Richard Thornburgh, Attorney General, to All Justice Department Litigators (June 8, 1989), reprint ed as Exhibit E in In re Doe, 801 F. Supp. 478, 489–93 (D.N.M. 1992).
\textsuperscript{106} See id.
ethics requirements.107 Congress sided with the courts and responded to the memorandum, and a similar regulation later promulgated under Attorney General Reno, by passing the McDade Amendment,108 which expressly subjects federal prosecutors to the ethics rules of every jurisdiction in which they practice, absent specific authorization from Congress.109 Before the McDade Amendment, prosecutors were governed only by the ethics rules of the jurisdiction in which they were licensed.110

Congress has since considered scaling back the McDade Amendment,111 and some commentators have criticized the amendment for ignoring legitimate federalism concerns and exacerbating confusion about inconsistent state and federal ethics rules.112 The amendment nevertheless remains in force and courts still hold federal prosecutors to the rules of professional responsibility governing the state(s) in which they practice as well as the state(s) in which they are licensed.113 For example, in United States v. Parker,114 a federal district court looked to ethical opinions written by the New York bar to hold that the prosecutor did not violate the rules of professional responsibility by permitting audio and visual surveillance of the defendant.115

The McDade Amendment demonstrates clear congressional intent that federal prosecutors abide by the same ethical standards to which their state analogs are held. Furthermore, the McDade Amendment—as well as the pre-McDade cases construing Thornburgh’s memorandum—suggests that an attorney general cannot exempt federal prosecutors from ethical requirements.

110 See Note, Federal Prosecutors, supra note 107, at 2080.
114 See id. at 476 (construing Model Code, supra note 94, DR 1-102(A)(4)).
Admittedly, the prosecutorial duty to "seek justice" is more abstract than, for instance, a requirement forbidding attorneys from contacting parties already represented by another lawyer. Moreover, a prosecutor who falls short in "seeking justice" will not likely face disciplinary proceedings, nor is it likely that a defendant could obtain standing to challenge a prosecutor's discretionary decision. Nevertheless, lawyers—particularly prosecutors—should hold themselves to standards higher than the minimum necessary to avoid disciplinary action.

II

THE ASHCROFT MEMORANDUM

A. The Terms

The Ashcroft Memorandum establishes Department of Justice charging and sentencing policy in federal criminal cases. In most cases, it requires federal prosecutors to "charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case . . . ." The memorandum provides for a few enumerated exceptions, which require express authorization by an Assistant Attorney General, U.S. Attorney, or another designated supervisor.

To support the policy set forth in the memorandum, the Attorney General invoked the Sentencing Reform Act of 1984, which he described as "a watershed event in the pursuit of fairness and consistency


117 See MANUAL, supra note 39, § 9-27.150 (explaining that the provisions in the United States Attorney's Manual are "not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party to litigation with the United States"). But see United States v. Schneppe, 302 F. Supp. 2d 1170, 1187 (D. Haw. 2004) ("Being sentenced pursuant to an invalid system . . . presents an 'actual, concrete invasion of a legally protected interest.'" (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992))). Schneppe might suggest that, were a defendant able to prove somehow that the lack of prosecutorial discretion curtailed his right to an actor bound to seek justice, he might be able to obtain standing to challenge the Ashcroft Memorandum. See id. Judge Easterbrook, however, has stated that "Criminals have neither a moral nor a constitutional claim to equal or entirely proportional treatment. Constitutional law is not a device allowing judges to set the 'just price' of crime, to prescribe the ratio of retailers' to manufacturers' sentences." United States v. Marshall, 908 F.2d 1312, 1326 (7th Cir. 1990) (en banc).

118 See, e.g., Gerald L. Postema, Moral Responsibility in Professional Ethics, 55 N.Y.U. L. REV. 68, 70-71 (1980) ("approving an "approach [to] the problems of professional ethics from a perspective that recognizes the importance of practical judgment and moral sentiment")

119 Ashcroft Memorandum, supra note 12, at 2; see also United States v. Redondo-Lemos, 955 F.2d 1296, 1299 (9th Cir. 1992) ("Prosecutorial charging and plea bargaining decisions are particularly ill-suited for broad judicial oversight."); United States v. Simpson, 927 F.2d 1088, 1091 (9th Cir. 1991) ("The doctrine of separation of powers requires judicial respect for the independence of the prosecutor.").
in the federal criminal justice system\(^{120}\) that was intended to promote transparency and honesty in sentencing, guide judicial sentencing discretion, and encourage judges to impose "appropriately different punishments for offenses of differing severity."\(^{121}\) He also suggested that the PROTECT Act\(^{122}\) reaffirmed Congressional "commitment to the principles of consistency and effective deterrence . . . embodied in the Sentencing Guidelines."\(^{123}\)

Section 401(\textit{i})(1) of the PROTECT Act instructs the Attorney General to issue a report stating the policies and procedures adopted by the Department of Justice pursuant to the PROTECT Act, including information regarding every downward departure a judge has granted.\(^{124}\) Response to the reporting requirement has been critical: former U.S. Attorney John S. Martin cited the new requirements as a key reason for his decision to retire from his thirteen-year

\(^{120}\) Ashcroft Memorandum, \textit{supra} note 12, at 1.

\(^{121}\) \textit{Id.}


This Note only briefly addresses the reporting requirement. The Feeney Amendment requires the Attorney General to submit a report to the House and Senate Committees on the Judiciary every time a sentencing judge downwardly departs. The report must include information about the facts of the case, the name of the judge, the reasons given for departure, and whether the court gave the prosecutor notice that it was planning to depart from the Guidelines. The report also requires information about the position taken by the prosecution and defense regarding the departure, whether the United States intends to file a motion for reconsideration, and whether the government plans to appeal. \textit{See} PROTECT Act § 401(\textit{i})(2), 117 Stat. 650, 674–75 (2003) (codified at 18 U.S.C.A. § 3553(\textit{i})(2) (West Supp. 2004)).

The Feeney Amendment imposes no duty to report federal judges who upwardly depart when the prosecutor does not request an upward departure. In one circuit, twenty-three out of twenty-five downward departures were overturned, while forty-four out of forty-six upward departures were affirmed. \textit{See} United States v. Yirkovsky, 338 F.3d 936, 943–45 (8th Cir. 2003) (Heaney J., dissenting) ("It is difficult for me to reconcile this contrast, and I am deeply concerned with the trend and the message it sends to district courts—that more severe sentences are far more likely to withstand appellate review."). Importantly, almost all of these cases were tried pre-Feeney Amendment. One can anticipate that the new reporting requirement may further chill the ability of district judges to downwardly depart, and may also lead a prosecutor who might otherwise accede to a departure to fight it.


stint as a federal district judge. Writing in *The New York Times*, he explained that the Sentencing Guidelines impede judges in their efforts to formulate just sentences, and he "no longer want[ed] to be part of our unjust criminal justice system." Judge Martin was not averse to appropriately tough sentences: he once sentenced a gang leader to life-plus-forty-five without communication privileges, to be served in solitary confinement. Nor was he alone in his criticism: two other federal judges recently lambasted the Sentencing Guidelines and Attorney General Ashcroft’s new reporting requirement. Senator Edward Kennedy warned that the reporting requirements will establish a "blacklist" of federal judges who choose to make downward departures, and the ranking Democrat on the House Judiciary Committee, John Conyers, described the requirement as a "scary" effort to assemble an "enemies list" of lenient judges. Chief Justice William Rehnquist feared that the reporting requirement would "seriously impair the ability of courts to impose just and reasonable sentences." Thus, while Ashcroft characterized his command that all federal prosecutors "charge and pursue the most serious, readily provable offense or offenses" as an effort to fulfill the Justice Department’s "legal obligation to enforce faithfully and honestly the Sentencing Reform Act, the PROTECT Act, and the Sentencing

Guidelines," judges and others expressed concern that rigid sentencing requirements were preventing just results in certain cases. The constraints placed on judges' sentencing discretion make the prosecutor's duty to seek justice even more important. The broad, overlapping crimes defined by the United States Code, from which a prosecutor must select her charges, permit the prosecutor to exercise a great deal of power in applying the law of the statute to the facts of the case. She must be granted sufficient discretion to consider precepts of justice when using this power.

Ashcroft provided only six exceptions to his requirement that prosecutors charge the most serious, readily provable offense. First, if the applicable Guideline range used to impose the sentence would not change, a prosecutor can choose not to charge or pursue a readily provable offense. Second, allowance is made for "fast-track" programs relying on "charge bargaining." Third, if the evidence changes after indictment—or for "some other justifiable reason"—the prosecutor may dismiss the charges, but only with the written approval of the U.S. Attorney, an Assistant Attorney General, or another designated supervisor. Fourth, the prosecutor may "in rare circumstances" offer a charge reduction in a plea agreement if the defendant provides substantial assistance in investigating or prosecuting another person. Fifth, while federal prosecutors are often required to file

---

134 Id.
135 See supra notes 125–32.
136 In fact, one commentator argues that prosecutors should be required to charge the most specific statute applicable to the defendant's act, to the exclusion of any more general statutes. See Stephen F. Smith, Proportionality and Federalization, 90 U. Va. L. Rev. ___ (forthcoming 2005). He further argues that a reinvigorated "rule of lenity" would permit federal courts to monitor this new sentencing requirement. Id. While requiring prosecutors to charge under the more specific statute will not always result in lesser penalties, it will not expose defendants to greater sentences than they might already face and will often either lead to a lesser sentence for the more-specific crime, or federal declination in favor of state prosecution. See id. (citing the thirty-year maximum for "more specific" bank fraud, 18 U.S.C. § 1014 (2000), versus the twenty-year maximum for "more general" wire, 18 U.S.C. § 1343 (2000) or mail fraud, 18 U.S.C. § 1341 (2000)).
137 See Ashcroft Memorandum, supra note 12, at 2–5.
138 Id. at 3.
139 Id. A fast-track program permits expedited disposition "whereby the Government agrees to charge less than the most serious, readily provable offense[; but] only when clearly warranted by local conditions within a district." Id.; see Ian Weinstein, Fifteen Years After the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing, 40 Am. Crim. L. Rev. 87, 96 n.41 (2003) ("Charge bargaining occurs when prosecutors agree to accept a plea of guilty to less serious charges than those for which the defendant would have gone to trial."); see also infra Part IIID (assessing the legitimacy of fast-track programs).
140 Ashcroft Memorandum, supra note 12 at 3 (giving, as examples of "justifiable reasons," witness unavailability and the need to protect the identity of a witness scheduled to testify against a more significant defendant).
141 See id.
142 See id.
statutory enhancements\textsuperscript{143} to increase penalties, a prosecutor can forego the statutory enhancement in certain circumstances.\textsuperscript{144} If the prosecutor offers a negotiated plea agreement after considering factors in § 9-27.420 of the Manual, she may decline to file the statutory enhancement.\textsuperscript{145} Additionally, a prosecutor may dismiss or forego charging a violation of 18 U.S.C. § 924(c), but only under certain circumstances and with her supervisor's approval.\textsuperscript{146} Finally, in other "exceptional circumstances" (and with written approval from the U.S. Attorney, an Assistant Attorney General, or another designated supervisor) prosecutors may decline to pursue or may dismiss readily provable charges.\textsuperscript{147} The supervisor should give approval when, for example, the office is "particularly over-burdened," when the trial might be lengthy, or when trying the case "would significantly reduce the total number of cases disposed of by the office."\textsuperscript{148}

\textsuperscript{143} Statutory enhancements, except those for prior convictions, may be unconstitutional after \textit{Blakely v. Washington}. See 542 U.S. 296, 124 S. Ct. 2581 (2004); see also infra Part III.E (evaluating the potential invalidation of statutory enhancements in light of \textit{Blakely}). Pre-\textit{Blakely}, the government needed only to prove by a preponderance of the evidence that the defendant committed additional crimes—regardless of whether he was charged with those crimes or whether the jury returned a not guilty verdict on those crimes—for the court to consider that information at sentencing. See, e.g., United States v. Watts, 519 U.S. 148, 156–57 (1997); see also U.S. SENTENCING GUIDELINES MANUAL § 1B1.3, cmt. background (2003) [hereinafter SENTENCING GUIDELINES] ("Conduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range."). In determining that the proper standard of proof for the cases was a preponderance of the evidence, the \textit{Watts} court "acknowledge[d] a divergence of opinion among the Circuits as to whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence," but did not address the issue. See \textit{Watts}, 519 U.S. at 156.

\textsuperscript{144} See Ashcroft Memorandum, supra note 12, at 4. If authorized by an Assistant Attorney General, U.S. Attorney, or designated supervisory attorney, a prosecutor can forego filing statutory enhancements in negotiated plea agreements. This is the only situation in which such upward enhancements may be forgone.

\textsuperscript{145} See Manual, supra note 39, at § 9-27.420. Considerations intended to guide attorneys' decisions in entering into plea agreements include: the defendant's criminal history, willingness to cooperate, remorse, and willingness to assume responsibility for his conduct, the seriousness and nature of the crimes charged, the probable sentence if the defendant is convicted, and the expense of trial and appeal. Id.

\textsuperscript{146} See Ashcroft Memorandum, supra note 12, at 4. The statute provides for a five-year minimum sentence if a defendant possesses a firearm during a crime of violence or drug possession. See 18 U.S.C. § 924(c) (2004). Regardless, the Ashcroft Memorandum requires prosecutors to pursue the "first readily provable violation of 18 U.S.C. § 924(c)," and, if there are three or more readily provable violations, the first two such charges in "all but exceptional cases." Ashcroft Memorandum, supra note 12, at 4.

\textsuperscript{147} Id.

\textsuperscript{148} Id. at 4–5; see generally Adam Liptak, \textit{U.S. Suits Multiply, But Fewer Ever Get To Trial, Study Says}, N.Y. Times, Dec. 14, 2003, at A1 ("The percentage of federal criminal prosecutions resolved by trials also declined, to less than 5 percent last year from 15 percent in 1962. The number of prosecutions more than doubled in the last four decades, but the number of criminal trials fell, to 3,574 last year from 5,097 in 1962.").
Plea agreements are similarly constrained. All plea agreements must be in writing to "facilitate efforts by the Department of Justice and the Sentencing Commission to monitor compliance by federal prosecutors with Department policies and the Sentencing Guidelines," and to avoid misunderstandings between the parties. In a July 28, 2003 memorandum regarding "Department Policies and Procedures Concerning Sentencing Recommendations and Sentencing Appeals," which required "honesty in sentencing" regarding both the facts and the law, Ashcroft stated,

Any sentencing recommendation made by the United States in a particular case must honestly reflect the totality and seriousness of the defendant's conduct and must be fully consistent with the Guidelines and applicable statutes and with the readily provable facts about the defendant's history and conduct.

Here, Ashcroft clarified that "this Memorandum by its terms supercedes prior Department guidance" regarding plea bargains. The Manual requires prosecutors to inform the court if a plea agreement includes a "charge bargain," and charge bargaining is only permitted "to the extent consistent with the principles set forth" in the six enumerated exceptions to the Memorandum's requirement that prosecutors charge and pursue all readily provable offenses. When engaging in sentence bargaining, a prosecutor may agree to a "plea agreement for a sentence that is within the specified guideline range," or to endorse a downward adjustment if she genuinely believes that the defendant has accepted responsibility. "Fact bargain-

---

149 Currently, less than five percent of federal criminal prosecutions are resolved by a trial. See Liptak, supra note 148, at A1 (citing an ABA study that found that the number of federal prosecutions doubled from 1962 to 2002, and the number of criminal trials fell from over 5,000 to 3,574). Another criticism of the Ashcroft Memorandum is that defendants will find plea bargains less attractive due to the prosecutor's reduced ability to offer shorter sentences. Some are concerned about the flood of litigation that would result if defendants insisted on going to trial. See, e.g., Gary Craig, Ashcroft Plea Deal Curb May Clog Courts, DEMOCRAT & CHRON. (Rochester, N.Y.), Sept. 29, 2003, at B4 (citing a commentator who suggested that defendants faced with the same sentence regardless of whether they plead or went to trial will "roll the dice and go to trial"). Another, more troubling possibility, is that "[i]f the only way you can get some sort of break is to cooperate and provide information, you are likely to provide the information . . . 'and the truth will be stretched.'" Shelley Murphy, Directives Against Federal Plea Bargains Spark Debate, BOSTON GLOBE, Sept. 25, 2003, at B8 (quoting Boston defense attorney Michael Liston).
150 Ashcroft Memorandum, supra note 12, at 5.
151 Id. at 5.
152 Id. This suggests that the Ashcroft Memorandum abrogates the requirements in the Manual. See supra Part I.B.1.
153 Ashcroft Memorandum, supra note 12, at 5. (citing MANUAL, supra note 39, §§ 9-27.300(B), 9-27.400(B)).
154 Ashcroft Memorandum, supra note 12, at 5.
155 Id. at 6.
156 Id. (citing SENTENCING GUIDELINES, supra note 143, § 3E1.1). An adjustment is not the same thing as a departure. Simplistically, adjustments are covered in chapter three of
ing” is forbidden. Similarly, the prosecutor cannot agree to any plea agreement that presents the sentencing court with “less than a full understanding of all readily provable facts relevant to sentencing.”

Once again invoking the PROTECT Act, Ashcroft pointed out that the Act calls for a reduction of the existing grounds for downward departures and instructed that federal prosecutors must not request or merely stand silent when a defendant requests a downward departure. Again, however, a prosecutor may accede to or request

the U.S. Sentencing Guidelines Manual and are a part of the offense level. The offense level and the defendant’s criminal history then compute the sentence, from which a judge may depart on grounds listed in chapter five of the U.S. Sentencing Guidelines Manual. For an excellent explanation of how the Sentencing Guidelines work, see Frank O. Bowman III, Departing is Such Sweet Sorrow: A Year of Judicial Revolt on “Substantial Assistance” Follows a Decade of Prosecutorial Indiscipline, 29 STETSON L. REV. 7, 10–12 (1999).

157 See Weinstein, supra note 159, at 96 n.41 (describing charge bargaining as being “at the heart of the plea bargaining process,” and fact bargaining as being “more peculiar to the Guidelines and involve[ing] an agreement between the prosecution and defense that the defendant will be sentenced on the basis of agreed-upon facts which will, if accepted by the court, place the defendant in a lower sentencing range than he would likely have faced after trial”).

158 Ashcroft Memorandum, supra note 12, at 5; see also Sentencing Guidelines, supra note 143, § 681.4 (requiring accurate stipulations of facts in plea bargains).

159 Ashcroft Memorandum, supra note 12, at 5. This provision appears to require all prosecutors in the sentencing phase to submit evidence suppressed as illegal in the trial-in-chief if that evidence would affect the final sentence. See, e.g., United States v. Tejada, 956 F.2d 1256, 1263 (2d Cir. 1992) (“Absent a showing that officers obtained evidence expressly to enhance a sentence, a district judge may not refuse to consider relevant evidence at sentencing, even if that evidence has been seized in violation of the Fourth Amendment.”). Prior to the Ashcroft Memorandum and the PROTECT Act, one commentator pointed to prosecutors’, defense attorneys’, and judges’ likely “resistance” to permitting illegal evidence from intruding upon the sentencing proceedings, resulting in “needless, unwarranted, hidden disparity contrary to the [Sentencing Reform Amendment].” Daniel J. Freed, Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers, 101 YALE L.J. 1681, 1740 (1992). For a discussion of the constitutional implications of using uncharged conduct—regardless of whether evidence supporting that conduct was suppressed because it violated the defendant’s constitutional rights or because the prosecutor simply chose to exclude it—see Gerald W. Heaney, The Reality of Guidelines Sentencing: No End to Disparity, 28 AM. CRIM. L. REV. 161, 208–15 (1991). Note, however, that courts have long been permitted to consider uncharged conduct for sentencing purposes. See Williams v. New York, 337 U.S. 241, 251 (1949) (“The due-process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure.”). Blakely v. Washington and its progeny may, however, require a jury to find any facts that compel a judge to enhance a defendant’s sentence. See 542 U.S. ___., 124 S. Ct. 2531, 2598 (2004).

160 See PROTECT Act § 401(m), 117 Stat. 650, 675 (2003) (requiring the U.S. Sentencing Commission to “promulgate . . . appropriate amendments to the sentencing guidelines, policy statements, and official commentary to ensure that the incidence of downward departures are substantially reduced”); cf. United States v. VanLeer, 270 F. Supp. 2d 1318, 1323 (D. Utah 2003) (examining legislative history to conclude that the “Feeney Amendment makes no change” to a judge’s ability to downwardly or upwardly depart in all but select cases).

161 See Ashcroft Memorandum, supra note 12, at 6.
a downward departure, if authorized by the appropriate supervisory authority, when the defendant offers substantial assistance\textsuperscript{162} to the government's case or fortuitously offended in a jurisdiction with a fast-track program for his crime.\textsuperscript{163}

Other downward departures should be a "rare occurrence,"\textsuperscript{164} and "prosecutors must affirmatively oppose downward departures that are not supported by the facts and the law, and must not agree to "stand silent" with respect to such departures."\textsuperscript{164} By its terms, the Memorandum permits prosecutors to independently review the "facts and the law." Nevertheless, the tenor of the Memorandum and the otherwise carefully—and narrowly—enunciated "discretion" provided to prosecutors suggests that "facts and law" supporting departures are likely intended to be those principles enumerated earlier in the Memorandum.

Ashcroft concluded the Memorandum by explaining that the Department of Justice must "ensure that all federal criminal cases are prosecuted according to the same standards. Fundamental fairness requires that all defendants prosecuted in the federal criminal justice system be subject to the same standards and treated in a consistent manner."\textsuperscript{165}

B. Distinguishing the Thornburgh Memorandum

The Ashcroft Memorandum implies that it is a return to prosecutorial discretion\textsuperscript{166} as defined by Attorney General Thornburgh in 1989 (Thornburgh Memorandum)\textsuperscript{167} after the Supreme

\textsuperscript{162} Id.
\textsuperscript{163} Id.
\textsuperscript{164} Id. at 7 (first alteration in original) (quoting Sentencing Guidelines, supra note 143, ch. 1, pt. A, ¶(4)(b)).
\textsuperscript{165} Id. at 7.
\textsuperscript{166} See id. at 1.
\textsuperscript{167} Thornburgh Memorandum, supra note 70. Janet Reno departed from the Thornburgh Memorandum, suggesting that prosecutors may consider "such factors as [whether] the sentencing guideline range . . . is proportional to the seriousness of the defendant's conduct . . . ." See Memorandum from Janet Reno, Attorney General, to Holders of U.S. Attorneys' Manual, Title 9 (Oct. 12, 1993), reprinted in 6 Fed. Sent. R. 352 (1994). But see Robinson, supra note 18, at 887-89 (criticizing Janet Reno's decision to change Thornburgh's standards, and reporting communication between Senator Hatch and Attorney General Reno in which she "clarified" that "individual prosecutors are not free to follow their own lights or to ignore legislative directives[,]" rather it remains the directive of the Department of Justice that prosecutors charge the most serious offense that is consistent with the nature of the defendant's conduct, that is likely to result in a sustainable conviction: that prosecutors adhere to the Sentencing Guidelines; and that charging and plea agreements be made at an appropriate level of responsibility with appropriate documentation.

Court upheld the constitutionality of the Sentencing Reform Act. 168 While the two memoranda are similar, 169 several distinctions should be recognized.

First, the Thornburgh Memorandum states that federal prosecutors "should initially charge the most serious, readily provable offense or offenses consistent with the defendant's conduct." 170 The Ashcroft Memorandum requires prosecutors to "charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case." 171 The distinction between the "facts of the case" and the "defendant's conduct" is significant. In requiring prosecutors to consider the "defendant's conduct," the Thornburgh Memorandum suggested a more individualized assessment, keyed to the defendant's culpability. 172 Directing prosecutors to weigh the "facts of the case," however, implies a less particularized assessment based more on the provability of the elements of a crime rather than the culpability of the criminal actor. Also, the Thornburgh Memorandum requires a prosecutor to initially charge the most serious offense, suggesting that the prosecutor may revisit that initial determination. 173 In contrast, the Ashcroft Memorandum requires a prosecutor to charge and pursue the more serious offense, suggesting that she cannot revisit her initial decision if she uncovers mitigating circumstances that indicate a lesser charge would be more appropriate. 174

Both memoranda permit sentence bargaining since a prosecutor may agree to recommend a sentence at the lower end of the Guidelines. 175 Thornburgh, however, permitted prosecutors to "seek to de-

169 Compare the remarks of Professor Stephen Saltzburg, one of Thornburgh's deputy assistant attorneys general, who stated that "'the resemblance to the Thornburgh memo is uncanny,'" with those of former Connecticut U.S. Attorney under Thornburgh Stanley Twardy, who contended that "'his is the latest in Ashcroft's efforts to centralize power in Washington.... It gives prosecutors in the field less discretion.'" Hechler, supra note 15, at 25 (internal quotation marks omitted).
170 Thornburgh Memorandum, supra note 70, at 421–22 (emphasis added).
171 Ashcroft Memorandum, supra note 12, at 2 (emphasis added).
172 See Thornburgh Memorandum, supra note 70, at 421–22.
173 Id. (emphasis added).
174 Ashcroft Memorandum, supra note 12, at 2 (emphasis added).
175 Compare Ashcroft Memorandum, supra note 12, at 6 ("[W]hen the Sentencing Guidelines range is 18–24 months, a prosecutor may agree to recommend a sentence of 18 or 20 months rather than argue for a sentence at the top of the range.")., with Thornburgh Memorandum, supra note 70, at 422 (stating that "prosecutors may bargain for a sentence that is within the specified guideline range" and giving the "18–24 months example").
part from the guidelines," as long as the plea "honestly reflect[ed] the totality and seriousness of the defendant's conduct . . . ."176 Furthermore, a prosecutor could use any of the enumerated departures to depart without a supervisor's approval and was only required to consult with supervisors if she wished to depart on grounds not specifically listed.177

Discretion to request or accede to downward departures is much more constrained by the Ashcroft Memorandum. Citing the PROTECT Act, the Ashcroft Memorandum outlines enumerated circumstances in which the prosecutor may depart—all of which demand explicit permission from an Assistant Attorney General, U.S. Attorney, or designated supervisory attorney.178 Prosecutors may depart if a defendant has provided "substantial" assistance,179 or if their office has a "fast-track" program for the offense.180 In "rare occurrences" prosecutors may acquiesce in other downward departures,181 but they must "affirmatively oppose downward departures that are not supported by the facts and the law, and cannot agree to 'stand silent' with respect to such departures."182 Under the Ashcroft Memorandum, when prosecutors support a departure, they should identify the grounds to create a record for judicial review.183 Similarly, the Thornburgh Memorandum expected prosecutors to "reveal to the court the departure" and

176 Thornburgh Memorandum, supra note 70, at 421–23.
177 See id. at 422 (addressing the subject of "Departures Generally").
178 See Ashcroft Memorandum, supra note 12, at 6–7 ("Congress has made clear its view that there have been too many downward departures from the Sentencing Guidelines, and it has instructed the Commission to take measures 'to ensure that the incidence of downward departure is substantially reduced.'" (alteration in original) (citing PROTECT Act § 401(m)(2)(A), 117 Stat. 650, 675 (2003))). The PROTECT Act also explains Congress's intent "to ensure that Department of Justice attorneys oppose sentencing adjustments, including downward departures, that are not supported by the facts and the law," and requires that a report regarding a judge's decision to downwardly depart include "the position of the parties with respect to the downward departure." This suggests that Congress anticipated that downward departures might be filed or supported by federal prosecutors. See PROTECT Act §§ 401(f)(1)(A), 401(f)(2)(B)(v), 117 Stat. 650, 674–75 (2003).
179 See Ashcroft Memorandum, supra note 12, at 6. Similarly, the Thornburgh Memorandum describes this as "the most important departure," and suggests that "prosecutors who bargain in good faith and who state reasons for recommending a departure should find that judges are receptive to their recommendations." Thornburgh Memorandum, supra note 70, at 421–23.
180 See Ashcroft Memorandum, supra note 12, at 6–7.
181 See id. at 7 (citing SENTENCING GUIDELINES, supra note 143, ch. 1, pt. A ¶(4)(b)). The Sentencing Commission granted the courts "legal freedom to depart from the guidelines," both in instances recognized by the guidelines regarding departures and on grounds not recognized by the departure guidelines. The Commission suggests that courts "will not [depart] very often," however, as the Sentencing Guidelines are intended to account for most factors relevant to sentencing practices. SENTENCING GUIDELINES, supra note 143, ch. 1, pt. A ¶(4)(b)).
182 Ashcroft Memorandum, supra note 12, at 7.
183 See id.
to “afford an opportunity for the court to reject it.” The Thornburgh Memorandum, therefore, appeared to address primarily the trial court’s ability to determine the appropriateness of the departure rather than an appellate court’s ability to review the trial court’s acquiescence.

Both memoranda decry fact bargaining. The Thornburgh Memorandum did suggest, however, that providing the court with the “true nature of the defendant’s involvement in a case will not always lead to a higher sentence.” It also allowed the prosecutor to agree with a defendant that self-incriminating information he provided when cooperating would not be used against him in determining the applicable guideline range.

The Thornburgh Memorandum did not address the Department of Justice’s position on the negotiability of statutory enhancements or the exercise of discretion regarding their implementation. The Ashcroft Memorandum, however, provides that statutory enhancements are “strongly encouraged.” A prosecutor may only forgo enhancements through a negotiated plea agreement that is subject to several restrictions.

Finally, the Thornburgh Memorandum concluded that federal prosecutors had the “tools necessary” to arrive at “appropriate dispositions in the process” so that their honest application of the Guidelines would make sentences “fair, honest, and appropriate.” The Ashcroft Memorandum, however, describes the Thornburgh Memorandum as intended to “ensure that [federal prosecutors’] practices were consis-

184 See Thornburgh Memorandum, supra note 70, at 421–22.
186 See supra note 157–58 and accompanying text.
187 Thornburgh Memorandum, supra note 70, at 422–23.
188 See id. (requiring also that the agreement be included in the defendant’s case file with a note that § 5K.1.B1.8 was invoked in determining the sentence, and that the incriminating information be disclosed to the court or probation officer). Elsewhere, Thornburgh gave concrete examples of how a prosecutor can bargain within the Guidelines, “recommending a sentence at the low end of a guideline range” and “a two level downward adjustment for acceptance of responsibility” to yield substantially shorter sentences. Id.
189 Ashcroft Memorandum, supra note 12, at 4. Statutory enhancements where judges engage in fact-finding to increase a maximum sentence are likely unconstitutional under Blakely. See Blakely v. Washington, 542 U.S. ___, 124 S. Ct. 2531 (2004); supra note 143; infra Part III.E.
190 See Ashcroft Memorandum, supra note 12, at 4 (suggesting that an important purpose in foregoing filing statutory enhancements is to induce a defendant to plead guilty, as filing enhancements might cause the statutory sentence to exceed the Guideline range, “ensuring that the defendant will not receive any credit for acceptance of responsibility and will have no incentive to plead guilty”).
191 See Thornburgh Memorandum, supra note 70, at 422–23 (emphasis added).
tent with the principles of equity, fairness, and uniformity," and pur-
pports to adopt these principles as its own. With such disparate
language, any claim that the Ashcroft Memorandum is merely a re-
turn to the principles of the Thornburgh Memorandum is indefen-
sible. The Ashcroft Memorandum represents a substantial movement
away from case-by-case determination of a defendant’s culpability and
hinders prosecutors’ ability to seek justice in every situation.

III

Prosecutorial Ethics and the Ashcroft Memorandum

*In holding to ethical standards, an attorney for the Government cannot be a mere minion of the Government.*

The Ashcroft Memorandum suggests that the role of the prosecu-
tor is not unlike the unbridled advocacy often encouraged in defense
attorneys, and risks turning prosecutors into little more than the gov-
ernment’s “hired guns.” The Supreme Court, however, clearly re-
jected this conception of the prosecutorial role in *Berger v. United
States*. Furthermore, transforming federal prosecutors’ responsibili-
ties into near-ministerial adherence to a memorandum that demands
uniformity at the expense of individualized justice will undermine
the individual offices’ reputations for probity, integrity, and judgment,
as well as hinder a prosecutor’s ability to comply with ethical norms
requiring her to pursue justice. The Ashcroft Memorandum may thus
represent an unfortunate new era in federal prosecution. It is not
merely an epoch in which charging and plea bargaining have been
massaged into compliance with a universal set of norms, but one in
which prosecutors’ duties as ministers of justice recede and they don a
mantle of blind advocacy.

---

192 Ashcroft Memorandum, *supra* note 12, at 1 (emphasis added).
195 295 U.S. 78, 88 (1935) (holding that “while [the prosecutor] may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one”); see also Simon, *supra* note 3, at 1090 (recognizing the distinction between the role of the judge and prosecutor and that of other attorneys, and arguing that all “lawyer[s] should take those actions that, considering the relevant circumstances of the particular case, seem most likely to promote justice”).
One unintended consequence of the Ashcroft Memorandum may be prosecutorial rebellion.197 Some reports about federal prosecutors’ reactions to the memorandum suggest that prosecutors may be refusing to obey its directives.198 One anonymous federal prosecutor commented that “there is tension between what my local district judge wants and what General Ashcroft wants, the local judge wins every time.”199 Forcing prosecutors to choose between charging a defendant beyond his culpability or not bringing charges at all could result in unanticipated declinations that would be difficult to monitor.200 Prosecutors and defense attorneys may also “collude” with judges to avoid the unduly harsh sentences that may follow from abiding by the Feeney Amendment and the Ashcroft Memorandum.201 It thus appears that goals of uniformity can be undercut by promulgating overly prescriptive and punitive rules.

It should be no consolation, however, that prosecutors may be able to “squeeze fairness” into the Ashcroft Memorandum.202 Any

---

197 One commentator suggested that “the tough-sounding policies [of the Ashcroft Memorandum] include exceptions that any wise prosecutor (and there are many wise prosecutors) could drive a truck through.” Marc L. Miller, Domination & Dissatisfaction: Prosecutors as Sentencers, 56 Stan. L. Rev. 1211, 1257 (2004).


Blakely itself may represent judicial rebellion against “unjust” sentencing requirements. Frank Bowman suggests that the Supreme Court’s decision to invalidate Washington state’s sentencing guidelines in Blakely, thus calling into question the Federal Sentencing Guidelines, stemmed from the “boiling frustration of the federal judiciary over the state of the federal sentencing system.” See Memorandum from Frank Bowman to the U.S. Sentencing Commission 1–2 (June 27, 2004), available at http://sentencing.typepad.com/sentencing_law_and_policy/files/frank_bowman_original_memo_to_ussc_on_blakely.doc (last visited Aug. 29, 2004).

199 King & Klein, supra note 198, at 320.

200 Thanks to Professor Stephen F. Smith for this point.

201 Blakely Senate Hearings, supra note 198 (statement of Frank Bowman, Professor of Law, Indiana University School of Law).

202 Zachary Carter, former U.S. Attorney for the Eastern District of New York, believes that federal prosecutors can still “squeeze fairness into these policies,” as the Ashcroft Memorandum “makes an attempt to constrict discretion, but it doesn’t do so absolutely.” Hechlend, supra note 15, at 25 (internal quotation marks omitted). Professor Daniel Freed, editor of the Federal Sentencing Reporter, suggested that the federal courts could still hand down sentences tailored to the individual defendant and crime because Congress never articulated the purpose of sentencing. See Freed, supra note 159, at 1709. Freed includes among the “sentencers” judges, probation officers, defense attorneys, and prosecutors. Id. at 1719–27. One might expand Freed’s premise—that Congressional “punting” frees judges to craft more individualized sentences—to permit prosecutors to continue to exercise discretion. See Ashcroft Memorandum, supra note 12, at 1 (“[F]ederal prosecutors
document guiding prosecutors in their execution of the federal criminal laws should not require a stilted reading or outright disobedience to permit them to fulfill their ethical and legal duty to seek justice. 203 Furthermore, the Memorandum's tight rein on prosecutorial discretion may imply that the Attorney General feels that prosecutors cannot be trusted to "make the calls" on their cases. 204 To John S. Martin—the former U.S. Attorney and Southern District Judge—this "harsh tone" was more troubling than any potential change in protocol. 205

The prescriptive—almost punitive—language of the Ashcroft Memorandum stands in stark contrast to Ashcroft's earlier edict requiring prosecutors to "promptly advise the Criminal Division of all cases in which Second Amendment issues are raised." 206 In that memorandum, by way of comparison, Ashcroft invoked the rousing language of Berger v. United States, 207 stating that "[j]ustice is best achieved, not by making any available argument that might win a case, but by vigorously enforcing federal law in a manner that heeds the commands of the Constitution." 208

The Memorandum might also lead to undeserved "leniency" for more culpable offenders. By over aggregating, 209 the Ashcroft Memorandum does not only over-punish the less culpable; treating offend-

---

203 This duty is enhanced by the Sentencing Guidelines and the reporting requirement in the PROTECT Act. As a Federal Public Defender stated prior to the Ashcroft Memorandum, "If we severely limit a judge's discretion, aren't we handing justice over to the prosecutor?" Richard Willing, Judges Go Soft on Sentences More Often: Growing Number Depart from Federal Guidelines, U.S.A. TODAY, Aug. 28, 2003, at 1A (internal quotation marks omitted).

204 As a federal prosecutor commented, "You have to count on reasonable prosecutors to make a reasonable assessment of what a case is worth and give them discretion" to make decisions about cases. Murphy, supra note 149, at B8 (internal quotation marks omitted). More acerbically, a Boston criminal defense lawyer suggested that Attorney General Ashcroft "might as well enter his appearance and try everyone himself because he certainly doesn't trust his prosecutors and judges." See id. (internal quotation marks omitted).


206 See Memorandum from John Ashcroft, Attorney General, to All United States Attorneys (Nov. 9, 2001) (noting that Ashcroft was "pleased that [the Fifth Circuit's decision in United States v. Emerson] upholds the constitutionality of 18 U.S.C. § 922(g)(8) ... and specifically affirmed that the Second Amendment protects the right of individuals, including those not then actually a member of any militia ... to privately possess and bear their own firearms" (internal quotation marks omitted)), available at http://www.usdoj.gov/ag/readingroom/emerson.htm (last visited Aug. 29, 2004).

207 See id. (stating that "the mission of the Department 'in a criminal prosecution is not that it shall win a case, but that justice shall be done'" (quoting Berger v. United States, 295 U.S. 78, 88 (1935))).

208 See id.

209 Aggregation is "the treatment of many cases all at once." Alschuler, supra note 18, at 904.
ers of differing culpability alike\textsuperscript{210} means that the more culpable are under-punished relative to others convicted of the same crime.\textsuperscript{211} For instance, a longshoreman—a "good, honest worker" with a clean record—who accepted five dollars to drive his friend to a hamburger stand so the friend could make a drug transaction was sentenced to ten years in prison, the statutory maximum.\textsuperscript{212} Someone who had actually purchased the drugs and resold them would have been exposed to about the same sentence. If the criminal justice system intends to link the punishment and the crime in some rational way, punishing the less culpable as harshly as the more culpable fails to satisfy that objective.\textsuperscript{213} To the extent that punishment schemes are intended to reflect the loss suffered by an individual victim or society at large, punishing a less culpable offender as much as a more culpable offender may send a message to the victims of the latter that the system does not appreciate their greater loss. Therefore, even if the Justice Department has the "prerogative"\textsuperscript{214} to strip discretion from prosecutors, the ethical dilemma those prosecutors face is still present. Prosecutors cannot evade their ethical duties by submitting a copy of their boss’s memorandum.

\textsuperscript{210} As Senator Leahy commented at the \textit{Blakely} hearings, "[J]ustice is not just about treating like cases alike; it is also about treating different cases differently." \textit{Blakely} Senate Hearings, supra note 198 (statement of Sen. Patrick Leahy).

\textsuperscript{211} As H.L.A. Hart observed, "Principles of justice or fairness between different offenders require morally distinguishable offences to be treated differently and morally similar offences to be treated alike." H.L.A. \textsc{Hart}, \textsc{Law}, \textsc{Liberty}, and \textsc{Morality} 96–37 (1963).

\textsuperscript{212} See \textit{New Drug Law Leaves No Room for Mercy}, CHI. TRIB, Oct. 5, 1989, at 28C. District Judge William Schwarzer, who sobbed openly during the sentencing, stated, "We are required to follow the rule of law . . . but in this case the law does anything but serve justice . . . . It may profit us very little to win the war on drugs if in the process we lose our soul." \textit{See id.} (internal quotation marks omitted). Judge Schwarzer later called the sentence he imposed "a grave miscarriage of justice," required by a statute that turns judges into "computers automatically imposing sentences without regard to what is just and right." \textit{See id.} (internal quotation marks omitted). Ira Eisenberg, \textit{An Alligator for the New AG, Plain Dealer} (CLEV.), April 3, 1993, at 7B. Judge Schwarzer, "a Republican known for his tough decisions and dour demeanor," quit the bench not long after he handed down the longshoreman’s sentence and campaigned for the repeal of mandatory minimum sentencing laws as the head of the Federal Judicial Center in Washington, D.C. \textit{See id.}

\textsuperscript{213} This Note recognizes that upward departures are available for particularly egregious conduct, and that the longshoreman would likely warrant a role reduction adjustment under § 3B1.2, which could result in a different sentence than that for his more culpable friend. \textit{See Sentencing Guidelines, supra note 143, § 3B1.2. Requiring prosecutors to fight every downward departure, however, suggests that the system will not recognize that some conduct is simply less damnable than that in the "heartland." The "heartland" is the "set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether departure is warranted." \textit{Id.} § 1A1.1 app. 4(b).

\textsuperscript{214} Federal District Judge David Larimer characterized the removal of judge and prosecutor discretion and concomitant centralization of decision-making as "unfortunate," but "also the attorney general’s prerogative." \textit{See Craig, supra} note 149, at B4 (internal quotation marks omitted).
The remainder of this Part has several objectives. First, it examines two specific instances in which the Ashcroft Memorandum removes from prosecutors the discretion necessary to fulfill their ethical duty to seek justice. Next, this Part addresses the often-invoked uniformity rationale for constraining discretion and suggests that the exception for “fast-track” programs undercuts that rationale. Finally, this Part briefly considers the potential impact of the Supreme Court’s recent opinion in Blakely v. Washington.215

A. Charging and Pursuing the Most Serious, Readily Provable Offense

The Ashcroft Memorandum requires prosecutors to “charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case.”216 This requirement is inconsistent with a prosecutor’s traditional obligation to “recognize when the circumstances of a person’s situation are such that the prosecution would do more harm than good,”217 and the nuanced discretion contemplated by the ethical codes and rules governing their behavior.

The Manual (which the Ashcroft Memorandum may have superseded) purports that its guidelines are just that: guidelines, “not [rules] intended to produce rigid uniformity among Federal prosecutors in all areas of the country at the expense of the fair administration of justice.”218 Such emphasis on the “fair administration of justice” suggests that the Department of Justice—at least at one time—afforded prosecutors some deference and permitted them to consider mitigating and aggravating factors regarding the defendant’s culpability when charging him.219

The ABA Standards for Criminal Justice Relating to the Prosecution Function likewise emphasize the prosecutor’s duty to “seek justice, not merely to convict.”220 She should consider whether the authorized punishment is proportional to the harm caused by the offender.221 Furthermore, the Standards state that a prosecutor “is not obliged to present all charges which the evidence might support”222 if the charges do not “fairly reflect the gravity of the offense.”223

216 See Ashcroft Memorandum, supra note 12, at 2.
217 See Slobin et al., supra note 22, § 5.3(a) (internal quotation marks omitted).
219 See, e.g., id. § 9-27.230 (suggesting prosecutors consider, inter alia, “[t]he probable sentence or other consequences if the person is convicted,” as well as his criminal history and culpability).
220 ABA Standards, supra note 4, § 3-1.2(c).
221 See id. § 3-3.9(b)(iii).
222 Id. § 3-3.9(b).
223 Id. § 3-3.9(f).
In addition, Ethical Considerations in the ABA Model Code of Professional Responsibility counsel prosecutors to “use restraint in the discretionary exercise of government powers [by refraining] from instituting or continuing litigation that is obviously unfair.”\textsuperscript{224} The Model Code also discourages the continuation of unfair litigation, even if an individual prosecutor lacks discretionary powers.\textsuperscript{225}

Thus, none of the ethical guidelines require prosecutors to charge and pursue the most serious offenses, and all counsel the prosecutor to consider the defendant’s culpability before charging him with a crime. The Thornburgh Memorandum also recognized that while a prosecutor “should initially charge the most serious, readily provable offense or offenses consistent with the defendant’s conduct,”\textsuperscript{226} further investigation of a case might reveal that pursuing the most serious offense would be inappropriate.

The Ashcroft Memorandum, on the other hand, presents an entirely different picture of the prosecutorial role. It severely limits a prosecutor’s ability to revisit an initial charge after discovering that the defendant’s actual culpability may ethically require a lesser charge—even if the “facts” may support the initial charge. In addition, the Ashcroft Memorandum “strongly encourag[es]” prosecutors to file statutory enhancements.\textsuperscript{227} It only permits prosecutors to forego filing enhancements in negotiated plea agreements where the defendant would otherwise have no incentive to plead guilty, suggesting that any “leniency” is merely sentencing gamesmanship.\textsuperscript{228} The Ashcroft Memorandum thus prevents prosecutors from making the individualized choices that every ethical guideline appears to require.

### B. Required Opposition to Downward Departures

Curtailing a prosecutor’s ability to request or accede to downward departures is arguably the Ashcroft Memorandum’s most troubling requirement.\textsuperscript{229} Compelling a prosecutor to ignore mitigating

---

\textsuperscript{224} Model Code, supra note 94, EC 7-13, 7-14.

\textsuperscript{225} Id. at EC 7-14.

\textsuperscript{226} Thornburgh Memorandum, supra note 70, at 421–22 (emphasis added).

\textsuperscript{227} Ashcroft Memorandum, supra note 12, at 4.

\textsuperscript{228} See id.

\textsuperscript{229} See Ashcroft Memorandum, supra note 12, at 6. Citing congressional displeasure with downward departures to justify preventing judges and inferior executive officers from exercising their statutory discretion is troubling. In Chief Justice William Rehnquist’s 2003 annual statement, he sharply criticized the PROTECT Act reporting requirements for judges who downwardly depart and stated that “by constitutional design, judges [have] ‘an institutional commitment to the independent administration of justice and are able to see the consequences or judicial reform proposals that legislative sponsors may not be in a position to see.’” Linda Greenhouse, Chief Justice Attacks a Law as Infringing on Judges, N.Y. Times, Jan. 1, 2004, at A14 (quoting the Chief Justice). While Rehnquist targeted the con-
circumstances and charge the most serious offense presents a different dilemma than requiring her to ignore those factors when a judge is deciding upon a sentence. One former federal prosecutor suggested that judicial discretion to give a lenient sentence may be appropriate, stating that "[p]rosecutors know that particularly in drug cases, the guidelines can't do perfect justice." Now that the ability of judges to downwardly depart has been curtailed by the Feeney Amendment, the prosecutor's role at sentencing may have changed.

Ethical guidelines counsel prosecutors to consider whether the punishment fairly reflects the crime. The Manual directs prosecutors to oppose unwarranted sentencing departures and to make sentence recommendations when required by the terms of a plea agreement, or in "unusual cases" when the prosecutor is concerned about the fairness of a sentence. These recommendations may provide the needed support for any suggestion that the judge increase or decrease a sentence. Similarly, the ABA Standards for Criminal Justice suggest that prosecutors consider the potential punishment when charging the defendant.

The Federal Sentencing Guidelines and the PROTECT Act might therefore require a prosecutor to play as active a role at the sentencing stage as she historically played at the charging stage. A prosecutor in a scheme that permits the judge great discretion in sentencing could assume that her only "job" was to present the facts, allow the jury to convict, and simply leave the judge to sentence "justly." Under the Sentencing Guidelines and PROTECT Act, however, judges' hands are more tightly bound with regard to sentencing. For instance, a government motion is necessary for a court to downwardly


See Willing, supra note 203, at 1A (quoting former federal prosecutor Anthony Pacheco, who also suggested that prosecutors would sometimes "signal to the judges that they won't appeal").

See Manual, supra note 39, § 9-27.720 cmt. ("As advocates for the United States, prosecutors should be prepared to argue concerning those adjustments (and, if necessary, departures allowed by the guidelines) in order to arrive at a final result which adequately and accurately describes the defendant's conduct of offense, criminal history, and other factors related to sentencing.").

Id. § 9-27.730 cmt.

See ABA Standards, supra note 4, § 3-3.9(b)(iii) (suggesting that prosecutors consider if the authorized punishment fits the crime when charging the defendant).

But see United States v. Green, Nos. CR. A. 02-10054-WGY, CR. A. 01-10469-WGY, CR. A. 99-10066-WGY, 2004 WL 1581101, at *32 (D. Mass. June 18, 2004) (arguing that "the ways in which the Guidelines regime have transferred the power of sentencing to the Department add up to a joining of the power to prosecute and the power to sentence in one branch of government").
depart if a defendant provides "substantial" assistance. Ethical guidelines also require a prosecutor to consider the relationship between the crime and the punishment. This suggests, at a minimum, that she has a duty not to contest a departure that would result in a more "just" sentence, given the defendant's culpability. While a judge may still deviate from a sentence agreed to in a plea bargain—as Judge Patterson did in the United Nations shooter case—the Feehney Amendment reporting requirements raise the possibility that a judge's decision to downwardly depart could be costly and ultimately ineffective due to the de novo review of the departure.

---

235 See, e.g., Freed, supra note 159, at 1710–11 (suggesting that the Sentencing Commission "[e]ntirely on its own prerogative . . . inserted the requirement of a government motion as a prerequisite to a judicial decision to reduce a nonmandatory sentence"); see also id. at 1711 n.162 (listing cases in which courts required government motions to depart before it would downwardly depart).

236 See Patricia Hurtado, UN Shooter Sentenced to 27 Months in Prison, NEWSWEEK, Oct. 21, 2003, at A16.

In showing . . . [a] postal worker who fired shot at the United Nations to protest human rights abuses in North Korea . . . leniency, [U.S. District Judge Robert] Patterson yesterday blasted Congress for limiting or "squeezing" federal judges by not giving them the leeway they previously had to stray from the strict federal sentencing guidelines. Patterson also addressed some media reports that criticized his view of the case.

"On the one hand, we must sentence in accordance with the law, yet . . . we must render a fair and just sentence based on the unique facts with which we are sometimes confronted," Patterson said.


237 See Ashcroft Overreaches, STAR-LEDGER (Newark, N.J.), Aug. 12, 2003, at 14 ("Federal Judge James Rosenbaum of Minnesota has been harassed by sentencing hawks on the House Judiciary Committee, who consider him too lenient."). But see United States v. VanLer, 270 F. Supp. 2d 1318, 1324 (D. Utah 2003) (Cassell, J.) ("[T]his court wishes to observe that it is not concerned about close scrutiny of its downward (or upward) departure decisions by Congress, the public, or otherwise."); Willing, supra note 203, at 1A. While one can argue that all federal judges should be as bold as Judge Cassell, this aspirational standard means little to an attorney or a defendant standing before a timid judge.

This statement may appear a bit schizophrenic as federal prosecutors are responsible for reporting downwardly departing judges under the PROTECT Act. See MANUAL, supra note 39, § 9-2.170(B). Nevertheless, downward departures that the government did not request provide one criteria in several categories of adverse sentencing decisions that the prosecutor is required to report. See, e.g., id. (listing categories). The Ashcroft Memorandum's strictures on requesting or acceding to downward departures could thus conceivably require a prosecutor to report a judge under the PROTECT Act as implemented in the U.S. Attorney's Manual. See id.; Ashcroft Memorandum, supra note 12, at 6.
As an administrator of justice, the prosecutor has a responsibility to aid in its realization. This duty certainly includes effective and eloquent advocacy on behalf of the government she represents. But it also requires a concomitant recognition that she must weigh the facts of each case and in some instances acknowledge that a more just result would occur if the judge departed from the Sentencing Guidelines. The Ashcroft Memorandum does not permit a prosecutor to "seek justice" where justice demands a downward departure.\footnote{Prosecutors are permitted to seek upward departures as warranted, though the procedures for upwardly departing post-Blakely are still uncertain as of this writing. Enhancing a sentence may be necessary for a more just result in some cases. By arguing for enhanced sentences for more egregious defendants and decreased sentences for less culpable defendants, prosecutors can help make rational and appropriate distinctions between offenders. Such variances should be amenable to the Sentencing Commission, which contemplated a twenty percent departure rate from the Guidelines. See generally 149 CONG. REC. S6711–12 (daily ed. May 20, 2003) (statement of Sen. Kennedy) (noting that judges depart from the Guidelines over the objection of the government slightly more than ten percent of the time). This observation rebuts arguments that the Commission and Congress did not intend to let officials responsible for sentencing federal defendants deviate from the Guidelines.}

C. A Brief Response to the "Justice Requires Uniformity" Argument

Some suggest that any potential disparity across jurisdictions is a greater injustice than restricting prosecutorial discretion or curtailing judges’ abilities to consider mitigating factors in sentencing.\footnote{See, e.g., Criminal Justice Oversight Subcommittee Hearing on "Oversight of the United States Sentencing Commission: Are the Guidelines Being Followed?": Hearing Before the Senate Judiciary Comm. Criminal Justice Oversight Subcomm., 106th Cong. (2000) (statement of Sen. Thurmond), reprinted in 15 FED. SENT. REP. 317, 317 (2003).} They argue that prior to the Sentencing Guidelines, "[t]he length of time a person spent in prison appeared to depend on 'what the judge ate for breakfast' on the day of sentencing, on which judge you got, or on other factors that should not have made a difference to the length of the sentence."\footnote{Blakely v. Washington, 542 U.S. ___, 124 S. Ct. 2531, 2554 (2004) (Breyer, J., dissenting) (citing studies finding that prior to the Sentencing Guidelines, "punishments for identical crimes in the Second Circuit ranged from 3 to 20 years' imprisonment and that sentences varied depending upon religion, gender of the defendant, and race of the defendant" (citations omitted))).} The Ashcroft Memorandum implicitly supports this view.\footnote{See Ashcroft Memorandum, supra note 12, at 7 ("Fundamental fairness requires that all defendants prosecuted in the federal criminal justice system be subject to the same standards and treated in a consistent manner.").}

Others take a more nuanced view. Professor Albert Alschuler describes the “movement from individualized to aggregated sentences” and argues that inflexible sentencing guidelines are "a backward step
in the search for just criminal punishments.”242 He suggests that uniformity should not be the only goal of the sentencing system.243 For instance, a regime that prescribed five-year terms for everything from littering to murder would be uniform, but would not reflect most conceptions of equal justice.244 Instead, “[c]ommentary does not mean same-ness; the term more commonly refers to the consistent application of a comprehensible principle or mix of principles to different cases. Excessive aggregation—treating unlike cases alike—can violate rather than promote the principle of equality.”245

The Justice Department should trust its prosecutors to consider facts more nuanced than the broadly sketched elements of an offense rather than focusing on “provable uniformity.”246 Provable uniformity should take a backseat to actual uniformity, which requires individual prosecutors abiding by ethical mandates to weigh mitigating circumstances reflected in the “seriousness of the defendant’s conduct,”247 but not captured by the “facts of the case.”248 Moreover, a focus on actual uniformity is reflected in the Sentencing Reform Act, which spawned the Sentencing Guidelines and sought to prevent “unwarranted disparities,” in sentencing.249 Individualized justice does not subvert Congressional intent.

Alschuler himself recognizes that “widespread injustice is more to be deplored than isolated injustice . . . .” [However, t]he injustice that

242 See Alschuler, supra note 18, at 902. Alschuler suggests that the Guidelines “dehumanized the sentencing process” by focusing on “social harm” to the exclusion of the individual defendant’s culpability. Id. at 903.
243 Id. at 916.
244 Id.
245 Id.
246 One achieves provable uniformity by ensuring that Defendant A, tried in Lefland by Lucy Liberal and convicted of federal Crime X, serves the same amount of time as Defendant B, tried in Rightville by Cathy Conservative, also convicted of Crime X. Actual uniformity contemplates that prosecutors may recognize differences between the relative culpability of Defendant A and Defendant B that are not reflected entirely by the elements of the crime and may appropriately argue that they should receive different sentences.
247 Thornburgh Memorandum, supra note 70, at 422.
248 Ashcroft Memorandum, supra note 12, at 1. This point is one place where the connotations of the Ashcroft Memoranda and Thornburgh Memoranda diverge. See supra Part II.B.
249 See 18 U.S.C. § 3553(a)(6) (2000) (admonishing judges to “avoid unwarranted disparities”); 28 U.S.C. § 991(b)(1)(B) (2000) (requiring the Sentencing Commission to provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices); 28 U.S.C. § 994(f) (2000) (explaining that Sentencing Commission duties include “providing certainty and fairness in sentencing and reducing unwarranted sentence disparities”). Finally, courts should impose a sentence that is “sufficient, but not greater than necessary.” 18 U.S.C. § 3553(a) (2000).
occurs in a single case is not diminished because it does not occur in others, nor is it diminished by the fact that it makes only a ripple in statistical patterns.\textsuperscript{250} All districts will have a few "outlier" cases demonstrating a clear disparity between the defendant's actual culpability and the charges he could face or the sentence to which he could be exposed. In such cases, the Attorney General should trust prosecutors to abide by their ethical mandates and recognize mitigating circumstances not fully captured in the statutory elements provable in a particular case.\textsuperscript{251}

This model necessarily requires that each U.S. Attorney exercise the same degree of care in selecting prosecutors that James Comey suggested he used when he spoke to the 2003 Southern District of New York summer interns.\textsuperscript{252} It also requires the Justice Department to trust these selected men and women to faithfully carry out their duties to the U.S. Government, to abide by the ethical mandates that govern their behavior, and to aspire to their larger and grander duty to seek justice. Finally, of course, it requires that individual prosecutors themselves remain faithful to their duty to seek justice.

Thus, prosecutors need not be required to "charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case" to ensure that defendants are treated consistently.\textsuperscript{253} The Justice Department could achieve actual uniformity by permitting prosecutors to recognize the outlier cases and treat them accordingly. The Attorney General should not force prosecutors to "squeeze fairness"\textsuperscript{254} into the document defining their discre-

\textsuperscript{250} Alschuler, supra note 18, at 905.

\textsuperscript{251} Of course, recognizing that each jurisdiction will have "outlier" cases does not preclude review of those cases to ensure that defendant characteristics such as race, gender, and class do not impermissibly correlate with prosecutorial clemency.

\textsuperscript{252} See supra note 9 and accompanying text.

\textsuperscript{253} Ashcroft Memorandum, supra note 12, at 1.

\textsuperscript{254} See Hechler, supra note 15, at 25. (quoting Zachary Carter, former U.S. Attorney for the Eastern District of New York, who believed that "U.S. attorneys [could still] squeeze fairness into these policies," as the memo "makes an attempt to constrict discretion, but it doesn't do so absolutely"). Unfortunately, individual attorneys may fail to recognize their potential ability—and possible ethical duty—to "squeeze fairness" out of the Ashcroft Memorandum. Conversely, the Ashcroft Memorandum might not reduce the supposed disparities that it was intended to quell. In fact, the Memorandum could enhance the disparities if some attorneys believe that the current ethos militates against permitting any prosecution or sentencing less than the maximum. If the same attorneys who would have chosen to overtly pursue a lesser offense in a given case figure out how to covertly do so by reading in some flexibility, they may strain against the Ashcroft Memorandum's requirements. See id. (noting that "the notion of what is a readily provable offense is highly subjective" (quoting Zachary Carter) (internal quotation marks omitted)). Thornburg remarks, however, that loyalty would lead most U.S. Attorneys to cooperate, but that every Attorney General still fires several who won't "take orders." See id. Regardless of whether prosecutors could "get away" with reading flexibility into the Ashcroft Memorandum, the fact that a federal prosecutor might have to subvert her boss's directives to fulfill her duty to "seek justice" is deeply troubling.
tion, but rather should encourage prosecutors to abide by the ethical mandates that guide their responsibilities as "minister[s] of justice."\footnote{255}

D. If Uniformity is Necessary, Why Make an Exception for Fast-Track Programs?

One approved exception to the Ashcroft Memorandum’s requirement that every attorney seek and pursue the highest possible charge is the “fast-track” program. The fast-track program is “an expedited disposition program whereby the Government agrees to charge less than the most serious, readily provable offense”\footnote{256} that is intended to relieve congestion in U.S. Attorney’s offices and the courts.\footnote{257} Fast-track programs provide “an offer of extraordinary sentence reductions to defendants willing to plead guilty pre-indictment to an information.”\footnote{258} For instance, the Southern District of California offers low-level narcotics offenders caught crossing the Mexican-American border a substantial sentence reduction in exchange for a guilty plea.\footnote{259}

While fast-track programs can be viewed as an imperfect compromise necessary to address an overburdened judiciary,\footnote{260} they unques-

\footnote{255}{See ABA Standards, supra note 4, § 3-1.2(b).}

\footnote{256}{Ashcroft Memorandum, supra note 12, at 3; see also PROTECT Act § 401(m)(2)(B), 117 Stat 650, 675 (2003).}

\footnote{257}{See United States v. Estrada-Plata, 57 F.3d 757, 761 (9th Cir. 1995).}

\footnote{258}{See Frank O. Bowman, III & Michael Heise, Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level, 87 Iowa L. Rev. 477, 550 (2002).}

\footnote{259}{Id. Defendants who pleaded guilty under this fast-track program usually received a seven-level downward departure. See id. This departure may have been so appealing as to tempt defendants who were innocent to plead guilty and avoid the possibility of a much longer sentence. While there is nothing unconstitutional about this, see North Carolina v. Alford, 400 U.S. 25, 39 (1970), it is nonetheless troubling. See generally Stephanos Bibas, Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas, 88 CORNELL L. REV. 1361 (2003) (arguing that, in criminal justice, substance is too often divorced from procedure). Fast-track programs, however, are now limited to—at most—a four level downward departure. See PROTECT Act § 401(m)(2)(B), 117 Stat. 650, 675 (2003); Memorandum Regarding Department Principles for Implementing an Expedited Disposition or Fast-Track Prosecution Program in a District, from Attorney General John Ashcroft, to All United States Attorneys 1 (Sept. 22, 2003) [hereinafter Fast-Track Memorandum], available at http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000aa79/departures/$FILE/FasttrackAGrequirements.pdf.}

\footnote{260}{Fast-track programs can, however, prevent defendants from escaping punishment entirely on speedy trial grounds if the system is too overburdened to try them in a timely manner. (Thanks to Professor Stephen F. Smith for this point.) Nevertheless, prosecutorial resources will be strained by the Ashcroft Memorandum’s charging requirements, and these requirements will heighten the sentencing disparity between the “lucky” defendant in a jurisdiction with a fast-track program for his crime and the “unlucky” defendant without the fast-track windfall. Further, Defendants will soon learn that the Ashcroft Memorandum curtails a prosecutor’s discretion to give them leniency in a plea bargain. This is likely result in more trials, which will use more prosecutorial and judicial resources, which will result in a}
tionally undercut the proffered purpose of the Ashcroft Memorandum: "to ensure that all federal criminal cases are prosecuted according to the same standards."261 The PROTECT Act did limit the availability of these programs,262 yet they are still allowed if the judicial and prosecutorial resources of the district would be too strained by the number of a particular category of cases.263 Permitting fast-track programs undermines the claim that "[f]undamental fairness requires that all defendants prosecuted in the federal criminal justice system be subject to the same standards and treated in a consistent manner."264 Furthermore, altering charging decisions solely to relieve pressure on an overburdened system but forbidding prosecutors to deviate when injustice would result risks transforming prosecutors into bureaucrats more concerned with administrative efficiency than justice.

E. The Potential Impact of Blakely v. Washington

In Blakely v. Washington,265 the Supreme Court held unconstitutional the State of Washington’s sentencing guidelines. In its June 24, 2004 opinion, the Court stated that the Washington guidelines unconstitutionally permitted a judge to enhance a defendant’s sentence above the statutory maximum of the standard range because the judge made a factual finding that he acted with “deliberate cruelty.”266 Pre-Blakely, for a court to use information to increase the defendant’s sentence, the government needed only to prove by a preponderance of the evidence that the defendant’s conduct fit into certain enhancement categories or that he committed additional crimes—regardless of whether he had been charged with or convicted by a jury for those crimes.267 The Court expressly refused to decide whether its holding implicated the Federal Sentencing Guidelines.268 After Blakely, however, the component of the Federal Sentencing Guidelines that permits judges to find facts that increase the defendant’s maximum

---

261 Ashcroft Memorandum, supra note 12, at 7.
263 In a memorandum distributed the same day as the Ashcroft Memorandum that is the subject of this Note, Ashcroft described the requirements for local jurisdictions to dispatched with cases using a fast-track system. See Fast-Track Memorandum, supra note 259, at 1–2. Fast-track programs require authorization from Ashcroft and will only be permitted in “exceptional circumstances.” See id. at 1.
264 Ashcroft Memorandum, supra note 12, at 7.
266 See id. at 2534.
268 See Blakely, 124 S. Ct. at 2538 n.9.
sentence beyond that warranted by the jury's fact finding may be unconstitutional.\footnote{269}

Courts, commentators, and Congress have begun debating Blakely's impact on the federal system. The Supreme Court quickly granted certiorari and heard oral arguments in United States v. Booker and United States v. Fanfan on October 4, 2004.\footnote{270} Whether the five-Justice Blakely bloc will hold is still being debated as this Note goes to press. While the Department of Justice (contrary to suggestions in its Blakely brief\footnote{271}) claimed that Blakely does not apply to the Federal Sentencing Guidelines,\footnote{272} the Department nevertheless required its prosecutors to seek waivers of Blakely rights.\footnote{273} In the Eastern District of Virginia, Judge Leonie Brinkema refused to accept these waivers until a higher court ruled on their constitutionality.\footnote{274}

Should the triple punch of Blakely, Booker, and Fanfan invalidate the Federal Sentencing Guidelines, many of the suggested replacements have the potential to shift even more power and discretion to the prosecutor.\footnote{275} For example, most proposals place greater weight on the charges to determine the sentence; filing charges remains the exclusive province of the prosecutor.\footnote{276} Giving prosecutors absolute


\footnote{271 See Brief for the United States as Amicus Curiae at 1, Blakely v. Washington, 524 U.S. ___, 124 S. Ct. 2531 (2004) (No. 02-1632) ("[A] decision invalidating judicial departure authority here could call into question the constitutionality of the federal Guidelines.").


\footnote{274 See id.}

\footnote{275 See Blakely, 124 S. Ct. at 2552-58 (Breyer, J., dissenting) (cataloguing and analyzing the ways in which legislatures may handle sentencing post-Blakely, noting that a pure charge offense system "gives tremendous power to prosecutors through their choice of charges"); Blakely Senate Hearings, supra note 198 (statement of Frank Bowman, Professor of Law, Indiana University School of Law).

\footnote{276 See supra Part I.A.}
control over defendants’ sentences may present separation of powers issues and makes it even more vital for prosecutors to abide by their duty to seek justice. The Supreme Court of Arizona, for instance, recognized that “a prosecutor is held to a higher standard of conduct than an ordinary attorney [as her] duty is to seek justice” and held that “refus[ing] to allege mitigating circumstances which the sentencing judge might consider meddles unduly with judicial power.” New Jersey similarly responded to separation of powers problems by permitting judicial oversight to “ferret[ ] out arbitrary and capricious prosecutorial decisions.” Such concerns about prosecutors’ power and responsibility should guide Congress, the courts, and the Attorney General in drafting new Sentencing Guidelines and prosecutorial policies more consistent with the prosecutor’s duty to seek justice.

The issues addressed in this Note, therefore, remain relevant regardless of the post-Blakely/Booker/Fanfan landscape. The fact remains that the Ashcroft Memorandum will still require prosecutors to “charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case.” Furthermore, if any downward departure scheme remains in place (i.e., one which provides for a “standard” sentence and requires defendants to ask for downward departures), the Memorandum will still require prosecutors to “not request or accede” to them. Finally, the ethical duty of prosecutors to “seek justice” will surely be the same.

CONCLUSION

Prosecutors are uniquely situated to “seek justice” because they are familiar with the aggravating and mitigating circumstances of the individual cases they prosecute. The Ashcroft Memorandum unduly


\[278\] Prentiss, 786 P.2d at 937 (construing the Arizona constitution).

\[279\] See Gonzalez, 603 A.2d at 520.

\[280\] Ashcroft Memorandum, supra note 12, at 2.


\[282\] Ashcroft Memorandum, supra note 12, at 6. But see Prentiss, 786 P.2d at 937; Gonzalez, 603 A.2d at 520.
constrains a prosecutor's discretion to charge a lesser offense that more fairly reflects a defendant's individual culpability. This directive can place a prosecutor in an untenable position: she must either respect the ethical precepts handed down by the common law, promulgated in the Manual, and passed by the American Bar Association, or abide by the Ashcroft Memorandum.

More importantly, perhaps, requiring a prosecutor to uniformly oppose downward departures is a clear movement away from the prosecutor's role as an administrator of justice. The Sentencing Guidelines were properly and necessarily developed to address generalities and cannot reflect the precise culpability of a defendant without permitting the flexibility of upward or downward departures in certain cases. The countervailing consideration of uniformity does not mitigate the discretion-stripping effected by the Ashcroft Memorandum, nor does it address or obviate the individual prosecutor's duty to seek justice.

The Supreme Court recognized that "we must have assurance that those who would wield [prosecutorial] power will be guided solely by their sense of public responsibility for the attainment of justice."283 Unfortunately, the Ashcroft Memorandum demands that federal prosecutors sacrifice individualized justice upon the altar of uniformity. By doing so, it threatens to turn justice into nothing more than the "fortuitous residue of the process in which the prosecutor participates" rather than the guiding principle for every aspect of her job.284

284 Melilli, supra note 1, at 702.