

1990

## A Proposed Check on the Charging Discretion of Wisconsin Prosecutors

Wayne A. Logan  
*Florida State University College of Law*

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### Recommended Citation

Wayne A. Logan, *A Proposed Check on the Charging Discretion of Wisconsin Prosecutors*, 1990 *Wis. L. REV.* 1695 (1990),  
Available at: <https://ir.law.fsu.edu/articles/206>

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# A PROPOSED CHECK ON THE CHARGING DISCRETION OF WISCONSIN PROSECUTORS

With the emergence of the increasingly vocal victims' rights movement and a more general punitive emphasis in criminal justice, the issue of prosecutorial discretion in the decision of whether to charge a suspect with a crime has assumed paramount importance. In two recent cases the Wisconsin Supreme Court addressed the fundamental question of whether it is the responsibility of the local prosecutor or the court to charge a suspect with a crime. This Comment examines these two cases, *Unnamed Petitioners v. Connors*, decided in 1987, and *State v. Unnamed Defendant*, decided in 1989. The Comment concludes that the charging mechanism upheld by the court comports neither with the modern practical necessity of having the charging decision reside with prosecutors nor with traditional Wisconsin separation of powers doctrine. The author suggests a new charging means, one that ensures greater prosecutorial accountability for charging decisions and involves the judiciary in the review of instances of prosecutorial inaction. This method, the author argues, is consistent with separation of powers doctrine and the practical realities of modern prosecution, and provides crime victims a critically important avenue of redress in the event a prosecutor unjustifiably refuses to charge.

## I. INTRODUCTION

It is an axiom of modern criminal justice administration that the public prosecutor wields enormous discretion in deciding whether to charge a suspect with a crime.<sup>1</sup> Commentators have recognized this power for some time. Newman Baker, writing in 1935, noted:

[T]he initiation of criminal prosecution is a matter resting in the uncontrolled discretion of the prosecuting attorney. To prosecute or not to prosecute? The answer rests upon his individual desires, dependent upon his character, remotely affected by the force of public opinion, but not subject to legal control except in the extreme instances of official misconduct.<sup>2</sup>

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1. "Charging" is used here to mean the initial decision to accuse a suspect with a crime and hence involve that suspect in the criminal justice system. In Wisconsin, the charging decision centers on the issuance of a criminal complaint, generally by the local district attorney. See *infra* notes 146-48 and accompanying text. The decision to file a complaint is distinguishable from subsequent decisions also within the rubric of "charging," including the number and type of offenses contained in an indictment or information. These latter decisions are beyond the scope of this Comment.

2. Baker, *The Prosecuting Attorney: Legal Aspects of the Office*, 26 J. AM. INST. CRIM. L. & CRIMINOLOGY 647, 647-48 (1935). See also Jackson, *The Federal Prosecutor*, 24 J. AM. JUD. SOC'Y 18 (1940) ("The prosecutor has more control over life, liberty and reputation than any other person in America. His discretion is tremendous").

The history of the American prosecutor has been characterized by a virtually unquestioned accretion of discretionary power. This unfettered growth is particularly notable in light of concerted efforts directed toward limiting discretion exercised by other criminal justice interests, especially the police and the courts.<sup>3</sup>

This growth, however, has recently come into question. In response to the increasingly powerful and vocal victims' rights movement,<sup>4</sup> numerous states have provided procedures to increase the involvement of crime victims in the criminal prosecutions of their alleged offenders.<sup>5</sup> These efforts have largely been directed at giving victims a greater voice in proceedings subsequent to the commencement of the criminal prosecution.<sup>6</sup> Today, however, there is increasing pressure to involve crime victims in the decision regarding whether to institute criminal actions at all.<sup>7</sup> Indeed, a number of states have procedures

3. See Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1525 (1981).

4. Of the victims' rights movement, Justice Abrahamson of the Wisconsin Supreme Court has said: "The victims' rights movement presents an alternative blueprint for the criminal justice system. . . . [A]doption of the changes advocated by the movement could significantly restructure our present criminal justice system, giving the victim a systematic influence from investigation and arrest through parole." Abrahamson, *Redefining Roles: The Victims' Rights Movement*, 1985 UTAH L. REV. 517, 518. "[T]he movement's basic theme can be summarized as a privatization of the concept of criminal justice. It demands that the personal interest of the victim be considered within the criminal justice system." *Id.* at 519. In general, the movement derives from a growing erosion of trust in the ability of the justice system to dispense justice effectively in individual instances. See Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L.J. 515, 518 (1982). For a helpful overview of the historical decline of victims in criminal prosecutions, see McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AM. CRIM. L. REV. 649, 651-61 (1976).

5. As of 1984, 14 states, including Wisconsin, had a "Victims' Bill of Rights," which provides crime victims a right to information, notice and participation in criminal proceedings. Kelly, *Victims' Perceptions of Criminal Justice*, 11 PEPPERDINE L. REV. 15, 21-22 (1984). Wisconsin's version, the first in the nation, is codified at WIS. STAT. § 950.04 (1989-1990). A recent manifestation of the concern over victims' rights is the enactment of constitutional amendments to ensure that victims have a role in the criminal justice process. In 1989 alone four states took such a measure, bringing the national total to five. See FLA. CONST. art. I, § 16(b); MICH. CONST. art. I, § 24; TEX. CONST. art. I, § 30; WASH. CONST. art. I, § 3(j). (Rhode Island passed an amendment in 1986; see R.I. CONST. art. I, § 23.) A constitutional amendment regarding victims' rights is also to be introduced in the 1991 Wisconsin legislative session. The amendment would elevate to constitutional status the extant victims' bill of rights and also ensure victims the right to confer with the prosecution and to be present at all proceedings the accused is entitled to attend. Conversation with Steve Derene, Office of Crime Victims Services, Wisconsin Department of Justice. Conversation transcript on file with author.

6. Wisconsin, for instance, provides that victims have the right to be informed of the final disposition of their cases (WIS. STAT. § 950.04(1) (1989-1990)); to provide the court with information regarding the economic, physical and psychological effects of their victimization and to have the information considered by the court (WIS. STAT. § 950.04(2m) (1989-1990)); and to make a statement to the court prior to sentencing (WIS. STAT. § 972.14(3) (1989-1990)).

7. Such a view makes eminent sense given that without commencement of the

that provide victims a direct role in the charging decision.<sup>8</sup> Moreover, while commentators have for some time urged that victims be provided a means to contest a prosecutor's decision not to prosecute,<sup>9</sup> the last two years have witnessed a burgeoning of this advocacy.<sup>10</sup>

In the wake of two recent decisions by the Wisconsin Supreme Court, the charging power of prosecutors has assumed particular importance in Wisconsin. The decisions, *Unnamed Petitioners v. Connors*<sup>11</sup> and *State v. Unnamed Defendant*,<sup>12</sup> evince markedly different views of the power of prosecutors in charging criminal suspects. In *Connors*, decided in 1987, the court found unconstitutional for separation of powers reasons Wisconsin Statutes section 968.02(3), a law passed in 1969 that permits a circuit judge to file a criminal complaint if the district attorney refuses or is unavailable to do so.<sup>13</sup> *Unnamed*

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criminal proceeding there can be no conviction, and with no conviction, there can be no sentence. The decision to prosecute is distinct from the refusal to do so, for reasons other than ultimate outcome. Affirmative decisions to prosecute have historically been subject to extensive judicial scrutiny. Selective prosecution based on race, religion or other arbitrary classification has been disallowed on constitutional grounds for some time. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Similarly, a prosecutor may not, consistent with the constitution, use the charging power to penalize a suspect for exercising constitutional rights. *Blackledge v. Perry*, 417 U.S. 21 (1974). This involvement by the courts historically has been absent with regard to refusals to charge. See *infra* notes 160-75 and accompanying text. See also K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 22 (1969) ("the power not to prosecute may be of greater magnitude than the power to prosecute, and it certainly [has been] much more abused because it is so little [controlled]").

8. See *infra* notes 176-79 and accompanying text.

9. See, e.g., Comment, *Private Prosecution: A Remedy For District Attorneys' Unwarranted Inaction*, 65 YALE L.J. 209 (1955); Comment, *Legal Methods For the Suppression of Organized Crime: Circumventing the Corrupt Prosecutor*, 48 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 531 (1958) [hereinafter *Circumventing the Corrupt Prosecutor*].

10. See, e.g., Note, *The Constitutional Validity of Pennsylvania Rule of Criminal Procedure 133(b)(2) and The Traditional Role of the Pennsylvania Courts in the Prosecutorial Function*, 52 U. PITT. L. REV. 269 (1990) (arguing that the judiciary be provided with extensive powers to review prosecutorial inaction); Davis, *The Crime Victim's "Right" To A Criminal Prosecution: A Proposed Model Statute for the Governance of Private Criminal Prosecutions*, 38 DE PAUL L. REV. 329 (1989) (suggesting that victims be able to retain private counsel in times of inaction); Note, *Private Challenges to Prosecutorial Inaction: A Model Declaratory Judgment Statute*, 97 YALE L.J. 488 (1988) (suggesting that a court be able to review a prosecutor's decision not to prosecute and, upon finding that the decision constituted an abuse of discretion, issue a declaratory judgment to "signal" the wrongful decision); Comment, *Judicially Initiated Prosecution: A Means of Preventing Continuing Victimization in the Event of Prosecutorial Inaction*, 76 CALIF. L. REV. 727 (1988) (victims suffering ongoing threat of harm should be able to petition the court to appoint a private attorney to prosecute the case when the state refuses to prosecute).

11. 136 Wis. 2d 118, 401 N.W.2d 782 (1987).

12. 150 Wis. 2d 352, 441 N.W.2d 696 (1989).

13. *Connors*, 136 Wis. 2d at 143, 401 N.W.2d at 782. Wis. STAT. § 968.02 (1989-1990) provides:

(1) Except as otherwise provided in this section, a complaint charging a person with an offense shall be issued only by a district attorney of the county where the crime is alleged to have been committed. A complaint is issued when it is approved for

*Defendant*, handed down only two years later and, like *Connors*, written by Chief Justice Heffernan, reversed *Connors*.<sup>14</sup> In *Unnamed Defendant*, the court considered the constitutionality of Wisconsin Statutes section 968.26, a law predating the state constitution that technically allows citizens to request circuit judges to issue criminal complaints without any involvement by local prosecutors.<sup>15</sup> The *Unnamed Defendant* court held that because section 968.26 had existed prior to the adoption of the state constitution, the statute was necessarily constitutional. To resolve the conflict with *Connors*, the court reversed *Connors* and deemed section 968.02(3) constitutional as well.

Aside from representing a rare about-face on a matter of constitutional significance, the opinions reveal an intriguing conflict over the proper locus of the charging function, an issue of fundamental importance in modern criminal justice administration. The purpose of this Comment is to examine, in the wake of *Connors* and *Unnamed Defendant*, the propriety of the mechanisms Wisconsin now uses to control discretion in the prosecution decision. In particular, the Comment argues that the *Unnamed Defendant* court arrived at essentially the right conclusion, but for the wrong reasons. The courts do indeed have a role to play in the charging decision, but this conclusion does not derive from a static historical analysis like that employed by the *Unnamed Defendant* court. Rather, consideration of traditional Wisconsin separation of powers principles and the practical realities of the modern justice system compels this conclusion. Use of the correct interpretive framework would have led the *Unnamed Defendant* court to invalidate the charging controls it ultimately upheld; the system does not comport with separation of powers doctrine and is based on an unrealistic understanding of contemporary prosecutorial needs and practices.

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filing by the district attorney. The approval shall be in the form of a written endorsement on the complaint.

(2) After a complaint has been issued, it shall be filed with a judge and either a warrant or summons shall be issued or the complaint shall be dismissed, pursuant to s. 968.03. Such filing commences the action.

(3) If a district attorney refuses or is unavailable to issue a complaint, a circuit judge may permit the filing of a complaint, if the judge finds there is probable cause to believe that the person to be charged has committed an offense after conducting a hearing. If the district attorney has refused to issue a complaint, he or she shall be informed of the hearing and may attend. The hearing shall be ex parte without the right of cross-examination.

14. *Unnamed Defendant*, 150 Wis. 2d at 365, 441 N.W.2d at 701.

15. WIS. STAT. § 968.26 (1989-1990) provides as follows:

If a person complains to a judge that he has reason to believe that a crime has been committed within his jurisdiction, the judge shall examine the complainant under oath and any witnesses produced. . . . If it appears probable from the testimony given that a crime has been committed and who committed it, the complaint shall be reduced to writing and signed and verified; and thereupon a warrant shall issue for the arrest of the accused. . . .

Part II of the Comment presents the background and reasoning of the *Connors* and *Unnamed Defendant* opinions. Part III criticizes the historical and constitutional analyses of the *Unnamed Defendant* court, finding them misconceived and ill-suited to modern separation of powers requirements. The charging decision and the role of public prosecutors in the criminal justice system have changed dramatically since the state's origin. A correct constitutional interpretation by the court would recognize that charging in contemporary Wisconsin is primarily, but not exclusively, the job of prosecutors, and that controls on this power are needed. However, the controls approved in *Unnamed Defendant* are inadequately tailored to the modern distribution of powers between the executive and the judiciary. Part IV discusses the need for a check on the prosecution decision and considers the current avenues of recourse available to Wisconsin citizens in response to prosecutorial inaction. Part V criticizes these existing controls for practical reasons, as well as for their fundamental constitutional infirmities. The Comment concludes with a proposal to replace current charging controls. The new approach is more consonant with Wisconsin separation of powers doctrine, striking a balance between the institutional demands of the criminal justice system and the needs of crime victims when the system unduly fails to prosecute.

## 11. BACKGROUND

The issue of judicial encroachment on the charging powers of Wisconsin prosecutors first came into question in *Unnamed Petitioners v. Connors*.<sup>16</sup> In *Connors*, a victim of sexual assault requested that a criminal complaint issue against her alleged assailants. After an investigation, the district attorney for Milwaukee County elected not to file a complaint, not on the basis of a lack of probable cause, but on his perceived inability to prove guilt beyond a reasonable doubt at trial.<sup>17</sup>

After the district attorney's refusal to prosecute, and upon the petition of the complainant, the matter was assigned to a circuit judge pursuant to Wisconsin Statutes section 968.02(3). This section provides, in part, that "[i]f a district attorney refuses or is unavailable to issue a complaint, a circuit judge may permit the filing of a complaint, if the judge finds there is probable cause to believe that the person to be charged has committed an offense after conducting a hearing."<sup>18</sup> The alleged assailants then sought a writ of prohibition from the Wisconsin

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16. 136 Wis. 2d 118, 401 N.W.2d 782 (1987).

17. *Id.* at 123, 401 N.W.2d at 784 (quoting *State ex rel. Newspapers, Inc. v. Circuit Court for Milwaukee County*, 124 Wis. 2d 409, 502, 307 N.W.2d 209, 211 (1985)).

18. WIS. STAT. § 968.02(3) (1989-1990).

Supreme Court, arguing that the statute unconstitutionally violated Wisconsin's separation of powers doctrine.<sup>19</sup>

The *Connors* court granted the writ, finding that the statute improperly vested the judiciary with powers constitutionally residing with prosecutors, members of the executive branch.<sup>20</sup> The court first reviewed case law that "has repeatedly held that the discretion to charge or not to charge, and the discretion of how to charge, rests solely with the district attorney."<sup>21</sup> The court then scrutinized the complaint issuance procedure contained in Wisconsin Statutes section 968.02(3). According to the court, the practical effect of the statute was to allow a circuit court to initiate prosecution *ab initio*: to construct its own factual record and make a charging determination upon either prosecutorial refusal or absence.<sup>22</sup> Because the procedure amounted to a "complete usurpation . . . of an important executive function by the judiciary," the *Connors* court found that the section unconstitutionally violated separation of powers doctrine.<sup>23</sup>

In *State v. Unnamed Defendant*,<sup>24</sup> decided only two years later, the Wisconsin Supreme Court again confronted the question of the scope of prosecutorial powers in the charging decision. In *Unnamed Defendant*, the Waukesha County district attorney's office refused to issue a complaint in response to an alleged sexual assault.<sup>25</sup> The stated reason for the refusal was a potential ethical problem. Members of the office knew both the complainant and the suspect.<sup>26</sup> An assistant district attorney for Dane County was therefore summoned and appointed acting district attorney for the county pursuant to Wisconsin Statutes section 59.44, which authorizes the district attorney or circuit judge to make such provisional appointments.<sup>27</sup> The acting prosecutor reviewed the investigative file and decided not to pursue criminal proceedings, believing that he could not establish the suspect's guilt beyond a reasonable doubt.<sup>28</sup>

The complainant, mindful of the recent *Connors* decision regarding Wisconsin Statutes section 968.02(3), then sought to commence

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19. *Connors*, 136 Wis. 2d at 123, 401 N.W.2d at 784.

20. *Id.*

21. *Id.* at 128, 401 N.W.2d at 786.

22. *Id.* at 142, 401 N.W.2d at 792.

23. *Id.* at 143, 401 N.W.2d at 792.

24. 150 Wis. 2d 352, 441 N.W.2d 696 (1989).

25. *Id.* at 356, 441 N.W.2d at 679.

26. *Id.*

27. WIS. STAT. § 59.44 (1988-1989) (repealed effective January 1, 1990). *See infra* note 249.

28. *Unnamed Defendant*, 150 Wis. 2d at 356, 441 N.W.2d at 697.

prosecution by means of section 968.26, the "John Doe" statute.<sup>29</sup> This statute provides that a citizen may approach a circuit court judge with information relating to an alleged crime and that the court may issue a complaint and arrest warrant upon finding probable cause that a crime was committed.<sup>30</sup> On the basis of testimony elicited by a special prosecutor, the circuit court filed a criminal complaint against the defendant. The defendant moved to have the action dismissed on the ground that section 968.26, like the statute at issue in *Connors*, unconstitutionally vested executive powers in the judiciary. The circuit court denied the defendant's motion to dismiss, the court of appeals certified the matter to the supreme court and the latter accepted certification.<sup>31</sup>

The *Unnamed Defendant* court held that the charging component of the John Doe proceeding did not constitute a violation of executive powers by the judiciary.<sup>32</sup> In so holding, the court overruled the premise of *Connors*—namely, that initiation of criminal prosecutions is an exclusive executive power in Wisconsin. The court based its decision on newly presented historical evidence indicating that criminal prosecutions in general, and John Doe proceedings in particular, had been the responsibility of the courts from the origin of Wisconsin's constitution until recent times.<sup>33</sup> According to the court, the provision authorizing initiation of criminal prosecutions by John Doe proceedings was in force in 1848 when the Wisconsin Constitution was first adopted.<sup>34</sup> The statutory provision allowing district attorneys to commence prosecutions, on the other hand, was first adopted in 1945. In that year, prosecutors were given explicit statutory powers, coextensive with the powers of the courts, to issue criminal complaints. Only in 1969, with the adoption of section 968.02(1), did the legislature give prosecutors the primary statutory authority to issue complaints.<sup>35</sup> Thus, because of its long-standing existence, the John Doe proceeding did not violate Wisconsin separation of powers doctrine.<sup>36</sup> Chief Justice Heffernan then overruled *Connors*, concluding that the holding in *Unnamed Defendant* constituted a *sub silentio* overruling of the constitutional infirmity of section 968.02(3).<sup>37</sup>

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29. WIS. STAT. § 968.26 (1989-1990). See *supra* note 15.

30. *Id.*

31. *Unnamed Defendant*, 150 Wis. 2d at 357-58, 441 N.W.2d at 697-98.

32. *Id.* at 365, 441 N.W.2d at 701.

33. The court based much of its historical analysis on information provided in an article written in response to *Connors*. See Becker, *Judicial Scrutiny of Prosecutorial Discretion in the Decision Not to File a Complaint*, 71 MARQ. L. REV. 749 (1988).

34. *Unnamed Defendant*, 150 Wis. 2d at 363, 441 N.W.2d at 699-700.

35. *Id.* at 363, 441 N.W.2d at 700.

36. *Id.* at 366-67, 441 N.W.2d at 701.

37. *Id.* at 365, 441 N.W.2d at 701.



### III. ANALYSIS OF THE *UNNAMED DEFENDANT* OPINION

At its core, the *Unnamed Defendant* opinion is based on a very simple premise: because the initiation of prosecutions was not the *exclusive* domain of the executive branch when the state constitution was adopted, separation of powers doctrine is not violated by statutes that give judicial officers charging power. This section questions the historical premises relied upon by the court in reaching its conclusion. Subsequent sections examine and criticize the rationales used by the *Unnamed Defendant* court to buttress its conclusion that Wisconsin Statutes sections 968.02(3) and 968.26 are constitutional.

#### A. *The Court's Misperception of the Historic Role of Wisconsin District Attorneys*

A linchpin in the rigid constitutional analysis employed in *Unnamed Defendant* is the court's understanding of the historical role of the Wisconsin district attorney. Scrutiny of this history, however, reveals that the court understated this role. Historically, the charging decision has not "traditionally been considered a judicial power,"<sup>38</sup> as was contended by the court. Rather, Wisconsin prosecutors historically have played a significant role in the charging decision, and this role has increased markedly in accord with the demands of the state's justice system.

Consideration of the constitution and the statutes in place at the time of Wisconsin's origin does not provide much guidance as to the original function of the Wisconsin district attorney. The first Wisconsin constitution, adopted in 1848, is notably silent as to the duties of the district attorney. Only in article VI, section 4, is the position mentioned at all and then only to establish the term of office and procedures to fill vacancies.<sup>39</sup>

The statutes of the era provide little additional information. Chapter 10, sections 63-64 of the 1889 statutes, makes the first mention of prosecutors' duties: district attorneys shall prosecute or defend in court all matters in which the state has an interest and must conduct criminal examinations at the request of magistrates.<sup>40</sup> Chapter 146, section 7, provided that district attorneys have subpoena powers.<sup>41</sup>

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38. *Id.* at 366, 441 N.W.2d at 701. Despite the fundamental importance of the matter, the question of whether prosecution is a traditional executive function has only recently been scrutinized. See Note, *Is Prosecution a Core Executive Function? Morrison v. Olson and the Framers' Intent*, 99 YALE L.J. 1069 (1990).

39. WIS. CONST. art. VI, § 4.

40. *An Act Concerning the Attorney-General and District Attorneys*, Stats. of the Territory of Wis. 94 (1839).

41. *Id.* at § 7.

In contrast, the statutes of the time are relatively clear on the duties of judges. Chapter 145, section 1, provided that judges shall issue “process”;<sup>42</sup> chapter 146, section 16, provided that in the absence of probable cause at a preliminary examination a magistrate may not bind over a defendant for trial.<sup>43</sup> Chapter 145, carried over from 1839 territorial statutes, contained what today is known as the John Doe statute. Originally entitled “An Act to Provide for the Arrest and Examination of Offenders, Commitment for Trial and Taking Bail,” this statute provided:

Upon complaint made to any such magistrate that a criminal offence has been committed, he shall examine on oath the complainant and any witnesses produced by him, and shall reduce the complaint to writing . . . and if it shall appear that any such offence has been committed, the court or justice shall issue a warrant reciting the substance of the accusation.<sup>44</sup>

Thus, as late as 1889, as noted by Justice Steinmetz in his *Connors* dissent, “[it] is not clear in these statutes whether the magistrate or the district attorney would make the decision to issue the complaint.”<sup>45</sup>

It was not until the middle of the twentieth century that the statutes expressly described the role of the district attorney in the charging decision. Wisconsin Statutes section 361.02(1), promulgated in 1945, empowered the district attorney to swear complaints and issue warrants.<sup>46</sup> In 1969 the legislature enacted section 968.02, the statute considered in *Connors*.<sup>47</sup>

Seen in the broader context of the history of the public prosecutor, this perceived lack of definitiveness in the role of prosecutors is perhaps not surprising. For, as noted by Joan Jacoby, the prosecutor is a peculiarly twentieth-century development.<sup>48</sup> Initially, the local prosecut-

42. Ch. 145 § 1.

43. Ch. 146 § 16.

44. WIS. REV. STAT., ch. 145 §§ 1-2 (1849).

45. *Connors*, 136 Wis. 2d 118, 168-69, 401 N.W.2d 782, 803 (Steinmetz, J., dissenting).

46. WIS. STAT. § 362.02(1) (1945).

47. WIS. STAT. § 968.02 (1989-1990). In 1969, contemporaneous with the enactment of WIS. STAT. § 968.02, the legislature repealed WIS. STAT. § 955.17 (1955). This latter law provided that if the district attorney determined that an information should not be filed, then she had to file a statement of explanation. If the court was not satisfied with the reasons, the court would direct the district attorney to file the information. This statute originated in 1871, at the time requirements for grand jury indictments were eliminated. See Becker, *supra* note 33, at 751.

48. J. JACOBY, *THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY* 31-32 (1980). The office of the public prosecutor has no clear historical antecedent. Under traditional Anglo-American common law, prosecutions were carried out in the name of the victim by private attorneys retained by victims or other interested parties. The emergence of the public prosecutor in the colonial era replaced this system: prosecutions were brought by a publicly-

ing attorney was considered a judicial figure—"a minor figure in the court, an adjunct to the judge. His position was primarily judicial, and perhaps only quasi-executive."<sup>49</sup>

Even in states where separate [constitutional] articles were written for local and county officers, the prosecuting attorney . . . was relegated to a subsection of those articles establishing the structure and officers of the state court systems. Never was he listed as a member of the executive branch; never was he described as an officer of local government. He was . . . clearly a minor actor in the court's structure.<sup>50</sup>

In state constitutions, as in Wisconsin, much greater emphasis and deference was provided the sheriff and county coroner; their offices were the first to gain independent status and to be locally elected.<sup>51</sup> "As a subsidiary of the courts, [the prosecutor] was considered merely an adjunct to the real powers of the courts, the judges."<sup>52</sup>

For decades, district attorneys performed in relative anonymity. Not until the 1920s did the district attorney become the subject of research attention. Early crime commissions of the era were both shocked at and critical of the great power they discovered local prosecutors possessed.<sup>53</sup> At the same time, however, researchers recognized that crime rates were increasing and that independent specialists were needed. The enormous case volumes then first burdening the justice systems of the cities necessarily precluded the courts from adjudicating anywhere near the entirety; some system of screening out the less worthwhile cases was needed.<sup>54</sup> The Wickersham Commission, writing in 1931, recognized that "[t]he sifting which must be done somewhere, and in a proper system should be done at the outset, had to be done by the prosecuting attorney."<sup>55</sup> By World War II, the office of the prosecutor had become central in the criminal justice system.<sup>56</sup>

Notably, this growth in power came at the expense of the other

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elected, unbiased actor in the name of the state. As a result, the object of prosecutions shifted from the vindication of private wrongs to the promotion of public interests like deterrence and rehabilitation. Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL'Y 357, 387-88 (1986).

49. J. JACOBY, *supra* note 48, at 23.

50. *Id.* For a discussion of the origins of public prosecutors in the federal system, see Note, *supra* note 38, at 1082-88.

51. J. JACOBY, *supra* note 48, at 24. See also WIS. CONST. art. VII, § 4.

52. J. JACOBY, *supra* note 48, at 24.

53. See, e.g., MISSOURI CRIME COMMISSION (1926); CLEVELAND CRIME COMMISSION (1922).

54. NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT [WICKERSHAM COMMISSION], *Report on Prosecution* 87 (1931).

55. *Id.* at 20.

56. J. JACOBY, *supra* note 48, at 39.

actors in the criminal justice system.<sup>57</sup> Of necessity, case initiation procedures common to earlier eras were replaced by the emerging functions of local prosecutors. This development has been noted by the American Bar Association:

Whatever may have been feasible in the past, modern conditions require that the authority to commence criminal proceedings be vested in a professional, trained, responsible public official. . . . Historically, the power to initiate prosecutions was not vested exclusively in public officials but was shared with private citizens. The essential screening to determine whether there was substance to a charge was performed by the magistrate . . . or by the grand jury. The emergence of the professional prosecutor . . . fundamentally altered this situation. The advent of the office of the public prosecutor provided a new and professional medium of screening that had not been previously available.<sup>58</sup>

The evolution of the district attorney's office was no different in Wisconsin. From a relatively early date, Wisconsin took steps to ensure that its public prosecutors upheld their obligation to impartially administer the criminal laws. In 1888, the Wisconsin Supreme Court decided *Biemel v. State*, holding that the use of prosecuting attorneys compensated by private persons in criminal actions was against public policy.<sup>59</sup> According to the court, "[T]he district attorney, who is the officer provided by the laws of the state to *initiate* and carry on such trials, shall be unprejudiced and unpaid except by the state, and shall have no private interest in such prosecution."<sup>60</sup> To allow otherwise, the court held, would run the risk of vindictive prosecutions, compromising the essential unbiased nature of the state's criminal courts.<sup>61</sup> In

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57. This shift has been described by Professor McDonald as follows:

In this transformation the office of the public prosecutor has grown from virtually a nonexistent role to the position of central actor in the system. Much of this growth has been by displacing . . . the police, the judiciary, and the defense bar from territory that once was theirs. . . . The increase in the size and complexity of the criminal justice industry brought with it the need for a centralized chief executive to bring some efficiency and coordination to its operation. The public prosecutor was the only component in the system able to do this.

W. McDONALD, *THE PROSECUTORS* 46 (1979).

58. AMERICAN BAR ASSOCIATION, *STANDARDS FOR CRIMINAL JUSTICE*, Standard 3-3.4 Commentary (1980) [hereinafter ABA STANDARDS].

59. 71 Wis. 444, 37 N.W. 244 (1888). This deference to the publicly-elected and impartial office of the district attorney was rare for its day. Indeed, in 1886 the Utah Supreme Court approved of the assistance of the public prosecutor by private counsel retained by the associates of the deceased, stating: "The more learning and ability brought to bear on the case, the better." *People v. Tidwell*, 4 Utah 506, 513, 12 P. 61, 64 (1886).

60. *Biemel*, 71 Wis. at 450, 37 N.W. at 247.

61. *Id.* at 451, 37 N.W. at 247-48. A similar sentiment was expressed later by the

1892, to ensure the professional quality of the office, the Wisconsin Supreme Court in *State v. Russell*<sup>62</sup> held that prosecutors must be attorneys and members of the state bar.<sup>63</sup> Such requirements were appropriate given the considerable power the supreme court perceived the office to have. In *Wight v. Rindskoph*, decided in 1877, the court stated:

A public prosecutor is a quasi judicial officer, retained by the public for the prosecution of persons accused of crime, in the exercise of sound discretion to distinguish between the guilty and the innocent, between the certainly and the doubtfully guilty; never voluntarily to acquiesce in an acquittal upon certain presumptions of guilt, or in conviction upon doubtful presumption of guilt. . . . He is trusted with broad official discretion, generally subject, however, to judicial control.<sup>64</sup>

The state's increasing reliance on district attorneys to serve faithfully the interests of the state manifested itself again in 1870. In that year, the state constitution was amended, resulting in the prosecutor's information eclipsing the grand jury's indictment as the state's principal accusatory device.<sup>65</sup>

Subsequent years witnessed an unrelenting growth in the powers of the office. The state's growing justice system, like that of the nation as a whole, required the services of a centralized executive officer to handle increasing case loads. In 1927, Wisconsin Supreme Court Justice Crownhart spoke to this need in an address to the state district attorneys' convention:

It is frequently said by certain altruistic persons that the law should be strictly enforced and for any infraction thereof punishment must be swift and sure. However, men of practical experience in life recognize that no such ideal, if it be an ideal, is possible. The public officials having to deal with crime must winnow and sift from the offenders those who are the most guilty . . . for vigorous prosecution.<sup>66</sup>

This necessary discretionary authority among district attorneys was

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court in *State v. Peterson*, 195 Wis. 351, 218 N.W. 367 (1928). There the court stated that in Wisconsin "we have private prosecution for private wrongs and public prosecution for public wrongs. Our scheme contemplates that an impartial man selected by the electors of the county shall prosecute all criminal actions in the county unbiased by desires of complaining witnesses or that of the defendant." *Id.* at 356. 218 N.W. at 369.

62. 83 Wis. 330, 53 N.W. 441 (1892) 218 N.W. at 369.

63. *Id.* at 332-33, 53 N.W. at 442. This professional evolution continues even to this day. See Wis. STAT. § 978.13 (1989-1990) (promulgated in 1989, making district attorneys state employees).

64. 43 Wis. 344, 354 (1877).

65. See *State v. Leicham*, 41 Wis. 565, 572-73 (1877) (describing the procedural evolution).

66. Address of Justice Charles H. Crownhart, delivered at District Attorneys' Convention in May 1927, 16 Op. Att'y. Gen. xlix (1927).

evident in supreme court opinions of the era as well. In 1923, in *Application of Bertine*,<sup>67</sup> the Wisconsin Supreme Court observed that the district attorney was not merely an “administrative officer,”<sup>68</sup> but a key actor looked to by citizens to exercise “sound discretion.”<sup>69</sup> According to the court:

The office of the district attorney is a constitutional office. It is held as a public trust, and the incumbent is charged with grave responsibilities calling for the exercise of learning in the law and sound judgment. The duties of the office should be discharged vigorously and without fear or favor.<sup>70</sup>

By 1968, the centrality of district attorneys in the charging decision was beyond doubt. In *State ex rel. Kurkierewicz v. Cannon*,<sup>71</sup> the Wisconsin Supreme Court held that the discretion of district attorneys to initiate coroner’s inquests, a duty ceded to them by the legislature in 1905, was not compellable in mandamus.<sup>72</sup> Speaking of the district attorney’s powers, the court noted:

It is clear that in his functions as a prosecutor he has great discretion in determining whether or not to prosecute. There is no obligation or duty upon a district attorney to prosecute all complaints that may be filed with him. While it is his duty to prosecute criminals, it is obvious that a great portion of the power of the state has been placed in his hands for him to use in furtherance of justice, and this does not require per se prosecution in all cases where there appears to be a violation of the law no matter how trivial. In general, the district attorney is not answerable to any other officer of the state in respect to the manner in which he exercises those powers.<sup>73</sup>

While it is clear that the powers of district attorneys have grown significantly over the years, it also clear that statutory law has not always kept pace with this de facto growth. The Opinions of the Wisconsin Attorney General from the early 1900s to the present evidence the

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67. 181 Wis. 579, 196 N.W. 213 (1923).

68. *Id.* at 587, 196 N.W. at 216.

69. *Id.* at 588, 196 N.W. at 216.

70. *Id.* at 587, 196 N.W. at 216-17.

71. 42 Wis. 2d 368, 166 N.W.2d 255 (1968).

72. *Id.* at 383, 166 N.W.2d at 262-63.

73. *Id.* at 378, 166 N.W.2d at 260. *See also* *State ex rel. White v. Simpson*, 28 Wis. 2d 590, 598, 137 N.W.2d 391, 394 (1965) (“We recognize that the district attorney holds an office of great dignity and that in some respects he has quasi-judicial responsibilities. His decision to initiate prosecution or refuse to do so is, in a sense, a judicial determination”); *Thompson v. State*, 61 Wis. 2d 325, 332, 212 N.W.2d 109, 112 (1973) (“For a limited time [the district attorney] is the trustee of the public’s law enforcement conscience. . . . In the exercise of that public conscience he is neither the puppet of the law enforcement authorities nor of the courts”).

emerging role of prosecutors in the charging decision and illustrate the significant actual role of district attorneys, in marked contrast to their modest role prescribed in the constitution and early statutes.

In an opinion dated March 20, 1918, the state attorney general responded to a district attorney's inquiry regarding whether to prosecute, at the mayor's urging, a rarely used "blue law" that would result in the closing of a saloon. The district attorney believed that it was his duty to prosecute only after a criminal complaint, made in good faith, was obtained by a citizen. In this instance he believed that the mayor may have had an improper, underlying political motive. The attorney general declined to adopt so modest a view of the district attorney's discretion:

It is true that there is not in our statutes an expressed provision making it the duty of the district attorney to make a complaint when a criminal law has been violated. . . . The office of the district attorney is a constitutional office (art. VI, § 4), and the prosecuting officer elected by the people in each county in the state. . . . It has been the practice in this state for district attorneys to make the complaint in a great many of the prosecutions, and the district attorneys are generally looked to by the people to bring the prosecutions where the criminal law has been clearly violated.<sup>74</sup>

Similarly, in 1936, at the conclusion of a review of the statutory duties of district attorneys, the attorney general observed:

From the statutes above it might seem that the district attorney's duties in prosecution begin after a complaint has been filed or other preliminary steps taken . . . but both public opinion and the courts have made it clear that it is the duty of the district attorney to instigate action upon his own knowledge as well as to prosecute after the indictment or complaint is filed. . . . Thus it is the duty of the district attorney to institute criminal proceedings whenever a criminal statute is

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74. 7 Op. Att'y Gen. 176, 177-78 (1918). *See also* 18 Op. Att'y Gen. 317, 319 (1925), in which a prosecutor informed the grandfather of a child killed in an auto accident that he would institute criminal proceedings if the grandfather wished. The prosecutor, however, was worried that the grandfather might have had a vengeful motive because he lost a civil wrongful death action on the matter. Moreover, it did not appear that the motorist's actions merited a conviction. The prosecutor consulted the attorney general regarding which course to pursue. The latter responded that the outcome of the civil action did not preclude a criminal prosecution. Nor did it matter that the complainant might have a spiteful motive when the facts showed a legal violation and that a conviction might have been obtained: "If, from all the facts and circumstances in the above case, you are of the opinion that it is useless . . . to start a prosecution as no conviction can be secured in your county, then you are certainly justified in not bringing the prosecution."

violated, even though no complaint or information has been filed.<sup>75</sup>

This disjunction between law and actual practice also was evident to Frank Miller in his landmark American Bar Foundation study of Wisconsin prosecutors. In *Prosecution: The Decision to Charge a Suspect with a Crime*, Miller discussed the preeminent role Wisconsin district attorneys came to assume in the issuance of arrest warrants by the 1950s.<sup>76</sup> By virtue of the legislature's enactment of Wisconsin statutes section 361.02(1),<sup>77</sup> both magistrates and district attorneys could issue complaints without the concurrence of the other. In practice, however, district attorneys exercised virtually complete control over the determination of probable cause and the issuance of warrants.<sup>78</sup> To Miller, this control was not surprising, given that most arrests by police were conducted without warrants and charging decisions by prosecutors, therefore, occurred after arrest.<sup>79</sup>

When the prosecutor's de facto control over prosecutions generally is combined with the observed practice of using the arrest warrant primarily as a charging document rather than to perform its historical arrest-authorizing function, it is inevitable that the prosecutor should assume control over its issuance.<sup>80</sup>

The warrant decision, Miller observed, thus became a "kaleidoscope for the pragmatic considerations insofar as it relates to charging"; the issuance of a warrant, without the support of the prosecutor, would be futile in the face of the prosecutor's power to subsequently screen the accused from the system.<sup>81</sup> "The refusal to issue a warrant without prior prosecutorial approval, then, is not mysterious."<sup>82</sup>

Thus, it is clear that the actual role of the prosecutor in initiating prosecutions has been understated in the state's law books. Interestingly, an identical difference between law and practice was observed in 1934 by professors Newman Baker and Earl De Long, in what today is still perhaps the classic work on American prosecutors:

The constitutional provisions and statutes which define the

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75. 25 Op. Att'y Gen. 549, 557 (1936). *But see* 14 Op. Att'y Gen. 15 (1930) (strict statutory construction of district attorney's duties).

76. F. MILLER, *PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME* (1970).

77. WIS. STAT. § 361.02(1) (1945).

78. *See* F. MILLER, *supra* note 76, at 55.

79. *Id.* at 11.

80. *Id.* at 55. For further discussion of the confusion surrounding the functions of post-arrest warrants and complaints, see Remington & Logan, *Frank Miller and the Decision to Prosecute*, 69 WASH. U.L.Q. 159 (1991).

81. *Id.* at 56 n.29.

82. *Id.* at 56.



powers and duties of the prosecuting attorneys of the various states certainly do not depict this office as it actually functions, for the habits and routine of administration often—perhaps usually—make the practical picture far different from the legal outline upon which it is built.<sup>83</sup>

The reason for this disparity is unclear. One possible explanation may be found in the observation of Judge Thurman Arnold over fifty years ago: “[t]he idea that a prosecuting attorney should be permitted to use his discretion concerning the laws which he will enforce and those which he will disregard appears to the ordinary citizen to border on anarchy.”<sup>84</sup> Such circumstances would constitute a strong disincentive for de jure recognition of prosecutors’ discretionary power to initiate prosecutions.

Whatever the reason, the image presented of the charging decision by the *Unnamed Defendant* court differs from reality. Doubtless, at the time of the state’s origin (as elsewhere in the United States) magistrates played a central role in initiating prosecutions, in contrast to the ambiguous role of district attorneys. However, as the state and its criminal justice needs evolved, so did the office of the public prosecutor, and the state’s law has not always recognized this de facto power. Seen in these terms, the *Unnamed Defendant* court’s view of the “traditional” role of Wisconsin prosecutors is understated. While it is true that the decision to charge has not always exclusively resided in the executive branch, it is also true that it has not resided exclusively in the domain of the judiciary. Rather, prosecutors have come to wield significant charging powers, accounting for a charging system wherein the executive, over time and to varying degrees, has at a minimum shared the charging role with the judiciary.

### *B. The Court’s Originalism*

Even if one were to grant that the court was correct in its assertion that charging “traditionally” has been the “exclusive domain” of the court, and not a power significantly shared with Wisconsin prosecutors, the *Unnamed Defendant* decision may be criticized on another, more compelling basis. This basis derives from the court’s constitutional rationale: because the power to initiate criminal prosecutions was not the “exclusive” power of prosecutors when the Wisconsin constitution was adopted, the separation of powers doctrine is not violated by pro-

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83. Baker & De Long, *The Prosecuting Attorney: Powers and Duties in Criminal Prosecution*, 24 J. AM. INST. CRIM. LAW & CRIMINOLOGY 1025, 1025 (1934).

84. Arnold, *Law Enforcement—An Attempt at Social Dissection*, 42 YALE L.J. 1, 7 (1932).

cedures that potentially eviscerate the executive's role in the charging decision.

Such a wooden, "originalist"<sup>85</sup> approach is both unrealistic and at odds with accepted modes of Wisconsin constitutional interpretation. Historically, the Wisconsin Supreme Court has conceived of the state constitution as "a set of principles, not rules" that must be construed in light of the realities and demands of the changing state.<sup>86</sup> Inevitably, this dynamic view of constitutional interpretation is at odds with the written nature of the constitution. Almost eighty years ago, in *Borgnis v. Falk Co.*,<sup>87</sup> the Wisconsin Supreme Court recognized this tension:

That governments founded on written constitutions . . . lose much in flexibility and adaptability to changed conditions there can be no doubt. A constitution is a very human document, and must embody with greater or less fidelity the spirit of the time of its adoption. It will be framed to meet the problems and difficulties which face the men who make it, and will generally crystallize . . . the political, social, and economic propositions which are considered irrefutable. . . . But the difficulty is that, while the constitution is fixed or very hard to change, the conditions and problems surrounding the people, as well as their ideals, are constantly changing.<sup>88</sup>

To expect that any written declaration could effectively anticipate the unforeseen developments wrought by social and economic change "would be tantamount to an egotistical declaration that when the constitution was framed the millennium had arrived and progress had reached its ultimate goal."<sup>89</sup> Necessarily, then, for the constitution to have prescriptive and continuing utility it must be construed in light of the changes occurring since its adoption. According to the *Borgnis* court:

[W]here there is no express command or prohibition, but only general language or policy to be considered, the conditions prevailing at the time of [the constitution's] adoption must have their due weight; but the changed social, economic, and governmental conditions and ideals of the time, as well as the problems which the changes have produced, must also logi-

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85. "Originalism" has been defined by one commentator as a mode of constitutional interpretation that "accords binding authority to the text of the Constitution or the intentions of its adopters." Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 204 (1980).

86. See, e.g., *Integration of Bar Case*, 244 Wis. 8, 11 N.W.2d 604 (1943).

87. 147 Wis. 327, 133 N.W. 209 (1911).

88. *Id.* at 348-49, 133 N.W. at 215.

89. *State ex rel. Van Alstine v. Frear*, 142 Wis. 320, 339, 125 N.W. 961, 968 (1910).

cally enter into the consideration, and become influential factors in the settlement of problems of construction and interpretation.<sup>90</sup>

*Unnamed Defendant*, however, manifests a marked refusal to heed this interpretive tenet. While recognizing that "not every constitutional controversy can be resolved by simple reference to the intent of the framers,"<sup>91</sup> the *Unnamed Defendant* court nonetheless shows total deference to the framers of 140 years ago. According to the court, this was because "the framer's intent . . . has special significance when we are dealing with a matter which was demonstrably contemplated by the framers. We may confidently presume that the framers were familiar with, and earnestly concerned about, the question we address in this case: the proper procedure for the initiation of criminal actions."<sup>92</sup>

The enormous changes occurring in the last 140 years cast significant doubt on whether the complexities of the modern justice system were "demonstrably contemplated" by the framers. The growth of the state and the concomitant burgeoning of its criminal justice system created the need for a centralized, popularly elected official to serve as the discretionary "gatekeeper" for the justice system.<sup>93</sup> Today this need is filled by the state's prosecutors. This is not to say that change is the end-all of constitutional inquiry. Rather, as Dean Sandalow observed, "[t]he relevant past for purposes of constitutional law . . . is to be found not only in the intentions of those who drafted and ratified the document but in the entirety of our history."<sup>94</sup> This same sentiment was echoed by Justice Holmes in *Missouri v. Holland*: "The case before us

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90. *Borgnis*, 147 Wis. at 349-50, 133 N.W. at 216. See also *B.F. Sturtavart Co. v. Industrial Commission*: "The language of a constitution is not to be limited to the precise things considered therein, but it embraces other things as they come into being. . . ." 186 Wis. 10, 19, 202 N.W. 324, 327 (1925); In re *Village of Chenequa*: "The Constitution, while remaining the same, is sufficiently elastic to be applied to the changing conditions of the life and growth of the state." 197 Wis. 163, 171, 221 N.W. 856, 859 (1928) (citation omitted). A similar sentiment was expressed by Justice Holmes in *Missouri v. Holland*:

[W]hen we are dealing with words that are also a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in light of our whole experience and not merely in that of what was said a hundred years ago.

252 U.S. 416, 433-34 (1920). See also *McCulloch v. Maryland*, where Chief Justice Marshall stated that the United States Constitution is "intended to endure for all ages to come, and, consequently, to be adapted to the various crises of human affairs." 17 U.S. (4 Wheat.) 316, 415 (1819).

91. *Unnamed Defendant*, 150 Wis. 2d at 361, 441 N.W.2d at 669.

92. *Id.* at 362, 441 N.W.2d at 669.

93. See *supra* notes 59-75 and accompanying text.

94. Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1071 (1981).

must be considered in light of our whole experience and not merely in that of what was said a hundred years ago."<sup>95</sup> In this sense, the incremental modifications occurring in our system of government, especially in the administration of justice, themselves deserve consideration.

The shortcoming of the *Unnamed Defendant* court's rationale is evident by taking the analysis to its natural conclusion. In ultimate terms, such a view would require the freezing of the duties of constitutional officers to those they possessed at the origin of the state. Under such circumstances, private prosecutions by crime victims and fee collections for services by prosecutors, practices long since abandoned in the state, would be condoned.<sup>96</sup>

### C. Separation of Powers Analysis

A byproduct of the court's originalist constitutional analysis is its strained separation of powers argument. As with the federal constitution, the doctrine of separation of powers in Wisconsin is not expressly provided for in the state constitution.<sup>97</sup> Rather, the concept is "em-

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95. *Missouri v. Holland*, 252 U.S. 416, 433-34 (1920). Dean Sandalow phrases this same notion in a more contemporary context:

The point is not that we should expect the historical meaning of a constitutional provision to be immediately ignored if an army of social scientists were suddenly to demonstrate that the well-being of the nation would be served thereby. Changes in law do not come about that way. . . . Changes in constitutional law, and the altered circumstances, knowledge, and valuations that underlie them, occur incrementally. The original meaning of the document is not abandoned at a single moment, but gradually.

Sandalow, *supra* note 94, at 1063.

96. During the nineteenth century, fee collection was commonplace. See Baker, *The Prosecuting Attorney: Legal Aspects of the Office*, 26 J. AM. INST. CRIM. LAW & CRIMINOLOGY 647, 652 (1935). In 1888, the Wisconsin Supreme Court discontinued the practice of private prosecution in the state. See *supra* note 59 and accompanying text. Previous decisions by the court evinced no qualms about the practice. See *Rounds v. State*, 57 Wis. 45, 14 N.W. 865 (1883); *Lawrence v. State*, 50 Wis. 507, 7 N.W. 343 (1883).

The questionable nature of the court's originalist view is underscored by federal case law as well. Chief Justice Warren, cognizant of the necessity of construing the United States Constitution in terms of modern realities, noted in *Brown v. Board of Education* that "in approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. . . . We must consider public education in the light of its full development and its present place in American life throughout the Nation." 347 U.S. 483, 492-93 (1953). Indeed, as noted by Professor Tushnet, the ultimate (and most believe proper) outcome of *Brown* would be very much in doubt had the Court embraced an originalist view. M. TUSHNET, *RED, WHITE AND BLUE* 41 (1988). Tushnet offers an "exemplary" (and infamous) instance of the Court's use of originalist analysis in *Dred Scott v. Sandford*, where Chief Justice Taney surveyed colonial American attitudes toward African-Americans and on this basis concluded that slavery was constitutional. *Id.* at 44-45.

Additional evidence of the Court's less than wholehearted embrace of originalism is found in its increasingly accommodating views toward the contracts clause, once believed inviolate. See e.g., *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 442 (1934).

97. *Unnamed Defendant*, 150 Wis. 2d at 360, 441 N.W.2d at 699.

bodied in the clauses of the Wisconsin Constitution providing that the legislative power shall be vested in a senate and assembly (article IV, section 1), the executive power in a governor and lieutenant governor (article V, section 1) and the judicial power in the courts (article VII, section 2).<sup>98</sup>

Separation of powers doctrine is premised on the belief that the dispersal of powers among the three branches of government—executive, legislative and judicial—operates as a “bulwark against tyranny.”<sup>99</sup> Under such a system the naturally and mutually self-seeking branches exist in counterpoise. As noted by the Wisconsin Supreme Court: “The doctrine of separation of powers should be viewed as a general principle to be applied to maintain the balance between the three branches of government, preserve their respective independence and integrity, and prevent concentration of unchecked power in the hands of any one branch.”<sup>100</sup> In addition to these institutional benefits, the “checks and balances” of the separation of powers doctrine provide citizens with other, more practical protections from tyranny. According to Justice Abrahamson, “[c]oncurrent powers afford the people greater protection: when the people perceive a need to which one branch has not been responsive, they can turn to the other branch for assistance.”<sup>101</sup>

The court has held repeatedly, however, that the doctrine does not compel the complete disassociation of the branches.<sup>102</sup> Rather, to better serve the needs of the state, the branches on occasion share powers.

There are ‘great borderlands of power’ . . . in which it is difficult to determine where the functions of one branch end and those of another begin. The doctrine of separation of powers does not demand a strict, complete, absolute, scientific division of functions between the three branches of government. The separation of powers doctrine states the principle of shared, rather than completely separated powers. The doctrine envisions a government of separated branches sharing certain powers.<sup>103</sup>

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98. *State v. Washington*, 83 Wis. 2d 808, 816, 266 N.W.2d 597, 601 (1978).

99. *United States v. Brown*, 381 U.S. 437, 443 (1965).

100. *Layton School of Art & Design*, 82 Wis. 2d 324, 348, 262 N.W.2d 218, 229 (1977).

101. *In Matter of Complaint Against Grady*, 118 Wis. 2d 762, 790, 348 N.W.2d 559, 573 (1984) (Abrahamson, J., concurring).

102. *See, e.g., Rules of Court Case*, 204 Wis. 501, 504, 236 N.W. 717, 718 (1931):

It is not only a matter of some difficulty to set precisely the border lines of legislative, executive, and judicial powers, but it also seems quite clear that either by custom or constitutional mandate, or the inherent necessities of the situation, the three branches of government have heretofore exercised other powers than those which, under the doctrine of separation of powers, belong peculiarly and exclusively to them.

103. *State v. Holmes*, 106 Wis. 2d 31, 43, 315 N.W.2d 703, 709 (1981). *See also*

In these areas of “shared powers,” one branch is entitled to “exercise power conferred on another only to an extent that does not unduly burden or substantially interfere with the other branch’s exercise of its power.”<sup>104</sup> With respect to legislative-judicial relations, the supreme court has remarked that when “the exercise of administrative and legislative power [has] so far invaded the judicial field as to embarrass the court and impair its proper functioning [the court will be] compelled to maintain its integrity as a constitutional institution.”<sup>105</sup> This said, the *Unnamed Defendant* opinion exhibits two essential flaws in its separation of powers analysis.

The first flaw stems from the opinion’s notable disavowal of Wisconsin case law regarding excessive intrusions by one branch on functions “shared” with another. On the basis of the previously recounted history concerning the initiation of prosecutions,<sup>106</sup> it would appear that at a minimum the executive has historically shared the charging function with the state’s judiciary.<sup>107</sup> However, it is clear that over the greater part of the twentieth century the prosecutor has become the linchpin of the criminal justice system, assuming great discretionary powers in the charging decision.<sup>108</sup> Frank Miller concluded that this ascendance derived from practical reasons stemming from need and the particular nature of the office itself:

[I]n performing his screening functions—both in evidence sufficiency and discretionary aspects—the prosecutor is more aware of the unique facts that characterize particular cases, and this general knowledge, coupled with his direct responsiveness to community attitudes better qualifies him to assess both whether the suspect is probably guilty and convictable

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*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (“While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity”).

104. *Grady*, 118 Wis. 2d at 775, 348 N.W.2d at 566 (Abrahamson, J., concurring).

105. *Integration of Bar Case*, 244 Wis. 8, 49, 11 N.W.2d 604, 623 (1943).

106. *See supra* notes 38-84 and accompanying text.

107. Further evidence of this sharing relationship between prosecutors and the judiciary is evident in the history of the John Doe statute itself, WIS. STAT. § 968.26 (1989-1990). Noting the invaluable symbiotic relation between the executive and judiciary, the court in *Kurkierewicz v. Canon* related that the “John Doe is a feeble investigative device indeed, unless both the district attorney and the magistrate are amenable to using their offices in furtherance of the investigation.” 42 Wis. 2d 368, 377, 166 N.W.2d 255, 259 (1968).

108. *See ABA STANDARDS, supra* note 58, Standard 3-1.1 Commentary: “Since the prosecutor bears a large share of the responsibility for determining which cases are taken into the courts, the character, quality, and efficiency of the whole system is shaped in great measure by the manner in which the prosecutor exercises his or her broad discretionary powers.” *See also* Thomas & Fitch, *Prosecutorial Decision Making*, 13 AM. CRIM. L. REV. 507, 509 (1976): “[T]he prosecutor plays a dual role. He is a decision maker in the individual case and the administrator of an integral part of the criminal justice system.”

and in what manner it is in the public interest to proceed against him if he is.<sup>109</sup>

Given this historical context, the court's approval of Wisconsin Statutes sections 968.26 and 968.02(3) rests on shaky constitutional ground. Professor (later Justice) Frankfurter, in his analysis of "shared power" cases decided by the United States Supreme Court, observed that "[t]he dominant note is respect for the action of that branch of the government upon which is cast the primary responsibility for adjusting public affairs."<sup>110</sup> In *Unnamed Defendant*, the Wisconsin Supreme Court showed scant "respect" for the executive, the branch which has assumed "primary responsibility" for charging. As will be discussed in greater detail later,<sup>111</sup> the court's approval of sections 968.02(3) and 968.26 has the practical effect of potentially obviating the executive office of the prosecutor in the charging decision: complainants may circumvent local district attorneys by first approaching the courts for the issuance of criminal complaints.

It strains credulity to say that such procedures do not "substantially interfere" with or "embarrass" district attorneys in their accusatory role in the criminal justice process. In the *Rules of Court Case*, perhaps the Wisconsin Supreme Court's foremost opinion on separation of powers, the court acknowledged:

The coordinate branches of government . . . should not abdicate or permit others to infringe upon such powers as are exclusively committed to their power by the constitution. As to the exercise of those powers, however, which are not exclusively committed to them, there should be such generous cooperation as will tend to keep the law responsive to the needs of society. This cooperation is peculiarly necessary today. . . .<sup>112</sup>

The *Unnamed Defendant* court did not heed the mandate of its predecessor courts. By fixating, erroneously, on where the "exclusive" powers might have lain for charging, rather than on the reality of the contemporary justice system, the court exhibited little of the "generous cooperation as will tend to keep the law responsive to the needs of society."<sup>113</sup> In so doing, the court violated the delicate and subtle checks and balances intrinsic to Wisconsin constitutional law.<sup>114</sup>

109. See F. MILLER, *supra* note 76, at 296.

110. Frankfurter & Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1016 (1923).

111. See *infra* notes 180-96 and accompanying text.

112. 204 Wis. 501, 514, 236 N.W. 717, 722 (1931).

113. *Id.*

114. Little Wisconsin case law exists relating to judicial intrusions on the executive

A second troubling aspect of the *Unnamed Defendant* opinion is its disregard for the central premise of separation of powers analysis: the doctrine should be viewed as a "set of principles and not of rules"<sup>115</sup> to "prevent concentration of unchecked power in the hands of any one branch."<sup>116</sup> Ultimately, the court's narrow consideration of where the power to charge might have resided in Wisconsin's distant past does violence to the larger goals historically served by separation of powers doctrine.

A central idea in the genesis of the separation of powers doctrine, borrowed by Wisconsin from the federal government, is that allowing one branch to wield both accusatory and judicial powers would threaten the impartial administration of justice.<sup>117</sup> The framers of the federal constitution recognized this threat to exist both when the executive exercises undue influence over the judiciary and when the judiciary controls the executive. James Madison, in the *Federalist Papers*, expressed the fear that if the courts held "the executive power, the judge might behave with all the violence of an oppressor."<sup>118</sup> This fear has since manifested itself repeatedly through the years in decisions mandating a "neutrality requirement"<sup>119</sup> so strict that even the *appearance* of judicial bias has been staunchly guarded against.<sup>120</sup>

In the context of the criminal justice process, neutrality is of particular importance. A defendant's right to a fair trial is compromised by even the appearance of the court assuming the mantle of prosecutorial advocacy.<sup>121</sup> For this reason, courts have consistently refused to

114. Little Wisconsin case law exists relating to judicial intrusions on the executive in shared power contexts. *But see* *In Interest of J.A.*, 138 Wis. 2d 483, 406 N.W.2d 272 (1987) (statute allowing court to order that information be provided regarding children receiving child welfare services does not unduly interfere because the executive agency is already required to maintain such information).

115. *Integration of Bar Case*, 244 Wis. 8, 46, 11 N.W.2d 604, 621 (1943).

116. *Layton School of Art & Design*, 82 Wis. 2d 324, 348, 262 N.W.2d 218, 229. A similar concern animates federal constitutional law. *See, e.g., McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (construction of U.S. Constitution must have regard for the document's "great outlines" and "important objects").

117. *See* W. GWYN, *THE MEANING OF THE SEPARATION OF POWERS* 127 (1965) (one of the major reasons for separation of powers is to "assure that the laws are impartially administered"); M. RICHTER, *THE POLITICAL THEORY OF MONTESQUIEU* 84-92 (1977) (the guarantee of an impartial judiciary is a principal justification for separation of powers).

118. *THE FEDERALIST* No. 47, at 338 (J. Madison) (B. Wright ed. 1966) (quoting Montesquieu) (emphasis omitted).

119. *Marshall v. Jerrico, Inc.* 446 U.S. 238, 242 (1980). *See also* *Chapman v. California*, 386 U.S. 18, 23 (1967) (right to impartial judge is so basic to due process that courts can never treat its infraction as harmless error); *Nader v. Bork*, 366 F. Supp. 104, 109 (D.D.C. 1973) ("The courts must remain neutral. Their duties are not prosecutorial").

120. *See, e.g., Taylor v. Hayes*, 418 U.S. 488, 501 (1973) (need for appearance of impartiality prohibits the involvement of trial judge who previously held defendant in contempt); *In re Murehison*, 349 U.S. 133, 136 (1955) (justice must satisfy the appearance of justice).

121. *See* Note, *Private Prosecutors in Criminal Contempt Actions Under Rule 42(b) of the Federal Rules of Criminal Procedure*, 54 *FORDHAM L. REV.* 1141, 1162-64 (1986).



condone the active participation of the judiciary in the screening aspect of the charging decision.<sup>122</sup>

*Unnamed Defendant*, however, ignored this concern. As a result of the decision, the judiciary can both accuse and try individuals in Wisconsin, depriving the judiciary of its neutrality and the executive of its independence. Such a consolidation is unseemly to modern notions of procedural justice and constitutes an inherent threat to separation of powers. As noted by Justice Abrahamson: "An expansive concept of exclusive judicial authority . . . creates the danger of unchecked power in the judiciary."<sup>123</sup>

In the final analysis, one must question why the court failed in *Unnamed Defendant* to apply traditional separation of powers principles. A likely answer lies in the court's fixation on correcting what it perceived as the mistaken "premise" of *Connors*: "that initiation of criminal prosecution is an *exclusively* executive power in Wisconsin."<sup>124</sup> This the court achieved; as noted, the charging function has not been the *exclusive* job of the executive.<sup>125</sup> However, in an effort to correct the *Connors* court's misreading of the historical record, the *Unnamed Defendant* court overvalued the inference that the corrected record justifiably raised. That is, some sharing of the charging power is constitutionally permissible, but the potential total removal of charging power from the executive in any given charging decision is contrary to Wisconsin separation of powers principles as they have evolved between the judiciary and executive over the past 140 years.

Ironically, appropriate use of separation of powers doctrine would have led the court to a similar, but better reasoned conclusion. The judiciary has played, and should continue to play, a role in Wisconsin charging decisions. In the contemporary criminal justice context, the courts can play an indispensable role in checking and conditioning the primary power of the executive in the charging decision.<sup>126</sup> The challenge lies in integrating the historic role of the courts into a charging

122. See, e.g., *Smith v. Gallagher*, 408 Pa. 551, 578, 185 A.2d 135, 152 (1962). See also Comment, *Circumventing the Corrupt Prosecutor*, *supra* note 9, at 540.

123. In *Matter of Complaint Against Grady*, 118 Wis. 2d 762, 790, 348 N.W.2d 559, 593 (1984) (Abrahamson, J., concurring).

124. *Unnamed Defendant*, 150 Wis. 2d at 358, 441 N.W.2d at 698 (emphasis added).

125. Moreover, in effect, the court corrected the mistaken view voiced in *Connors* that prosecutors are not subordinate to the legislature in regard to the exercise of their powers; they undeniably are subject to the will of the legislature. This error was recognized by Justice Abrahamson in *Connors*. There, speaking of the powers of the district attorney, she noted that "there is no basis for holding that his duties in representing the state are not subordinate to legislative direction as to the cases in which he shall proceed." *Connors*, 136 Wis. 2d at 149, 401 N.W.2d at 795 (quoting *State v. Coubal*, 248 Wis. 247, 257, 21 N.W.2d 381, 385 (1946)).

126. See *infra* notes 217-29 and accompanying text.

system consonant with the framers' desire to adapt separation of powers "principles to the practical affairs of government in order to make the government workable."<sup>127</sup> The remainder of this Comment addresses this challenge.

#### IV. CURRENT CONTROLS ON THE PROSECUTION DECISION

*Unnamed Defendant* presents the state with a prime opportunity to reassess its means of controlling prosecutorial decision making. It is clear that both the legislature<sup>128</sup> and a majority of the Wisconsin Supreme Court believe that a check upon the district attorney's power to refuse prosecutions is desirable.<sup>129</sup> Such a view is also widely embraced by the various advisory panels and commentators that have considered the matter. The National Advisory Commission on Criminal Justice Standards and Goals (NACCJSG), for one, recommends that "[i]f the prosecutor screens a defendant, the police or the private complainant should have recourse to the court."<sup>130</sup>

##### A. Reasons for a Check

There are numerous reasons for some form of control over the discretion of prosecutors to refuse prosecution. A principal reason, increasingly voiced from many quarters of society and from the *Connors* and *Unnamed Defendant* opinions themselves, stems from a concern for the victims of crime.<sup>131</sup> According to victims' advocates, a citizen harmed by a criminal act should not be victimized yet again by a justice system, theoretically acting in the victim's interests, that improperly

127. *Integration of Bar Case*, 244 Wis. 8, 46, 11 N.W.2d 604, 621 (1943).

128. The Commentary to Wis. Stat. 968.02(3) provides: "Sub. (3) provides a check upon the district attorney who fails to authorize the issuance of a complaint, when one should have been issued, by providing for a judge to authorize its issuance." 1969 Wis. Laws 602, 621.

129. See *Unnamed Defendant*, 150 Wis. 2d at 365, 441 N.W.2d at 701.

130. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, THE COURTS 24 (1973) [hereinafter NATIONAL ADVISORY COMMISSION]. While the ABA discourages private prosecution it acknowledges that victims have a right to be heard. The ABA states that its encouragement of public prosecution was "not intended to discourage the adoption of a system under which a complainant may move for prosecution before a magistrate when a prosecutor has declined to proceed. . . ." See ABA STANDARDS, *supra* note 58, at Standard 3-2.1 Commentary.

131. *Unnamed Defendant*, 150 Wis. 2d at 368, 441 N.W.2d at 702 (Heffernan, C.J., concurring); *id.* at 370-71, 441 N.W.2d at 703 (Day, J., concurring); *Connors*, 136 Wis. 2d at 153, 401 N.W.2d at 797 (Steinmetz, J., dissenting); *id.* at 149, 401 N.W.2d at 795 (Abrahamson, J., concurring).

refuses to prosecute.<sup>132</sup> Commentators expressing this view have drawn support from myriad sources, perhaps most notably Lockean social contract theory. According to this view, because citizens have surrendered to the state their natural right to protect themselves, the government must fulfill its obligation to protect its citizens.<sup>133</sup> The typical alternate civil avenues of redress provided victims in times of prosecutorial inaction—civil damages and injunctions under threat of contempt—are insufficient.<sup>134</sup> In sum, the tenuous quid pro quo between citizen and government is strained when the government improperly refuses to prosecute, causing alienation and frustration, and perhaps even the potential for vigilantism.<sup>135</sup>

Other commentators have identified other, non-victim-oriented reasons to be wary of unfettered prosecutorial discretion. Roger Joseph, for example, expresses concern over the functional problems with unfettered discretion. To him, such a situation involves a “qualification of powers” normally the prerogatives of the legislative and judicial branches:

Refusal to prosecute . . . may minimize the effect of or negate altogether duly enacted statutes and regulations, thus infringing upon or qualifying the lawmaking power of legislatures. Similarly, in deciding when to prosecute . . . [prosecutors] often determine the meaning and intent of statutes and their

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132. The perceived shabby treatment of victims has led one commentator to conclude that “[t]he victims of crime are truly the forgotten people in the American criminal justice system.” Gittler, *Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems*, 11 PEPPERDINE L. REV. 117, 117 (1984).

133. See Hudson, *The Crime Victim and the Criminal Justice System: Time for a Change*, 11 PEPPERDINE L. REV. 23, 31 (1984). *But cf.* Heckler v. Chaney, 470 U.S. 821, 847 (1985) (Marshall, J., concurring) (“Criminal prosecutorial decisions vindicate only intangible interests, common to society as a whole, in the enforcement of the criminal law. The conduct at issue has already occurred; all that remains is society’s general interest in assuring that the guilty are punished”).

134. See Comment, *The Outmoded Concept of Private Prosecution*, 25 AM. U.L. REV. 754, 789 n.182 (1976) (noting that criminal defendants are usually judgment-proof); Comment, *Judicially Initiated Prosecution: A Means of Preventing Continuing Victimization in the Event of Prosecutorial Inaction*, 76 CALIF. L. REV. 727, 736-40 (1988) (noting that injunctions are ineffective as they help only after the injury and otherwise provide little in the way of deterrence).

135. See *Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring) (“When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they ‘deserve,’ then there are sown the seeds of anarchy-of self-help, vigilante justice, and lynch law”). This frustration can have other negative effects as well. Professor Welling notes that “[i]f victims feel irrelevant and alienated, they may not cooperate in reporting and prosecuting crime, and the system, which is dependent on citizen participation, would function less effectively as a result.” Welling, *Victims in the Criminal Process: A Utilitarian Analysis of Victim Participation in the Charging Decision*, 30 ARIZ. L. REV. 85, 92 (1988).

applicability to particular cases, thus performing functions traditionally exercised by courts. . . .<sup>136</sup>

Professor Vorenberg has pointed out additional troubling ramifications associated with unfettered discretion. According to him, discretion

hides malfunctions in the criminal justice system and avoids difficult policy judgments by giving the appearance that they do not have to be made. It obscures the need for additional resources and makes misapplication of available resources more likely. . . . Discretionary decision-making has helped keep cases moving through the system without too many embarrassing questions, while promoting the impression that compassion and wisdom are at work. The result has been some compassion (often matched or exceeded by unfairness) and very little wisdom.<sup>137</sup>

### B. Discretion as a Necessary Evil

While it is clear that undue refusals to charge have a negative impact on the system, it is equally apparent that discretion plays an important and perhaps indispensable role in the contemporary administration of justice.<sup>138</sup> The notion that full enforcement of the criminal law is possible is now roundly discredited. Many cases entering the system are either too insignificant or lacking in evidentiary merit to warrant the expenditure of scarce system resources.<sup>139</sup> Moreover, in practical terms, the sheer volume of potential criminal cases today is simply too great and the resources available too few to allow for anything approaching full enforcement.<sup>140</sup> Discretion, in essence, is a necessary evil that enables the criminal justice system to enforce the criminal law.

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136. Note, *Reviewability of Prosecutorial Discretion: Failure to Prosecute*, 75 COLUM. L. REV. 130, 130 (1975) (footnote omitted).

137. Vorenberg, *Narrowing the Discretion of Criminal Justice Officials*, 1976 DUKE L.J. 651, 652.

138. See Mellon, Jacoby & Brewer, *The Prosecutor Constrained by His Environment: A New Look at Discretionary Justice in the United States*, 72 J. CRIM. L. & CRIMINOLOGY 52, 53 (1981) ("Discretion is an essential component of the American system of criminal justice. It is the element that makes the system uniquely American—the flexible and individualized treatment of persons accused of crimes . . ."). Indeed, the facts of the *Connors* case itself arguably present a good example of the necessity of discretion. There, several members of the Green Bay Packers professional football team allegedly assaulted a female dancer in the dressing room of a nightclub. If a trial were to have occurred, and sufficient evidence to convict were lacking, the highly charged trial would have damaged reputations and consumed considerable resources—all to no avail.

139. See Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1547 (1981).

140. According to Professor McDonald:

For almost a century it has been beyond the capacity of urban court systems to give every case its day in court. Faced with the prospect of an ever-increasing discrepancy

Discretion is necessary for reasons other than its role in conserving resources. Discretion protects citizens from the excessive breadth or antiquated nature of the substantive criminal law. Not all laws currently on the books are realistically intended to be enforced.<sup>141</sup> Discretion is also necessary to individualize justice and to mitigate criminal sanctions that under certain circumstances may be unduly harsh. If discretion were not present and violations administered in "strict accordance with rules of law, precisely and narrowly laid down, the criminal law would be ordered but intolerable."<sup>142</sup> Such individualization arises in instances when an accused cooperates in the apprehension or conviction of others; when strict enforcement would cause harm to the offender in undue proportion to the harm of the crime; when not prosecuting the offender would assist in achievement of other enforcement goals; or when there is the possibility of prosecution by another jurisdiction.<sup>143</sup>

Finally, discretion is inevitable because of the "open texture" of the law.<sup>144</sup> This view, forwarded most notably by Professor Kenneth C. Davis, holds that the law and legislatures are inherently unable to predict and take into consideration the innumerable situations that might merit legal control. For this reason, society requires individuals to evaluate situations and decide whether and to what degree the laws shall apply.<sup>145</sup>

### C. Wisconsin Controls on the Prosecution Decision

Wisconsin Statutes section 967.05 provides that there are three methods of commencing a criminal prosecution: by an information,

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between caseloads and trial capacity, crime commissions since the 1920s have repeatedly recommended that prosecutors' offices inaugurate vigorous early screening programs.

McDonald, *Prosecutors, Courts, and Police: Some Constraints on the Police Chief Executive*, in *POLICE LEADERSHIP IN AMERICA* 205-06 (W. Gellert ed. 1985). See also Vorenberg, *supra* note 139, at 1548-49.

141. LaFave, *The Prosecutor's Discretion in the United States*, 18 *AM. J. OF COMP. L.* 532, 533 (1970). According to Lezak and Leonard, "laws are often passed which reflect the ideals of the community rather than a realistic expectation of conformity." Lezak & Leonard, *The Prosecutor's Discretion: Out of the Closet—Not Out of Control*, 63 *OR. L. REV.* 247, 248 (1984). See also T. ARNOLD, *THE SYMBOLS OF GOVERNMENT* 160 (1935): "Most unenforced criminal laws survive in order to satisfy moral obligations to established modes of conduct. They are unenforced because we want to continue our conduct, and unrepealed because we want to preserve our morals"). Examples of such enactments are Sunday "blue laws," gambling laws, etc.

142. Breitel, *Controls in Criminal Law Enforcement*, 27 *U. CHI. L. REV.* 427 (1960); see also ABA STANDARDS, *supra* note 58, at Standard 3-3.9 Commentary: "The public interest is best served and evenhanded justice best dispensed not by the mechanical application of the 'letter of the law,' but by a flexible and individualized application of its norms through the exercise of a prosecutor's thoughtful discretion."

143. See ABA STANDARDS, *supra* note 58, at Standard 3-3.9.

144. See H. HART, *THE CONCEPT OF LAW* (1961).

145. See K. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 15-21 (1969).

an indictment or a complaint. The most common method is by means of a criminal complaint.<sup>146</sup> Complaints themselves may be issued by three means. The first two are contained in section 968.02. Under this section, a complaint may be issued either by the district attorney or, if she is unavailable or refuses to do so, by a circuit judge.<sup>147</sup> Alternatively, section 968.26, the John Doe statute considered in *Unnamed Defendant*, may be used.<sup>148</sup>

In an effort to determine the relative frequency of use of the above procedures, an informal survey of district attorney offices was undertaken. Personnel in offices in the Wisconsin counties of Milwaukee, Brown (Green Bay), Oneida (Rhinelander), Dane (Madison) and Eau Claire were interviewed. These interviews revealed that by far the most common means of complaint issuance is by section 968.02(1), whereby alleged criminal behavior comes to the attention of the prosecutor who accepts or declines the case.<sup>149</sup> As for section 968.02(3), which allows a court to issue a complaint in the event of prosecutor declination or absence, interviews indicate that the mechanism has been used very rarely in its twenty-year existence.<sup>150</sup> The John Doe statute, section 968.26, has been used with greater frequency but still far less than section 968.02(1), and even then only in an "investigatory" and cooperative capacity with the district attorney.<sup>151</sup>

In the event that a citizen is dissatisfied with a district attorney's decision not to prosecute, little recourse exists other than sections 968.26 and 968.02(3).<sup>152</sup> As noted earlier, since the late 1800s Wiscon-

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146. See B. BROWN, *THE WISCONSIN DISTRICT ATTORNEY AND THE CRIMINAL CASE* 47 (1977). WIS. STAT. § 967.05(1)(b) (1989-1990) provides that if the defendant is a corporation, the prosecution is commenced by the filing of an information. Under other circumstances, an indictment handed down by a grand jury may commence a prosecution. WIS. STAT. § 968.01(2) (1989-1990) defines a complaint as "a written statement of the essential facts constituting the offense charged. A person may make a complaint on information and belief." WIS. STAT. § 967.05(2),(3) (1989-1990) provides that if the crime involved is a misdemeanor, any trial is on the basis of a complaint, while if a felony, trial is on an information.

147. WIS. STAT. § 968.02(1), (3) (1989-1990).

148. See *supra* note 15.

149. Conversation transcripts on file with author.

150. *Id.* An identical finding was made by Miller in his American Bar Foundation work in Wisconsin. See F. MILLER, *supra* note 76, at 158-59 ("there is no expectation that, in the normal pattern of events, someone else's judgment will be substituted").

151. See *supra* note 107.

152. See *supra* notes 13 & 15. In addition to these avenues, state law allows for prosecutions by persons other than the district attorney in certain limited and quasi-criminal circumstances. *E.g.*, WIS. STAT. § 23.65 (1989-1990) (allows a circuit court to file a complaint if the prosecutor refuses or is unavailable and there is probable cause to believe that suspect has violated WIS. STAT. §§ 159.07 (land disposal and incineration), 159.08 (yard waste), 159.81 (littering) or chs. 23 (conservation), 26 (forest lands), 27 (parks), 28 (public forests), 29 (fish and game), 30 (navigable waters, harbors, and navigation), 31 (dams and bridges) or 350 (snowmobiles)); WIS. STAT. § 79.04(2) (1989-1990) (if prosecutor refuses to order an inquest, the circuit court, upon petition of a coroner or medical examiner, may issue the

sin has disallowed private prosecution of alleged criminal behavior by counsel retained by citizens.<sup>153</sup> This deference by the courts to the publicly elected office of the prosecutor has been extended to preclude private counsel from even assisting district attorneys in prosecutions.<sup>154</sup> In addition, barring extreme exigent circumstances, the attorney general has no say in the charging decision<sup>155</sup> and charging, seen as inherently discretionary, is not compellable in mandamus.<sup>156</sup> The principle means of controlling district attorneys, then, are the strictures of equal protection, threat of suspension by the governor upon a finding of just cause, scrutiny by the press and threat of political defeat in general election or recall.<sup>157</sup> In reality, however, these controls are more imaginary than real because the officials wielding the controls are either reluctant or unable to invoke them.<sup>158</sup> Moreover, because charging decisions are essentially invisible, taking place in great volume deep within the confines of local offices, the public is ill-equipped to assess prosecutorial practices.<sup>159</sup> Thus, in ultimate terms, the individual complainant in Wisconsin has little recourse in response to unjustified prosecutorial inaction.

#### *D. Federal and State Controls on the Prosecution Decision*

The federal courts have exhibited a marked reluctance to interfere with the prosecutor's discretion to prosecute.<sup>160</sup> A principal rationale

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order if it finds that the prosecutor has abused his discretion in not ordering an inquest); WIS. STAT. §§ 5.08, 11.61(2), 19.51(1)(a), 767.65(12), (18)(c), (38)(b) (1989-1990) (allow state department of justice to act if prosecutor does not with regard to certain violations); WIS. STAT. § 19.97(4) (1989-1990) (if prosecutor fails to enforce the open meeting law within 20 days after receiving a verified complaint, the complainant may bring an action on behalf of the state and get reasonable attorney fees if she prevails).

153. *Biemel v. State*, 71 Wis. 444, 37 N.W. 244 (1888).

154. *Rock v. Eckern*, 162 Wis. 291, 156 N.W. 197 (1916).

155. See F. MILLER, *supra* note 76, at 325-27.

156. *State ex rel. Kurkierewicz v. Cannon*, 42 Wis. 2d 368, 166 N.W.2d 255 (1969).

157. *Connors*, 136 Wis. 2d at 140-41, 401 N.W.2d at 791-92; WIS. STAT. § 17.11 (1989-1990) provides for removal by the governor. See *supra* note 7, discussing constitutional expectations regarding affirmative decisions to charge.

158. See F. MILLER, *supra* note 76, at 293-96.

159. See K. DAVIS, *supra* note 145, at 207-08:

[The prosecutor] is usually an elected official, and the theory is that he is responsible to the electorate. The reality is that nearly all his decisions to prosecute or not to prosecute . . . and nearly all his reasons for decision are carefully kept secret, so that review by the electorate is nonexistent except for the occasional case that happens to be publicized. The plain fact is that more than nine-tenths of local prosecutors' decisions are supervised or reviewed by no one.

See also *Quinlan, The District Attorney*, 5 MARQ. L. REV. 190, 194 (1921) (voters are unlikely to provide diligent check on prosecutors' discretion).

160. See, e.g., *Wayte v. United States*, 470 U.S. 598, 608 (1985) (describing the federal courts as "properly hesitant to examine the decision whether to prosecute"); *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375 (2d Cir. 1973) (discussion of judicial reluctance to review charging decisions).

for this deference is the belief that involvement of the judiciary in the charging decision would violate separation of powers doctrine.<sup>161</sup> Separation of powers concerns also have been used by the federal courts to deny mandamus as a means to compel prosecutions<sup>162</sup> and to deny judicial review of prosecutorial decisions.<sup>163</sup>

A second basis used by the federal courts to justify the discretion given prosecutors is the perceived need to maintain flexibility to allow effective use of limited resources and to achieve individualized justice.<sup>164</sup> According to this view, prosecutors need significant flexibility to screen out weak cases and effectively individualize justice in accord with the diverse circumstances surrounding criminal behavior.

A third reason federal courts have used to justify their eschewal of involvement in prosecutorial decisionmaking is that such involvement, particularly judicial review, would involve prohibitive "systemic costs."<sup>165</sup> Second-guessing of prosecutors would overtax the already overburdened criminal justice system.<sup>166</sup>

Similar deference is manifest among the states. Many state laws require that district attorneys institute prosecutions against all crimes<sup>167</sup> and others expressly allow prosecutors to exercise discretion in deciding which cases to prosecute.<sup>168</sup> As a general rule, the decision whether to prosecute rests entirely within the discretion of public prosecutors, subject to modification only upon a showing of constitutional wrongdoing.<sup>169</sup>

As in Wisconsin, little recourse is available to citizens unhappy

161. See, e.g., *United States v. Torquato*, 602 F.2d 564, 569 (3d Cir. 1979) ("The concept of separation of powers underlies the courts' concern that the prosecutorial function be relatively untrammelled"); *Attica*, 477 F.2d at 379 ("The primary ground upon which this traditional aversion to compelling prosecutions has been based is the separation of powers doctrine").

162. *Powell v. Katzenbach*, 359 F.2d 234 (D.C. Cir. 1965), cert. denied, 384 U.S. 906 (1966), reh'g denied, 384 U.S. 967 (1968).

163. *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965).

164. *Spillman v. United States*, 413 F.2d 527, 530 (9th Cir. 1969) ("The United States Attorney must be given wide latitude in order to effectively enforce the federal criminal laws"). See generally ABA STANDARDS, *supra* note 58, Standard 3-3.9 Commentary.

165. *Wayte v. United States*, 470 U.S. 598, 607 (1985).

166. *Id.*

167. See, e.g., 16 PA. CONS. STAT. ANN. § 1402 (Purdon 1987); KY. REV. STAT. ANN. § 15.725(1) (Michie/Bobbs-Merrill 1985).

168. See, e.g., CAL. GOV'T CODE § 26500 (West 1987) ("The public prosecutor shall attend the courts, and within his or her discretion shall initiate and conduct on behalf of the people all prosecutions . . .").

169. See *supra* note 7. See also *State v. Murphy*, 113 Ariz. 416, 555 P.2d 1110 (1976) ("The duty and discretion to conduct prosecutions for public offenses rests with the county attorney. Generally, the courts have no power to interfere with the discretion of the prosecutor unless he is acting illegally or in excess of his powers"); *State v. McMahon*, 183 N.J. Super. 97, 443 A.2d 258 (1981) (no interference absent bad faith, arbitrariness or gross abuse of discretion); *In re Padgett*, 678 P.2d 870 (Wyo. 1984) (holding unconstitutional a statute that required court upon "satisfactory proof" to require prosecutor to file information).



over a prosecutor's decision not to pursue a prosecution. District attorneys may be removed by courts, governors and legislatures.<sup>170</sup> Similarly, in a number of jurisdictions the state attorney general and the district attorney have concurrent jurisdiction to conduct criminal actions,<sup>171</sup> or the attorney general may supercede the local prosecutor at the request of the governor.<sup>172</sup> However, all such occurrences are rare.<sup>173</sup> Where grand juries are used, disappointed complainants generally may not attempt to prompt prosecution by means of the grand jury. Moreover, because charging decisions are seen as being inherently discretionary, mandamus is generally not available to compel prosecution by a district attorney absent a showing of bad faith or corruption on the prosecutor's part.<sup>174</sup> As in Wisconsin, public opinion is looked to by most states as the principal hedge against prosecutorial abuse, but such control is modest absent outrageous prosecutorial misconduct.<sup>175</sup>

In a few states, however, some recourse does exist. While the great majority of states do not allow private prosecution, a small number provide for a limited form of private prosecution.<sup>176</sup> A few others allow some form of judicial review whereby a court may order a prosecutor to proceed with a previously declined prosecution<sup>177</sup> or allow for the

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170. See, e.g., N.M. STAT. ANN. § 36-1-9, 16 (1984); OHIO REV. CODE ANN. § 3.08 (Baldwin 1990) (judicial removal); N.Y. CONST. art. 13, § 13 (McKinney 1987) (gubernatorial removal). See generally Note, *Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction*, 65 YALE L.J. 209, 212 (1955) (noting that such occurrences are rare).

171. See, e.g., CAL. GOV'T CODE § 12550 (Deering 1980); NEB. REV. STAT. § 84-204 (1987) (giving the attorney general power to supervise local prosecutors).

172. See, e.g., W. VA. CODE § 5-3-2 (1990).

173. See generally Note, *supra* note 170, at 212 ("This method of restraint merely places the ultimate opportunity for action with other, busier, more remote officials").

174. *Smith v. Superior Court*, 101 Ariz. 559, 442 P.2d 123 (1967); *Taliaferro v. Locke*, 182 Cal. App. 752, 6 Cal. Repr. 813 (1960); *Hennebry v. Hoy*, 343 N.W.2d 87 (N.D. 1983). But see *Hamstead v. Dostert*, 313 S.E.2d 409 (W. Va. 1984) (state law allows citizen to petition court for writ of mandamus if prosecutor abuses discretion in not prosecuting); *Graham v. Gaither*, 140 Md. 330, 117 A. 858 (1922) (mandamus might be available against police officer who corruptly refuses to enforce a law).

175. See Note, *supra* note 170, at 213.

176. See, e.g., PA. STAT. ANN. tit. 16, § 1409 (Purdon 1956) ("[the court] may direct any private counsel employed by [complainant] to conduct the entire proceeding"); *State v. Rollins*, 129 N.H. 684, 533 A.2d 331 (1987) (allows initiation and prosecution of certain criminal complaints by private attorneys subject to the *nolle prosequi* powers of the attorney general or prosecuting attorney); UTAH CODE ANN. § 30-6-2 (Supp. 1990) (allowing private prosecution for "cohabitant" abuse).

177. See, e.g., MICH. COMP. LAWS § 767.41 (1990) (prosecutor must provide reasons for refusing prosecution in writing; if court is not "satisfied with the statement [of reasons for declining prosecution], the prosecuting attorney shall be directed by the court to file the proper information and bring the case to trial"), interpreted in *Genesee County Prosecutor v. Genesee Circuit Judge*, 391 Mich. 115, 121, 215 N.W.2d 145, 147 (1974) (The court "may not properly substitute its judgment for that of the . . . prosecuting attorney. . . ." The judge may reverse or revise a prosecutor's decision only if it appears on the record that the decision constitutes an abuse of discretion); NEB. REV. STAT. § 29-1606 (1989) (prosecutor must

appointment of a special prosecutor.<sup>178</sup> Others allow for appeal to the state attorney general.<sup>179</sup>

## V. WHY THE CURRENT CHECK IS INAPPROPRIATE

The power of the prosecutor to refuse prosecution is an essential but potentially abused aspect of the justice system. A check on the discretion of Wisconsin prosecutors is needed, especially because Wis-

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provide written reasons for declining prosecution; if court not "satisfied with the statement," it shall direct the county attorney to file the proper information and bring the case to trial); COLO. REV. STAT. 16-5-209 (1990) ("If after a hearing the judge finds that the refusal . . . to prosecute was arbitrary or capricious and without reasonable excuse, he may order the prosecuting attorney to file an information and prosecute the case . . ."), *construed in* Tooley v. District Court, 190 Colo. 468, 549 P.2d 772 (1976) (court may not reverse prosecutor's decision absent "clear and convincing evidence" that the decision was arbitrary or capricious); PA. R. CRIM. P. 133(b)(2) (Purdon 1989) (attorney for the commonwealth "shall state the reasons [for prosecution refusals] on the complaint form and return it to the affiant. Thereafter the affiant may file the complaint with a judge . . . for approval or disapproval . . ."), *construed in* Com. v. Benz, 523 Pa. 203, 209-10, 565 A.2d 764, 768 (1989) (court may review prosecutor's decision not to file complaint if this decision is based on assessment that there is insufficient evidence to establish a *prima facie* case; however, the court may not review any decision not to prosecute based on prosecutorial "policy"). The latter Pennsylvania judicial review process has been construed to require the application of a "gross abuse of discretion" standard of review; *see* Com. v. Eisemann, 276 Pa. Super. 543, 419 A.2d 591, 593 (1980). In 1984, the Wyoming Supreme Court invalidated for separation of powers reasons WYO. STAT. § 7-6-110 (1977), which provided that if the trial court were not satisfied with a prosecutor's stated reason for inaction, "the county attorney shall be directed by the court to file the information and bring the case to trial." *In re Padget*, 678 P.2d 870 (Wyo. 1984).

178. ALA. CODE § 12-17-186 (1986) ("when the district attorney refuses to act, [the court] may appoint [a] competent attorney to act in such district attorney's place"); MINN. STAT. § 388.12 (1968 & Supp. 1986) (court may appoint an attorney to serve "as, or in the place of" the county attorney), *construed in* State *ex. rel.* Wild v. Otis, 257 N.W.2d 361, 365 (Minn. 1977) ("Arguably, a private citizen could petition the district court for action pursuant to this statute and the court could appoint a special prosecutor if it decided that this was necessary"); N.D. CENT. CODE § 11-16-06 (1985) (if court finds that "state's attorney has refused or neglected to perform" it may request the attorney general to prosecute or appoint another "attorney to take charge of" the action); COLO. REV. STAT. § 16-5-209 (1990) ("If after a hearing the judge finds that the refusal of the prosecuting attorney to prosecute was arbitrary or capricious and without reasonable excuse, he may order the prosecuting attorney to file an information and prosecute the case or may appoint a special prosecutor to do so"); PA. STAT. ANN. tit. 16, § 1409 (Purdon 1956) ("If any district attorney shall neglect or refuse to prosecute . . . [the court] may direct any private counsel employed by such prosecutor to conduct the entire proceeding"); WYO. STAT. § 9-1-805 (1987) (permits the court to direct or permit any member of the bar to act in place of the district attorney when the latter is interested or refuses to act), *construed in* *In re Padget*, 678 P.2d 870 (Wyo. 1984); UTAH CONST. art. 8, § 16 (court may appoint special prosecutor if prosecutor fails or refuses to prosecute); TENN. CONST. art. 6, § 5 (same).

179. *See, e.g.*, N.M. STAT. ANN. § 8-5-3 (1983) (upon failure or refusal of prosecutor to act, attorney general may pursue the matter if deemed advisable and governor directs the investigation); MINN. STAT. § 8.01 (1977) (upon governor's written request, attorney general shall represent the state and exercise the powers of the county attorney), *construed in* State *ex. rel.* Wild v. Otis, 257 N.W.2d 361 (1977) (citizen may appeal to governor, who then might order the attorney general to prosecute the case).

consin law disallows alternate means of redress in the form of mandamus<sup>180</sup> or private prosecution.<sup>181</sup> Moreover, as discussed earlier, the traditional means thought to control prosecutorial abuses—threat of not being reelected, press scrutiny and removal from office—are more theoretical than real.<sup>182</sup>

While the current check provided for in Wisconsin Statutes section 968.02(3) is a step in the right direction, it is also clear that the overall charging approach upheld by the *Unnamed Defendant* court is not the answer. Other than the constitutional flaws discussed earlier, numerous practical reasons militate against the continued use of the checks approved by the *Unnamed Defendant* court.

The first shortcoming in the current controls is that both sections 968.02(3) and 968.26 permit a de novo determination by the court as to whether a complaint should issue. Such an approach is an anomaly in the nation and is problematic for the considerable potential strain it will impose on the courts.<sup>183</sup> While the statutes have heretofore been used sparingly,<sup>184</sup> there is no assurance that the same will continue, given the notoriety of *Connors* and *Unnamed Defendant* and the growing popularity of victims' rights.

The second and more troubling shortcoming is the requirement in both statutes that courts use the minimal legal evidentiary standard of probable cause. A strict reading of the statutes dictates that a complaint must be issued if a court finds probable cause to charge a suspect with a crime.<sup>185</sup>

The use of the probable cause charging standard is problematic for a number of reasons. The first is of a practical nature and is well-illustrated by a recent West Virginia case, *State ex rel. Hamstead v. Dostert*.<sup>186</sup> In *Hamstead*, the state's supreme court held in dicta that a private citizen may use a writ of mandamus to compel a reluctant prosecutor to charge a suspect if probable cause is found to exist.<sup>187</sup> In a stinging opinion, Justice Neely criticized the use of the charging stan-

180. *State ex rel. Kurkierewicz v. Cannon*, 42 Wis. 2d 368, 166 N.W.2d 255 (1969).

181. *Biemel v. State*, 71 Wis. 444, 37 N.W. 244 (1888).

182. See *supra* notes 157-59 and accompanying text.

183. See Note, *supra* note 136, at 139 ("De novo review is not favored, because it would place a great burden on the time and energies of the courts . . ."); see also *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 380-81 (2d Cir. 1973); 5 U.S.C. § 706 (Administrative Procedures Act disallows de novo review of discretionary determinations).

184. See *supra* notes 149-51 and accompanying text.

185. *Unnamed Defendant*, 150 Wis. 2d 352, 367-68, 441 N.W.2d 696, 702 (Heffernan, C.J., concurring) ("Both of the statutes validated herein make it possible for persons to trigger the prosecutorial powers of the state in any kind of criminal action where 'probable cause' can be established").

186. 313 S.E.2d 409 (W.Va. 1984).

187. *Id.* at 415-16.

dard as “potentially disastrous as a matter of policy . . . burden[ing] the courts with responsibility for listening to unfounded charges from every self-appointed guardian of the public interest in criminal prosecutions.”<sup>188</sup> According to Justice Neely, the central flaw in the court’s reasoning was its use of the evidentiary minimum of probable cause as the end-all of charging: “It is elementary logic that a mandatory standard of omission does not imply that in the reverse situation there is a mandatory standard of commission.”<sup>189</sup>

This sentiment is directly apposite to Wisconsin’s current charging situation. The *Unnamed Defendant* court endorsed a system that effectively reduces charging, an intrinsically fact-intensive judgment rife with policy considerations, to a formulaic decision based solely on the probable cause standard. This outcome, as noted by Chief Justice Heffernan in *Unnamed Defendant*, makes for a situation in which

[n]o consistent prosecutorial policy in respect to the initiation of charges can be maintained. . . . The *de facto* standard for prosecuting attorneys is, in the experience of this writer, but for the exceptional case, not to invoke the awesome power of the state unless the crime in all likelihood can be proved beyond a reasonable doubt. Our imprimatur upon these statutes may well give a gloss that runs counter to the legislative intent of Wisconsin’s criminal law reforms.<sup>190</sup>

Ultimately, as noted by Chief Justice Heffernan, the low charging threshold potentially opens the way for abuses by persons with improper motives seeking to have enemies prosecuted: “Both of the statutes . . . make it possible for persons to trigger the prosecutorial powers of the state in any kind of criminal action where ‘probable cause’ can be established.”<sup>191</sup> Such a situation can only be seen as counterproductive in light of Wisconsin’s early and sustained concern over a system of public prosecution.

In addition to the illogical, impractical effect of using the probable cause standard, there is the fundamental conflict it poses with prosecutorial ethics. For decades Wisconsin prosecutors have embraced as

188. *Id.* at 425 (Neely, J., concurring in part and dissenting in part).

189. *Id.* at 420. See also U.S. DEP’T OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION 5 (1980) [hereinafter PRINCIPLES OF FEDERAL PROSECUTION] (“[Probable cause] is, of course a threshold consideration only. Merely because this requirement can be met in a given case does not automatically warrant prosecution . . .”).

190. *Unnamed Defendant*, 150 Wis. 2d at 367, 441 N.W.2d at 702 (Heffernan, C.J., concurring).

191. *Id.* at 367, 441 N.W.2d at 702 (Heffernan, C.J., concurring); see also *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375 (2d Cir. 1973) (“Such interference with the normal operations of criminal investigations . . . based solely upon allegations of criminal conduct, raises serious questions of potential abuse by persons seeking to have other persons prosecuted. . . .”).

accepted wisdom that prosecution is not merited without a reasonable expectation of conviction at trial.<sup>192</sup> Given this, prosecutors are faced with what amounts to a Hobson's choice: they must charge if probable cause exists but may not charge unless there is a reasonable expectation of conviction. Thus, in cases in which they have probable cause, but not sufficient evidence to convict, prosecutors will necessarily violate one of their duties.

Finally, the current approach embodied in sections 968.26 and 968.02(3) is problematic for its implicit notion that full enforcement of the criminal law is desirable and capable of being achieved. Theoretically, with the lower charging standard, all arrests or alleged violations otherwise brought to the attention of prosecutors would be prosecuted—and justifiably so. This would prevent, in Justice Steinmetz's words, situations wherein "the district attorney takes the role of prosecutor and jury."<sup>193</sup> In truth, however, if prosecutors were required to prosecute whenever the bare charging minimum of probable cause existed, enormous caseload increases would occur and suspects for whom the state lacked evidence to convict would suffer incalculable damages in reputation and expense.<sup>194</sup> That full enforcement is beyond the capacity of the system is illustrated by the recently enacted "pro-prosecution" policy in Dane County regarding domestic abuse.<sup>195</sup> Preliminary figures indicate a huge clogging of the courts caused by the enforcement policy regarding this offense alone.<sup>196</sup>

## VI. A PROPOSAL

As discussed, an avenue is needed for victim redress in the event of undue prosecutorial inaction. As Justice Abrahamson observed in

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192. See, e.g., 7 Op. Att'y Gen. 178 (1918); *Thompson v. State*, 61 Wis. 2d 325, 330, 212 N.W.2d 109, 111 (1973). This standard is also common throughout the nation. See F. MILLER *supra* note 76, at 32; ABA STANDARDS, *supra* note 58, at Standard 3-3.9; U.S. ATTORNEY'S MANUAL 9-27.220 (1984); Baker, *The Prosecutor—Initiation of Prosecution*, 23 AM. INST. CRIM. LAW & CRIMINOLOGY 770, 785 (1933).

193. *Connors*, 136 Wis. 2d at 154, 401 N.W.2d at 797 (Steinmetz, J., dissenting). Implicit in the Justice's view is the idea that the courts might somehow screen cases with greater consistency and effectiveness. The notion that the courts screen cases more effectively than prosecutors is belied by Donald McIntyre's experience in Chicago where judges formerly screened with rates very similar to those of prosecutors elsewhere. See McIntyre, *Judicial Dominance of Charging Practice*, 59 J. CRIM. L. & CRIMINOLOGY 468, 490 (1968).

194. As noted by the United States Department of Justice: "[B]oth as a matter of fundamental fairness and in the interest of the efficient administration of justice, no prosecution should be initiated against any person unless the government believes that the person probably will be found guilty by an unbiased trier of fact." See PRINCIPLES OF FEDERAL PROSECUTION, *supra* note 189, at 6. Similarly, another commentator observes a more pragmatic ramification: "Judicial compulsion of prosecution of all known violators might create equity in prosecution, but the resulting prosecutions would be less effective." Note, *supra* note 136, at 144.

195. WIS. STAT. § 968.075 (1989-1990).

196. See Harris, *Abuse Cases Clog the Courts*, Wis. St. J., April 18, 1988, at C1, col. 1.

*Connors*, the question facing Wisconsin is not whether the legislature is empowered to control the discretion of the district attorney at the charging stage. The legislature is so empowered.<sup>197</sup> Rather, the question is “whether to provide a forum, and if so what kind of forum, in which the prosecutor’s decision not to charge a person suspected of having committed a crime may be challenged and overturned.”<sup>198</sup>

The challenge in establishing a fair means of initiating criminal prosecutions is clear: to provide a system that at once allows prosecutors sufficient flexibility to do their jobs effectively, yet also provides a check on discretion that will guard against its inappropriate exercise.<sup>199</sup> The multi-faceted reform approach suggested here is directed toward satisfying these demands.

### *A. The Use of Guidelines and Declination Reasons*

Executive rule-making, a process whereby prosecutors’ offices promulgate prosecution guidelines and disciplinary measures for themselves, has gained increasing popularity in recent years. The approach has been adopted by the federal government,<sup>200</sup> numerous localities,<sup>201</sup> and the American Bar Association (ABA), among other advisory groups.<sup>202</sup> Indeed, numerous local prosecutors offices within Wisconsin

197. See *supra* note 125.

198. *Connors*, 136 Wis. 2d at 151, 401 N.W.2d at 796.

199. See *State v. Karpinski*, 92 Wis. 2d 599, 608, 285 N.W.2d 729, 735 (1979) (“In the criminal justice system there is at one and the same time the need for encouraging prosecutorial discretion to achieve flexibility and sensitivity and the need for circumscribing prosecutorial discretion to avoid arbitrary, discriminatory or oppressive results”).

In this endeavor, a delicate balance must be struck. As recognized by Lezak and Leonard, “[a] blanket revision of a system of compulsory prosecution, when practicalities permit only selective enforcement, would drive discretion underground and stifle attempts to control and channel its use.” Lezak & Leonard, *The Prosecutor’s Discretion: Out of the Closet—Not Out of Control*, 63 OR. L. REV. 247, 257 (1984). Other recent commentators express this restraint from a more pragmatic perspective:

This is not to suggest that prosecutorial discretion can or should be abolished. The multifarious situations confronting the prosecutor from day to day all cannot be anticipated or resolved in advance. Further, certain decisions properly fall within the unique technical expertise of the prosecutor and are properly made by him. But absolute discretion in determining whom to charge and selecting which laws to enforce is undesirable because it tends to become a tool to achieve expediency at the expense of justice.

Bubany & Skillern, *Taming the Dragon: An Administrative Law for Prosecutorial Decision Making*, 13 AM. CRIM. L. REV. 473, 494-95 (1976).

200. See PRINCIPLES OF FEDERAL PROSECUTION, *supra* note 189, at 2-3.

201. See Vorenberg, *supra* note 137, at 680.

202. See ABA STANDARDS, *supra* note 58, at Standard 3-2.5; see also THE COURTS, *supra* note 130, at Standard 1.2; NATIONAL PROSECUTION STANDARDS, Standard 8.1 (Nat’l Dist. Attorneys Ass’n 1977).

itself have adopted internal charging guidelines.<sup>203</sup> This practice should be required of all local prosecutors' offices in the state.

The advantages of formulating internal rules to guide prosecution decisions are manifold. Principally, the use of rules compels rationality and consistency in prosecutors' charging practices. The process of rule-making itself injects a consciousness into an otherwise frequently reflexive act, promoting an ongoing reassessment of office actions.<sup>204</sup> Moreover, rules allow for accountability once prosecution decisions are made<sup>205</sup> and promote public confidence as citizens are able to scrutinize the avowed policies and practices of their prosecutors' offices.<sup>206</sup>

The development of any meaningful criteria in such an inherently subjective area is difficult. The ABA in its *Standards for Criminal Justice Relating to the Prosecution Function* notes that "[b]y its very nature, the exercise of discretion cannot be reduced to a formula. Nevertheless, certain guidelines for the exercise of discretion should be established."<sup>207</sup> Recent years have witnessed numerous attempts to formulate guidelines to structure charging discretion. The ABA provided perhaps the most widely acknowledged:

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

- (i) the prosecutor's reasonable doubt that the accused is in fact guilty; . . .
- (iii) the disproportion of the authorized punishment in relation to the particular offense or the offender;
- (iv) possible improper motives of a complainant;
- (v) reluctance of the victim to testify;

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203. See WIS. LEGIS. COUNCIL, STAFF BULL. 83-1, at 18 (1982). In construing these guidelines the Wisconsin Supreme Court has applied a "rational basis" test, looking to see if the charging policy "is based on justifiable and reasonable considerations." *Locklear v. State*, 86 Wis. 2d 602, 613, 273 N.W.2d 339, 338 (1979).

204. See Vorenberg, *supra* note 3, at 1545 ("Self-imposed limits on discretion may have greater force than either their detractors or creators realize. As they acquire greater visibility, they may become part of the popular climate and professional culture in which prosecutors work").

205. See *infra* notes 236-38 and accompanying text.

206. For a discussion of whether dissemination of guidelines may lessen the deterrent effects of the law, see Rabin, *Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion*, 24 STAN. L. REV. 1036, 1076-77 (1972); Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1, 25-34 (1971).

207. See ABA STANDARDS, *supra* note 58, at Standard 3-3.9 Commentary.

- (vi) cooperation of the accused in the apprehension or conviction of others; and
- (vii) availability and likelihood of prosecution by another jurisdiction.<sup>208</sup>

Other, perhaps more helpful approaches have been of a more specific nature, including those concerning the nature of the offense and offender; the personal characteristics of the defendant; considerations of the purposes and demands of the criminal justice system; and evidence sufficiency.<sup>209</sup>

The development of these guidelines among Wisconsin prosecutors should take place at the local level, as opposed to being imposed by the legislature or another state-wide body. This approach is encouraged by the ABA and other commentators.<sup>210</sup> Joan Jacoby argues that such an approach is sensible because district attorneys are elected officials who are uniquely suited to adopt practices that "reflect the attitudes and policies of [their] constituents."<sup>211</sup> "Since the prosecutor is a result of the local political process," writes Jacoby, "his policy about enforcement of the law should reflect the opinions of the community at large."<sup>212</sup> The internal development of guidelines is also preferable because such guidelines have a greater chance of being recognized and followed by local prosecutors.<sup>213</sup>

In tandem with guidelines, all prosecutors' offices should be required to implement a system whereby prosecutors in each instance of refused prosecution provide a written record specifying why prosecution was declined.<sup>214</sup> The procedure is beneficial as it encourages prosecutors to consider each case carefully in the context of the prosecution

208. *Id.* at Standard 3-3.9; see also NATIONAL PROSECUTION STANDARDS, *supra* note 202, at Standard 8.2; PRINCIPLES OF FEDERAL PROSECUTION, *supra* note 189, at 5-15.

209. See Thomas & Fitch, *Prosecutorial Decision Making*, 13 AM. CRIM. L. REV. 507, 518-22 (1976). For an insightful analysis of excessive generality in guidelines, see Comment, *Justice Department's Prosecution Guidelines of Little Value to State and Local Prosecutors*, 72 J. CRIM. L. & CRIMINOLOGY 955 (1981).

210. See ABA STANDARDS, *supra* note 58, at Standard 3-3.9 Commentary ("The instant standard is not intended to be a substitute for developing appropriate prosecution policies on a local level"); *id.* at Standard 3-3.4(c). ("The prosecutor should establish standards and procedures for evaluating complaints to determine whether criminal proceedings should be instituted").

211. Jacoby, *The Charging Policies of Prosecutors*, in THE PROSECUTOR 75, 77 (W. McDonald ed. 1979).

212. *Id.* at 78. Jacoby adopts this view for other reasons as well. Under these circumstances, the local prosecutor serves as a "dynamic" element in the criminal law, in contrast to the cumbersome legislative process of change, allowing "changes in public policy to come into effect and be tested." *Id.* at 77.

213. See Lezak & Leonard, *supra* note 199, at 263.

214. Ironically, Wisconsin for many years had a similar practice codified at WIS. STAT. § 955.17, only with respect to the filing of informations. See *supra* note 47. Currently, the states of Michigan and Nebraska require the provision of written declination reasons; see *supra* note 177. The approach was also endorsed by the National Advisory Commission on Criminal Justice Standards and Goals in the early 1970s; see *supra* note 130, at 3.



guidelines.<sup>215</sup> Moreover, the provision of declination reasons will allow victims to learn why their case was refused, thereby lessening the prospect of alienation among citizens in the prosecution process.

The development of guidelines and the requirement that reasons for negative charging decisions be provided is significant for yet another reason—it will facilitate judicial review of prosecutors' decisions, the cornerstone of the control mechanism advocated in this Comment. The lack of any record for the reviewing court to examine has, in the past, served as a principal reason to avoid the review of prosecutors' decisions.<sup>216</sup>

### B. *The Use of Judicial Review*

Traditionally shunned as an affront to separation of powers doctrine,<sup>217</sup> judicial review is assuming increasing popularity today as a discretion control measure.<sup>218</sup> Most notably, the process was looked upon favorably by the Wisconsin Supreme Court in *Connors* and *Unnamed Defendant* as an alternative to the current charging approach. In his concurring opinion in *Unnamed Defendant*, Chief Justice Heffernan stated:

The writer is not unmindful of the predicament of a victim of a crime who is afforded no relief by a recalcitrant prosecutor. It would appear, however, that this situation might better be alleviated by legislative approval of a limited judicial review of a prosecutor's declination to prosecute.<sup>219</sup>

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215. Comment, *Prosecutorial Discretion in the Initiation of Criminal Complaints*, 42 S. CAL. L. REV. 519, 543 (1969).

216. See, e.g., *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 380 (2d Cir. 1973) ("In the absence of statutorily defined standards governing reviewability, or regulatory or statutory policies of prosecution, the problems inherent in the task of supervising prosecutorial decisions do not lend themselves to resolution by the judiciary").

217. See *supra* note 163 and accompanying text.

218. See *supra* note 177. The notion that separation of powers precludes review is increasingly being discredited. Professor Kenneth Davis notes that:

If separation of powers prevents review of discretion of executive officers, then more than a hundred Supreme Court decisions spread over a century and three-quarters will have to be found contrary to the Constitution! If courts could not interfere with abuse of discretion by executive officers, our fundamental institutions would be altogether different from what they are . . . the courts would be powerless to interfere when executive officers, acting illegally, are about to execute an innocent person! K. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 210 (1969). *But see* Abrams, *supra* note 206, at 52 (author cautions that the "ready availability of judicial review could interfere with the rapid development of the desired type of internal controls").

219. *Unnamed Defendant*, 150 Wis. 2d at 368, 441 N.W.2d at 702 (Heffernan, C.J., concurring). See also *supra* note 177 for examples of other states employing judicial review in the event of prosecutorial inaction.

Many practical reasons justify judicial review, but two in particular stand out. First, review allows aggrieved parties an opportunity to obtain reconsideration of a non-prosecution decision of a district attorney.<sup>220</sup> Such a safety valve is essential in the name of fairness to victims and the overarching concern for fostering trust in the justice system. As noted by Justice Steinmetz in *Connors*: "Allowing a review of [the prosecutor's] decision, even if the decision is affirmed, by a member of the judiciary promotes trust in the legal system."<sup>221</sup> Second, review will also benefit prosecutors. A judicial ratification of a decision not to prosecute may eliminate any unfounded complaints against prosecutors and diminish suspicions that inevitably attach to cloistered decisions.<sup>222</sup>

The approach also has appeal for its consistency with traditional Wisconsin notions of separation of powers. Historically, Wisconsin case law has seen the district attorney as a "quasi-judicial officer," engaged in a sharing of responsibility with the courts to assure that justice is fairly and efficiently done.<sup>223</sup> The judiciary already serves as a check on the executive powers of prosecutors at numerous points in the criminal justice process. Wisconsin Statutes section 970.03 provides that at a preliminary hearing the circuit court must review the state's case as presented by the prosecutor and determine whether sufficient probable cause exists to believe a crime has been committed.<sup>224</sup> Only then may a defendant be bound over for trial.<sup>225</sup> Similarly, if a prosecutor wishes to dismiss a case after it has been judicially certified for trial she must first receive court approval.<sup>226</sup> Moreover, Wisconsin law provides numerous statutes characterized by a sharing of responsibility between

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220. See J. MASHOW & R. MERRILL, *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM* 269 (2d ed. 1985) ("The central value of judicial review may be its residual guarantee of justice in individual cases. From this perspective judicial review protects the citizen from the extremes of bureaucratic tunnel vision or incompetence . . .").

221. *Connors*, 136 Wis. 2d at 153, 401 N.W.2d at 797 (Steinmetz, J., dissenting).

222. *Bubany & Skillern*, *supra* note 199, at 505.

223. *State v. Washington*, 83 Wis. 2d 808, 816-17, 266 N.W.2d 597, 601-02 (1978); *Loose v. State*, 120 Wis. 115, 130, 97 N.W.2d 526, 531 (1903) ("The legislature . . . has spoken intending to leave the prosecuting officer to exercise the administrative authority mentioned [on selection of appropriate charges]. . . . That authority is doubtless not unlimited. It cannot be arbitrarily exercised. The trial court must necessarily have supervisory control over it so as to prevent any manifest abuse thereof"). See also Cox, *Prosecutorial Discretion: An Overview*, 13 AM. CRIM. L. REV. 383, 397 (1976) ("Acceptance of some judicial review results in an interpretation of separation of powers more consistent with its original intent; that is, that separation of powers implies a limit to discretion and was not intended to prevent review of discretionary acts").

224. WIS. STAT. § 970.03(1) (1989-1990); *State v. Hooper*, 101 Wis. 2d 517, 533-34, 305 N.W.2d 110, 118-19 (1981).

225. WIS. STAT. § 970.03(7) (1989-1990).

226. *State v. Kenyon*, 85 Wis. 2d 36, 45, 270 N.W.2d 160, 164 (1978) ("Prosecutorial discretion to terminate a pending prosecution in Wisconsin is subject to the independent authority of the trial court to grant or refuse a motion to dismiss 'in the public interest'").

the executive and the judiciary in the administration of justice.<sup>227</sup> The ABA itself endorses such a "sharing" approach:

There are sound general policy reasons that argue for the joint screening of cases by both the prosecutor and the magistrate. The prosecutor brings trial experience, continuity in office, and the perspective of public responsibility to bear on a decision. Beyond this, the sharing of responsibility in the decision whether to prosecute is an important application of 'checks and balances' to the field of prosecution.<sup>228</sup>

Ultimately, judicial review is consonant with separation of powers principles. As noted by Professor Vorenberg, "[r]ather than displacing prosecutorial judgment, [judicial] review merely requires prosecutors to state how they will employ their judgment and holds them to those statements."<sup>229</sup>

### C. *Judicial Standard of Review*

With the adoption of judicial review, a standard must exist to facilitate review. The standard chosen must be flexible enough to allow complainants latitude to challenge inaction yet be sufficiently deferential to deter frivolous actions and preserve the necessary autonomy of the district attorney. An unduly restrictive standard of review might encourage a prosecutor to minimize the exercise of discretion or, at a minimum, limit the visibility of that exercise. As noted by one commentator:

If decisions not to bring criminal prosecutions were subject to overly strict review, the quality of mercy which tempers the justice of the criminal law may be lost since the prospect of being overruled may influence prosecutors to disregard the subjective factors which may prompt decisions not to exact the law's full measure.<sup>230</sup>

Given these criteria, an "abuse of discretion" standard would appear most appropriate. The NACCJSG has endorsed the abuse standard

227. See, e.g., WIS. STAT. § 967.055(2)(a) (1989-1990) (drunk driving statute requires judicial supervision to amend or dismiss charges). See also *supra* note 107 (discussing the "sharing" of duties common to "John Doe" investigations pursuant to WIS. STAT. § 968.26 (1989-1990)).

228. See ABA STANDARDS, *supra* note 58, at Standard 3-3.4 Commentary.

229. See Vorenberg, *supra* note 3, at 1571. See also *In re Piscanio*, 235 Pa. Super. 490, 494-95, 344 A.2d 658, 661 (1975), where a Pennsylvania court found a similar justification for the judicial review process codified at PA. R. CRIM. P. 133(b)(2): "[the rule] protects the interests of the private complainant by allowing for the submission of the disapproved complaint to a judge. . . . The judge's independent review of the complaint checks and balances the district attorney's decision and further hedges against possibility of error."

230. See Note, *supra* note 135, at 143.

in times of prosecutorial inaction.<sup>231</sup> More importantly, the standard is a familiar one in Wisconsin jurisprudence. Traditionally, reviewing courts have used the standard to assess general discretionary decisions by lower courts,<sup>232</sup> to examine the propriety of John Doe investigations in particular<sup>233</sup> and to review post-preliminary hearing charging decisions by prosecutors.<sup>234</sup> In addition, Wisconsin statutory law provides that the standard is to be employed by courts in the review of district attorney refusals to order medical inquests.<sup>235</sup>

With the standard in place, the question that next arises is what criteria the courts should use when assessing whether prosecutors abused their discretion in refusing to institute criminal proceedings.<sup>236</sup> In this context, the local prosecutors' rules and recording of declination reasons assume prime importance. On these bases, the reviewing court would consider whether the inaction was premised on the standards and policies of the office or was motivated by extraneous or unreasonable factors. The court would need to be particularly attentive to situations in which there is some reason to believe that race, sex, religion, political affiliation or the personal sentiments of the prosecutor played a role in the decision not to prosecute.<sup>237</sup> Similarly, the potential that the fact-finder(s) will likely acquit because of some unpopular factor in the state's case or because of the popularity of the accused should not be deemed reasonable bases for declination.<sup>238</sup> An abuse would exist only when the court discovered a departure from standards and policies without appropriate reason.

Consistent with current judicial review practices among Wisconsin courts, judges reviewing prosecutors' decisions would consult the record in its entirety to decide whether an abuse of discretion had occurred.<sup>239</sup> Also, consistent with case law, the reviewing court would

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231. See NATIONAL ADVISORY COMMISSION, *supra* note 130, at Standard 1.2. *But cf. supra* note 177 (describing differing judicial standards of review).

232. See, e.g., *In re Johnson*, 9 Wis. 2d 65, 100 N.W.2d 383 (1960) (where discretion is conferred upon trial court, appellate court is not to reverse unless record demonstrates that there has been clear abuse of discretion).

233. *State ex rel. Niedziejko v. Coffey*, 22 Wis. 2d 392, 401, 402, 126 N.W.2d 96, 101 (1964).

234. *State v. Hooper*, 101 Wis. 2d 517, 305 N.W.2d 110 (1981).

235. WIS. STAT. § 979.04(2) (1989-1990) provides that the circuit court, upon the petition of a coroner or medical examiner, may issue the order if it finds that the district attorney has abused his discretion in not ordering an inquest.

236. In *Hooper*, the court held that it is an abuse of discretion for a prosecutor to institute criminal proceedings when evidence is clearly insufficient to merit conviction. 101 Wis. 2d at 538, 305 N.W.2d at 121. However, there is no Wisconsin law on standards to evaluate discretionary abuse in instances of prosecutorial refusal to institute proceedings.

237. See PRINCIPLES OF FEDERAL PROSECUTION, *supra* note 189, at 14.

238. *Id.*

239. See, e.g., *In re Guardianship of Schmidt*, 71 Wis. 2d 317, 237 N.W.2d 919 (1976) (supreme court may review record in its entirety in deciding whether trial court has abused its discretion).

uphold the discretionary decision of the prosecutor if there were facts of record that would reasonably support such a decision pursuant to the articulated charging guidelines.<sup>240</sup>

#### D. The Procedure

Because of the serious nature of criminal charges, any challenge to a prosecutor's decision not to charge should not be approached lightly. To minimize the potential threat of harassment and vindictive actions, and yet provide victims a form of redress in times of prosecutorial inaction, the charging mechanism proposed here requires the satisfaction of strict standing requirements. To this end, only those persons<sup>241</sup> suffering an injury in fact<sup>242</sup> would be eligible to challenge a prosecutor's decision not to prosecute an alleged criminal event.<sup>243</sup>

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240. *Maier Constr., Inc. v. Ryan*, 81 Wis. 2d 463, 260 N.W.2d 700 (1978) (reviewing court must uphold discretionary decision of the trial court if there are facts of record that would support such a decision had it been made on the basis of those facts); *Dunn v. Fred A. Mikkelson, Inc.*, 88 Wis. 2d 369, 276 N.W.2d 748 (1979) (reviewing court does not take independent review as it would where there is a claim of legal error and, instead, will affirm discretionary order if there appears to be any reasonable basis for trial court's decision); *Rhodes v. Terry*, 91 Wis. 2d 165, 280 N.W.2d 248 (1979) (reviewing court will not find abuse of discretion if record shows that discretion was in fact exercised and if record shows that there is reasonable basis for trial court's determination); *Schumacher v. Schumacher*, 131 Wis. 2d 332, 388 N.W.2d 912 (1986) (supreme court will sustain discretionary act of trial court if court examined relevant facts, applied proper standard of law and, using demonstrated rational process, reached conclusion that reasonable judge could reach).

241. WIS. STAT. § 967.05(1)(b) (1989-1990) provides that prosecutions involving corporations are commenced by the filing of informations, rather than complaints, which is the typical means for individuals. Because this proposal seeks to refine only the complaint-issuance process, prosecutions involving corporate entities are beyond its scope.

242. The jurisdiction of Wisconsin courts, unlike their federal counterparts, is not bound by the necessity of a "case or controversy." However, standing doctrine is adaptable to the situation here. A complainant would need to show that he or she was within the "zone of interests" and suffered an "injury in fact." See, e.g., *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 152-53 (1970).

In Michigan, a crime victim is one who "suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime." MICH. COMP. LAWS ANN. § 780.752(g)(i) (West Supp. 1990). The Florida constitutional amendment, discussed at *supra* note 5, provides that the "next of kin of homicide victims" are to be treated as victims for the purposes of the amendment. This would seem an appropriate expansion of the otherwise limited standing requirement.

243. The United States Supreme Court itself has spoken to the issue of victim standing in actions to compel prosecution. In *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973), the Court refused to endorse an action brought by the mother of an illegitimate child seeking to compel the prosecution of the child's putative father to provide support payments. According to the Court, "in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Id.* at 619. While apparently announcing a per se preclusion of victim standing, the language of the Court later in the opinion softened this stance. This particular victim lacked standing due to "an insufficient showing of a direct nexus between the vindication of her interest and the enforcement of the State's criminal laws." *Id.* See also *Leeke v. Timmerman*, 454 U.S. 83 (1981) (Court refused to grant standing to parties seeking to have arrest warrants issued because "questionable nexus" existed between parties' injuries and defendants' conduct).

Thus, so-called "victimless" crimes would be beyond the purview of the proposed approach.<sup>244</sup>

In due deference to the preeminent role of the executive in the charging decision, the proposal also envisions an exhaustion requirement.<sup>245</sup> Under all circumstances a complainant must first approach the local district attorney to request prosecution; only after prosecution is refused may a victim seek redress from the courts.<sup>246</sup> In the event a prosecutor declines to prosecute, justification for this decision must be provided in writing and must be based on an articulable office policy. This decision and its attendant rationale must then be provided to the prospective complainant. The latter would then have a right to appeal to an internal review committee contained within the office of the local prosecutor.<sup>247</sup> If the committee confirms the decision of the individual

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244. To allow such prosecutions would run too great a risk of circumventing a central tenet of standing doctrine, viz., to preclude the use of the court to litigate "ideological" or "political" causes. For instance, a citizen upset over the government's failure to prosecute violations of a paraphernalia law would not be allowed to challenge prosecutorial inaction. Such a citizen's views would be more appropriately expressed via political avenues, rather than through the criminal law. *But see* Note, *supra* note 170, at 232 (suggesting private prosecution scheme that would allow private prosecution of victimless crimes "upon a showing that the crime threatens public confidence in law and order, or undermines the integrity of governmental institutions").

245. This concept is borrowed from administrative law and was described by the Wisconsin Supreme Court in *Wisconsin Collectors Association v. Thorp Finance Corp.*: "'Exhaustion' applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course." 32 Wis. 2d 36, 47, 145 N.W.2d 33, 38 (1966) (citation omitted). The requirement also provides the court with the prosecutors' expertise and, under the circumstances advocated here, provides a factual record for review. This would preempt a common problem noted by the United States Supreme Court: "[J]udicial review may be hindered by the failure of the litigant to allow the agency to make a factual record or to exercise its discretion or to apply its expertise." *McKart v. United States*, 395 U.S. 185, 194 (1969).

246. This requirement is consistent with the views of the ABA; *see* ABA STANDARD, *supra* note 58, at Standard 3-3.4(d) ("Where the law permits a citizen to complain directly to a judicial officer . . . the citizen complainant should be required to present the complaint for prior approval to the prosecutor, and the prosecutor's action or recommendation thereon should be communicated to the judicial officer . . .").

247. Ideally, this committee would be comprised of senior prosecutors, individuals seasoned in prosecutorial decision making. The creation and use of such a committee would have several benefits. First, it would allow victims to be heard in a less formal (and perhaps less intimidating) setting than a court. Second, the expertise of prosecutors would be further utilized, thereby perhaps obviating the need to expend scarce judicial resources in the review process. Third, providing the executive with an opportunity to reconsider its prosecutorial decision would be less disruptive of separation of powers principles—relative to disallowing executive review prior to appeal by the victim to the judiciary. The author is indebted to Professor Carin Clauss, University of Wisconsin Law School, for this insight.

An alternative process to the one outlined above might resemble the charging conference now used by the Milwaukee County Office of the District Attorney. Under that scheme the charging attorney, victim(s), arresting officer and any witnesses to the alleged crime meet to discuss the facts of the case. The district attorney reviews the facts and the preliminary charge suggested by the arresting officer and subsequent to the meeting determines whether the suspect is to be charged. If the victim is dissatisfied with the outcome, she is entitled to

prosecutor, a victim would then bear the burden of approaching the court.

If a victim with requisite standing wished to pursue the matter, the reviewing court would, on the basis of the above-described criteria, determine whether the prosecutor abused her discretion in declining the case. To facilitate review, the court would summon the prosecutor (or a representative) and the victim and then conduct a public proceeding on the merits of the complaint.<sup>248</sup> If, after the meeting, the court were dissatisfied with the prosecutor's decision, and the prosecutor persisted in not filing a complaint, the court would appoint a special prosecutor to initiate prosecution.<sup>249</sup> Ideally, but not necessarily, this appointee would be a prosecutor from another local office, sharing similar discretionary skills. To minimize the threat of vindictive prosecutions and to preserve the "quasi-judicial" role of the prosecutor, the private attorney of a victim would not constitute a suitable prosecutorial appointee.<sup>250</sup> The exercise of this appointment power by the court

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appeal to a senior district attorney. The latter will then review the file in the presence of the victim and arresting officer. This information was provided by Greg O'Meara, assistant district attorney and training director of the Milwaukee District Attorney's Office. Conversation transcript on file with the author.

Obviously, neither of the above options would be viable in offices containing insufficient numbers of prosecutors. Such offices should, to the extent possible, devise an analogous review process on a local basis. The author is indebted to Professor Frank Remington, University of Wisconsin Law School, for this insight.

248. The public nature of the proceeding is consonant with the democratic belief that local district attorneys are elected by the people and hence should conduct their business openly. This view was shared by the Wisconsin Supreme Court in an early interpretation of Wis. STAT. § 968.02(3) (1989-1990) where the court held that the proceeding authorized by that statute was presumptively open to the public. *State ex rel. Newspapers, Inc. v. Circuit Ct.*, 124 Wis. 2d 499, 513, 370 N.W.2d 209, 216 (1985). A closed proceeding would be appropriate only when a "substantial, compelling reason" were shown. *Id.* at 501, 370 N.W.2d at 211. This showing must be "based on articulable facts known to the court rather than unsupported hypotheses or conjecture." *Id.* at 508, 370 N.W.2d at 214. The court provided several factors that might justify closure: (1) the "salacious" nature of the evidence might embarrass the parties or threaten the public interest, (2) the avoidance of harassment, intimidation, etc., either by other persons accused or the public, and (3) protection of the privacy or reputational interests of the accused, if a criminal charge were not to result. *Id.*

249. See Wis. STAT. § 978.045(1) (1989-1990). This statute essentially recodifies Wis. STAT. § 59.44 (repealed Jan. 1, 1990). It provides that in certain circumstances (lack of a district attorney in a county, conflict of interest, absence, etc.) the court may "appoint some suitable attorney" to act as district attorney for "the time being." *Id.* This statute, to date, has been used by Wisconsin courts only with regard to refusals to prosecute in the context of dismissals. See *Guinther v. City of Milwaukee*, 217 Wis. 334, 258 N.W. 865 (1935). As noted earlier, see *supra* note 226 and accompanying text, the *nolle prosequi* powers of prosecutors, unlike those relating to charging, have traditionally been subject to the supervision of the courts. This difference notwithstanding, it appears that Wis. STAT. § 978.045(1) may be appropriately used to appoint special prosecutors at the pre-charge juncture.

250. As noted in *supra* notes 59-61 and accompanying text, Wisconsin since the 1800s has disallowed the use of private counsel in criminal prosecutions. See also *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987). In *Young*, the Court construed the constitutionality of a procedure within Federal Rule of Criminal Procedure 42(b), which courts had interpreted to allow judicial appointment of a private attorney to prosecute crim-

would minimize encroachment by the judiciary on the executive: ultimately, another executive officer would reconsider the decision to prosecute.<sup>251</sup>

The question that next arises is what are to be the rights of appeal among the respective parties. As for complainants, in the event that the lower court endorsed the prosecutor's decision not to prosecute, a complainant could appeal this decision to a higher court.<sup>252</sup> Similarly, if a district attorney were dissatisfied with a reviewing court's finding that the initial refusal to prosecute constituted an abuse of discretion, she would have a right to appeal.<sup>253</sup> The accused would be granted no right to appeal at this stage; procedural safeguards at the preliminary hearing and later in the proceedings are designed to protect such interests.<sup>254</sup>

In essence, the mechanism suggested above is intended to replace the current well-intended but ill-conceived review procedure contained in Wisconsin Statutes section 969.02(3). There remains, however, the potential *de novo* role of the circuit judge in the context of the John Doe proceeding wherein the court may issue complaints if "it appears probable from the testimony given that a crime has been committed and who committed it. . . ."<sup>255</sup>

While found constitutional in *Unnamed Defendant*, the complaint issuance aspect provided for in section 968.26 is anachronistic,<sup>256</sup> rarely used<sup>257</sup> and ultimately does not comport with contemporary separation

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inal contempt proceedings. In the case at bar, the Court invalidated the Second Circuit's practice of appointing the private counsel of the injunction's beneficiary to prosecute the injunction's violation. According to the Court, such a practice ran the risk of allowing the counsel, under the aegis of the state, to elevate his client's interests above those of the state in achieving justice. *Id.* at 804-05. Moreover, the use of the interested party's attorney created "an appearance of impropriety that diminishes faith in the fairness of the criminal justice system in general." *Id.*

251. See *In re Padget*, 678 P.2d 870 (Wyo. 1984); *Morrison v. Olson*, 487 U.S. 654 (1988).

252. This safeguard was suggested by the Wisconsin Court of Appeals in *Gaveus v. Maroney*, 127 Wis. 2d 69, 377 N.W.2d 200 (Ct. App. 1985). The state of Pennsylvania allows a similar right of appeal. See PA. RULE CRIM. P. 133(B)(2) (Purdon 1989), construed in *Com. v. Muroski*, 352 Pa. Super. 15, 506 A.2d 1312, 1314 (1986). However, in light of the financial and emotional costs associated with such litigation it is unlikely that many complainants would pursue further review.

253. While this right of appeal would exist in law, in reality it is unlikely that prosecutors would appeal, given their natural desire as officers of the court to retain the judiciary's good will.

254. The writer is cognizant of the disparity among the appeal rights discussed here vis-à-vis defendants, the victim and the state. However, excessive procedural controls at this early stage would likely lead to what Arthur Rosett calls "judicialization": the tendency for each stage to assume the traits of a full-blown trial, making the process more expensive, complex and time-consuming. Rosett, *Discretion, Severity and Legality in Criminal Justice*, 46 S. CAL. L. REV. 12, 19 (1972). This is an inherent threat with any system involving judicial review and this threat should be minimized.

255. WIS. STAT. § 968.26 (1989-1990).

256. See *supra* notes 42-84 and accompanying text.

257. See *supra* notes 149-51 and accompanying text.



of powers principles.<sup>258</sup> The ability of complainants, in technical terms, to approach the court outside of the context of an investigative proceeding should be precluded. The legislature should modify section 968.26 to reflect the statute's contemporary usage—as an expedient investigatory alternative to the grand jury when the powers of the prosecutor and the court are joined in a shared enterprise.<sup>259</sup> Section 968.26 should be modified by the legislature to ensure that this approach is the continued emphasis. To this end, in the event a John Doe judge deems that a criminal complaint should issue in a given proceeding, the judge should direct the district attorney to file the complaint.<sup>260</sup>

## VII. CONCLUSION

Concern over the rights of victims in times of prosecutorial inaction is justifiably and increasingly making its presence felt across the country. In *Unnamed Defendant*, the Wisconsin Supreme Court approved of a system of checks over the largely unfettered discretion of prosecutors in the charging decision. This Comment has examined these little-used controls and found them inconsistent with separation of powers principles and the realities of the modern justice system. An alternative system of control has therefore been suggested, one which incorporates executive rule-making, the requirement of a written record in times of prosecutorial inaction and judicial review. Inevitably, such a reform will entail an uncertain degree of systemic costs. However, the check advocated here is designed to minimize such costs. Prosecutors would now have an incentive to regulate themselves to a much

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258. See *supra* notes 106-27 and accompanying text.

259. This role of the John Doe has been predominant for some time. In *State ex rel. Long v. Keyes* (1889), the Wisconsin Supreme Court related that “[t]he main purpos[e] [of the John Doe] is to obtain the facts in relation to the offense from the complainant and other witnesses. . . .” 75 Wis. 288, 293 (1889). More recently, the supreme court in *State v. Washington* pointed out that “[t]he John Doe is, at its inception, not so much a procedure for the determination of probable cause as it is an inquest for the discovery of crime in which the judge has significant powers.” *State v. Washington*, 83 Wis. 2d 808, 822, 266 N.W.2d 597, 604 (1978). See also *Wolke v. Fleming*, 24 Wis. 2d 606, 612, 129 N.W.2d 841 (1964); *State ex rel. Kurkierewicz v. Canon*, 42 Wis. 2d 368, 376, 166 N.W.2d 255 (1969).

260. As noted by the *Washington* court, as a matter of practice district attorneys are present in John Doe proceedings, but the statute does not mandate their presence: “It is usual but not required that an attorney representing the state’s interest in criminal prosecution be involved both in initiation and conducting the proceedings. Sec. 968.26, Stats., does not require the participation of the district attorney nor does it set forth the duties of the district attorney.” *Washington*, 83 Wis. 2d at 823 n.10, 266 N.W.2d at 605 n.10. This Comment is intended to apply to the typical situation where the district attorney is present. The legislature should consider recodifying the John Doe statute to require a member of the executive to be present in the course of John Doe proceedings. (If the executive itself were the subject of investigation special dispensation would be appropriate).

greater extent than ever before. Moreover, any costs ultimately incurred should be seen as a small price to pay for a charging system responsive to the needs of Wisconsin's citizens.

WAYNE A. LOGAN

