Are Prosecutors Charging Practices Above The Law?

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I. INTRODUCTION

On January 6, 2011, local authorities placed Aaron Swartz under arrest for illegally downloading millions of academic articles from subscription-based database JSTOR.[2] He was initially charged with two felonies of breaking and entering.[3] However, on November 6, 2011, the Middlesex County District Attorney filed charges against Swartz with six counts: two counts of breaking and entering with the intent to commit a felony; three counts of accessing a computer without authorization; and one count of larceny.[4] Aaron Swartz's attorney requested discovery from the DA; however, the U.S. Attorney's Office was in possession of all the evidence related to Swartz' alleged crimes, and refused production. This decision rendered the District Attorney unable to comply with the discovery request and consequently forced the District Attorney to dismiss the charges against Aaron Swartz.[5] However, the dismissal wasn't the end of the story for Swartz.

The lead prosecutor from the U.S. Attorney's Office filed new charges against Swartz, including four felony counts: one count of wire fraud and three counts for violating the Computer Fraud and Abuse Act (CFAA).[6] On September 12, 2012, despite no new evidence, the

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[2] Emily Bazelon, *When the Law is Worse Than the Crime, Why was a prosecutor allowed to intimidate Aaron Swartz for so long?* SLATE (January 1, 2013 3:59 PM). http://www.slate.com/articles/technology/technology/2013/01/aaron_swartz_suicide_prosecutors_have_too_much_power_to_charge_and_intimidate.html.

[3] Harold Abelson, Peter A. Diamond, Andrew Grosso, Douglas W. Pfeiffer, *Report to the President, MIT and the Prosecution of Aaron Swartz*, MIT (2012), http://swartz-report.mit.edu/docs/report-to-the-president.pdf.

[4] *Id*.

[5] *Id*.

[6] *Id*.

initial complaint was amended to include 13 charges instead of four.[7] Under the newly amended complaint Aaron Swartz was charged with two counts of wire fraud and eleven counts of violating the CFAA.[8] The charges filed by the U.S. Attorney's Office carried a potential 50-year sentence for Swartz. However, no conviction would happen in this case. Two years after his arrest, at the young age of 26, Swartz hung himself. Many blame the U.S. Attorney's Office for his death; asking, how did two breaking and entering charges multiply into 13 separate charges carrying a potential 50-year sentence? Some believe the prosecuting attorney at the U.S. Attorney's Office, Stephen Heymann, overcharged Swartz to generate publicity.[9]

The case of Aaron Swartz illustrates well how the subjective discretion of an unethical prosecutor can threaten the United States' unique system of justice. The ability of prosecutors to overcharge criminal defendants is abused too often and can lead to tragic consequences like the tragic suicide of Aaron Swartz. The criminal justice system would benefit if restrictions were placed on prosecutors, designed to prevent frivolous overcharging.

II. OVERCHARGING DEFINED

"Overcharging" in its general use can be defined as filing charges against a criminal defendant that are not reflective of the facts provided and when there is insufficient evidence to support a finding of "probable cause."[10] Overcharging is generally seen as unethical because the "touchstone of [the] due process analysis is the fairness of the trial, not the culpability of the prosecutor."[11] Overcharging is categorized into two types: horizontal overcharging and

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[7] *Id*.
[8] *Id*.
[9] Gerry Smith, *Aaron Swartz's Lawyer: Prosecutor Stephen Heymann Wanted 'Juicy' Case for Publicity*, HUFFINGTON POST (Jan. 14, 2011), http://www.huffingtonpost.com/2013/01/14/aaron-swartz-stephen-heymann_n_2473278.html.
[10] Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 47 (1983) (Discussing definition of overcharging).
[11] *Smith v. Phillips*, 455 U.S. 209, 219 (1981).

vertical overcharging.[12] Horizontal overcharging is the "unreasonable multiplying of accusations against a single defendant."[13] Vertical overcharging is the "charging of a single offense at a higher level than the circumstances of the case seem to warrant."[14]

Categorical differences aside, one underlying issue of overcharging must be addressed to protect the integrity of the criminal justice system. Prosecutors must never use excessive or disproportionate charges to gain leverage on the defendant and encourage them to plead guilty to a crime that is not supported by probable cause.

The body of ethics law in the United States is currently ill equipped to effectively discourage prosecutors from overcharging. The Model Rules of Professional Conduct address the issue of overcharging in Rule 3.8(a), which specifically states, "the prosecutor in a criminal case shall refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause."[15] In analogous fashion, the California Rules of Professional Conduct state in rule 5-110, "a member in government service shall not institute or cause to be instituted criminal charges when the member knows or should know that the charges are not supported by probable cause." The California Rule adds an additional requirement where the prosecutor responsible for the charges must advise the court if they become aware the charges are not supported by probable cause.[16] The ambiguous nature of these rules leaves room for different interpretations of probable cause, and the potential for unnecessary, and at times unethical, overcharging of criminal defendants.

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[12] Albert Alschuler, *The Prosecutor's Role in the Plea Bargaining*, 36 U. CHI. L. REV. 50, 86-87 (1968) (Defines types of overcharging).
[13] *Id*.
[14] *Id*.
[15] ABA Model Rules of Prof's Conduct, Rule 3.8(a).
[16] Cal. Rules of Prof'l Conduct, Rule 5-110 (2014).

In order to file charges, the Model Rules uniformly require a finding of probable cause; however, the standard of probable cause is vague in and of itself. Probable cause cannot be quantified and is not determined by way of a bright line rule. Rather, probable cause is a practical, nontechnical concept to be determined upon the facts and circumstances in each case.[17] In addition to probable cause being a low standard of proof; for a prosecutor to file charges, the inconclusive nature of it runs synonymous with inconsistent charging of criminal defendants and will continue to be abused by unethical prosecutors.

III. HISTORY AND POTENTIAL ROOTS OF OVERCHARGING

Prosecutors are frequently accused of overcharging defendants.[18] Supreme Court Justice Antonin Scalia said in a dissenting opinion that the act of overcharging "presents a grave risk ... that effectively compels an innocent defendant to avoid a massive risk by pleading guilty to a lesser offense."[19] While overcharging provides leverage in plea-bargaining and thereby produces higher rates of conviction, it prevents the prosecuting attorney from fulfilling their duty[20] to uphold and seek justice.[21]

An issue that may be incidental to excessive overcharging is a prosecutor's abuse of qualified immunity. Qualified Immunity gives public employees who act in accordance with

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[17] *Maryland v. Pringle*, 540 U.S. 366, 370-371 (2003).

[18] E.g., Jonathan Turley, *Trayvon Martin Prosecutor Accused of Overcharging and Being Party to "Institutional Racism"*, JONATHANTURLEY.ORG (May 12, 2012) http://jonathanturley.org/2012/05/12/trayvon-martin-prosecutor-accused-of-overcharging-and-being-party-to-institutional-racism/(quoting Rep. Brown claiming defendant Marissa Alexander "was overcharged by the prosecutor. Period. She never should have been charged."); John Dean, *Dealing With Aaron Swartz in the Nixonian Tradition: Overzealous Overcharging Leads to a Tragic Result* (January 25, 2013) http://verdict.justia.com/2013/01/25/dealing-with-aaron-swartz-in-the-nixonian-tradition (observing the prosecution of Aaron Swartz "that this case was seriously, unnecessarily, and brutally overcharged.").

[19] *Lafler v. Cooper*, 132 S.Ct. 1372, 1397 (2012) (Scalia, J. dissenting).

[20] ABA Criminal Justice Section Standards, Prosecution Function, Standard 3-1.2(c) The Function of the Prosecutor

[21] *Bordenkircher v. Hayes*, 434 U.S. 357 (1977) ("Indeed, acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process. By hypothesis, the plea may have been induced by promises of a recommendation of a lenient sentence or a reduction of charges, and thus by fear of the possibility of a greater penalty upon conviction after a trial.").

their jobs, immunity from civil liability.[22] "[Q]ualified immunity balances two important interests–the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties."[23] This immunity applies regardless of whether the prosecutor erred as a result of mistake of law, mistake of fact, or a combination of both.[24]

Problems with qualified immunity are demonstrated in the case of *Connick v. Thompson*. John Thompson, was charged with murder in 1985.[25] Due to public pressure, an additional, unrelated, armed robbery charge was filed.[26] A swatch stained with the robber's blood was found, and subsequently used against Mr. Thompson during trial.[27] The blood type and lab report were never verified[28] and Mr. Thompson was eventually convicted of armed robbery.[29] A few weeks later at his murder trial, Thompson did not testify because of his armed robbery conviction.[30] As a result he was convicted for murder and placed on death row twice for each of his convictions. Ultimately, Mr. Thompson's investigator found a lab report and had his blood type tested.[31] His blood did not match and on appeal his case was reversed, holding, he was deprived of his right to testify in his own defense at his murder trial.[32] In retrospect, the armed robbery charge was unlikely supported by probable cause; therefore, resulting in the overcharging of Mr. Thompson. Mr. Thompson was eventually exonerated and sued former

[22] *Lewis v. Tripp*, 604 F.3d 1221, 1230 (2010).
[23] *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).
[24] *Groh v. Ramirez*, 540 U.S. 551, 567 (2004) (Kennedy, J. Dissenting).
[25] *Connick v. Thompson*, 131 S. Ct. 1350, 1356 (2011).
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*

District Attorney Harry Connick.[33] However, in 2011 the U.S. Supreme Court dismissed his case because of Connick's immunity.[34]

Arguably, the underlying policy of having immunity is to assist in prosecuting; however, it also inadvertently allows prosecutors to overcharge defendants without fear of civil liability. Qualified immunity becomes an issue when a prosecutor overcharges because not only are they not held accountable to the full extent of the law, but the overcharging continues and the creditability of the justice system is jeopardized.

When prosecutors overcharge criminal defendants, they put their interests before those of the people they represent. Supreme Court Justice Robert Jackson captured this sentiment when he said, "if the prosecutor is obliged to choose his cases, it follows he can choose his defendants."[35] A method he added, that could result in "the most dangerous power" because the prosecutor will choose who he thinks he should get rather than choose the cases that need to be prosecuted.[36] When a prosecutor acts this way, it is a matter of finding a crime and then matching it with a defendant.[37] It is the duty of the prosecutor to match the person with the crime, but an inquiry of overcharging is not finding the commission of a crime and then pairing it with a defendant who has committed it, rather it is a question of selecting the defendant and then researching the laws, or putting investigators to work, to charge him with an obscure offense.[38]

Professor Tim Wu of Columbia Law School explained in American Lawbreaking, that the federal prosecutor's office in the Southern District of New York played a "darkly humorous

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[33] Radley Balko, *The Untouchables: America's Misbehaving Prosecutors, And The System that Protects Them*, HUFFINGTON POST (August 05, 2013), http://www.huffingtonpost.com/2013/08/01/prosecutorial-misconduct-new-orleans-louisiana_n_3529891.html.
[34] *Id*.
[35] 24 J. Am. Jud. Soc'y 18 (1940).
[36] *Id*.
[37] *Id*.
[38] *Id*.

game" where they would sit around and name random celebrities.[39] After the senior prosecutors picked a random celebrity name, they would order the junior prosecutors to indict the celebrity with a crime.[40] Of course, they did not include the broad crimes[41] we regularly see on television or in casebooks. They would choose obscure crimes, such as, "'false statements' (a felony, up to five years) or 'obstructing the mails' (five years)."[42] When a prosecutor realizes the power they possess, and hone their ability to fabricate charges from thin air, it opens a gateway to the problem of overcharging that we see in the justice system today.

Overcharging may result in an over-criminalization of the general public. A prosecutor is supposed to charge a defendant for crimes that are supported by probable cause.[43] Take for instance the cases of field invaders, individuals that run onto the field of play during a sporting event.[44] While seen by some as youthful indiscretion, in some jurisdictions this is a criminal misdemeanor.[45] This act could result in the charging of criminal trespass or criminal mischief,[46] and potentially result in a fine of $1000, one year in county jail, or both. Barring the nature of the field invasion,[47] overcharging a field invader could result in initial charges of an infraction and misdemeanor, or multiple misdemeanors to be used as a tactic to plead the defendant down to a single misdemeanor.[48]

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[39] Tim Wu, *American Lawbreaking*, SLATE (October 14, 2007), http://www.slate.com/articles/news_and_politics/jurisprudence/features/2007/american_lawbreaking/introduction.html.

[40] *Id*.

[41] E.g., *Id*. rape or murder.

[42] *Id*.

[43] ABA Model Rules of Prof's Conduct, Rule 3.8(a).

[44] Macmillan Dictionary, http://www.macmillandictionary.com/dictionary/british/pitch-invasion (last visited Oct. 15, 2014).

[45] ORS § 164.278.

[46] R.R.S. Neb. § 28-519, 520, 521.

[47] Allison Manning, *Field runner enters not guilty plea*, THE COLUMBUS DISPATCH (October 22, 2014) http://www.dispatch.com/content/stories/local/2014/09/30/OSU-field-runner-enters-not-guilty-plea.html (student ran onto football field during a game and was charged with misdemeanor criminal trespass).

[48] Cal. Penal Code 602 PC Misdemeanor Trespass, Cal. Penal Code 602.8.

Overcharging criminal defendants may result in a violation of their due process rights. Some prosecutors may inundate the criminal justice system with frivolous charges, effectively bypassing the requirement of probable cause and leading to plea agreements in their favor. In this instance, a prosecutor looking to overcharge will likely not wait for obvious signs of a crime, rather he will look for charges or enhancements in addition to those for which the defendant was arrested in hopes of encouraging the defendant to take a plea. Overcharging potentially violates an individual's due process rights where they may feel coerced to waiving their right to a jury trial or appeal. Each individual has explicit due process rights enumerated in the constitution. Overcharging violates these rights in that; however, it is seemingly disregarded when a prosecutor has unethical charging practices.

The practice of overcharging puts everyone at risk. The continued exercise of overcharging is an abuse of power that will cause American citizens to lose faith and trust in the system that is supposed to protect their constitutional rights.

Although most prosecutors charge ethically, there remains a need to implement changes to prevent abuse of the system. The fact that prosecutors both past and present have not been accused of overcharging on state or national level, suggests that a majority of prosecutors act in an ethical manner and exercise their discretion with virtuous intentions. However, the system is abused and solutions must be implemented.

IV. RECOMMENDATIONS

The longer overcharging goes unnoticed, the more likely it will continue and the faith and creditability of the United States' system of justice will be jeopardized. Therefore, a proactive, five-fold approach in resolving the unethical practice of overcharging should be implemented immediately.

A. The use of a grand jury.

The first and most traditional recommendation to resolve overcharging is the use of a grand jury. Grand juries allow the final charging decision to be made by members of the public. In theory, this added layer to the process will prevent criminal prosecutors from overcharging defendants because the decision is placed upon jurors; however, problems can arise if this process applies to every case. It was best said by Tom Wolfe in his satire novel *Bonfire of Vanities*, that a good criminal prosecutor can convince a jury to "indict a ham sandwich."[49] In an ideal world, most people placed on a grand jury will properly exercise their judgment. However, if an inexperienced juror comes in with preconceived notions that the defendant is already guilty until he is proven innocent[50] this could lead to a situation where some grand jury members rubber stamp cases because they misplace the burden of proof. Despite the potential problems with using a grand jury in all cases, it may be beneficial for jurisdictions to use them in certain circumstances.

New York acts as the poster child for this practice, requiring a grand jury for all felony cases.[51] The underlying policy of acting as the "sword and shield"[52] for alleged commission of serious crimes[53] compels jurors to exercise more caution and place burden of charging upon

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[49] *People v. Carter*, 77 N.Y.2d 95, 108 (1990) (Titone, J. dissenting) (quoting Tom Wolfe *The Bonfire of the Vanities*).

[50] E.g., Lori Quick, *Juror Misonduct: Recognizing it and Raising it on Appeal*, http://www.sdap.org/downloads/research/criminal/jmcdu.pdf; Christopher Robertson, David Yokum, and Matt Palmer, *Can Jurors Self-Diagnose Bias*? http://www.mslitigationreview.com/files/2013/05/Can-Jurors-self-diagnose-bias-2.pdf; *Circuit Consensus on Jurors' Disregard for Limiting Instructions on Defendant's Exercise of Right Not to Testify*, (October 22, 2014) http://federalevidence.com/blog/2014/march/circuit-consensus-juror-bias; Michael Helfand, *Can Jurors Really Be Impartial*?, (October 22, 2014) http://www.chicagonow.com/chicagos-real-law-blog/2010/10/can-jurors-really-be-impartial/.

[51] New York County District Attorney's Office, *Criminal Justice System: How it Works* (Last Updated May 12, 1999), http://manhattanda.org/criminal-justice-system-how-it-works?s=39.

[52] John Amodeo, Hon. Patricia Marks, Norman Goodman, Mary C. Mone, Dennis Hawkins, Phylliis Mingione, Vincent Homenick, Sidney Oglesby, Herculano Iqzuierdo, John Ryan, Barry Kamins, Hon. Micki Scerer, Elissa Krauss, Irwin Shaw, and Hon. Martin Marcus, *New York State Unified Court System: Grand Juror's Handbook*, http://www.nyjuror.gov/pdfs/hb_grand.pdf.

[53] *Id.*

themselves to use sound discretion on a more high profile case. It is in this capacity the implementation of a grand jury would be a step in the right direction.

B. Elimination of immunity.

To discourage overcharging, the United States should adopt a system that will strip prosecutors of their immunity after they have been shown to abuse their charging discretion. People are more likely to act in good faith when they have skin in the game. Finding that a prosecutor has abused their discretion by way of overcharging should require a showing of beyond a reasonable doubt. The standard would be set high because it would likely require more evidence to assist the trier of fact in making a ruling. It can be assumed a prosecutor will not only lose his immunity because a finding of such misconduct may result in being disbarred. Knowing that court proceedings may follow overcharging misconduct, may encourage a stricter adherence to the law.

C. Additional continued learning education for prosecutors.

A third recommendation to remedy the problem of overcharging comes in the form of requiring prosecutors to take a Continued Learning Education (CLE) exam every two years. The exam would have fifty multiple-choice questions and two essays with subject matter testing on general charging practices. Each multiple-choice question would equal one point and the essays would be twenty-five points each. The exam would require prosecutors to go through various scenarios and determine if probable cause exists. This may not completely defeat the unethical overcharging, but it could relieve the system of the unnecessary cases and or overcharging where probable cause does not exist. The idea is, “if you don't use it, you lose it” because if prosecutors continuously exercise their ethical standards they should have no problem earning a passing score. Conversely, prosecutors who find ways to overcharge may have greater difficulty

because they are not typically in the practice of performing their job ethically. The exam would not result in loss of job placement, but rather in suspension or limited duties. The idea is to discourage overcharging and keep the mind sharp.

D. Multilevel vertical integrated review system.

Another step in preventing overcharging comes in the form of a modified vertical integration. It could be more efficient if there were multiple prosecutors of increasing experience that a file must go through before charging decisions are made. In this system, district attorney offices would require three sequential findings of probable cause by three different attorneys in the same unit. If the last attorney does not believe the charges are supported by probable cause the individual will not be charged or unsupported charges will be dropped. This may slow an already congested calendar and put more pressure on offices with limited resources, but upholding justice is of the utmost importance. The purpose of this is to have a uniform charging practice within an office.

E. Requiring a higher standard of proof to charge.

The final recommendation to prevent overcharging by prosecutors is requiring a higher standard of proof to file criminal charges. Police officers must have probable cause to arrest an individual. It follows then that it is redundant for that case to go through the same evaluation by a prosecutor to determine if there was probable cause for the same crime. As previously stated, the ambiguous nature of the Model Rules of Professional Conduct could vary with each person. A police officer may believe there was probable cause, while a prosecutor may not. However, if the standard of clear and convincing evidence were applied, it may encourage a prosecutor to give more thought to charging instead of rubber-stamping the arresting officer's finding of probable cause.

V. CONCLUSION

Prosecutors have an exclusive set of ethical duties and must do their job in the most honorable fashion. Charging defendants only for the crimes that warrant punishment is one of those duties. A prosecutor's job is to benefit society, not become a detriment by needlessly punishing people for crimes they may not have committed. Such a prestigious position requires the same level of respect to the people they represent.

The prosecutor is uniquely situated and is supposed to act on behalf of the people while simultaneously seeking justice. Overcharging leads to problems that contradict this purpose and causes problems that potentially result in violation of an individual's due process rights, an overcriminalization of the general public, and lack of trust in the criminal justice system.

Solving this problem requires implementing safeguards. Each recommendation would be a step in finding the balance where charging practices match the crimes committed. If this balance is found on a national scale we will truly find the truth and justice we all seek.