September 2004

Prosecutorial Neutrality

Fred C. Zacharias
University of San Diego School of Law, zacharia@sandiego.edu

Bruce A. Green
Fordham University Law School

Public Law and Legal Theory Research Paper Series

September 2004

Prosecutorial Neutrality

Fred C. Zacharias, University of San Diego
and
Bruce A. Green, Fordham University

PROSECUTORIAL NEUTRALITY

Bruce A. Green*
Louis Stein Professor of Law and
Director, Louis Stein Center for Law and Ethics
Fordham U. School of Law

Fred C. Zacharias**
Herzog Endowed Research Professor of Law and
University Professor
U. of San Diego School of Law

* Louis Stein Professor of Law and Director, Louis Stein Center for Law and Ethics, Fordham University School of Law

** Herzog Endowed Research Professor of Law and University Professor, University of San Diego School of Law. The authors appreciate the excellent research assistance of Fred Funk and Chris Odne and the generous research support provided by their respective schools, the Fordham University School of Law and the University of San Diego School of Law.

Prosecutorial discretion plays a central role in criminal law enforcement.[1] Few decisions prosecutors make are subject to legal restraints or judicial review.[2] Consequently, the key question for prosecutors ordinarily is not whether their decisions are lawless, in the sense that a court might overturn them,[3] but rather whether the decisions are wise or imprudent.[4]

---

[1] Despite the practical significance of prosecutorial discretion, the subject for a long time received little attention in the academic literature. *See* RAYMOND MOLEY, POLITICS AND CRIMINAL PROSECUTION 48 (1929) (noting that the "increasing significance of the American prosecuting attorney has been strangely neglected by institutional commentators and historians"); John Kaplan, *The Prosecutorial Discretion – A Comment*, 60 NW. U.L. REV. 174, 174 (1965) ("Despite the enormous importance of the decision whether or not to prosecute, there has been an amazingly small amount of material published in this area"); Frank J. Remington & Victor G. Rosenblum, *The Criminal Law and the Legislative Process*, 1960 U. ILL. L.F. 481, 497 (noting that "little is known about this most important question" of how prosecutors and others in the criminal justice system exercise discretion). Newman Baker and Earl DeLong produced much of the early work. *E.g.*, Newman F. Baker, *The Prosecution – Initiation of Prosecution*, 23 J. AM. INST. CRIM. L. & CRIMINOLOGY, 770, 770 (1933) [hereinafter "Baker, *Initiation of Prosecution"*]; Newman Baker and Earl Delong, *The Prosecuting Attorney: Powers and Duties in Criminal Prosecution*, 24 J. CRIM. L. & CRIMINOLOGY 1025 (1934); Newman Baker and Earl Delong, *The Prosecuting Attorney and His Office*, 25 J. CRIM. L. & CRIMINOLOGY 695 (1935). Scholarly interest in the subject, however, grew substantially during the 1970s and 1980s. *E.g.*, HOWARD ABADINSKY, DISCRETIONARY JUSTICE: AN INTRODUCTION TO DISCRETION IN CRIMINAL JUSTICE 61-109 (1984); ABRAHAM S. GOLDSTEIN, THE PASSIVE JUDICIARY: PROSECUTORIAL DISCRETION AND THE GUILTY PLEA 33-51 (1981); JOAN E. JACOBY, THE PROSECUTOR'S CHARGING DECISION: A POLICY PERSPECTIVE (1977) (reporting a LEAA study of pretrial screening); WILLIAM F. MCDONALD, THE PROSECUTOR (1979); Sidney I. Lezak and Maureen Leonard, *The Prosecution's Discretion: Out of the Closet, Not Out of Control*, *in* CARL F. PINKELE & WILLIAM C. LOUTHAN, DISCRETION, JUSTICE AND DEMOCRACY: A PUBLIC POLICY PERSPECTIVE 44, 45 (1985); Wayne R. LaFave, *The Prosecutor's Discretion in the United* States, 18 AM. J. COMP. L. 532 (1970); Comment, *Prosecutorial Discretion -- A Re-evaluation of the Prosecutor's Unbridled Discretion and its Potential for Abuse*, 21 DEPAUL L. REV. 885 (1971).

[2] *See generally* Karl S. Coplan, Note, *Rethinking Selective Enforcement in the First Amendment Context*, 84 COLUM. L. REV. 144 (1984); Robert Heller, Comment, *Selective Prosecution and the Federalization of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion*, 145 U. PA. L. REV. 1309 (1997); Andrew B. Loewenstein, Note, *Judicial Review and the Limits of Prosecutorial Discretion*, 38 AM. CRIM. L. REV. 351 (2001); Tobin Romero, Note, *Liberal Discovery on Selective Prosecution Claims: Fulfilling the Promise of Equal Justice*, 84 Geo. L.J. 2043 (1996).

[3] One prominent judge has suggested that, even when charging decisions cannot be reviewed by courts, they are subject to constitutional constraints, albeit constraints that are unenforceable other than by prosecutors themselves. *See* United States v. Redondo-Lemos, 955

A number of commentators have either assumed that prosecutors[5] should be "neutral" in making discretionary decisions[6] or have criticized prosecutors for decisions that purportedly demonstrate a lack of neutrality.[7] Previously, neutrality had been associated primarily with

---

F.2d 1296, 1300 (9th Cir. 1992) (Kozinski, J.) ("Our only available course is to deny the defendant a judicial remedy for what may be a violation of a constitutional right–not to have charging or plea bargaining decisions made in an arbitrary or capricious manner.").

[4] *See, e.g.*, United States v. Van Engel, 15 F.3d 623, 629 (7th Cir. 1993) (Posner, C.J.) ("The Department of Justice wields enormous power over people's lives, much of it beyond effective judicial or political review. With power comes responsibility, moral if not legal, for its prudent and restrained exercise"). For a few recent analyses of prosecutorial discretion, see GEORGE F. COLE, CRIMINAL JUSTICE: LAW AND POLITICS 143-209 (6th ed. 1993); JULIA FIONDA, PUBLIC PROSECUTORS AND DISCRETION (1995) (reporting a comparative study of prosecutorial discretion); Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259 (2001); Robert L. Misner, *Criminal Law: Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717 (1996); Shelby A. Dickerson Moore, *Questioning the Autonomy of Prosecutorial Charging Decisions: Recognizing the Need to Exercise Discretion - Knowing There Will Be Consequences for Crossing the Line*, 60 LA. L. REV. 371 (2000); William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 OHIO ST. L.J. 1325 (1993); Ellen S. Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 FORDHAM L. REV. 1511 (2000).

[5] In alluding to prosecutors throughout this Article, we are not always referring to the particular prosecutors responsible for the cases in question. Often, we mean to refer collectively to all individuals with ultimate prosecutorial authority (e.g., the Attorney General or United States Attorney or the elected District Attorney) and to those in the prosecutors' office to whom authority has been delegated.

[6] The U.S. Attorney General himself recently announced a policy requiring federal prosecutors to seek the conviction of all defendants upon the maximum possible charges. *See* Eric Lichtblau, *Ashcroft Sets Curbs On Federal Plea Deals*, SAN DIEGO UNION TRIBUNE, Sept. 23, 2003, p.1 (describing the new policy). Presumably, the thrust of this policy was to eliminate inconsistent approaches within the federal prosecution corps and to impose a "neutral" standard to govern charging and plea bargaining decisionmaking.

[7] A prominent example was the response of Attorney General Edwin Meese 3d to an Independent Counsel report which found that, although prosecution of Meese was unwarranted, Meese had probably violated conflict-of-interest and tax laws. Meese's rebuttal accused the Independent Counsel of a "lack of neutrality," and questioned whether "a neutral prosecutor" would have made these allegations of misconduct based on the evidence. *The McKay Report; Excerpts From Rebuttal by Meese to Report of the Prosecutor*, N.Y. TIMES, July 19, 1988, p. A22. In fairness, we should note that the idea of prosecutorial neutrality is not entirely new. *See,*

judges, and was thought to describe a trait that distinguishes judges from lawyers.[8] The emerging notion of prosecutorial neutrality recalls the traditional conception of prosecutors as "quasi-judicial" officers,[9] and emphasizes the distinction between prosecutors and lawyers for private parties.

Neutrality appears to mean something different from, and more specific than, the

---

e.g., United States v. Wells, 163 F. 313, 326 (D. Idaho 1908)(with respect to the prosecutor's role in the grand jury, "[t]he fundamental idea which runs through the statutes and decisions apparently is that the prosecutor must remain neutral, must be impartial, must not undertake to control the finding by undue influence").

[8] For example, Fourth Amendment case law requires that search warrant applications be reviewed by "neutral and detached" judicial officers as distinguished from the police and prosecutors. *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443, 453 (1971) (search and seizure violated the Fourth Amendment because warrant was issued by state Attorney General "who was the chief investigator and prosecutor" and not by "the neutral and detached magistrate required by the Constitution"); Wallis v. O'Kier, 491 F.2d 1323, 1325 (10th Cir. 1974) ("[Supreme Court] decisions hold that police officers and prosecutors do not have that independence and neutrality which are necessary in the exercise of the issuance of search warrants"). In contrast, courts have stated in various contexts that prosecutors are not expected to be neutral. *See, e.g.*, In re April 1977 Grand Jury Subpoenas, 573 F.2d 936, 948 (6th Cir. 1978) (holding that litigants "may not demand a neutral prosecutor. . . . A judge should disqualify himself from a case he participated in as a lawyer, but a prosecutor need not disqualify himself because he has previously conducted other investigations of the same suspect . . .."); United States v. Rosner, 485 F.2d 1213, 1231 (2d Cir. 1973) (requiring resentencing because a presentence report was prepared "by the prosecutor, not a professional neutral"); Franks v. State, 543 S.W.2d 613, 616 (Tenn. 1976) ("We would emphasize to the District Attorney General that his role [at sentencing] should be more than detached neutrality"); Jennings v. State, 79 So. 814, 815 (Miss. 1918) (stating that, in making arguments to the jury, "the district attorney is not expected to approach with the cold neutrality of the judge").

[9] *See, e.g.*, Roberta K. Flowers, *What You See Is What You Get: Applying the Appearance of Impropriety Standard to Prosecutors*, 63 MO. L. REV. 699, 728-34 (1998) (stating that prosecutors must "protect society's values by prosecuting and convicting criminals while attempting to ensure that no innocent person is wrongly convicted" and that by doing so a prosecutor accomplishes the important goal of ensuring public confidence in the judicial system); Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197, 215-27 (1988)(observing that "in her quasi-judicial role the prosecutor acts impartially and judge-like; her orientation to the factual contest is neutral"); *cf.* Note, *Prosecutorial Indiscretion: A Result of Political Influence*, 34 IND. L.J. 477, 480-81 (1958) ("[Prosecutors] have the same duty as the trial court to see that justice is administered in conformity with recognized principles of law").

common notion that prosecutors should be "fair."[10] But the meaning attributed to prosecutorial neutrality has varied depending on the context.[11] The term has been used to express diverse, and potentially inconsistent, views of appropriate prosecutorial conduct.

This Article examines the deceptively complex ideal of prosecutorial neutrality in an effort to determine its value as a measure of prosecutorial conduct. If the concept has meaning, it can be significant in contemporary debates about the propriety of particular prosecutorial decisions. Conversely, if the concept of neutrality fails to capture an employable norm, that suggests a need for commentators to rethink their essential approach to the subject of prosecutorial discretion.

The Article demonstrates that, standing alone, the notion of prosecutorial neutrality is unenlightening because the term potentially encompasses a range of norms, each of which is itself uncertain in meaning. Commentators need to be more precise about what they expect of prosecutors and how particular prosecutors have fallen short of expectations. The Article also concludes, however, that the alternative conceptions of prosecutorial neutrality share a valid core premise: that prosecutors should make decisions based on articulable principles or sub-principles that command broad societal acceptance. This insight poses a challenge, for prosecutors have never, either individually or collectively, undertaken the task of identifying workable norms for the array of discretionary decisions that their offices make each day.

I. BACKGROUND: PROSECUTORIAL DISCRETION AND NEUTRALITY

A. Discretion

Prosecutors do not enforce the criminal law mechanically. Discretion pervades every aspect of their work,[12] including investigations,[13] charging and plea bargaining,[14] trials,[15]

---

[10] *See, e.g.*, Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2131 (1998) (observing that in plea bargaining, "[b]ecause the prosecutor is, in principle, looking for a 'fair' price rather than the highest price, arguments couched in terms of justice will have more currency than they might in a purely economic negotiation. . . . The prosecutor's proclaimed commitment to fairness, moreover, will typically permit defense counsel to appeal not only to general considerations of justice but to specific precedent").

[11] *See infra* Part IB.

[12] *See generally* Note, *Prosecutor's Discretion*, 103 U. PA. L. REV. 1057 (1955) (surveying discretionary decisionmaking).

[13] Prosecutors exercise discretion in deciding whether to initiate a grand jury investigation and whether to subpoena particular witnesses to the grand jury. They also advise the police and oversee the work of the police and other investigators. *See generally* Margaret McGhee, *Preliminary Proceedings, Prosecutorial Discretion*, 88 GEO. L. J. 1057, 1058-59

sentencing,[16] and responding to post-conviction events.[17]

(2000) (citing extensive authority concerning prosecutors' far-reaching authority over investigations and grand jury proceedings); Lynn R. Singband, Note, *The Hyde Amendment and Prosecutorial Investigation: The Promise of Protection for Criminal Defendants*, 28 FORDHAM URB. L.J. 1967, 1967-68 (2001) (discussing federal prosecutors' considerable involvement in the pre-charging investigation and virtual free rein over the charging decision); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1536-39 (1981) (discussing prosecutors' vast discretion in directing scores of law-enforcement personnel and "orchestrating" grand jury proceedings); *cf*. United States v. Dionisio, 410 U.S. 19, 23 (1973) (J. Douglas dissenting) (arguing that the grand jury has become nothing "but a convenient tool for the prosecutor" and that any "experienced prosecutor will admit that he can indict anybody at any time for almost anything before any grand jury").

[14] Prosecutors decide whether to institute a prosecution, which criminal charges to bring, whether to dismiss some or all charges, and what, if any, sentence to recommend or to accept in exchange for a guilty plea. For discussions of prosecutors' discretion in plea bargaining, see GOLDSTEIN, *supra* note 1, at 33-51; Julie Gyurci, Note, *Prosecutorial Discretion to Bring a Substantial Assistance Motion Pursuant to a Plea Agreement: Enforcing a Good Faith Standard*, 78 MINN. L. REV. 1253 (1994); Lynch, *supra* note 10; Terance D. Miethe, *Charging and Plea Bargaining Practices Under Determinate Sentencing: An Investigation of the Hydraulic Displacement of Discretion*, 78 J. CRIM. L. & CRIMINOLOGY 155 (1987); Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CALIF. L. REV. 1471 (1993); Ian Weinstein, *Fifteen Years After the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing*, 40 AM. CRIM. L. REV. 87 (2003).

[15] For example, prosecutors alone determine which witnesses to call and what arguments to advance. *See, e.g.*, Michael English, *A Prosecutor's Use of Inconsistent Factual Theories of a Crime in Successive Trials: Zealous Advocacy or Due Process Violation?*, 68 FORDHAM L. REV. 525, 538-43 (1999) (observing that, except for scant due process limitations, prosecutors may advance practically any factual theory that does not deceive the court); *cf*. Podgor, *supra* note 4, at 1522 (discussing the decision of when to provide witness statements).

[16] *See generally* Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501 (1992) (discussing the exercise of prosecutorial discretion under the federal sentencing guidelines).

[17] Anna Franceschelli, *Motions for Post DNA Testing: Determining the Standard of Proof Necessary in Granting Requests*, 31 CAP. U. L. REV. 243, 256 (2003) (discussing a statute in Washington that gives decision-making authority for post-conviction DNA testing to prosecutors and the state attorney general); Judith Goldberg and David Siegel, *The Ethical Obligations of Prosecutors in Cases Involving Post-Conviction Claims of Innocence*, 38 CAL. W. L. REV. 389 (2002) (discussing the extensive discretion available to prosecutors after a conviction and

The fact that prosecutorial decisions are discretionary does not imply that they are, or should be, standardless. Prosecutors might have the ability to flip coins or throw darts to determine which guilty individuals to charge with a crime, but society certainly would disapprove of such a cavalier approach.[18] Commentators therefore have attempted to identify the contours of legitimate discretionary decisionmaking. Much of the literature is descriptive, anecdotal, or empirical – identifying how prosecutors have made decisions in particular cases or categories of cases.[19] Some is normative – proposing how prosecutors ought to resolve specific issues.[20] But it is fair to conclude that there has been nothing approaching a systematic effort to define the principles that should govern prosecutorial decisionmaking.[21]

---

proposing guidelines for ethical post-conviction decisionmaking); Fred C. Zacharias, *Post-Conviction Justice*, ___ _____ ___, ___ (forthcoming 2004) (analyzing prosecutors' obligation to "do justice" post-conviction).

[18] *See* United States v. Redondo-Lemos, 955 F.2d 1296, 1299 (9th Cir. 1992) ("Given the significance of the prosecutor's charging and plea bargaining decisions, it would offend common notions of justice to have them made on the basis of a dart throw, a coin toss or some other arbitrary or capricious process.").

[19] *E.g.* Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968); Michael Kades, *Exercising Discretion: A Case Study of Prosecutorial Discretion in the Wisconsin Department of Justice*, 25 AM. J. CRIM. L. 115 (1997); Stephen J. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 AM. CRIM. L. REV. 231 (1989). The most substantial undertaking has been a survey sponsored by the American Bar Foundation in the 1960's that culminated in a systematic, but now outdated, study of the prosecutor's charging discretion. FRANK W. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME (1969).

[20] *See, e.g.*, Rory K. Little, *Proportionality as an Ethical Precept for Prosecutors in Their Investigative Role*, 68 FORDHAM L. REV. 723 (1999) (proposing ethics standards requiring prosecutors to consider proportionality when deciding whether to employ particular investigative techniques).

[21] Some commentators have tended to define their proposed standards at the highest level of generality – urging, for example, that prosecutorial decisions should be "fair". *See, e.g.*, Sam Earle Hobbs, *Prosecutor's Bias, An Occupational Disease*, 2 ALA. L. REV. 40, 41 (1949) ("[a district attorney] owes the defendant a solemn duty of fairness"); Robert Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMIN. 3, 4 (1940) (referring to the obligation of "fair dealing"). Others have proposed purely procedural solutions to the problems of arbitrariness, overzealousness and bias. *See, e.g.*, Aubrey Cates, Jr., *Can We Ignore Laws? - Discretion Not to Prosecute*, 14 ALA. L. REV. 1, 10 (1961) (recommending that prosecutors put in writing their reasons for not initiating a prosecution); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 18 (1998) (proposing "the use of racial impact studies in prosecution offices to advance the responsible, nondiscriminatory exercise of

"Principles" of decisionmaking differ from "policies". "Policies" refer to sets of rules or specific standards for making particular categories of decisions.[22] Prosecutors' offices, especially those that deal with a large volume of similar cases, often adopt policies in order to promote consistency and administrative efficiency. Prosecutorial policies typically are not meant to be judicially enforceable, are presumptive, and may or may not be public.[23]

"Principles," in contrast, refer to fundamental, normative premises about prosecutorial decisionmaking that ideally underlie both prosecutorial policies and ad hoc decisionmaking.[24]

---

prosecutorial discretion"); John A. Horowitz, Note, *Prosecutorial Discretion and the Death Penalty: Creating a Committee to Decide Whether to Seek the Death Penalty*, 65 FORDHAM L. REV. 2571 (1997) (urging decision by committee); Moore, *supra* note 4, at 400-04 (advocating more supervision of prosecutors and enabling acquitted defendants to bring civil suits and criminal charges against prosecutors for intentional abuses of power); Podgor, *supra* note 4, at 1514 (encouraging the education of prosecutors); Walter Steele, Jr., *Unethical Prosecutors and Inadequate Discipline*, 38 SW. L.J. 965, 982-88 (1984) (proposing private redress of grievances against prosecutorial misconduct in the trial setting).

[22] *See, e.g.*, Bennett L. Gershman, *A Moral Standard for the Prosecutor's Exercise of the Charging Discretion*, 20 FORDHAM URB. L.J. 513, 519 n.12 (1993) (discussing particular prosecutorial policies).

[23] *See, e.g.*, Kim Banks Mayer, Comment, *Applying Open Records Policy to Wisconsin District Attorneys: Can Charging Guidelines Promote Public Awareness?*, 1996 WIS. L. REV. 295, 297 (1996) (discussing the pros and cons of a proposal to require district attorneys to adopt and publicize charging guidelines). For example, the U.S. Department of Justice has adopted and published policies on a considerable number of investigative, charging and plea bargaining issues. U.S.A.M. § 9-2.010 (discussing investigations and whether to prosecute); U.S.A.M. § 9-27.400 (discussing plea-bargaining generally). The subjects of Department of Justice policy range from whether or not to subpoena lawyers, journalists or family members of the person under investigation, to whether to initiate RICO or tax charges based on particular conduct, to whether to extend leniency to a corporation. U.S.A.M. §9-13.400-.410 (discussing subpoenas for news media personnel and attorneys); §9-110.300-.330 (guidelines for initiating RICO prosecutions); § 6-4.010-.311 (guidelines for bringing tax charges). Individual state and federal prosecutors' offices may also have non-public policies; for example, policies regarding indictments of bank tellers who have embezzled less than a certain amount of funds and persons who have been arrested while possessing less than a certain quantity of drugs.

[24] *See, e.g.*, David A. Sklansky, *Starr, Singleton, and the Prosecutor's Role*, 26 FORDHAM URB. L.J. 509, 532 (1999) (discussing principles governing charging and concluding that "principles alone [often] will not determine the outcome . . . . And prosecutors, like judges, often reason from the specific to the general, deriving their working principles from particular circumstances, instead of simply applying preexisting principles to the situations they encounter").

Some principles of prosecutorial conduct command a broad consensus.[25] Others are more controversial.[26] Principles also can range from global, first-order principles that purport to

---

[25] For example, most commentators would agree that a prosecutor should not bring charges unless she has some degree of confidence that the person charged is in fact guilty – although there is disagreement about how much confidence is needed. *See, e.g.*, Gershman, *supra* note 22, at 522 (arguing that a prosecutor must be morally certain that a defendant is factually and legally guilty before bringing charges); Kaplan, *supra* note 1, at 178 (reviewing one federal prosecution office and concluding that "It was generally agreed that . . . if the prosecutor did not actually believe in the guilt of the accused, he had no business prosecuting"). Many would also agree that a prosecutor should not pursue charges unless she is confident that a conviction can be obtained. *See, e.g.*, Kaplan, *supra* note 1, at 180 (stating that a prerequisite to prosecution is whether "the case could be expected to result in a conviction"); Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 B.Y.U. L. REV. 669. 702 ("the prosecutor must refuse to accept the risk of conviction of individuals when the prosecutor has reasonable doubts as to their guilt"). There is a range of views on how likely it must be that the prosecution will secure a conviction. *See* Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 ILL. L. REV. 1573, ___ (discussing competing viewpoints).

[26] One such principle is the understanding that a prosecutor need not charge every guilty person who can be convicted. *Compare* George Framton, Jr., *Some Practical and Ethical Problems of Prosecuting Public Officials*, 36 MD L. REV. 5, 14-15 (1976) (discussing the countervailing considerations in a prosecutor's decision of whether to prosecute a political figure she believes to have committed a crime) and Moore, *supra* note 4, at 377 (arguing that a prosecutor must decide whether prosecution would be in the public's best interests) *with* Newman Baker, *The Prosecutor - Initiation of Prosecution, supra* note 1, at 770 (adopting the premise that a prosecutor "is bound to commence proceedings" if the law is violated). Under the commonly held view, charges need not be brought when criminal punishment would be undeservedly harsh, when an offense is trivial, or when the offender is subject to sufficient punishment by other authorities. *See, e.g.*, Kaplan, *supra* note 1, at 188, 193 (describing the issue as whether "prosecution in the long run would do more harm than good"); Lynch, *supra* note 10, at 2127 ("[P]rosecutors are not seeking simply to maximize the amount of jail time that can be extracted from their adversaries, regardless of guilt or innocence; rather, they undertake to determine, in response to the defendant's arguments, whether the evidence truly demonstrates guilt, and if so, what sentence is appropriate"); Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 L. & CONTEMP. PROBS. 23, 35-37 (1997) (discussing whether it is appropriate to seek criminal prosecution against corporate defendants when civil or administrative sanctions are sufficient punishment); William Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 569-79 (2001) (finding that legislatures trust prosecutors not to enforce laws that encompass relatively innocent acts).

Somewhat more controversial are the principles that prosecutors should decline to pursue charges only when necessary to conserve financial or administrative resources, that prosecutors should not seek excessive punishment, and that prosecutors may offer leniency to secure an

govern all decisions to more defined, second-order "sub-principles" that apply to categories of decisions.[27] Commentators who have emphasized the notion of neutrality ordinarily have treated it as a first-order principle of fundamental significance.

It is important to advance the dialogue regarding appropriate principles of prosecutorial decisionmaking both because prosecutors need better touchstones on which to base decisions and because the public needs meaningful criteria for assessing claims of prosecutorial abuse. Questions about prosecutorial decisionmaking have been a subject of perennial public concern,[28] but never more than in recent years.

In the 1990s, American society heatedly debated whether several special prosecutors, and especially Independent Counsel Kenneth Starr, acted too politically (or not politically enough) to satisfy the public's expectations.[29] More recently, commentators have questioned federal prosecutors' efforts to combat terrorism,[30] espionage,[31] drug dealing,[32] and white-collar crime.[33]

---

offender's valuable cooperation against others. *See, e.g.*, Kaplan, *supra* note 1, at 187 (discussing the use of accomplice testimony); H. Lloyd King, Jr., *Why Prosecutors Are Permitted to Offer Witness Inducements: A Matter of Constitutional Authority*, 29 STETSON L. REV. 155, 155-58 (1999) (discussing whether prosecutors must bring the highest possible charge and the benefits of exchanging leniency for testimony); Lynch, *supra* note 10, at 2139 ("prosecutorial decisions inevitably combine judgments of desert with judgments of resource allocation"); Sklansky, *supra* note 24, at 533-36 (discussing federal prosecution guidelines governing whether prosecutors should charge "the provable offenses that would result in the heaviest possible sentence").

[27] *See infra* text accompanying note 121.

[28] See Carolyn B. Ramsey, *The Discretionary Power of "Public" Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1312-13 (2002) ("In the 1880s and 1890s, as today, prosecutors were accused of failing to be accountable for pre-trial decisions. The press made demands for consistency, principle, and visibility similar to those articulated during the past few decades").

[29] *See, e.g.*, Paul Butler, *Starr is to Clinton As Regular Prosecutors Are to Blacks*, 40 B.C. L. REV. 705, 711 (1999) (arguing that, in assessing the Independent Counsel's activities, "the public is engaging in an analysis of the benefit of prosecution and punishment of a law breaker versus the cost of that law enforcement. The way to measure this cost is by gauging the effect that prosecution has on the community").

[30] *See, e.g.*, Lucy Dalglish, *Democracies Die Behind Closed Doors*, ORLANDO SENTINEL, Sept. 5, 2002, p. A17 (suggesting that Attorney General Ashcroft's Justice Department is not serving the public's best interests when attempting to investigate and prosecute terrorism cases in complete secrecy); Edward Alden & Anne Fifield, *The Planned Use of Military Tribunals to Hear Terrorist Cases May Affect the Trials' Credibility and Could Make it Difficult for Washington to Claim the Moral High Ground in Urging Judicial Reform Elsewhere in the World*, FINANCIAL TIMES (London) July 16, 2003, p. 15 (suggesting that the failure to prosecute detainees from Guantanamo Bay in civilian court weakens U.S. claims of justice and does

On the state and local level, prosecutors have been criticized for bringing cases that are too weak or poorly investigated,[34] for bringing prosecutions that are unduly harsh,[35] and for other purported excesses.[36] The ongoing public debate regarding appropriate prosecutorial

---

damage to international credibility).

[31] *See, e.g.*, Commentary, *Resolution for Wen Ho Lee*, HARTFORD COURANT, Sept. 17, 2000, p. C2 (opining that federal government undertook an "overzealous prosecution" of nuclear scientist accused of espionage in response to pressure from Congress "to solve the so-called China spy case").

[32] *See, e.g., DEA is Out of Touch*, ST. PETERSBURG TIMES, June 19, 2003, p. 16A (criticizing policy decision by the federal Attorney General to "unleas[h] the DEA to shut down medical marijuana operations"); *Not a Drug Dealer*, S.F. CHRONICLE, June 2, 2003, p. B6 (criticizing the federal prosecution of Ed Rosenthal for growing marijuana for medical use, as permitted by state law, and maintaining that "the letter of the federal law must be weighed against common sense, humanity and the spirit of a voter-approved initiative"); *Federal Persecution*, N.Y. TIMES, May 31, 2003, p. A14 ("It is a waste of [federal] law enforcement resources to prosecute and incarcerate medical marijuana cultivators. And it is particularly wrong to do so in a state . . . that has expressly made it legal, after a trial in which the jurors were not told the full story").

[33] *See, e.g.*, William Safire, *Fight It, Martha*, N.Y. TIMES, June 12, 2003, p. A35 (stating, "I hope [Martha Stewart] beats the rap because I don't like the idea of a prosecutor – eager to deter others from wrongdoing – twisting the law to make an example out of a celebrity. In doing justice, righteous ends don't justify unscrupulous means."); John C. Danforth, *When Enforcement Becomes Harassment*, N.Y. TIMES, May, 6, 2003, p. A31 (referring to Arthur Anderson prosecution); Jack Quinn, *Rich was Railroaded*, USA TODAY, Feb. 2, 2001, p. 11A (arguing that the federal prosecutors who indicted Marc Rich "misused the racketeering sledgehammer . . . to attack Rich for what was no more than a regulatory dispute about process and controls").

[34] *See, e.g., Look Into Their Faces*, ST. LOUIS POST-DISPATCH, Apr. 27, 2003, p. B2 (opining that prosecutor overreacted to abuse of child in foster care by "fil[ing] a weak criminal case against a nurse who had seen [him] during a hospital visit"); *Investigate, Then Prosecute: Bungled Lewis trial: Atlanta Prosecutors, Police Rushed to Indict Before They Had All the Evidence*, BALTIMORE SUN, June 14, 2000, p. 22A (stating that "overzealous prosecutors created an embarrassing fiasco" by indicting football player Ray Lewis for murder before collecting the relevant evidence).

[35] For example, because of particular defendants' age or level of culpability. *See, e.g., Once Again, Drug War Picks Wrong Battle,"* ATLANTA JOURNAL-CONSTITUTION, Aug. 11, 2002, p. 8F (criticizing the prosecution of a 12-year-old for drug offense).

[36] *See, e.g., Victim of Witchhunt Deserves Justice*, FORT LAUDERDALE SUN-SENTINEL,

decisionmaking suggests the need for deeper analysis of the common conceptions of prosecutorial discretion.

A few legal limitations do bound prosecutorial discretion. Some take the form of enforceable law.[37] Other standards applicable to criminal cases do not provide a basis for direct regulation of prosecutors, but establish norms of conduct that affect how prosecutors exercise their powers.[38] Informal mechanisms - including public oversight, political realities, and internal and administrative supervision - set boundaries too.[39] Yet when all is said and done, individual prosecutors' preferences still control a vast range and number of choices, free of outside or supervisory controls.

B. The Role of Neutrality in Prosecutorial Decisionmaking

Many commentators have suggested that prosecutors act improperly when they fail to act neutrally.[40] What the commentators mean by neutrality, however, differs.[41] Some may not have a

---

Jan. 20, 2001, p. 16A (describing child abuse prosecution of Margaret Kelly Michaels as "a modern-day witchhunt"); *Justice Eluded Again in Murder Case*, CHI. TRIBUNE, Nov. 15, 2000, p. 20 (describing a defendant as a victim of "one outrageous jailhouse liar and a handful of overzealous prosecutors").

[37] Such limitations range from constitutional law governing prosecutorial vindictiveness, to statutory law providing remedies for abuses of discretion, to professional rules regulating the administration of justice. *See, e.g.*, 18 U.S.C. §3006(A) note (West 1997) (authorizing federal courts to award attorneys' fees to criminal defendants who retained counsel to defend against frivolous or vexatious charges); Thigpen v. Roberts, 468 U.S. 27 (1984) (holding unconstitutional a manslaughter prosecution after defendant chose to appeal misdemeanor convictions, based on a presumption of prosecutorial vindictiveness). These are "enforceable law" largely in the sense that they are explicit. As an empirical matter, professional discipline of prosecutors has been rare. Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N. CAR. L. REV. 721, 755 (2001).

[38] These include, for example, probable cause standards for when prosecutors should authorize searches or arrests and other constitutional standards that define how prosecutors must act in disclosing information or at trial (*e.g.*, in closing arguments). For a discussion of a range of informal constraints courts can impose upon prosecutors, see Bruce A. Green and Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381, 400-03 (2002).

[39] Internal oversight can include administrative rules, guidelines, manuals, and supervisor recommendations that limit what line prosecutors may do, or are willing to do. *See* Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 ST. THOMAS L. REV. 69, 76-77 (1995) (discussing Department of Justice guidelines).

[40] Roberta K. Flowers, *A Code of Their Own: Updating the Ethics Codes to Include the*

clear image in their own minds of what the concept entails.[42]

In the context of special, or independent, prosecutors, for example, commentators have referred to the need for prosecutors to be *politically* neutral,[43] as well as neutral in the sense of being independent of those who have an interest in the case.[44] In cases involving high-ranking

---

Non-Adversarial Roles of Federal Prosecutors, 37 B.C. L. REV. 923, 972 (1996) (proposing that the Department of Justice introduce provisions in their ethics codes that ensure prosecutors strive to remain neutral in their pre-trial roles); Ken Gormley, *An Original Model of the Independent Counsel Statute*, 97 MICH. L. REV. 601, 616-617 (1998) (arguing that the initial purpose of the independent counsel statute was to provide a "neutral prosecutor" in executive branch investigations); Lynch, *supra* note 10, at 2149 (stating that "[p]rosecutors should be trained to approach their determinations of appropriate dispositions in a spirit of fairness and neutrality"); Michael McTigue, Jr., *Court Got Your Tongue? Limitations on Attorney Speech in the Name of Federalism: Gentile v. State Bar*, 72 B.U. L. REV. 657, 671 (1992) (stating that the public generally views prosecutors as neutral parties interested only in a just result); H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM. L. REV. 1695, 1701 (2000) (proposing that to properly discharge her duty, a prosecutor must act neutrally at least until the case passes to the adversarial or trial stage).

[41] *See* Flowers, *supra* note 40, at 924 ("In determining the offense and the offender, the investigating attorney should act not as an advocate but as a neutral fact finder"); Gormley, *supra* note 40, at 603 (using the phrase "neutral prosecutor" to mean a prosecutor who is not politically biased or especially beholden); Lynch, *supra* note 10, at 2128-30 (using neutrality only to mean the vaguer standard of "fairness"); Uviller, *supra* note 40, at 1696 (using neutrality in pre-trial determinations as a substitute for the more familiar "quasi-judicial" role of prosecutors).

[42] To be clear, we should note that this Article is not taking a position on whether or not the actions of the prosecutors in the examples are proper. We simply identify the examples as instances in which the prosecutorial activity might be criticized by some commentators for its lack of so-called neutrality.

[43] *See, e.g.*, Kenneth Gormley, *Starr Should Cut a Deal With Clinton*, NEWSDAY, Oct. 2, 1998 , p. A53 (criticizing Independent Counsel Kenneth Starr for "straddling the line between serving as neutral special prosecutor and a warm-up act for Congress impeachment exercises"); Stephen Labaton, *Rethinking a Law*, N.Y. TIMES, Dec. 13, 1997, p. A10 (stating that the office of the independent counsel was created "to renew public confidence in the political and legal systems by pulling sensitive investigations of high officials away from the Justice Department and politics and putting them into the hands of seasoned and neutral prosecutors"); *see generally* James P. Fleissner, *The Future of the Independent Counsel Statute: Confronting the Dilemma of Allocating the Power of Prosecutorial Discretion*, 49 MERCER L. REV. 427, 431-39 (1998) (discussing the pros and cons of the use of independent counsel to prosecute government officials).

[44] *See, e.g.*, Leslie Boellstorff, *Federal Probe Set In Death Lancaster County Names*

executive-branch officials, some observers have taken the position that Department of Justice attorneys cannot maintain the level of neutrality that is ordinarily expected of a prosecutor. When persons outside the Department have been assigned to prosecute, as in the appointment of Kenneth Starr to investigate President Clinton,[45] the special prosecutor's output typically has been measured against the expectation of neutrality,[46] in the sense of political nonpartisanship.[47]

Prosecutor, OMAHA WORLD HERALD, Oct. 13, 1994, p. 1 (reporting a county judge who stated that he appointed a private attorney who "is 'completely neutral in every respect'" to investigate possible police brutality); *Special Prosecutor*, Houston Chronicle, Sept. 28, 1991, p. A33 (stating that the county attorney referred an investigation of county judge to "a neutral, independent prosecutor . . . to remove any appearance of bias or impropriety"). Persons who have an interest may include not only the targets of investigations and their victims, but also their political allies and opponents.

[45] This investigation is described and discussed in detail in Stephen Kline, *Heal It, Don't Bury It! Testimony on Re-Authorization of the Independent Counsel Act*, 1999 MICH. ST. U. DET. C.L. L. REV. 51 (1999) and Robert Gordon, *Imprudence and Partisanship: Starr's OIC and the Clinton-Lewinsky Affair*, 68 FORDHAM L. REV. 639, 703-707 (1999).

[46] *See, e.g.*, Gordon, *supra* note 45, 123 at 708 (stating that while the Independent Counsel in his referral and testimony before the House Judiciary Committee "could choose to be a relatively neutral and objective reporter of facts or a disinterested analyst of the factual, constitutional, and legal issues involved, Starr chose neither"); Pat Wilcox, *No Neutral Parties*, THE CHATTANOOGA TIMES, Nov. 21, 1998, p.A8 (stating that House Judiciary Chairman Henry Hyde's efforts "to portray independent counsel Kenneth Starr as neutral was downright funny"); Marianne Means, *Starr Has One More Chance to Justify Actions and Soften Image*, SEATTLE POST-INTELLIGENCER, Nov. 18, 1998, p.A18 (arguing that the way in which Starr conducted his investigation evinced a lack of neutrality); Bruce Gottlieb, *What Did Ken Starr Do Wrong?*, SLATE MAGAZINE, Oct. 17, 1998 (arguing that because Starr did not reveal a minor involvement in a civil suit against the president he showed "once again that [he] is not a neutral pursuer of justice"); *cf.* H. Geoffrey Moulton, Jr. & Daniel C. Richman, *Of Prosecutors and Special Prosecutors: An Organizational Perspective*, 5 WID. L. SYMP. J. 79, 79 (2000) ("Like many others, we have found [Starr's] exercise of prosecutorial power terribly troubling. Also troubling, however, is the difficulty we (and others) have had in identifying 'neutral principles' of prosecutorial discretion that Starr violated").

[47] *See, e.g.*, Richard Pious, *Impeaching the President: The Intersection of Constitutional and Popular Law*, 43 ST. LOUIS U. L.J. 859, 897 (1999) ("The public had little use for Starr and his investigation, largely agreeing with the First Lady in seeing the investigation as partisan and politically motivated"); Matthew Tate Rossettini, *Bastille Day: Litigation, Investigation and Legal Coup D'Etat in the United States*, 5 WIDENER L. SYMP. J. 297, 333 (2000) (proposing stricter limitations on the power of the independent counsel which would have meant that "Starr would not have been able to manifest a conflict of interest in investigating the President because he could only investigate what government officials (and the public) with credible information

Outside the context of official corruption cases, prosecutorial neutrality can have quite different meanings. For example, in death penalty cases, where racial disparities are a subject of concern,[48] prosecutors are enjoined to be racially "neutral".[49] With respect to garden-variety investigations and prosecutions, neutrality sometimes connotes independence from the police.[50] And, with respect to the prosecutor's review of evidence to determine whether to bring charges, commentators have used "neutrality" to suggest objectivity.[51] All of these definitions of "neutrality," and others that we shall discuss, embody potentially legitimate notions of how prosecutors should act.

Parts II-IV of this Article illustrate that there are three broad (but somewhat overlapping) dimensions of prosecutorial neutrality. Each of these dimensions includes a variety of possible components, and each could be defined in a more or less inclusive way. We use the categories in

---

want him to investigate, not what he wanted to investigate as motivated by his political bias"); *cf.* Ken Gormley, *Monica Lewinsky, Impeachment, and the Death of the Independent Counsel Law: What Congress Can Salvage From the Wreckage - A Minimalist View*, 60 MD. L. REV. 97, 99 (2001) (discussing the dangers of political partisanship when independent prosecutors are appointed); Philip B. Heymann, *Should Latin American Prosecutors Be Independent of the Executive in Prosecuting Government Abuses?*, 26 U. MIAMI INTER-AM. L. REV. 535, 553-54 (1995) (discussing what "independent prosecutors" can do to "strengthen the hand of democratically-elected leaders in preventing abuses by a powerful military in the name of internal security"); Brett M. Kavanaugh, The *President and the Independent Counsel*, 86 GEO. L.J. 2133, 2149 (1998) (alluding to the risk that an independent counsel will be seen to be "excessively partisan" against the executive when the independent counsel is appointed by Congress or the courts).

[48] Statistics suggest that the death penalty has been sought and imposed disproportionally in cases involving minority defendants and/or white victims. *See, e.g.*, Kathryn Roe Eldridge, *Racial Disparities in the Capital System: Invidious or Accidental?*, 14 CAP. DEF. J. 305 (2002) (discussing some of the data).

[49] *See, e.g.*, Stephanie Hanes, *Judge Imposes Two Life Terms in Killing of 2*, BALT. SUN, Mar. 7, 2003, p. 1B (stating that prosecutors in capital case viewed the case "as an example of the office's race-neutrality"). In other words, prosecutors should not take race into account

[50] *See, e.g.*, Christie Blatchford, *Morin Revelations Changed Nothing*, TORONTO SUN, Oct. 7, 1997, p. 5 (reporting veteran Crown Prosecutor's lecture to police "that the notion of a Crown attorney being an impartial vehicle for the truth or the presenter of the facts was 'bullshit," gave the "unmistakable message. . . that the prosecutor wasn't neutral, that he was part and parcel of the police team").

[51] *See, e.g.*, Lou Gelfand, *Does Son's Disability Justify Privacy?*," MINNEAPOLIS STAR TRIBUNE, Oct. 31, 1993, p. 29A (reporting the claim of a lawyer for a client accused of assaulting a police officer that a "neutral prosecutor . . . refused to charge my client with any crime after a review of the facts and police reports").

the pages that follow simply as a way of organizing our discussion.

One well-accepted aspect of prosecutorial neutrality is the notion that prosecutors should not be biased in their decisionmaking.[52] Bias itself encompasses several concepts. The law is settled that prosecutors may not act out of racial or ethnic prejudice[53] or against a particular religious group for reasons of its beliefs.[54] At least in a basic sense, society also expects prosecutors to be disinterested – to recuse themselves from cases when they have personal stakes in the matters at issue.[55] In general, we refer to the category of "non-bias" as capturing the

---

[52] *See supra* Part II; *see also* AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 3-3.1(b) (3rd ed. 1993) (forbidding prosecutors to "invidiously discriminate" on the basis of "race, religion, sex, sexual preference, or ethnicity") [hereinafter "ABA STANDARDS"]; Dwight L. Greene, *Abusive Prosecutors: Gender, Race & Class Discretion and the Prosecution of Drug-addicted Mothers*, 39 BUFF. L. REV. 737, 745 (1991) (questioning whether prosecutions of drug-addicted mothers "is the result of neutral exercises of [prosecutors'] discretion" or a result of racial and class bias); Adina Levine, *A Dark State of Criminal Affairs: ADR Can Restore Justice to the Criminal "Justice" System*, 24 HAMLINE J. PUB. L. & POL'Y 369, 392 (2003) (arguing that "ADR intervention at the plea bargaining process would provide neutrality at this pivotal juncture in the criminal process where racial bias runs rampant"); Rebecca A. Pinto, Note, *The Public Interest and Private Financing of Criminal Prosecutions*, 77 WASH. U. L.Q. 1343, 1353-54 (1999) (arguing that prosecutors sometimes are not neutral because they are not held to a strict standard of non-bias); Anne Bowen Poulin, *Prosecutorial Discretion and Selective Prosecution: Enforcing Protection After United States v. Armstrong*, 34 AM. CRIM. L. REV. 1071, 1109-1120 (1997) (linking prosecutorial neutrality and determining bias in selective prosecution cases).

[53] Oyler v. Boles, 368 U.S. 448, 456 (1962) (finding that some consciously selective enforcement is constitutional as long as the selection was not "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification"); Batson v. Kentucky, 476 U.S. 79, 97 (1986) (requiring prosecutors to provide a "neutral explanation" for the exercise of peremptory challenges, in the sense that the decision to challenge must be shown not to have been based on race or gender); *see also* Daniel Givelber, *The New Law of Murder*, 69 IND. L.J. 375, 419 (1994) (arguing that race-neutrality is the key to the legitimacy of prosecutorial charging decisions in capital cases).

[54] *See, e.g.*, Wayte v. United States, 470 U.S. 598, 608 (1985) (stating that "[i]n particular, the decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification").

[55] *See, e.g.*, JOHN WESLEY HALL, JR., PROFESSIONAL RESPONSIBILITY OF THE CRIMINAL LAWYER § 11:36, at 443 (2d ed. 1996) (noting that a prosecutor should be removed based upon factors such as "close personal friendship, political rivalry, and the display of personal antagonism and animosity toward the accused"); Rita M. Glavin, Note, *Prosecutors Who Disclose Prosecutorial Information for Literary or Media Purposes: What About the Duty of*

dimension of neutrality which presupposes that prosecutors will exclude particular forbidden considerations from their decisionmaking.

A second common conception of prosecutorial neutrality is that prosecutors should engage in nonpartisan decisionmaking.[56] The contours of nonpartisanship are less concrete than the components of non-bias. Nonpartisanship arguably includes such notions as independence from actors who wish to influence prosecutorial decisions, objectivity in weighing evidence, and freedom from political agendas. In general, we refer to "nonpartisanship" as covering the dimension of neutrality that captures attitudes or states of mind which prosecutors are expected to bring to decisionmaking.

The third dimension of neutrality is the notion that prosecutors should base their decisions on readily identifiable and consistently-applied criteria.[57] In a sense, this dimension of

---

Confidentiality?, 63 FORDHAM L. REV. 1809, 1832 (1995) ("A chief prosecutor must recuse himself in other situations where he has a conflict, or even the appearance of conflict"); Douglas R. Richmond, *The Rude Question of Standing in Attorney Disqualification Disputes*, 25 AM. J. TRIAL ADVOC. 17, 62 (2001) (stating that prosecutors should recuse themselves when they have a personal interest in a case); Edward L. Wilkinson, *Conflicts of Interest in Texas Criminal Cases*, 54 BAYLOR L. REV. 171, 197 (2002) (noting that prosecutors generally are expected to be disinterested, but that Texas statutes and rules do not define the level of interest that is required for disqualification); *cf. generally* Susan W. Brenner and James Geoffrey Durham, *Towards Resolving Prosecutor Conflicts of Interest*, 6 GEO. J. LEGAL ETHICS 415 (1993) (discussing prosecutorial conflicts of interest more generally).

[56] *See infra* Part III; *see also* Dan Reicher, *Conflicts of Interest in Inspector General, Justice Department, and Special Prosecutor Investigations of Agency Heads*, 35 STAN. L. REV. 975, 990-91 (1983) (stating that, under the Special Prosecutor provisions of the Ethics in Government of 1978, "the Department of Justice is required to recuse itself in favor of an independent and nonpartisan investigator and prosecutor").

[57] *See infra* Part IV; *see also* Laurie L. Levinson, *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors*, 26 FORDHAM URB. L.J. 553, 569 (1999) ("It has long been believed that maximum fairness will be achieved by neutral rules and standards to guide prosecutors' exercise of discretion"); Erik Luna, *Principled Enforcement of Penal Laws*, 4 BUFF. CRIM. L. REV. 515, 523 (2000) (arguing for the need for principled prosecutorial decisionmaking); *cf.* Patti B. Saris, *Below the Radar Screens: Have the Sentencing Guidelines Eliminated Disparity? One Judge's Perspective*, 30 SUFFOLK U. L. REV. 1027, 1050 (1997) (arguing that the Department of Justice should rely on principled justifications for moving for sentencing reductions based on defendants' substantial assistance).

The pressures in favor of principled decisionmaking, in part, are the driving force for the efforts of some prosecutors' offices, including the Department of Justice, to develop manuals and other administrative guidelines that regulate or inform individual prosecutors' exercise of discretion. *See* Thomas E. Baker, *A View to the Future of Judicial Federalism: "Neither Out far Nor In Deep*," 45 CASE WES. RES. L. REV. 705, 749 (1995) (discussing the process by which "The Department of Justice and the typical U.S. Attorney's Office have written prosecution

neutrality is akin to the much debated premise that judges should act on the basis of law that is "found" rather than made.[58] It is consistent with the increasing tendency within the criminal justice system to impose fixed requirements on discretionary decisionmakers such as judges and prosecutors.[59]

The abstract conceptions of prosecutorial neutrality identified above all are qualities of decisionmaking to which everyone expects prosecutors to adhere in some cases. On closer examination, however, their meaning and legitimacy become less certain – at least as qualities that prosecutors' decisions must invariably exhibit. The next three parts of this Article discuss each dimension of prosecutorial neutrality in turn.

II. NON-BIASED DECISIONMAKING

Let us first consider the dimension of prosecutorial neutrality that suggests prosecutors must act in an unbiased fashion, in the sense that they should avoid decisions based on

---

guidelines, often labeled 'declination policies,' that describe principles for informed exercise of federal prosecutorial discretion").

[58] 1 WILLIAM BLACKSTONE, COMMENTARIES 69 (asserting that judicial function is not to "pronounce a new law, but to maintain and expound the old one"); Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296, 300 (1990) (discussing judicial candor about whether law truly controls judicial decisionmaking); Richard A. Epstein, *All Quiet on the Eastern Front*, 58 U. CHI. L. REV. 555, 558 (1991) (criticizing the "standard view . . . [that] judges who simply reiterate the ostensible wisdom of the past, who naively believe that law is found and not made, are condemned to a second-class status within the legal firmament"); *cf.* Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 9-25 (1984) (arguing "the weakness of the theory that law is found and not made").

[59] Examples of this tendency include the development of sentencing guidelines constraining judges' sentencing discretion and mandatory minimum and three-strikes laws that purport to limit both prosecutorial charging discretion and judicial sentencing discretion. Interestingly, the practical effect of such fixed principles often is to shift discretion from one actor in the system (*e.g.*, the sentencing judge) to another (*e.g.*, the indicting or plea-bargaining prosecutor). *See, e.g.*, Sara Sun Beale, *The Political, Social, Psychological, and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 28 (1997) (discussing the phenomenon of legislative channeling of judicial discretion to prosecutors); Cynthia K.Y. Lee, *From Gatekeeper to Concierge: Reigning in the Federal Prosecutor's Expanding Power Over Substantial Assistance Departures*, 50 RUTGERS L. REV. 199, 241 (1997) (arguing that federal sentencing system should be revised to vest initial discretion to depart from guidelines in judges rather than prosecutors); Jeffrey Standen, *An Economic Perspective on Federal Criminal Law Reform*, 2 BUFF. CRIM. L. REV. 249, 279-80 (1998) (arguing that the federal sentencing guidelines "enhance the significance of the exercise of the prosecutor's discretion instead of serving to embody limiting principles").

impermissible criteria.[60] At one level, it may seem axiomatic that prosecutors should not rely on criteria such as race and gender, self-interest, idiosyncratic personal beliefs, or partisan politics in exercising their discretion. On close examination, however, the concept of neutrality as non-bias raises as many questions as it answers.

A. Avoiding Impermissible Considerations

Most observers would agree that there are some criteria that prosecutors may not permissibly rely upon because they reflect an improper institutional or individual prejudice on the prosecutor's part. For example, prosecutors may not prosecute a defendant, or take steps disadvantaging a defendant, simply because the defendant is of a particular race, gender, or religion.[61] Constitutional principles, at a minimum, forbid prosecutors to base state action on such factors.[62] Thus, it has been said that prosecutors must act in a manner that is "race-neutral" or "gender-neutral." A prosecutor who is unable to exclude impermissible racial, gender, or religious considerations from her discretionary decisionmaking, or who is predisposed to give weight to these considerations, lacks neutrality.

---

[60] An early article on prosecutorial discretion referred to "bias" in another sense – that is, as a psychological predisposition to initiate a prosecution regardless of the likelihood of guilt or the strength of the evidence. *See generally* Hobbs, *supra* note 21. We address this conception of neutrality in our discussion of nonpartisanship in Part II(B).

[61] *See* Faizal R. Mirza, *Mandatory Minimum Prison Sentencing and Systemic Racism*, 39 OSGOODE HALL L.J. 491 (2001) (arguing disapprovingly that "that mandatory prison sentences enhance the quasi-judicial role of prosecutors, providing Crown attorneys with greater leverage to convict a disproportionate number of Black persons"); Developments, *Race and the Criminal Process: IV – Race and the Prosecutor's Charging Discretion*, 101 HARV. L. REV. 1520, 1530 (1988) (discussing judicial responses to racial discrimination in charging decisions); *cf*. Davis, *supra* note 21, at 17 (examining "prosecutorial discretion–a major cause of racial inequality in the criminal justice system"). One might add gender to these categories. But because some criminal laws specifically rely on gender distinctions (*e.g.*, sexual assault and abortion laws) and other crimes tend, empirically, to be committed disproportionately by one gender (*e.g.*, prostitution and some crimes involving physical violence), the application of gender discrimination notions seem intrinsically more complicated. *Cf.* Suzanne D'Amico, Comment, *Inherently Female Cases of Child Abuse and Neglect: A Gender-Neutral Analysis*, 28 FORDHAM URB. L.J. 855, 856 (2001) (arguing that child-abuse and neglect prosecutions often reflect gender stereotypes and gender bias).

[62] *See, e.g.*, Oyler v. Boles, 368 U.S. 448, 456 (1962 (noting the impermissibility of selective prosecution "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification"); *cf.* United States v. Armstrong, 517 U.S. 456, 462 (1996) (rejecting claim of selective prosecution based on racial grounds because statistics alone did not establish the claim, but recognizing the viability of the allegation).

This conception leaves a host of unanswered questions. First, is it invariably improper to rely on race, gender, and religion? At least sometimes, such factors are legally relevant. For example, in considering whether a crime of violence was a "hate crime," a prosecutor may have to consider the race, gender, or religion of the accused and of the victim in order to ascertain the accused's motive.[63] Anthony Alfieri has argued that pure neutrality with respect to race is undesirable in less obvious ways.[64]

Second, how can a prosecutor implement non-biased decisionmaking when law enforcement policies themselves reflect societal assumptions about race, gender, or religion? Consider, for example, laws that call for the protection of abortion clinics, on the one hand, or that restrict abortion practices, on the other. These laws, at least in their adoption, may respect, or deny respect to, particular religious viewpoints. A prosecutor may have difficulty identifying a religiously-neutral posture for making decisions.[65] Similarly, it may be a challenge for a prosecutor to remain gender-neutral in the context of sex-crime prosecutions when she believes that the underlying law and traditional law enforcement practices reflect gender bias.[66]

---

[63] On the problem of racial bias in the enforcement of hate crimes, *see, e.g.*, Frederick M. Lawrence, *Enforcing Bias-Crimes Without Bias, Evaluating the Disproportionate-Enforcement Critique*, 66 L. & CONT. PROBS. 49 (2003) and the articles cited therein, at 52-53 nns. 13-18; Christopher Chorba, Note, *The Danger of Federalizing Hate Crimes: Congressional Misconceptions and the Unintended Consequences of the Hate Crimes Prevention Act*, 87 VA. L. REV. 319, 362-68 (2001) (noting that a federal hate crime statute would likely have a disproportionate impact on minorities). Regarding prosecutorial discretion to enforce hate crimes, see Tanya Kateri Hernandez, Note, Bias Crimes: Unconscious Racism in the Prosecution of "Racially Motivated Violence," 99 YALE L.J. 845 (1990).

[64] *E.g.* Anthony V. Alfieri, *Prosecuting Race*, 48 DUKE L. REV. 1157, 1163 (1999) (proposing "a model of race-conscious, community-oriented prosecutorial discretion as an alternative to the dominant colorblind prosecutorial canon of race neutrality"); Anthony V. Alfieri, *Race Prosecutors, Race Defenders*, 89 GEO. L. J. 2227, 2244-45(2001) (arguing that in cases involving racial violence, "race-conscious" prosecutors should "mobilize citizens in demanding their civil rights to racial dignity, equality, and justice," including, after charges are filed, by "allocat[ing] investigative and trial resources to awaken and uplift community" through "pretrial outreach and publicity, and the tactical use of narratives at trial and sentencing").

[65] Consider the case of a cruelty to animals law that is violated by an unpopular religious sect (consisting mainly of immigrants) that kills chickens brutally as part of its religious practices. *E.g.* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993). Prosecution may reflect a religious bias if the legislature adopted parts of the statute with specific religious practices in mind. *Id.* at 535 ("It is a necessary conclusion that almost the only conduct subject to [the ordinances] is the religious exercise of Santeria church members. The texts show that they were drafted in tandem to achieve this result").

[66] *Cf.* Michelle J. Anderson, *Violence Against Women and the State Action Doctrine*, 46

A third issue is the extent to which neutrality requires prosecutors not only to exclude improper considerations from decisionmaking but also to avoid discriminatory effects. Race neutrality, for example, has implications for drug prosecutions.[67] Arguably, a prosecutor who targets the sale of crack cocaine on the streets, as opposed to the distribution of powder cocaine in corporate boardrooms, fails to act in a race-neutral way because her policy results in disproportionate charging of minority defendants. Does it suffice for the non-bias principle that she not explicitly consider race in deciding how to allocate law-enforcement resources?

Fourth, what does neutrality require in situations in which a prosecutor's personal beliefs about race, gender, or religion are implicated subliminally? It seems fair to suggest that racially bigoted lawyers should stay out of prosecutors' offices, but the same cannot be said of religiously observant lawyers. When a prosecutor decides whether or not to enforce laws that have a religious aspect, such as abortion and physician-assisted suicide laws,[68] her religious beliefs are likely to affect her approach. Proponents of the argument that prosecutors must avoid religious (or gender or racial) bias in order to be neutral may not all agree that the prosecutor's own beliefs must take the form of agnosticism.[69]

There are additional questions having to do with the identification of forbidden considerations. Does non-bias extend to categories other than those that have traditionally been disfavored, such as race, gender, and religion? Must prosecutors look exclusively to constitutional case law to decide which categories are relevant?[70] In the elaboration of what

---

VILL. L. REV. 907, 945 (2001) ("Ostensibly neutral discretionary decisions by police and prosecutors hide intent-bias against women that is grounded in the historical common law of rape").

[67] *See, e.g.*, Commonwealth v. Agnew, 600 A.2d 1265 (Pa. Super. 1991) (holding that a prosecutor did not violate due process by refusing to make those who sold drugs in the city of Chester eligible for pretrial diversion program while allowing those who sold drugs elsewhere in Delaware County to be eligible, because the decision was not based deliberately on race but rather on a judgment that Chester was "the hub of illegal drug trafficking" and that the disparate treatment was justified by the need to protect the public).

[68] *See, e.g.*, United States v. Lynch, 952 F. Supp. 167 (S.D.N.Y. 1997) (acquitting religiously-motivated abortion protesters, finding that they lacked the requisite willful intent).

[69] *See, e.g.*, Alfieri, *Race Prosecutors*, *supra* note 64, at 2240 (arguing the need for prosecutors to counteract seemingly racially objective imagery and behavior that "devalues racially subordinate communities"); *cf.* Sheri Johnson, *Batson Ethics for Prosecutors and Trial Court Judges*, 73 Chi.-Kent L. Rev. 475, 502-506 (1998) (urging prosecutors to ask themselves, upon challenging a prospective black juror on ostensibly neutral grounds, whether their explanations are "inextricably linked with race or racial stereotypes?" and, ordinarily, to avoid excusing black jurors because of the history of exclusion of black jurors).

[70] For example, must prosecutors be "neutral" with respect to sexual orientation in light of contemporary mores, even absent a Supreme Court decision recognizing sexual orientation as

constitutes impermissible bias, the details remain very much subject to controversy and debate.

B. Avoiding Self-interest

Neutrality has also been invoked to imply that prosecutors may not consider their self-interest – personal or economic.[71] Some have argued that high-profile cases should be assigned only to career prosecutors or senior prosecutors, who are less likely than others to base decisions on their own interest in moving to the private sector or climbing the ladder in their own offices.[72] Concerns also have been raised about the motivations of elected prosecutors, whose decisions may be influenced by the desire to satisfy voters.[73]

It is uncertain whether all aspects of self-interest can, or should, be excluded from prosecutorial decisionmaking. At a minimum, the dividing line between acting on self-interest and serving the public is not always clear. When, for example, a prosecutor pursues the death penalty because the community demands it, she may do so for reasons of personal advancement. She may therefore be criticized for lacking neutrality, in the sense that she has relied upon an impermissible factor.[74] One might, however, just as easily deem it desirable for this prosecutor to

---

a suspect criterion for official decisionmaking? If so, was the Texas prosecutor in *Lawrence v. Texas* subject to criticism for prosecuting two gay men under the state's then-legitimate sodomy law? Lawrence v. Texas, ___ U.S. ___, 123 S.Ct. 2472, 2477-78 (2003) (holding a prosecution under Texas's sodomy law unconstitutional).

[71] Doing so would create a disqualifying conflict-of-interest under the professional rules and probably also would violate federal or state law. *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443 (1971) (finding chief investigator and prosecutor not to be "neutral" because of their financial self-interest); *see also* Richard W. Murphy, *Superbifurcation: Making Room for State Prosecution in the Punitive Damages Context*, 76 N.C. L. REV. 463, 531 (1998) ("Prosecutors are . . . supposed to be 'neutral' in the limited sense of lacking a personal or financial ax to grind against defendants").

[72] *See* Richard Cooper, *Independent Counsel*, NAT'L L.J., Feb. 1, 1999, p.B20 (arguing that senior career prosecutors are less likely than private practitioners who are appointed to serve as Independent Counsel to be tempted to use a high-profile prosecution as a springboard to personal advancement or public renown); *cf*. GEORGE F. COLE, POLITICS AND THE ADMINISTRATION FO JUSTICE 112, 150-53 (1973) (discussing the historical tradition of "The use of the office of the prosecuting attorney as a stepping-stone to more prestigious governmental positions").

[73] *See, e.g.*, Cates, *supra* note 21, at 10 ("seldom could an elected American statesman remain in office to serve as a statesman unless he was also a good politician").

[74] *See* Coramae Richey Mann, *Drugs: We Don't Need More Wars*, 31 VAL. U.L. REV. 565, 574 (1997) (arguing that legislatures should eliminate "mandatory punishments and return the balance of power to neutral judges rather than 'partisan prosecutors' who seek 'to advance

be publicly accountable and, hence, for her to consider the popularity of her decision.

Even if one accepts that prosecutors must disregard all aspects of their self-interest, it is not clear that prosecutors ever can be entirely neutral in this sense. A prosecutor can avoid cases that implicate her direct interests; for example, those in which she has a financial interest or in which a relative is the defendant or victim. But *all* prosecutors inevitably have a reputational interest in *all* their cases, because the results reflect on their abilities. Even prosecutors on the brink of retirement are likely to care about their legacies.

Therefore, insofar as neutrality is a proxy for decisionmaking that excludes self-interest, it must be a relative concept. As such, this conception of neutrality becomes less useful as a standard for assessing prosecutors' decisions. When a particular decision appears to advance a prosecutor's career,[75] it may also be impossible to determine whether self-promotion was a motivation for, or an unintended byproduct of, the decision.

C. Excluding Personal Beliefs

Prosecutorial neutrality arguably also implies that prosecutors should avoid relying upon idiosyncratic personal beliefs, such as their own moral values and conceptions of the public good.[76] In the ideal world, all prosecutors – including prosecutors with varying viewpoints – would reach roughly the same decisions in similar cases.

This conception too is subject to question. One would expect prosecutors to exercise discretion on the basis of what they believe is good or right. They are elected or appointed, in part, precisely because of society's confidence in their judgment. The exercise of judgment inevitably includes reaching conclusions about what decisions will best serve the public.

Consider, for example, the decision of whether to seek the death penalty in a particular case.[77] Death penalty statutes presuppose that prosecutors will not invariably seek capital

---

their own careers by securing convictions,' especially in high-profile cases"); F. Thomas Schornhorst, *Preliminary Screening of Prosecutorial Access to Death Qualified Juries: A Missing Constitutional Link*, 62 IND. L.J. 295, 306 (1987) ("An elected prosecutor's choice to initiate a capital case cannot be divorced from the prosecutor's desire for reelection").

[75] As, for example, when a prosecutor initiates charges in a high-profile case.

[76] *Cf.* ABA STANDARDS, Standard 3-1.3 commentary ("a prosecutor should not allow personal . . . beliefs to interfere with the professional performance of official duties"); Mendoza Toro v. Gil, 110 F. Supp. 2d 28 (D.P.R. 2000) (assistant federal prosecutor may be required to prosecute persons charged with trespassing on the U.S. navy base in Vieques despite her moral opposition to prosecuting the cases).

[77] *See generally* Jonathan DeMay, Note, *A District Attorney's Decision Whether to Seek the Death Penalty: Toward an Improved Process*, 26 FORDHAM URB. L.J. 767 (1999) (arguing that "the dangers inherent in [death penalty decisionmaking] justify the imposition of controls over the exercise of prosecutorial discretion in the decision whether to seek the death penalty"); Horowitz, *supra* note 21, at 2571 (describing "the dangers that result when prosecutors are given

sentencing whenever a crime technically satisfies the statutes' terms. But the statutes typically do not express criteria for the exercise of discretion. A prosecutor's personal beliefs concerning criminal justice policy seem relevant. In selecting among cases, she must consider, at some level, the extent to which capital punishment will deter future murders and the need for certainty of proof before seeking such punishment.

But may the prosecutor also consider her personal sense that the death penalty is morally wrong? To the extent that the public supports the death penalty, the prosecutor arguably acts in a biased fashion because she is favoring her own moral views. Yet her so-called personal belief may stem from her experience as a prosecutor – for example, her experience regarding the risk of error in capital cases.

If a prosecutor is entitled and expected to draw on some personal beliefs but not others, the question arises of which beliefs are, and which are not, permissible sources for decisionmaking. As soon as one determines that "neutrality" does not require the exclusion of all personal beliefs, then that concept loses force as a guide for prosecutorial conduct or as a standard for evaluating prosecutorial conduct.

D. Avoiding Party Politics

The conception of neutrality as non-bias may also encompass the notion that the prosecutor should not base decisions on party politics.[78] In other words, neutrality may require that she avoid making decisions in the way her Democrat or Republican friends wish.[79] At a

---

sole discretionary power to decide who will face the death penalty at trial"); Anthony Neddo, Comment, *Prosecutorial Discretion in Charging the Death Penalty: Opening the Doors to Arbitrary Decisionmaking in New York Capital Cases*, 60 ALA. L. REV. 1949, 1950 (1997) (arguing that death penalty charging depends on "arbitrary decisionmaking processes reflective of an individual prosecutor's moral or ideological position on the death penalty, or on his or her notion of justice"); Ashley Rupp, *Death Penalty Prosecutorial Charging Decisions and County Budgetary Restrictions: Is the Death Penalty Arbitrarily based on County Funding?*, 71 FORDHAM L. REV. 2735, 2739 (2003) (considering "constitutional problems that arise when prosecutors take budgetary considerations into account in capital charging decisions").

[78] Beth Nolan, *Removing Conflicts from the Administration of Justice: Conflicts of Interest and Independent Counsels Under the Ethics in Government Act*, 79 GEO. L.J. 1, 4 (1990) ("Prosecution of criminal offenses is a paradigm of a function that should be protected from political or other nonneutral interests. In fact, its neutrality is not merely a governmental aspiration; it is a constitutional requirement").

[79] *See* N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 683 (1996) (maintaining that a prosecutor must "exercise [his or her] discretion in a disinterested, nonpartisan fashion," and therefore may not exercise prosecutorial discretion "to advance his or her own political interests or those of another"); *cf.* Jae Won Kim, *The Ideal and the Reality of the Korean Legal Profession*, 1 ASIAN-PACIFIC L. & POL'Y J. 45, 57 (2001) ("Although political neutrality among prosecutors may seem to be merely a utopian ideal, it is nevertheless a practical requirement to

simple level, everyone would agree to that proposition; the chairman of the local political party ought not to control prosecutorial decisionmaking. However, to the extent a district attorney is elected because of her political stance on particular issues – say the death penalty or counter-terrorism methods – does she act in a biased way when she implements that stance?[80]

E. Initial Conclusions About Neutrality As Non-bias

The conceptions discussed above define neutrality by the exclusion of particular kinds of considerations. Yet the identification of these considerations is not susceptible to consensus. Only a few of the candidates for exclusion are universally seen as improper, and the specific content of the forbidden considerations also is subject to dispute.

The application of non-bias principles can be controversial, too. Typically, for example, it will be difficult to separate a prosecutor's implementation of a contestable position on criminal justice policy from her implementation of personal views or personal self-interest.[81] Simply noting the fact that the prosecutor has views on an issue (*e.g.*, the death penalty, abortion, or hate crimes) – even religiously-based views – does not mean that a prosecutor's decisions regarding those issues is wrong.[82]

---

achieving the Rule of Law. Partisan bias in law enforcement is not only vicious and morally reprehensible but also undermines public trust in the legal system as a whole. . . . The longstanding practice of misusing prosecutorial power to suppress political opposition has helped give Korean prosecutors a bad name"); Rachel Vorspan, *Freedom of Assembly and the Right to Passage in Modern English Legal History*, 34 SAN DIEGO L. REV. 921, 938, 945-46 (1997) (discussing instances of English prosecutors' use of obstruction law for political ends while seeking to preserve appearance of political neutrality).

[80] *See* ABA STANDARDS, Standard 3-1.3 commentary ("a prosecutor should not allow . . . ideological, or political beliefs to interfere with the professional performance of official duties"); *cf.* Thomas W. Merrill, *Beyond the Independent Counsel: Evaluating the Options*, 43 ST. LOUIS L.J. 1047, 1055 (1999) ("The problem with the concept [of politically-neutral prosecutors] is that it naively assumes that we can neatly differentiate between politically-motivated prosecutorial decisions and neutral or apolitical prosecutorial decisions").

[81] *See, e.g.*, Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Criminal Law*, 83 GEO. L.J. 2407, 2456 et seq. (1995) (discussing "the myth of political neutrality" in the enforcement of criminal law); *Cf.* Christo Lassiter, *The O.J. Simpson Verdict: A Lesson in Black and White*, 1 MICH. J. RACE & L. 69, 94 (1996) (arguing that, in highly-publicized cases like the O.J. Simpson case, "the trial . . . begins to operate on a social theme larger than the matter under charge . . . . [N]eutral and dispassionate judicial prosecution of wrongdoing . . . is converted into an instrument for a politically motivated prosecution on the larger social issue, . . . [and] the public outcry leads to a political subjudicial disposition of the trial against a disfavored minority on the larger social issue").

[82] This, of course, is the dilemma inherent in the broader issue of when selective

In short, positing that prosecutors must act in neutral, non-biased fashion does not prescribe a workable standard for how prosecutors should act. Neutrality so conceptualized fails to define which considerations should be excluded, which should have priority over others, or how much weight they should be given.

III. NONPARTISAN DECISIONMAKING

The second dimension of prosecutorial neutrality encompasses principles that mandate a prosecutorial attitude or state of mind that might be termed nonpartisan or impartial.[83] There are at least three possible notions of nonpartisanship, roughly corresponding to (1) independence, (2) objectivity, and/or (3) non-politicism. None of these provide clear decisionmaking standards.

A. Independence

Commentators sometimes employ the term "neutrality" to refer to prosecutorial independence from police investigators,[84] elected officials interested in the case,[85] victims or

---

prosecution should be allowed. The issue is particularly troubling when selective prosecution is based on the prosecutor's distaste for, or acceptance of, categories of conduct that fit a general legislative proscription. *See generally* Barry Lynn Creech, *And Justice for All: Wayte v. United States and the Defense of Selective Prosecution*, 64 N.C. L. REV. 385 (1986) (discussing the precedent leading to the Supreme Court's decision to uphold selective prosecution of persons failing to register for the draft); Heller, *supra* note 2, at 1331-32 (discussing the judicial response to the claim that prosecution of crack cocaine users was improper, racially-biased selective prosecution rather than an appropriate implementation of a war on drugs).

[83] *Cf.* Jackson, *supra* note 21, at 5 ("the prosecutor should have, as nearly as possible, a detached and impartial view of all groups in his community"); *id.* at 6 (arguing that, where local enforcement and morals vary, federal prosecutors must nevertheless "confine [themselves] to strict and impartial enforcement of federal law, letting the chips fall where they may"); Note, *supra* note 9, at 481 ("the prosecutor must conduct the state's case and present the state's evidence in an impartial manner" because of the duties to prosecute and to protect the rights of the accused).

[84] *See, e.g.*, Kenneth Rosenthal, *Prosecutor Misconduct, Convictions, and Double Jeopardy: Case Studies in an Emerging Jurisprudence*, 71 TEMPLE L. REV. 887, 951 (1998) ("It is the occupants of th[e prosecutor's] office alone who are in the position to check excesses and potentially precipitous actions of the police, to serve as more neutral seekers of the truth, to consider and pursue hypotheses that may be inconsistent with suppositions adopted in the preliminary stages of the investigation, and to ensure meaningful implementation of the presumption of innocence").

[85] As discussed above, elected officials may have political interests in the outcome and even non-elected officials representing the executive branch of government may have secondary

their families,[86] and other interested parties.[87] But one might ask: "independence" in what sense? All lawyers are expected to have some degree of professional independence or detachment from their clients.[88] Prosecutorial neutrality suggests independence that is greater in degree or different in kind.

---

interests that conflict, or are connected with, the government's interest in criminal prosecutions. *See infra* text accompanying note 81. In the case of federal prosecutors, neutrality may sometimes be conceived to mean independence from the President or other executive officers. *See, e.g.,* NANCY V. BAKER, CONFLICTING LOYALTIES: LAW AND POLITICS IN THE ATTORNEY GENERAL'S OFFICE 1789-1990, 169-177 (1992) (discussing efforts to "depoliticize Justice"); William G. Ross, *The President's Constitutional Role in Confirming Cabinet Nominees and Other Executive Officers*, 48 SYR. L. REV. 1123, 1183 (1998) (discussing the pros and cons of having an Attorney General with close ties, and loyalty, to the president), and authorities cited at 1184 n.377.

[86] *See, e.g.*, John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 514 (1994) (arguing that the use of private prosecutors who represent victims' interests in criminal prosecutions "is unethical and violative of a defendant's constitutional rights"); Rachel King, *Why a Victims' Rights Constitutional Amendment is a Bad Idea: Practical Experiences from Crime Victims*, 68 U. CIN. L. REV. 357, 391 (2000) ("A [Victims' Rights Amendment] would require the prosecutor to seek the victim's input and then, if he disagrees with it, it would force him to either go against the victims wishes or against his own best judgment. Some may view taking away power and discretion from the prosecutor as a desirable goal. However, the prosecutor is, at least in theory, a neutral representative of the state who is better able to assess the most fair and judicious way to handle a case.").

[87] In this context, we are not considering a junior prosecutor's independence from supervisors, but rather the independence of a decisionmaking prosecutor or her office from outside influences. *Cf.* Robert M. Pitler, *Independent State Search and Seizure Constitutionalism: The New York State Court of Appeals' Quest for Principled Decisionmaking*, 62 BROOKLYN L. REV. 1, 68 (1996) (discussing prosecutor Thomas Dewey's independence from the elected District Attorney).

[88] *See, e.g.*, Jay Feinman & Marc Feldman, *Pedagogy and Politics*, 73 GEO. L.J. 875, 889 (1985) (noting the ideal in which the "lawyer is relied on for . . . judgment; while engaged intimately in his clients' affairs, he maintains a cool professional detachment from them"); Bruce A. Green, *Thoughts About Corporate Lawyers After Reading The Cigarette Papers: Has the "Wise Counselor" Given Way to the "Hired Gun"*?, 51 DEPAUL L. REV. 407, 411 (2001) (discussing the assumption "that, as legal advisers, outside general counsel asser[t] moral influence and exercis[e] professional detachment in ways that other lawyers d[o] not and perhaps, as a practical matter, could not"); *cf.* Peter Margulies, *Representation of Domestic Violence Survivors as a New Paradigm of Poverty Law: In Search of Access, Connection, and Voice*, 63 GEO. WASH. L. REV. 1071, 1096-97 (1995) (arguing that sometimes "lawyers should surrender the neutral, nonjudgmental stance which the instrumentalist style suggests").

Most obviously, prosecutors are independent in that they, not the police or the victims, are the ultimate decisionmakers. This distinguishes prosecutors from privately-retained lawyers, who are duty-bound to defer to clients' decisions on essential aspects of the representation. The prosecutor has a client in an abstract sense – she represents the "public" or the "state" – but, nonetheless, the prosecutor usually calls the shots.[89]

Neutrality might denote independence in a stronger sense. Arguably, prosecutors should make discretionary decisions not only autonomously, but also indifferently to the preferences and objectives of interested third parties. In making a judgment about the likelihood of an individual's guilt, the nonpartisan prosecutor would not weigh evidence in the light most favorable to any person, but rather would evaluate the evidence as a judge might.[90] This stands in contrast to the lawyer for a private party in a civil case, whose judgment may be slanted in favor of the client's position.[91]

This conception of nonpartisanship is not self-justifying. One could easily conceptualize the prosecutor's appropriate role as being partisan in the same sense as private lawyers – either representing the interests of the police or the interests of victims.[92] One might reasonably argue

---

[89] Criminal prosecutors are somewhat different in this regard than other government attorneys, who sometimes serve agency clients in a very direct way. *See generally* Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951 (1991) (discussing the obligations of nonprosecutorial government lawyers to their clients).

[90] *See, e.g.*, Flowers, *supra* note 40, at 962 (referring to "the prosecutor's neutral fact finding process"); Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 340 (2001) (observing that "[a] prosecutor can maintain a neutral and objective view of the evidence more readily than a jury"); *cf.* Zachary W. Carter, *Independence Under Siege: Unbridled Criticism of Judges and Prosecutors*, 5 J.L. & POL'Y 531, 531 (1997) ("We look to judges and prosecutors to make decisions for us that we are not in a position to make for ourselves because we have vested interest in . . . controversies in which we have an emotional stake, such as situations in which we are relatives of crime victims, or we are victims of crime ourselves or when we are accused of crime").

[91] *See* Jake Sussman, *Suspect Choices: Lineup Procedures and the Abdication of Judicial and Prosecutorial Responsibility for Improving the Criminal Justice System*, 27 N.Y.U. REV. L. & SOC. CHANGE 507, 532 (2002) ("Unlike defense counsel's role as unequivocal advocate for an individual client, the prosecutor retains the critical responsibility of neutral inquiry into all aspects of a case").

[92] Indeed, the directly adversarial nature of American prosecutors' role has frequently been cited as the characteristic that distinguishes American prosecutors from their counterparts in foreign jurisdictions in which prosecutors are expected to fulfill neutral inquisitorial functions. *See, e.g.*, Hiram E. Chodosh and Stephen A. Mayo, *The Palestinian Legal Study: Consensus and Assessment of the New Palestinian Legal System*, 38 HARV. INT'L L.J. 375, 412 n. 224 (1997)

that the adversarial system can produce appropriate results better when such partisanship is out in the open.[93]

Likewise, relying on the notion of independence may be counter-productive because it is counter-factual.[94] Prosecutors ordinarily *are* naturally aligned with the police[95] and victims.[96]

(noting "[Palestinian] prosecutorial functions [that are] are inquisitorial and theoretically neutral, rather than accusatorial and theoretically adversarial"); Detlev Frehsee, *Restitution and Offender-Victim Arrangement in German Criminal Law: Development and Theoretical Implications*, 3 BUFF. CRIM. L. REV. 235, 246 (1999) ("[t]he [German] prosecutor is a neutral person and obliged to present exonerating evidence as well"); Daniel H. Foote, *The Benevolent Paternalism of Japanese Criminal Law*, 80 CALIF. L. REV. 317, 390 n. 298 (1992) (noting "the trust placed in [Japanese] prosecutors as highly qualified, supposedly neutral representatives of the justice system"); Sohail Mered, *It's Not a Cultural Thing: Disparate Domestic Enforcement of International Criminal Procedure Standards – United States and Egypt*, 28 CASE W. RES. J. INT'L L. 141, 160 (1996) ("Unlike the U.S. prosecutor, the Egyptian public prosecutor is a judicial officer with a neutral role"); Thomas Weigend, *Sentencing in West Germany*, 42 MD. L. REV. 37, 52 (1983) ("A significant difference in legal status exists between American and German prosecutors. . . . German law casts the prosecutor in a more neutral position"); *cf.* Alicia Ely Yamin & Ma. Pilar Noriega Garcia, *The Absence of the Rule of Law in Mexico: Diagnosis and Implications for a Mexican Transition to Democracy*, 21 LOY. L.A. INT'L & COMP. L.J. 467, 514 (1999) ("Under Mexican law, the Public Prosecutor's Office is supposed to play a more neutral role in the investigation and prosecution of crimes than in common law systems. In practice, however, the reverse is true").

[93] In the trial context, for example, one might take the position that prosecutors ordinarily serve justice best by acting as aggressive advocates. *See generally* Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45 (1991) [hereinafter "Zacharias, *Structuring the Ethics"*]; *cf.* Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121, 1124 (1998) (arguing that an adversarial approach makes less sense in the plea bargaining context) [hereinafter "Zacharias, *Justice in Plea Bargaining*"].

[94] *See, e.g.*, Ronald K. Chen, *Constitutional Challenges to Megan's Law: A Year's Retrospective*, 6 B.U. PUB. INT'L L.J. 57, 71 (1996) ("Prosecutors are by the very nature of their position not neutral fact finders with respect to criminal defendants"); Daniel I. Smulow, Comment, *When Fair is Foul: Federal Drug Sentencing in the Wake of United States v. La Bonte*, 48 CASE WES. RES. L. REV 437, 457-58 (1998) ("prosecutors are inherently partisan"); *cf.* Ford v. Wainwright, 477 U.S. 399, 416 (1986) ("[t]he commander of the State's corps of prosecutors cannot be said to have the neutrality that is necessary for the reliability in the factfinding proceeding").

[95] Maintaining independence from the police is difficult as a practical matter. Whether or not prosecutors work hand-in-glove with police in the investigative stage, prosecutors are dependent on the police. Brooklyn DA Elizabeth Holtzman learned this the hard way when, after

Elected prosecutors may be unable to divorce themselves entirely from the desires – even the whims – of the community.[97] Constructing a prosecutorial role based on counter-factual assumptions may lead both to unrealistic dependence on prosecutors' ability to achieve just results and to distrust on society's part when prosecutors fall short.[98] More importantly, the assumptions may prevent society from developing independent remedies for over-partisanship or for correcting defects in the criminal justice system.

Nevertheless, the system historically has vested prosecutors with a great deal of discretion on the assumption that prosecutors are more removed from the facts of cases than police officers and therefore can exercise more independence. Society envisions prosecutors, as lawyers, as being trained to maintain their independent judgment.

B. Objectivity

A second, related conception of nonpartisanship centers on the notion that a prosecutor

---

she established a special unit to investigate police brutality cases, 5,000 police officers protested outside her office. ELIZABETH HOLTZMAN WITH CYNTHIA L. COOPER, WHO SAID IT WOULD BE EASY? ONE WOMAN'S LIFE IN THE POLITICAL ARENA 138 (1996). At a minimum, prosecutors and police officers deal with each other professionally on a daily basis, and must treat each other as colleagues. They may become friends, and identify, with their counterparts. *Cf.* Erwin Chemerinsky, *The Role of Prosecutors in Dealing With Police Abuse: The Lessons of Los Angeles*, 8 VA. J. SOC. POL'Y & L. 305 (2001) (discussing prosecutors' difficulties in investigating and prosecuting police abuse).

[96] *See, e.g.,* Richard E. Levy, *Opposing Counsel*, 47 KAN. L. REV. 583, 585-86 (1999) ("Notwithstanding . . . the idea that prosecutors are more neutral seekers of truth than are attorneys representing private parties in private actions, it is inherent in human nature that prosecutors will come to believe in the merits of their position, regard the targets of investigations as guilty, and act as adversaries"); Steven Alan Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. PA. L. REV. 1365, 1387 (1987) ("[because] ensuring the infliction of deserved punishment is part and parcel of the prosecutor's job . . . [the] prosecutor's attitude toward the defendant in a hard-fought case is seldom benign or neutral").

[97] *See, e.g.,* Schornhorst, *supra* note 74, at 303 (arguing, in the death penalty context, that elected prosecutors "may be motivated to respond more to a sense of the community's fear and its demands for vengeance than to a rational evaluation of the available evidence").

[98] For an example of such distrust, see Shaila K. Dewan, *Witnesses in Killing by Police Want to Talk Only to an 'Objective' Prosecutor, Sharpton Says*, N.Y. TIMES, May, 27, 2003, p. 4 (reporting that a spokesman for witnesses to a fatal shooting by the police, which occurred during their execution of a search warrant obtained by the District Attorney's office, announced that "the witnesses wanted to speak only to an 'objective prosecutor,'" and called for the Governor's appointment of an independent prosecutor to investigate).

must remain objective in making prosecutorial decisions.[99] She must, at all stages of the prosecution, review the evidence without predisposition.[100] She must carefully assess the likelihood of an erroneous conviction and be attentive to the possibility that she is acting for improper reasons.[101] While the prosecutor may make assumptions or reach conclusions about the veracity of witnesses (*e.g.*, the police) or about the suspect's guilt, she must do so on a case-by-case basis without predetermined presumptions. Similarly, in deciding how harshly or leniently to treat an individual who is evidently guilty, the prosecutor must weigh applicable considerations or apply applicable criteria in an "objective" manner, without any predispositions.

One might reasonably question whether, as a practical matter, objectivity truly is, or should be, a component of neutrality – at least in the trial context. If we expect prosecutors to act as partisan advocates at trials[102] and assume that this advocacy helps effectuate appropriate

---

[99] *See, e.g.*, Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 OKLA. CITY U. L. REV. 833, 869-70 (1997) (arguing that *Brady* violations result frequently because of the "institutional incapacity of prosecutors to perform the objective weighing of the materiality of the exculpatory evidence"); Maria Collins Warren, *Ethical Prosecution: A Philosophical Field Guide*, 41 WASHBURN L.J. 269, 270 (2002) ("We should learn as prosecutors to objectively evaluate cases before we ever decide on a course of prosecution").

[100] Thus, she must avoid assuming that the defendant is guilty based on reasons that have nothing to do with the weight of the evidence. Such reasons might include, among others, the belief of the police, the victim, or a superior that defendant is guilty, public demand for punishment, and the possibility that dropping the charges will embarrass the prosecutor or her office.

[101] *See, e.g.*, COLE, *supra* note 72, at 145-46 (noting one prosecutor's concern that, even when sufficient evidence to prosecute exists, "We must consider for whose benefit prosecution is being undertaken"); Vanessa Merton, *What Do You Do When You Meet a "Walking Violation of the Sixth Amendment" If You're Trying to Put That Lawyer's Client in Jail?*, 69 FORDHAM L. REV. 997, 1001 n.12 (2000) ("[T]he prosecutor's uniquely nonadversarial role . . . includes elements of neutral objectivity and dispassionate evaluation not only of the facts of a case, but of their legal, social, and moral implications. . . ."); Uviller, *supra* note 40, at 1701 (discussing aspects of the prosecutor's role that require "quasi-judicial detachment"). In other words, the objective prosecutor not only must weigh the evidence, but she must also make sure that her own motivations in reaching her decisions have been pure (*i.e,* not influenced by improper considerations).

[102] *See* Kenneth L. Wainstein, Comment, *Judicially Initiated Prosecution: A Means of Preventing Continuing Victimization in the Event of Prosecutorial Inaction*, 76 CALIF. L. REV. 727, 756 (1988) ("[C]ourts acknowledge that prosecutors are not intended to be neutral. 'If honestly convinced of the defendant's guilt, the prosecutor is free, indeed obliged, to be deeply interested in urging that view by any fair means. True disinterest . . . is the domain of the judge

results,[103] why should the same not hold true for other discretionary prosecutorial decisionmaking?[104] Conversely, if the commitment to objectivity defines the appropriate prosecutorial role, why should it not apply equally at the trial stage?[105]

---

and the jury – not the prosecutor.'") (quoting Wright v. United States, 732 F.2d 1048, 1056 (2d Cir. 1984)); *cf.* Marshall v. Jerrico, Inc., 446 U.S. 238, 248 (1980) ("[prosecutors] need not be entirely 'neutral and detached'. In an adversary system, they are necessarily permitted to be zealous in their enforcement of the law").

[103] Zacharias, *Structuring the Ethics*, *supra* note 93, at 52 ("One can hypothesize open-minded prosecutors who present facts neutrally and encourage courts and jurors to emphasize defendants' procedural rights. These idealized government attorneys constantly would reevaluate the strength of their case. They would adjust the content and force of each evidentiary presentation to further the outcome that they believe the jury should reach on the current state of the evidence. . . . For our purposes, it suffices to recognize that the noncompetitive approach to prosecutorial ethics is inconsistent with the professional codes' underlying theory.").

[104] There are bases for distinguishing decisionmaking in the trial and nontrial contexts. Most importantly, prosecutors make many pre- and post-trial decisions without judicial supervision and without subjecting their own determination to verification by the jury. In some instances, the defendant and factfinder will not even know that a decision has been made, as for example, when a prosecutor withholds discovery based on a determination that particular evidence in her possession is not material or exculpatory. *See* Zacharias, *Justice in Plea Bargaining*, *supra* note 93, at 1124 (noting the reasons for not applying an adversarial model of prosecutorial decisionmaking to the plea bargaining context).

[105] Arguably, the need for lawyers to remain objective applies to all lawyers, including prosecutors, and applies to all contexts. *See, e.g.*, Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. Rev. 1303, 1306 (1995) (arguing that maintaining objectivity is a significant aspect of lawyer professionalism).

It may be that one needs to distinguish the trial from other stages, for both practical and theoretical reasons. To the extent prosecutors second-guess themselves too much in advocacy, they may undermine their effectiveness as instruments in the truthseeking process. To the extent society wishes a prosecutor's office to serve a role in assessing innocence at the same time as it seeks to prove guilt, it may be necessary to divide the responsibilities for doing so among different actors within the office. *See* Uviller, *supra* note 40, at 1713-6 (discussing the possibility of bifurcating prosecutors' functions). Alternatively, at the trial stage, society may be willing to rely on other actors who are present to serve the function of appraising the evidence objectively and correcting misperceptions that derive from the prosecutor's lack of neutrality. *See* Zacharias, *Structuring the Ethics*, *supra* note 93, at 56-57 ("Court-enforced constitutional safeguards . . . arguably suffice to protect the innocent"); *cf.* William W. Schwarzer, *Sentencing Guidelines and Mandatory Minimums: Mixing Apples and Oranges*, 66 S. CAL. L. REV. 405, 407 (1992) (questioning the allocation of authority under the federal sentencing guidelines" to "advocator prosecutors" rather than "neutral judges").

At its root, the emphasis on objectivity stems from the notion that the prosecutor's client is the public, not any individual constituent whose interests the prosecution might affect.[106] A nonpartisan prosecutor must at least consider the interests of all her constituencies in some fashion, including those of the defendant.[107] She should not simply follow the instructions of the police, nor assume that the police are proceeding truthfully and honestly.

It is important to note what this conceptions says, and does not say, about the common saw that a prosecutor represents the interests of all her constituents, including the government, the public, the victim, and the defendant. Obviously, prosecutors can not *serve* everyone's interests, since there is a conflict between the public's interest in convicting at least some guilty defendants and those defendants' interest in freedom. Even if one limits the premise to the idea that prosecutors must take account of, and balance in some way, everyone's *legitimate* interests (including the defendant's interest in a fair trial), the premise inevitably leads to problems of application.

Consider, for purposes of discussion, the decision of a prosecutor of whether and how aggressively to prosecute violations of anti-abortion and pornography statutes. Different constituencies of individual prosecutors, and constituencies of prosecutors in different jurisdictions,[108] inevitably have diverging views on such laws. The state's interests may range from concern about the government's ability to enforce the law, to concerns about the effects of enforcement on the health care system or other criminal activity (*e.g.*, prostitution), to the desire to support the legislative decision to criminalize the acts, to the general interest in limiting sexual promiscuity (especially among teenagers) and promoting a vision of morality. The public's approach towards the issue of abortion and obscenity prosecutions likewise are not monolithic. As for the targets of the prosecutions, women obtaining abortions or persons posing for

---

[106] For a discussion of the significance of the fact that prosecutors have multiple constituencies, see Zacharias, *Structuring the Ethics, supra* note 93, at 57.

[107] *See* United States v. Bazzano, 570 F.2d 1120, 1126 (3d Cir. 1977) ("Although the prosecutor operates within the adversary system, it is fundamental that the prosecutor's obligation is to protect the innocent as well as to convict the guilty, to guard the rights of the accused as well as to enforce the rights of the public"; *quoting* ABA STANDARDS, *supra* note 52, commentary to Standard 1); Uviller, *supra* note 40, at 1697 ("Neutrality, I will suggest, puts the prosecutor in the position of advocate for all the people - including the person against whom the evidence has been accumulating"); Note, *supra* note 9, at 480 ("The prosecuting attorney represents all of the people of his jurisdiction, *including the accused*") (emphasis in original).

[108] Ordinarily, the individual prosecutor responsible for a case will not be particularly concerned about how prosecutors in other jurisdictions might act. *But see* Joshua E. Bowers, Note, *"The Integrity of the Game is Everything": The Problem of Geographic Disparity in Three Strikes*, 76 N.Y.U. L. REV. 1164, 1184-85 (2001) (noting some problems relating to prosecutions in multiple jurisdictions). Nevertheless, the approach of other prosecutors may be highly relevant to critics and other observers who take a global view in deciding what prosecutorial conduct is appropriate.

pornography might be viewed as victim or criminal, depending on the circumstances. These defendants certainly have potential rights and constitutional claims that the prosecutor might consider.

It is too facile to claim that the prosecutor in this scenario could represent all of the competing interests simply by recognizing that they exist and, in some undefined way, taking them into account. At a minimum, there is a very real tension between being independent of the various constituents and representing their interests.

The notion that the prosecutor must, in part, represent the defendant's interests complicates the conception of objectivity further. Were one to apply this notion in more than a minimal sense (*e.g.*, the prosecutor should assess the evidence against a defendant realistically), prosecutors would constantly need to reconcile irreconcilable interests – most notably those of society or the victim in punishment and those of the defendant in acquittal. Even in scenarios in which defendants have legitimate substantive or procedural constitutional claims, the prosecutor's consideration of those interests still may be inconsistent with implementing the victim's interest in retribution or the government's or public's interest in incapacitation or deterrence. The reference to a prosecutorial obligation to defendants resonates in that it appeals to our innate desire for a fair justice system. However, without better definition, it almost inevitably produces tension with other prosecutorial obligations.[109]

Thus, objectivity must mean something both more specific and less-inclusive. Prosecutors need to consider the *interests* of all constituents, but perhaps only in the sense that the prosecutors are charged with assuring that the process works evenhandedly.[110] They must

---

[109] It may do more. Consider recent attempts by federal law enforcement agencies to combat terrorism by indefinitely confining middle-eastern witnesses and suspects and the decision to restrict the witnesses' and suspects' private communications with counsel. *See, e.g.*, Eric Lichtblau, *U.S. Will Tighten Rules on Holding Terror Suspects*, N.Y. TIMES, June 13, 2003, p. A1 (discussing the post-9/11 arrest and incarceration of illegal immigrants for months in harsh conditions, often without access to lawyers); Lois Romano and David S. Fallis, *Questions Swirl Around Men Held in Terror Probe*, WASHINGTON POST, October 15, 2001, Section A (discussing the incarceration of suspects with Middle Eastern names in solitary confinement and without access lawyers); Courtland Milloy, *As Taliban Falls, U.S. Confronts New Foe: Itself*, WASHINGTON POST, November 18, 2001, Metro p.C1 (reporting Department of Justice policy of allowing eavesdropping on conversations between imprisoned terrorist suspects and their attorneys). Nonpartisanship's suggestion that neutral prosecutors should represent all constituents' interests implies that the prosecutor in these cases should seek to preserve the constitutional rights of the incarcerated persons. She should take care to avoid outside influence when public outrage, as existed after the September 11, 2001, World Trade Center attacks, threatens one-sided decisionmaking. In practice, however, federal prosecutors have resisted implementing this conception of neutrality on the basis of a competing neutral principle: namely, their commitment to acting primarily for law enforcement purposes.

[110] *See* Zacharias, *Structuring the Ethics*, *supra* note 93, at 64 (discussing the obligation of prosecutors to assure that the playing field is level).

avoid making decisions that affect the various constituents' interests based on predispositions that exclude potentially important considerations. Objectivity does not, however, mean that prosecutors need to represent, or further, the *desires* of all constituents.

It is also important to note that the concept of objectivity suggests that prosecutors must recognize their own personal insignificance. Although they control the litigation as a surrogate for the client (*i.e.*, the public), that does not mean that their personal views and interests should be controlling.[111] Arguably, they are charged with implementing the legislative will, to the extent that it can be discerned.[112]

The devil lies in the details for the objectivity vision of nonpartisanship. Stating that a prosecutor must treat the interests of all constituents evenhandedly does not tell the prosecutor how to do so, especially when the interests are clearly at odds. Similarly, prosecutors who are willing to sublimate their own views and interests may be left without practical perspectives through which they can evaluate the evidence. Even outside the trial context, individual prosecutors arguably are elected or appointed precisely because they are deemed capable of exercising good, independent professional judgment, based on their own experience and understanding of the law and societal expectations.[113]

C. Non-politicism

The third conception of "neutrality as nonpartisanship" is that, whatever else prosecutors do, they should act non-politically.[114] This encompasses both avoiding obligations to the political

---

[111] *Cf.* Albert Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 54 (1968) (discussing prosecutors' views on whether they may take into account "their personal opinion" of the applicable law).

[112] *See infra* text accompanying note 123.

[113] *See supra* text accompanying note 98.

[114] *See* JEROME FRANK AND BARBARA FRANK, NOT GUILTY 240-241 (1971) (attributing the incidence of convictions of innocent persons, in part, to inappropriate prosecutorial decisionmaking arising from a system of choosing prosecutors on political grounds); Note, *Public Officers – Liability – Bad Faith Sufficient to Charge Prosecutor with Criminal Nonfeasance in not Initiating Investigations and Arrests*, 67 HARV. L. REV. 352, 354 (1953) (attributing neglect or failure to perform their duties on the part of some prosecutors to the fact that they are "political officers"); *cf.* Stanley E. Cox, *Halper's Continuing Double Jeopardy Implications: A Thorn by any Other Name Would Prick as Deep*, 39 ST. LOUIS U. L.J. 1235, 1240 (1995) (expressing a preference for "non-political prosecutor[s]"); Michael Tonry, *Rethinking Unthinkable Punishment Policies in America*, 46 U.C.L.A. L. REV. 1751, 1789-90 (1999) ("Achievement of moderate, humane practices and policies may be easier in countries in which judges and prosecutors are nonpolitical, career civil servants, as in most Civil Law countries, or are appointed for life . . .")

parties with which they are affiliated (and which may have helped them obtain their positions) and holding themselves above public outcry and frenzy about particular cases.[115] The latter principle derives from society's aversion to mob justice. The assumption is that police, prosecutors, and courts all play a role in making sure that only the guilty are accused, and that even they are treated fairly.

In part, this view of neutrality appears to be inconsistent with the separate notion that prosecutors should execute the public's will, rather than their own. In an abstract sense, however, these conceptions are reconcilable. A non-political prosecutor arguably can ignore the public's desires concerning a specific case at a heated moment of time while remaining true to the public will in a more general sense.[116] In other words, the non-political prosecutor will ignore a momentary hue and cry but continue to heed public expectations as they are expressed over time in the law and popular culture.

D. Initial Conclusions About Neutrality as Nonpartisanship

The idea that prosecutors should be independent, objective, and/or non-political says something about prosecutors' appropriate attitudes towards the standards that ultimately govern their decisionmaking. It implies that prosecutors should not think of themselves as having freestanding discretion. The applicable standards, whatever they are, refer to the interests of all constituents, not simply the prosecutors' personal preferences. Nevertheless, the principles of nonpartisanship say little about what the relevant standards actually might be.

IV. PRINCIPLED DECISIONMAKING

The third dimension of prosecutorial neutrality reflects the understanding that prosecutors should not act arbitrarily.[117] Arguably, prosecutors should base their decisions on "neutral

---

[115] *See* Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability*?, 83 VA. L. REV. 939, 959 (1997) ("The ideal is . . . in part, negative - one of insulation from narrow interest groups and corrupt influences. But it has developed far further, into a robust belief, as an affirmative matter, that independent-minded prosecutors are well-placed to divine the public interest . . ."); *cf*. Jackson, *supra* note 21, at 5 ("In times of fear or hysteria, political, racial, religious, social, or economic groups, often from the best of motives, cry for the scalps of individuals or groups because they do not like their views").

[116] The most obvious example is society's commitment, or will, to adhere to constitutional protections of defendants' rights despite society's desire, or bias, in favor of achieving quick and harsh convictions of criminals. A neutral prosecutor acts nonpolitically when she sets aside society's immediate preference, and her own, in favor of making objective principled decisions.

[117] Courts generally lack power to review prosecutors' discretionary decisions and to overturn them when the prosecutor appears to have abused her discretion. *See, e.g.*, United States

principles;"[118] that is, norms derived from a source that society can accept[119] and that can be consistently applied.[120] Requiring prosecutors to follow neutral principles empowers the public

---

v. Jacobo-Zavala, 241 F.3d 1009, 1014 (8th Cir. 2001) (overturning district court's decision denying federal prosecutor leave to dismiss an indictment, stating: "The decision not to prosecute . . . is central to the executive power granted to United States Attorneys"); Commonwealth v. Lutz, 508 Pa. 297, 306 (1985) (holding that the decision to submit a case for pre-trial placement in an Accelerated Rehabilitation Disposition program "rests in the sound discretion of the district attorney" and may be overturned only where it rests on a prohibited criterion such as race or religion). But mechanisms such as the grand jury and the jury are intended to provide some other procedural restraint on arbitrary prosecutorial decisionmaking. *See, e.g.,* Apprendi v. New Jersey, 530 U.S. 466, 550 (2000) (observing that the procedural protections of the constitution are "meant to protect criminal defendants from the potentially arbitrary exercise of power by prosecutors"); Batson v. Kentucky, 476 U.S. 79, 86 (1986) ("The petit jury has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge"). Additionally, the recent Hyde Amendment allows federal courts to provide a remedy after-the-fact in certain cases where prosecutors have abused their discretion. *See* 18 U.S.C. §3006(A) note (West 1997) (authorizing federal courts to award attorneys' fees to criminal defendants who had to retain representation to respond to frivolous or vexatious criminal charges).

[118] *See* Malvina Halberstam, *Towards Neutral Principles in the Administration of Criminal Justice: A Critique of Supreme Court Decisions Sanctioning the Plea Bargaining Process*, 73 J. CRIM. L. & CRIMIN. 1 (1982) (arguing for the application of neutral principles in the plea bargaining context); *see also* SENATE COMM. ON GOVERNMENTAL AFFAIRS, ETHICS IN GOVERNMENT ACT OF 1978, S. Rep. No. 95-170, 95th Cong., 2d Sess. 4 (1978), reprinted in U.S. CODE CONG. & ADMIN. NEWS 4216, 4219 ("No one who has watched 'Watergate' unfold can doubt that the Justice Department has difficulty investigating and prosecuting high officials, or that an independent prosecutor is freer to act according to politically neutral principles of fairness and justice" *quoting* WATERGATE SPECIAL PROSECUTION FORCE FINAL REPORT at 137-38); John O. McGinnis, *The Political Economy of Global Multi-Lateralism*, 1 CHI. J. INT'L L. 381, 397 (2000) ("The result of the combination of interest group pressures and public inattention creates a risk that the international prosecutor will not follow neutral principles in carrying out his mandate"); *cf.* Raymond Paternoster, *Race of Victim and Location of Crime: the Decision to Seek the Death Penalty in South Carolina*,74 J. CRIM. L. & CRIMIN. 754, 756 (1983) (suggesting that "the prosecutor's decision to seek the death penalty" should be "informed and structured by the same statutory guidelines which structure sentencing discretion").

[119] In other words, that are not driven exclusively by the prosecutor's personal preferences and world view.

[120] *See* Luna, *supra* note 57, at 523-24 (2000) (arguing that "the appearance of unprincipled discretion can threaten the authority of law and those charged with its enforcement while reducing popular compliance with legal commands").

to evaluate the bases for prosecutorial conduct and to assess whether a prosecutor has correctly and consistently applied the principles in particular cases.

By "neutral principles" here, we mean something narrower than first-order principles such as "neutrality" or the need to "serve justice" – which also purport to be "neutral" and "principles". Principled decisionmaking, instead, refers to the importance of identifying fixed (and presumably more limited) criteria that can constrain decisionmaking in categories of cases without depending upon the exercise of a great deal of discretion. One can argue in favor of reliance on neutral principles or sub-principles that reflect general decisionmaking norms or more specifically on "policies" that simply determine the outcome in particular types of cases.[121] Either approach arguably promotes neutrality, in the sense of facilitating consistent decisionmaking that can be assessed with reference to objective criteria.

This dimension of neutrality raises some obvious questions. What are the appropriate sources of neutral principles or sub-principles of prosecutorial decisionmaking? Which principles are legitimate, or socially acceptable, and which are not? Assuming that one can identify legitimate criteria for decisionmaking, will they meaningfully channel prosecutorial discretion in individual cases (or classes of cases)? To the extent multiple principles or sub-principles drive prosecutorial decisionmaking, can they be consistently applied?

A. *Sources of Principled Decisionmaking and Their* Legitimacy

Appropriate decisionmaking criteria might derive from criminal statutes themselves. In one sense, society believes that it is the job of neutral prosecutors to enforce the legislative will, which in turn represents society's view of prohibited conduct. A second-order principle that prosecutors should exercise their discretion in a way that most closely implements the legislative will would comport with the notion that the prosecutor's role is to faithfully execute the law, not to create public policy.

Alternatively, neutral prosecutors might be expected to base their decisionmaking on criteria that find their root in the criminal law in some broader sense – in theories of culpability and punishment.[122] Of course, the task of discovering appropriate criminal law-related principles,

---

[121] *See supra* text accompanying note 22. For purposes of this Article, it does not pay to engage in an extended theoretical discussion concerning the difference between "principles" and "sub-principles". The concepts clearly overlap. Some aspects or dimensions of neutrality can be characterized as alternative conceptions and therefore "principles" in their own right – for example, the notions of objectivity and independence. Other aspects, such as non-bias, clearly are sub-principles, in the sense that they only come into play in limited categories of cases. Our point in discussing "principled decisionmaking" here is that one view of neutrality is that prosecutors will rely upon criteria, however characterized, that are ascertainable, well-defined, and capable of being implemented in a way that substantially constrains their discretion.

[122] Standen, *supra* note 59, at 275 ("Prosecutors in charging and plea bargaining, much like judges in sentencing, presumably are motivated by a disparate mixture of philosophies and aims, including deterrence, retribution or just desserts, incapacitation, and rehabilitation").

sub-principles, or policies would leave considerable room for judgment, because criminal law theory itself is a subject of much debate. But it is conceivable that prosecutors, collectively and over time, could intuit general norms to guide the exercise of prosecutorial discretion.

More controversial is the issue of whether neutral criteria derived from non-criminal law sources are legitimate. To what extent may neutral prosecutors pursue public policy objectives that have not been sanctioned directly by the legislature or the culture of criminal punishment? How should prosecutors identify neutral principles to govern the pursuit of such objectives?

1. Implementing Legislative Will

On the surface, the claim that prosecutorial decisions should implement, rather than flout, the legislative will seems almost tautological. Yet at its core, the claim is controversial. For in some respects, the very function of prosecutorial discretion is to smooth rough edges in criminal legislation.[123] Screening of cases prevents over-enforcement and application of onerous penalties to minor offenders.[124] Plea bargaining differentiates among offenders in a way legislation cannot.[125] Prosecution and sentencing policies sometimes serve to modernize out-of-date laws.[126]

---

[123] *See, e.g.*, Green and Zacharias, *supra* note 38, at 439-42 (discussing prosecutors' function of "smoothing rough edges in the terms of law"); Brenda Gordon, *A Criminal's Justice or a Child's Injustice? Trends in the Waiver of Juvenile Court Jurisdiction and the Flaws in the Arizona Response*, 41 ARIZ. L. REV. 193, 207 (1999) ("Proponents of prosecutorial waiver assert that prosecutors are more neutral, balanced, responsive, and objective gatekeepers than either 'totally child-oriented' juvenile court judges or 'get tough' legislators"); Lynch, supra note 10, at 2138 ("Most people want exactly what we now have: a system in which criminal prohibitions can function as symbolic condemnation of behavior we seriously disapprove of, but without imposing severe sanctions on every ordinarily law-abiding person who on occasion indulges in it; . . . and in which unforeseeable factual variants and individual circumstances can be taken into account to soften enforcement of rules that, in the abstract and on average, are appropriately made severe."); Richman, *supra* note 115, at 959 (noting the argument that prosecutors serve the function of "harmoniz[ing] ill-defined legislative policies with principles of individualized justice").

[124] *See, e.g.*, Wayne R. LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532, 533-34 (1970) (arguing that prosecutors' exercise of discretion limits legislative overcriminalization and "individualize[s] treatment of offenders"); Lezak and Leonard, supra note 1, at 45 (arguing that prosecutorial discretion counteracts unduly harsh punishment of undeserving individuals); William C. Louthan, *The Politics of Discretionary Justice among Criminal Justice Agencies, in* PINKELE AND LOUTHAN, *supra*, at 13, 16 ("there *are* considerations unique to a given defendant that may legitimate a decision not to prosecute").

[125] *See, e.g.*, MALCOLM M. FEELEY, THE PROCESS IS PUNISHMENT: HANDLING CASES IN A LOWER COURT 16 (1979) ("The antithesis of bureaucracy is discretion, the ability to base decisions on individual judgments rather than rules"); GOLDSTEIN, *supra* note 1, at 3 (analyzing

At least on occasion, prosecutors are expected to interpose themselves between defendants and unreasonable or overly rigid laws.[127]

Indeed, legislatures may expect prosecutors to exercise these gap-filling functions and accordingly may refrain from expressing a legislative will. Rarely do statutes include explicit criteria that dictate prosecutors' decisions.[128] This may either be because the legislators have an

---

various aspects of prosecutorial discretion, especially plea bargaining, and concluding that the prosecutor "individualizes justice . . . and mitigates the severity of the law"); Charles P. Bubany & Frank Skillern, *Taming the Dragon: An Administrative Law for Prosecutorial Decisionmaking*, 13 AM. CRIM. L. REV. 473, 482 (1976) (discussing the impact of prosecutorial discretion in plea bargaining on effectuating individualized treatment of defendants); LaFave, *supra* note 1, at 534 (noting the importance of prosecutorial discretion because "A criminal code can only deal in general categories of conduct"); Zacharias, *supra* note 93, at 1136 (noting that plea bargaining enables prosecutors to "take equitable factors into account").

[126] *See, e.g.*, Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 U.C.L.A. L. REV. 1, 3 (1971) (suggesting that the exercise of prosecutorial discretion not to enforce a law may lead the legislature to agree to revise an out-of-date law); Griffin, *supra*, note 4, at 263-64 ("prosecutors are more suited than the legislature to adapt the criminal law to new circumstances and to identify when the prosecution of certain statutes would be anachronistic"); MILLER, *supra* note 19, 126 at 294-95 (reporting a study of charging discretion and concluding that "no one else is in a better position to make charging decisions which reflect community values as accurately and effectively as the prosecutor"); *cf.* Gyurci, *supra* note 14, 126 at 1265 n.62 (1994) ("Prosecutors circumvent the Sentencing Guidelines by engaging in bargaining over facts (changing the amount or nature of the drug), Guidelines-factor bargaining (ignoring or reducing the individual's role in the crime), limiting proof (limiting the evidence to be considered in prosecuting a case), bringing less severe alternative charges, and using substantial assistance motions improperly").

[127] *See, e.g.*, COLE, *supra* note 72, at 112 (discussing ways in which "The prosecuting attorney using his discretionary powers influences the ways laws are enforced"); KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 17 (1969) ("Rules without discretion cannot fully take into account the need for tailoring results to unique facts and circumstances of particularized cases"); JACOBY, *supra* note 1, at 3 (analyzing the use of prosecutorial charging and sentencing discretion to apply laws appropriately to individual defendants); James Vorenberg, *Narrowing the Discretion of Criminal Justice Officials*, 1976 DUKE L. J. 651, 678 (1976) ("The prosecutor's decision whether and what to charge is the broadest discretionary power in criminal administration"); Zacharias, *supra* note 93, at 1136 (noting that the exercise of plea bargaining "limit[s] the effects of rigid legislation").

[128] A rare example of a statute that does set forth standards of prosecutorial decisionmaking is the Juvenile Justice and Delinquency Prevention Act of 1974, 18 U.S.C. §§ 5031-5042, which governs the Attorney General's decision of whether to exercise federal jurisdiction in a juvenile prosecution. *See* United States v. Juvenile No. 1, 118 F.3d 298, 300 (5th

expectation that prosecutors will fully enforce the law or because the legislators wish to condemn the prohibited conduct for symbolic reasons, without forming concrete expectations regarding enforcement. In the absence of a legislative command, criminal law theory has never presupposed a default legislative intent regarding enforcement.

As a practical matter, therefore, the sub-principle that prosecutors must obey the legislative will at best can serve as a minimum, non-exclusive guide for prosecutorial behavior: prosecutors may not directly defy legislative directives when those can be discerned. This guide only will prove useful in a limited number of cases.

Implementation of even this narrow sub-principle may be difficult. Consider, first, the extreme example of a prosecutor who categorically refuses to enforce a particular law – for example, refusing to seek the death penalty on moral or general policy grounds. This prosecutor's action may contradict the legislative expectation that the law, at least sometimes, will be implemented.[129] Under the neutral sub-principle, the prosecutor should not be permitted to overrule the legislature's will, both because doing so is *ultra vires* and because that would allow public policy to be implemented differently by each prosecutor in the jurisdiction.[130]

In less extreme circumstances, however, it is impossible to extrapolate the legislate will. With respect to almost every law, the legislature anticipates that prosecutors will determine who to prosecute, who to plea bargain with, and what sentences to propose.[131] One thus cannot

---

Cir. 1997) (holding that the Attorney General's certification of a "substantial Federal interest" warranting the exercise of federal jurisdiction is not subject to judicial review); Robert Mahini, Note, *There's No Place Like Home: The Availability of Judicial Review Over Certification Decisions Invoking Federal Jurisdiction under the Juvenile Justice and Delinquency Prevention Act*, 53 VAND. L. REV. 1311 (2000). With respect to state prosecutors' discretionary decision whether to try minors as juveniles or adults, see Catherine R. Guttman, Note, *Listen to the Children: The Decision to Transfer Juveniles to Adult Court*, 30 HARV. C.R.-C.L. L. REV. 507 (1995).

[129] *See, e.g.*, DeMay, *supra* note 77, at 806-08 (1999) (discussing, *inter alia*, possible controls on prosecutors who refuse to seek the death penalty under any circumstances).

[130] Similarly, consider how a prosecutor might react to a recent legislative decision to adopt another strict form of punishment: a three-strikes law. Defendants' interests always will conflict with implementation of the law. In any individual case, a prosecutor may have independent, potentially legitimate reasons for opposing implementation – notions of fairness, concerns about constitutionality, and neutral law enforcement concerns. Yet one can offer at least a fair argument that the prosecutor's role does not include the right to nullify the legislation. In the end, our dilemma is that the objective neutrality principles (such as the commitment to legislative decisionmaking) cannot coexist with the competing conceptions that envision prosecutorial flexibility, but in some contexts seem equally valid as a normative matter.

[131] Because prosecutorial resources are finite, the decision to enforce a statute fully, by definition, constitutes a decision not to enforce other statutes fully. Accordingly, legislatures ordinarily must assume that the exercise of prosecutorial discretion will spread resources

determine when a decision not to prosecute fully is consistent with the legislature's ostensible desire to punish.[132]

Moreover, expressions of the legislative will, when they can be ascertained, are not typically crystal clear – temporally (*i.e.*, what a legislature wishes 3 or 10 years after its enactment of a law)[133] or internally (*i.e.*, what different proponents of the legislation anticipated).[134] In the case of the death penalty statute, for example, the legislature at the time of adoption may have expected that the law would be enforced because it believed that there was a societal consensus in favor of the death penalty, that the statute could be fairly implemented, and that the death penalty serves as a deterrent. But the legislature may also have understood that, if these assumptions are proven to be erroneous or inapplicable in a particular district or at a particular time, a prosecutor would have latitude not to implement the law.

Strong proponents of prosecutorial discretion may dispute the preeminence of legislative will on theoretical grounds as well. One can make a case for the position that elected prosecutors *should* serve as check on legislatures and should play an independent role in shaping the law.[135]

---

appropriately.

[132] Conversely, the mere fact that a statute is on the books should not establish a justification for particular decisions to prosecute, because the presence of the statute does not, by itself, illustrate a legislative desire for full enforcement.

[133] *See* Cates, *supra* note 21, at 3-6 (discussing prosecutions under obsolete statutes). The U.S. Supreme Court has suggested that the failure to repeal even dormant laws suggests a legislative desire to have the laws enforced. *See* District of Columbia v. John R. Thompson Co., 346 U.S. 100, 117 (1953) (holding that long-term disuse does "not bear on the continuing validity of the law; it is only an ameliorating factor in enforcement"); *see also* R.I. Ass'n of Realtors v. Whitehouse, 199 F.3d 26, 32 (1st Cir. 1999) (finding a credible threat of prosecution under an unenforced statute because it had been adopted "only twenty years ago"); *but cf.* Poe v. Ullman, 367 U.S. 497, (1961) (finding lack of justiciability of a challenge to a dormant statute on the grounds that 80 years of non-enforcement constituted a "tacit agreement" not to prosecute under the law). Commentators have questioned that conclusion. *See, e.g.*, WAYNE R. LAFAVE, JEROLD H. ISRAEL, AND NANCY J. KING, CRIMINAL PROCEDURE §13.5 at 689 (3rd ed. 2000) (noting criticism of the Supreme Court's conclusions); *see also* Roska v. Peterson, 328 F.3d 1230, 1253 (10th Cir. 2003) (noting that whether a statute has "fallen into desuetude" is a factor bearing on a police officer's good faith in believing actions based on a statute are appropriate).

[134] *See, e.g.*, Palmer v. Thompson, 403 U.S. 217, 224 (1971) (noting the difficulties inherent in focusing on legislative motives, including the problem of identifying the true legislative intent when legislators differ in their views).

[135] *See supra* text accompanying note 123-128. There may also be an issue of whether individual prosecutors, rather than the prosecutors' offices, should develop law enforcement policy. But for purposes of our discussion here, we are referring to the highest prosecuting officer – for example, the federal or state Attorney General or the elected district attorney.

Consider, for example, a prosecutor employed in Texas immediately before the Supreme Court struck down the state's law governing consensual sexual relations by homosexual couples.[136] Under the legislative-obeisance sub-principle, the prosecutor might have had no leeway to decline enforcement. Arguably, however, the prosecutor should have been able to anticipate the Supreme Court's decision and been able to conclude that the specific legislative intent was superceded by general principles governing prosecutors' charging discretion.[137] The prosecutor might, for example, have determined that limits on prosecutorial resources justify non-enforcement in cases in which a conviction is likely to be overturned.[138] Moreover, regardless of the predicted outcome of the case on constitutional grounds, the prosecutor arguably should have recognized that the law was premised on a popular bias based on sexual orientation that should not be given effect through the prosecution's exercise of criminal law enforcement power. The prosecutor in question may have failed to act neutrally, or may have exhibited bias, by disregarding these countervailing considerations.[139]

2. Principled Decisionmaking Rooted in the Purposes of Criminal Law

One might be able to construct a theory requiring neutral prosecutors to rely solely on considerations internal to the justice system or, conversely, to avoid considerations extraneous to the system. At its simplest level, this theory would suggest that prosecutors must confine their decisionmaking criteria to a combination of resource considerations and policy considerations

---

[136] Lawrence v. Texas, __ U.S. __, 123 S.Ct. 2472 (2003).

[137] Alternatively, the prosecutor might have relied on other neutral criminal law principles that suggest prosecutions should be reserved for cases most deserving of prosecution, including cases involving conduct that can and should be deterred, very harmful conduct, or conduct about which there is clear societal consensus.

[138] *Cf.* Lawrence v. Texas, __ U.S. __, 123 S.Ct. 2472, 2498 (2003) (Thomas, J., dissenting) ("Punishing someone for expressing his sexual preference through noncommercial consensual conduct with another adult does not appear to be a worthy way to expend valuable law enforcement resources").

[139] After-the-fact, a Texas prosecutor who participated in the case acknowledged that the prosecution departed from traditional prosecutorial priorities. *See* Dean E. Murphy, *The Supreme Court: The Reaction; Gays Celebrate, and Plan Campaign for Broader Rights*, N.Y. TIMES, June 27, 2003, p. A20 (quoting an assistant district attorney who participated at the appellate level: "Obviously I am a little bit disappointed in the outcome because of the amount of work we put into it . . .. But I have a lot more serious criminal offenses in files on my desk than this . . .. It is going to be something of a relief to leave the social implications and philosophy and all that behind, and just focus on putting the bad guys in prison.").

that drive the justifications for punishment.[140] This contrasts with the notion that prosecutors may pursue policy agendas that ordinarily are the bailiwick of the legislature or other agencies of government.[141]

This vision of neutrality might encompass, or legitimate, second-order principles to which prosecutors should aspire. Arguably, for example, neutral prosecutors should commit themselves in all their actions to the axiom that the guilty should be convicted and the innocent acquitted.[142] Neutral prosecutors might be required to exercise discretion solely for the purpose of maximizing deterrence. Or, more vaguely, they might be required to strive for the imposition of "just deserts."[143] Each of these sub-principles is a subset of the general notion that criminal law is exclusively concerned with convicting truly guilty persons, in a constitutionally permissible way, for the purposes of incapacitating criminals and deterring crime.[144]

In practice, the contours of this approach are unclear. Depending upon how one phrases the second-order principles, they may become of little use. The preference for "just deserts", for example, is deeply rooted in the tradition of American criminal procedure. Yet what is just is so malleable a criterion that it enables prosecutors to justify almost any action.[145]

The phrasing of the principles may also, advertently or inadvertently, incorporate assumptions or presumptions that have nothing to do with the enterprise of focusing decisionmaking on criminal law functions. Consider, for example, the emphasis on punishing only the guilty. At one level, our justice system accepts the premise that it is preferable to allow some number of innocent persons to go free in order to assure that no innocent person is

---

[140] For example, the maximization of deterrence, imposing appropriate punishment, incapacitating dangerous defendants, and facilitating rehabilitation. *See* Fred C. Zacharias, *The Purposes of Discipline*, __ WM. & MARY L .REV. __, __ (2003) (discussing the purposes of criminal law sanctions).

[141] *See infra* text accompanying note 161.

[142] *See, e.g.*, Berger v. United States, 295 U.S. 78, 88 (1935) ("It is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one").

[143] *See* McTigue, *supra* note 40, at 671 ("the public generally views police officers, and to a lesser extent prosecutors, as neutral parties who seek to protect community safety and are only interested in a just result").

[144] *See* Richman, *supra* note 115, at 957-59 ("On one hand, we celebrate the professional independence of prosecutors. We expect them to set their priorities based on such considerations as the responsiveness of a social problem to criminal sanctions, the nature of the harm, and the maximization of deterrence. . .).

[145] In this sense, the concept of fairness is akin to the commonly cited principle that prosecutors must serve "justice". *See* Zacharias, *Structuring the Ethics*, *supra* note 93, at 48 (discussing the meaning of prosecutorial justice at the trial stage).

convicted.[146] This may, however, not be consistent with the emphasis of criminal theory on the imposition of just deserts, which would deem mistakes in either direction to be equally undesirable.[147]

There are, of course, powerful practical arguments in favor of imposing a gatekeeper role upon prosecutors, some empirical,[148] others having to do with the prosecutor's unique access to information.[149] The punitive nature of the criminal process, in which cost and stigma are imposed

---

[146] The aphorism that it is "better that ten guilty persons escape, than one innocent suffer" first appeared in 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 358 (1765). *See In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (stating that the requirement of proof beyond a reasonable doubt is "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free"); *accord* Johnson v. Louisiana, 406 U.S. 356 , 380, 393 (1972) (Douglas, J., concurring); Arizona v. Youngblood, 488 U.S. 51, 61, 73 (1988) (Blackmun, J., dissenting).

[147] *See, e.g.*, Larry Glasser, Note, *The American Exclusionary Rule Debate: Looking to England and Canada for Guidance*, 35 GEO. WASH. INT'L REV. 159, 189 (2003) ("Although it may very well be better to let ten guilty suspects go free than to convict one innocent suspect, the goal of the criminal justice system should be to convict the guilty and acquit the innocent"); Erik Lillquist, *Recasting Reasonable Doubt: Decision Theory and The Virtues of Variability*, 36 U.C. DAVIS L. REV. 85, 104 (2002) (quantitatively based article challenging Blackstone's premise); Alexander Volokh, *N Guilty Men*, 146 U. PA. L. REV. 173, 175 (1997) (questioning the proposition that society should let 10 guilty men go free to protect against incorrectly convicting one innocent man); *cf*. Russell L. Christopher, *Deterring Retributivism: The Injustice of "Just" Punishment*, 96 NW. U. L. REV. 843, 911 (2002) ("consequentialist theories justify intentional punishment of the innocent and are unable to explain the wrong of doing so"); Jeffrey Reiman & Ernest Van Den Haag, *On the Common Saying that it is Better that Ten Guilty Persons Escape than that One Innocent Suffer: Pro and Con*, in ELLEN FRANKEL PAUL, FRED MILLER JR., & JEFFREY PAUL, CRIME, CULPABILITY, AND REMEDY 234, 235 (1990) (evaluating the utilitarian arguments against Blackstone's premise).

[148] The empirical claim posits a substantial likelihood of error in the criminal process, which suggests that safeguards involving prosecutorial action may be necessary if our ideals are to be satisfied. Society might want prosecutors to screen cases not because of any special prosecutorial competence, but simply out of a desire to impose some additional obstacle in the way of potentially faulty convictions. In other words, the preference for avoiding erroneous convictions may lead society to assign prosecutors the function of serving as a check – officials who take second look at the evidence the police already considered in deciding to recommend prosecution.

[149] In other words, without the prosecutor's action, some information may never become available to the fact-finder or the defense. *See, e.g.*, United States v. Bryant, 439 F.2d 642, 648 (D.C. Cir. 1971) (justifying the prosecutorial duty to disclose information under *Brady v.*

upon defendants whether or not they ultimately are exonerated, may justify requiring prosecutors to screen prosecutions with a special emphasis on the possibility of innocence.[150] But these concerns do not explain the normative judgment that it is just or "neutral" for prosecutors to dismiss cases of defendants likely to be guilty.

The tension between the "imposing just deserts" and "protecting the innocent" principles highlights another, practical difficulty of relying upon norms such as these to identify appropriate exercises of prosecutorial discretion. Even if we recognize protection of the innocent as a compelling ideal, the implementation of that ideal may not be achieved best through the adoption of a decisionmaking principle that focuses directly on the rights of falsely accused defendants.[151] Society may be willing to rely on other actors present at trial to serve the function of evaluating the evidence and correcting misperceptions that derive from prosecutors' lack of neutrality.[152]

Maryland on the basis that much "relevant material . . ., because of imbalance in investigative resources, will be exclusively in the hands of the Government"). The factfinders, for example, ordinarily never learn about inadmissible evidence, evidence that has not been produced in discovery, and impressions that prosecutors form based upon witness interviews and witness preparation.

[150] *See, e.g.*, Young v. United States ex rel. Vuitton et Fils S.A., 107 S. Ct. 2124, 2141 (1987) ("Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life. For this reason, we must have assurance that those who would wield this power will be guided solely by their sense of public responsibility for the attainment of justice."); *cf.* Fred C. Zacharias, *The Civil-Criminal Distinction in Professional Responsibility*, 7 J. CONTEMP. LEG. ISSUES 165, 172-76 (questioning whether criminal cases are inherently distinctive).

[151] Mandating a defendant-protective mindset will not necessarily serve the goals of the criminal justice system. One might just as easily take the view that the process works most efficiently – and protects the innocent most effectively – when prosecutors act as advocates in favor of criminal convictions and let the criminal justice process weed out the unworthy cases. Indeed, if neutral prosecutors are expected to focus on the potential innocence of defendants, it may be necessary to carve out special sub-principles for different stages of prosecutors' work – especially the trial stage. Prosecutors who emphasize accuracy at trial may second-guess their advocacy in a way that undermines their effectiveness as instruments in the truthseeking process. To the extent society binds prosecutors' offices to the task of assessing innocence at the same time as it seeks to establish guilt, chief prosecutors may need to divide these responsibilities among different actors within their offices. *See* Uviller, *supra* note 40, at 1697 (inquiring whether society has "imposed fundamentally inconsistent obligations on our prosecutors, bending them into psychological pretzels by requiring them to be the neutral investigator and the 'quasi-judicial' adjudicator").

[152] Namely, the judge and the jury, and defense counsel. *See* Zacharias, *Structuring the Ethics*, *supra* note 93, at 60 (suggesting that prosecutors must strive only for "adversarially correct results"); *cf.* Schwarzer, *supra* note 105, at 407 (questioning the allocation of authority

The validity of the underlying norm to the criminal justice system does not necessarily translate into behavioral directives inherent in the prosecutor's role.

3. Principled Policy-making

An alternative conception of principled neutrality is simply that neutral prosecutors' offices will constrain their own exercise of discretion, and the potential for arbitrariness, through the adoption of administrative policies that govern categories of cases. In part, this is the approach followed, to a limited extent, in the Department of Justice's U.S. Attorney's Manual. By identifying specific criteria on which decisions will be based, such guidelines promote consistency and expose the decisionmaking criteria to public debate and review.[153]

This view of neutral decisionmaking seems incomplete, however, for at least two reasons. First, it says nothing about the legitimacy of the reasons for the particular office policy. Second, it does not necessarily presuppose consistency among various policies. The mere fact that any given charging policy, or other decisionmaking policy, is consistently applied does not mean that decisionmaking in a prosecutor's office is made on a coherent, defensible basis.

Consider, for example, the U.S. Attorney General's recently articulated policy requiring federal prosecutors, in charging a defendant, generally to bring the harshest charges that can be readily proven.[154] The policy has been explained as promoting consistency and transparency. But one might ask whether there is a defensible justification for uniformly charging defendants as harshly as possible, rather than pursuing other equally transparent approaches that also promote consistency.

The best rationale is that lawbreakers should be punished as harshly as possible in order to maximize deterrence and retribution, and that charging all provable offenses helps ensure maximum punishment.[155] Yet federal prosecutors do not act on this premise in other aspects of their work. Prosecutors frequently decline to file charges at all when they conclude that

---

under the federal sentencing guidelines" to "advocator prosecutors" rather than "neutral judges").

[153] A critical analysis of the U.S. Attorney's Manual is beyond this Article's scope. It is fair to conclude, however, that the manual fails to offer a complete, coherent and consistent account of how prosecutors should make discretionary decisions. With respect to many specific issues, it either offers scant guidance or announces a categorical policy that may not accord with ordinary decisionmaking principles.

[154] Memorandum of Attorney General John Ashcroft re "Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing." It is uncertain whether the policy is new or whether the Department has simply re-articulated a policy that has been understood to exist since the adoption of the Federal Sentencing Guidelines.

[155] It is important to note that this rationale is inconsistent with the traditional notion that "punishment should fit the crime." Because of this inconsistency, it is unlikely that the Department of Justice would invoke the principle of maximizing punishment to justify the new policy.

prosecution would be undeservedly harsh, even in instances in which federal crimes can easily be proven.[156] In cases of white-collar crimes, prosecutors often leave cases to be pursued civilly. Prosecutors also routinely exchange non-prosecution for defendants' agreement to make restitution or to abide by conditions of diversion. The current prosecutorial policy notwithstanding, federal prosecutors thus have relied heavily, and will no doubt continue to rely, on the notion of individualized justice that results in proportionate treatment of offenders.

A second possible rationale for the new policy is that constraining federal prosecutors' discretion to limit charges implements the congressional intent that each federal criminal law be fully enforced. As we have already discussed, however, it is not clear that Congress in fact has ever expected its laws to be enforced rigidly, or has intended to relegate prosecutors to a purely ministerial role.[157] Moreover, federal prosecutors do not act on the premise that criminal laws must be fully enforced in other aspects of their work. Virtually all federal crimes are prosecuted selectively.

In short, the current federal policy illustrates that the adoption of administrative policies do not invariably ensure "principled" decisionmaking in a broader sense. Policies may promote some degree of consistency, though that will not always be the case.[158] More importantly, the mere adoption of a policy does not ensure the legitimacy of the mandated prosecutorial action because the policy will not automatically rest upon a legitimate principle that justifies the policy.[159]

---

[156] *See, e.g.*, United States v. Jacobo-Zavala, 241 F.3d 1009, 1011 (8th Cir. 2001) (noting a prosecutor's agreement to dismissal of federal narcotics charges in favor of the filing of state narcotics charges "because the penalty in state court was, in her opinion, sufficient punishment for the defendants' crimes"). The Department's internal guidelines specifically provide that charges should be filed only when a "substantial federal interest would be served by prosecution" and that in deciding whether to decline to bring charges, prosecutors should consider "[t]he nature and seriousness of the offense," "[t]he deterrent effect of prosecution," and "[t]he person's culpability in connection with the offense." U.S.A.M. §§ 9-27.220 & 9-27.230. *See* United States v. Juvenile No. 1, 118 F.3d 298, 305-06 (5th Cir. 1997) (citing the Department of Justice guidelines and observing that prosecutors' charging decisions are ill-suited to judicial review because "[s]uch factors as . . . the prosecution's general deterrence value" are not readily susceptible to judicial analysis).

[157] *See supra* text accompanying note 128.

[158] Indeed, the Attorney General's new policy, while relying on the desire for transparency and consistency in charging, may in fact mask exercises of discretion that occur at the pre-charging stage (*e.g.*, in declining to bring charges at all) or in evaluating whether crimes with particularly severe penalties are "readily provable" and therefore must be charged.

[159] It is important to remember that categorical policies may create only the venire of consistency. In practice they often are under- or over-inclusive, with the result that they disregard alternative considerations that prosecutors ought to, or may in fact, apply. Ultimately, specific

4. Non-criminal law rationales

If neutrality means that prosecutors must make principled decisions, an important issue is whether the applicable decisionmaking criteria must be based on criminal law rationales. As a purely theoretical matter, when prosecutors implement criminal law to achieve non-criminal law objectives, they depart from their core functions. The neutrality principle arguably requires them to avoid entering the realm of politics and public policy.

The resolution of this issue has broad practical significance. It can affect recurring dilemmas, such as whether a municipal prosecutor may use a pending or threatened prosecution to gain leverage in a civil action by or against the municipality.[160] More broadly, it has bearing on how prosecutors should view their role as public servants. May a state or federal prosecutor use her authority to promote the interests of another branch of government?[161]

In the real world, prosecutors do not consider themselves to be inordinately constrained in the policies they may implement. Prosecutors typically see themselves as executive branch officials who are free to promote any legitimate government objective.[162] Some prosecution

---

office policies may be justifiable, but should be tested against whatever principles and sub-principles that one believes should govern prosecutorial decisionmaking generally.

[160] *See* Seth F. Kreimer, *Releases, Redress and Police Misconduct: Reflections on Agreements to Waive Civil Rights Actions in Exchange for Dismissal of Civil Rights Charges*, 136 U. PA. L. REV. 851, 902 (1988) ("Adversaries, courts, and citizens expect the prosecutor to be a guardian of the interests of justice. . . . [T]his impartial, if not neutral, role [arguably] is threatened by the release-dismissal practice, which injects the issue of civil liability into the criminal decisions"); Zacharias, *supra* note 17, at ___ n.149 (collecting and analyzing cases addressing the practice of conditioning prosecutorial decisions on a defendant's willingness to forego a civil suit). Similarly, may an office rest prosecution decisions on whether convictions are likely to produce the forfeiture of significant assets to the state? Steffanie Stracke, *The Criminal Activity Forfeiture Act: Replete with Constitutional Violations*, 57 MO. L. REV. 909, 919 (1992) (arguing that prosecutors often have a conflict of interest and should recuse themselves from plea bargaining when the application of forfeiture provisions are at issue). Arguably, both types of decisions are akin to other prosecutorial decisions that rest on considerations of resource preservation or maximization.

[161] One's view of appropriate prosecutorial conduct may vary depending upon the context. One might, for example, take the position that a prosecutor must steadfastly remain neutral (in the sense of focusing solely on law enforcement concerns) in deciding to commence a prosecution but that she may consider other policy considerations in declining or terminating a prosecution.

[162] *Cf.* Stephanie A.J. Dangel, Note, *Is Prosecution a Core Executive Function? Morrison v. Olson and the Framers' Intent*, 99 YALE L.J. 1069, 1087 (1990) ("early Federal prosecutorial practice parallels the Framers' intent which emerges from the Constitution and related records: The Founding Fathers did not conceive of prosecution as the exclusive function of the President,

agencies, particularly the federal Department of Justice, assume that Congress has assigned them functions that extend beyond criminal prosecutions (*e.g.,* foreign policy functions).

Of course, it is often difficult to distinguish between criminal law and non-criminal law objectives. Investigations into terrorism, for example, bridge the gap between enforcement of domestic criminal law, promoting ongoing war efforts, and the conduct of foreign policy. A prosecutorial focus on international money laundering likewise can be viewed in a variety of ways.

At the very least, however, one can reasonably posit that neutral prosecutors should confine themselves to implementing principles, sub-principles, or policies that have something to do with legitimate public-policy interests of their jurisdiction. This approach would exclude the pursuit of objectives unrelated to the sovereignty served by the particular prosecutor. States and localities would have no foreign-policy jurisdiction;[163] federal prosecutors might be limited in addressing purely state concerns.

B. The Usefulness of Relying on the Concept of Principled Decisionmaking

No one would dispute the theoretical benefits of principled prosecutorial decisionmaking. Yet one should not underestimate the difficulty of identifying meaningful criteria for prosecutorial decisionmaking that are both universally acceptable and workable. On the one hand, at too great a level of generality, sub-principles may be broadly recognized but offer little guidance. The most frequently espoused sub-principle, for example, is also the most fungible and least workable; namely, that a prosecutor must act fairly in making discretionary decisions.

On the other hand, highly specific sub-principles of decisionmaking are likely to offer more guidance, but also engender more debate. As we have seen, most observers would accept the broad notion that prosecutors should try to avoid punishing innocent defendants.[164] But narrower sub-principles that follow from this cannot generate a consensus.[165] The same holds true for standards prosecutors might adopt to govern the level of belief they must hold before

---

nor even of the executive branch").

[163] Thus, for example, a local prosecutor could not decline to prosecute certain foreign nationals in order to avoid offending an allied nation. Nor could she target foreign nationals in retaliation for their country's treatment of U.S. citizens.

[164] *See, e.g.*, Berger v. United States, 295 U.S. 78, 88 (1935) ("It is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one").

[165] To what extent, for example, must prosecutors screen cases to avoid prosecuting innocent people? May a prosecutor initiate proceedings based on as little as "probable cause" to believe an individual committed a crime or, at the other end of the spectrum, must a prosecutor be "morally certain" of guilt before bringing charges? *See, e.g.*, United States v. Ramming, 915 F. Supp. 854 (S.D. Tex. 1996) (opining that prosecution had "an obligation . . . to not prosecute where the evidence at best is disputed").

acting on a convicted defendant's behalf.[166]

Even if one can identify noncontroversial and specific decisionmaking criteria, these still may fail to shape appropriate prosecutorial decisionmaking. Consider a sub-principle that many would accept: that punishment should fit the crime.[167] Although the proportionality standard is clear, the meaning of proportionality varies with the context. A prosecutor who, for example, concludes that the death penalty in a particular murder case would be disproportionately harsh might nevertheless initiate a capital charge to gain leverage in plea bargaining. In this setting, the prosecutor can take the position that a death *sentence* might be disproportionately harsh but, because overcharging helps lead to appropriate punishment, a death *indictment* is proportionate.

Moreover, many so-called neutral sub-principles that seem useful and broadly acceptable will push in opposite directions when applied to specific cases. Selective prosecution within particular categories of crime, for example, may serve the maximization of deterrence and the preservation of resources but, at the same time, clash with the standards of proportionality and consistency.[168] Likewise, implementing the legislative will to fully enforce, or not enforce, particular crimes (or to enforce them in a particular way) may undermine traditional principles associated with criminal law concerns.

C. Initial Conclusions About Neutrality as Principled Decisionmaking

The notion that prosecutors should make principled decisions can be conceptualized as a separate dimension of neutrality, but it also represents an assumption implicit in other dimensions that we have identified. Many of the conceptions of neutrality to which this Article has alluded could be classified as sub-principles. At a minimum, they suggest that neutral

---

[166] That is, when must prosecutors take steps to overturn wrongful convictions? *See* Zacharias, *supra* note 17, at ___ (discussing prosecutors' obligations after a conviction is complete).

[167] Some might say that questions of punishment should be left to the judge. At this point, however, most accept that prosecutors may legitimately make decisions that influence, if not determine, what sentence will be imposed. Insofar as prosecutors make those decisions – *e.g.*, by initiating charges that carry mandatory minimum sentences or by agreeing to drop charges or recommend a particular sentence in exchange for a guilty plea – it may be argued that prosecutors should make them in a principled way.

[168] Federal prosecutions for insider trading are a good example. Prosecutors lack resources to prosecute all instances of insider trading and recognize that, perhaps unlike murder cases, it is unnecessary to prosecute them all. Private civil actions and S.E.C. investigations provide penalties in unprosecuted cases, with the result that criminal prosecution in the most visible cases adequately serves the need for deterrence. But if most persons who engage in insider trading are sanctioned civilly, criminal punishment may seem to be disproportionately harsh. And in the absence of some principle for determining which violators of securities law are most deserving of punishment, selective prosecution seems arbitrary.

principles or sub-principles exist and should govern prosecutorial discretion. For example, the idea of nonbiased prosecution not only means that there are illegitimate criteria for decisionmaking but, conversely, also suggests the existence of legitimate criteria. Nonpartisanship likewise presupposes that there are decisionmaking criteria that can be applied independently and objectively in individual cases.

Therefore, vague though the concept of prosecutorial neutrality may be and however it is conceptualized, the various dimensions of prosecutorial neutrality do share an underlying premise that prosecutors can, and should, exercise their discretion in a nonarbitrary fashion. Defining the sub-principles and other criteria governing decisionmaking and establishing priorities among them is a daunting task, yet any conception of prosecutorial neutrality seems to demand that this work be done.

That is not to say that identifying sub-principles of prosecutorial decisionmaking automatically would enable the public to assess individual prosecutors' work. Much of what prosecutors do inevitably remains hidden. Moreover, to the extent that some neutral principles target prosecutors' motives, those will be of limited utility for public oversight, because prosecutors' motivation usually is unascertainable.[169] Nevertheless, articulating principles and sub-principles of prosecution has value. It can make the exercise of discretion more thoughtful and systematic, enable well-intentioned prosecutors to reach decisions with reference to impersonal norms, narrow inconsistency within a prosecutor's office, and facilitate review by supervisory prosecutors. Though the public may not always be in a position to assess prosecutors' application of the decisionmaking criteria in individual cases, identifying the criteria at a minimum allows the public to evaluate the office's general approach.

V. THE THREE-DIMENSIONAL NEUTRAL PROSECUTOR

The foregoing analysis illustrates that commentators have used the term "neutrality" to describe several different limitations on discretionary prosecutorial decisionmaking. The question naturally arises of whether the different conceptions can co-exist. In other words, is it possible for a prosecutor to satisfy all three dimensions of neutrality simultaneously?

A. Commonalities Among the Different Conceptions of Neutrality

At the most abstract level, the different dimensions are reconcilable. A three-dimensional

---

[169] Consider, for example, the principle that prosecutors should not use the criminal justice process to penalize persons who have not yet been convicted. Under this principle, prosecutors should not authorize searches to harass a person; prosecutors should not oppose bail merely to punish defendants by incarcerating them before trial; prosecutors should not indict simply to subject defendants them to the anxiety and expense of a trial. *Cf.* Freedberg v. United States Department of Justice, 703 F. Supp. 107 (D.D.C. 1988) (enjoining simultaneous obscenity prosecutions of business owner in four different federal districts). But insofar as a prosecutor can point to legitimate justifications for her actions, it ordinarily will be impossible to discern whether she has acted for a permissible or impermissible purpose.

"neutral prosecutor" simply would need to remain non-biased, nonpartisan, and principled. This prosecutor would ignore impermissible considerations such as race, gender and religion, self-interest, personal beliefs, and party politics. Her frame of mind would be independent, objective, and non-political. She would need to act in a non-arbitrary fashion, consistently applying decision-making criteria derived from societally acceptable sources.

Indeed, the three dimensions of neutrality contain common threads. First, each dimension reflects the notion that prosecutorial decisionmaking should be depersonalized. When, for example, one says that prosecutors may not rely upon their own beliefs, must be objective, and must apply societally acceptable principles, one is describing an approach to criminal justice administration that aims at elevating legal and professional decisionmaking criteria over individual preferences. Depersonalization of decisionmaking, ideally, would lead all prosecutors to act consistently in like situations regardless of their biographies, predispositions, and idiosyncracies. A prosecutor arguably acts neutrally when she reaches the same decision that other prosecutors would, and should, reach.

Second, the three dimensions all reflect the idea that prosecutors should make decisions abstractly or "noncontextually" – intellectually removed from the immediate controversy in which the issues arise. The non-biased prosecutor, for example, should disregard impermissible considerations, even those that appear to animate the community's views or the law itself. The nonpartisan prosecutor should ignore a momentary hue and cry. The principled prosecutor should consistently make decisions by reference to a set of generalized, deeply-rooted decisionmaking norms.

Third, the three dimensions suggest that the neutral prosecutor must be accountable to the public, in the broadest sense. The non-biased prosecutor disregards personal beliefs in favor of public values and ignores the desires of her political party in order to represent the entire citizenry. The nonpartisan prosecutor makes decisions independently of the police, the victim and the voting public, in order to give appropriate respect and weight to the legitimate interests of all of her constituents (including the defendant). The principled prosecutor gives due weight to public expectations and values as expressed in particular criminal legislation and in the broad expectations of the criminal justice system.

That these themes cut across commentators' different conceptions suggests that "neutrality" offers a coherent account of how prosecutors should behave. As the following sections will suggest, however, the themes themselves, both in theory and practice, are in tension.

B. Tension Between Decontextualized and Depersonalized Decisionmaking

Decontextualized decisionmaking – decisionmaking divorced from the immediate context in which issues arise – may be in tension with depersonalized decisionmaking. Decontextualization suggests that decisions should be made without regard for the demands and expectations of a public constituency that is divided in its desires and that is motivated by impermissible prejudices and momentary passions. Accordingly, the prosecutor must look elsewhere for decisionmaking criteria. The likely alternative source of standards is the prosecutor's own value system – her beliefs about what decisions will best serve the public good. This risks idiosyncratic subjective judgments that are inconsistent with the notion of

depersonalized decisionmaking.

In theory, a "neutral" prosecutor might avoid this dilemma by making decisions based on external, objective criteria that are based neither on momentary public expectations about a particular case nor personal beliefs. In particular, the prosecutor would strive to implement deeply-rooted and broadly-accepted decisionmaking principles or sub-principles. The difficulty is that there are few universally-accepted objective criteria for making decisions and prosecutors have not collectively attempted to derive useful standards (*e.g.,* from the criminal law and criminal justice system) and then articulate those principles. A chief prosecutor or other supervisory prosecutors might choose from among possible, and competing, principles and communicate them throughout the office, but this is rarely done. Likewise, few if any prosecutors' offices explicitly deliberate and record the reasons for their decisions. In the absence of codified principles or prosecutorial common law, individual prosecutors typically must identify the relevant criteria themselves.[170] The process of selecting from among equally justifiable norms raises the specter of personalized, value-laden choices.

These concerns are illustrated by the everyday case of a prosecutor deciding how to proceed against an immigrant woman with children who has served as a courier in a large drug-dealing operation.[171] Initially, the prosecutor may be inclined to base her approach on the general views of society regarding the appropriate treatment of such defendants. Upon reflection, however, the prosecutor may conclude that the popular view reflects momentary passions and prejudices. Contemporary stereotypes about the relative culpability of women in criminal organizations (*e.g.,* that women are coerced into playing subordinate roles) and the impact of imprisonment on women and their children (*e.g.,* that imprisonment is harsher for women than for men) might lead to undue leniency because the prevailing stereotypic assumptions are incorrect. Alternatively, contemporary prejudices against immigrants might lead to undue harshness relative to drug couriers who are citizens. Respect for the importance of decontextualization arguably requires the neutral prosecutor to rely on alternative, though depersonalized, standards.

So the prosecutor might select a common, seemingly objective standard as her lodestar. Suppose, for example, that she vows to base her decisions solely and objectively on the defendant's culpability, because that will lead to proportionate punishment. It is easy to see that the generality of this standard will create difficulty for the prosecutor in forming concrete decisions. But beyond that inevitable problem, there also is a substantial risk that the standard itself is more subjective than it appears. In assessing the defendant's relative culpability, the standard allows the prosecutor to understate the defendant's role based on stereotypical assumptions similar to those inherent in the community view; either that women in drug

---

[170] In other words, some prosecutor will need to make a personal choice among contested principles.

[171] *See, e.g.* United States v. Redondo-Lemos, 955 F.2d 1296, 1297-98 (9th Cir. 1992) (reviewing district court's determination that federal prosecutor's office was violating the rights of male defendants who were convicted of transporting narcotics because the office "was enforcing the drug laws in a manner that was both quirky and favorable to female defendants").

operations play a minor role or are exploited or coerced into participation or that immigrant drug couriers are somehow more blameworthy than drug couriers who are United States citizens.

Assume, therefore, that, in the interest of preserving depersonalized decisionmaking, the chief prosecutor announces office policies that exclude the defendant's gender and immigration status entirely from consideration. That would be the effect, for example, of rules requiring assistant prosecutors to (1) bring the most serious charge that the evidence allows and seeking the harshest available sentence in all drug-courier cases,[172] or (2) seek a particular sentence (say, ten years' imprisonment) in all drug-courier cases regardless of the particular circumstances. Of course, the selection of these rules over others is, in some sense, arbitrary. It is unclear what principle underlies their selection. Yet the fear of contextualization and the demand for less personalization in decisionmaking may require some artificiality in the interest of applying manageable, objective standards.

Nevertheless, the adoption of such focused policies gives rise to a broader problem, particularly when combined with the absence of an office common law. It may be difficult to square the selected policies with other standards that also are being, or have been, emphasized within the same office. For example, if the office's ordinary practice is to take the defendant's relative culpability into account in deciding whether to charge or what charges to bring, it is hard to justify not doing so in drug courier cases. Likewise, if the office's ordinary practice is to give some weight to the legitimate interests of all who will be affected by the prosecutor's decision, it is hard to justify entirely ignoring the impact of a prosecution on the female drug courier's dependent family members. While leading to seemingly consistent treatment of drug couriers, the new office rules inexplicably distinguish between drug-courier prosecutions and other prosecutions in which case-specific considerations relevant to proportionality and retribution are given weight.[173]

Some of the these concerns are inherent in the notion of objective decisionmaking. But they ultimately relate, in part, to the interaction between the simultaneous desires for depersonalization and the avoidance of case-by-case decisionmaking that is vulnerable to momentary demands of the prosecutor's potentially frenzied or biased constituencies. The call for decontextualization pushes in the direction of resort to independent values, which inevitably risk personalization in hidden forms. The imposition of rules designed to avoid contextual decisionmaking also can mask personal biases of the designator of the rules, can prove arbitrary, or in practice can become so difficult to implement consistently that they fail to provide the

---

[172] This seems to be the Justice Department's policy on paper, if not in actual practice.

[173] One might, of course, justify the difference on the basis of administrative necessity. In jurisdictions where a prosecutor's office handles a large number of narcotics cases, categorical policies based on such factors as the amount of drugs involved or the number of prior offenses are necessary to preserve prosecutorial resources. A practice of making individual charging, plea bargaining and sentencing decisions based on a multiplicity of factors would take up too much time. Thus, prosecutors might characterize cookie-cutter policies in drug cases as a fair resolution of the tension between the need to make individualized decisions and the need to preserve prosecutorial resources.

objectivity that is their goal.

C. Tension Between Decontextualized Decisionmaking and Public Accountability in Decisionmaking

Decontextualized decisionmaking, at least in part, is inconsistent with the notion of public accountability. If a prosecutor ignores public expectations in an effort to avoid being swayed by prejudice and irrational excesses, how can the prosecutor serve the public's will?[174] Public accountability presupposes some form of responsiveness to society's present-day desires.

Consider, for example, a prosecutor called upon to enforce bank fraud legislation adopted in the wake of the savings-and-loan scandal of the 1980s,[175] or to enforce anti-terrorist legislation after the terrorist attacks of September 11, 2001. The idea that the neutral prosecutor should avoid popular prejudices and temper public excesses suggests that the prosecutor should enforce these laws circumspectly. In contrast, the publicly-accountable prosecutor probably would enforce these laws to the hilt – seeking the harshest allowable penalties, in deference to the popular will as reflected in the then-new legislation.

D. Tension between Depersonalized Decisionmaking and Public Accountability in Decisionmaking

Finally, there is a tension between the idea that prosecutorial decisionmaking should be impersonal, in the sense that it should be separated from prosecutors' own self-interest, and the idea that prosecutors should be accountable to those general societal preferences that do not stem merely from the heat of the moment.[176] That tension arises because American society's democratic processes presuppose, to some extent, that self-interest on the part of government officials promotes public accountability.

Our system of selecting prosecutors suggests that the commitment to public

---

[174] Richman, *supra* note 115, at 960 ("Yet for all the apparent confidence in the judgment of the professionals, the idea that prosecutors should be broadly responsive to the concerns of their community also runs deep. Where reasonable minds might differ on how prosecutorial resources might be deployed, community preferences are thought to be critical").

[175] *See generally* Bruce A. Green, *After the Fall: The Criminal Law Enforcement Response to the S&L Crisis*, 59 FORDHAM L. REV. S155, S173-76 (1991) (discussing Congress's enhancement of criminal penalties for banking crimes in response to the savings-and-loan crisis of the 1980s).

[176] The tension discussed in Section V(C) referred to the issue of how prosecutors might react to society's desires in the midst of a public groundswell. This section addresses the separate issue of how depersonalized decisionmaking relates to the question of whether, even assuming that prosecutors should ignore frenzied public opinion, they should be accountable to more general, impetuous societal preferences.

accountability is meant as more than a *de minimis* constraint requiring objectivity and adherence to unambiguous legislative directives. We follow a democratic regime of electing prosecutors, or those who appoint prosecutors, for limited terms. We do not give prosecutors life or guaranteed tenure, as we do for federal judges. Part of the reason presumably is that prosecutors are more likely to satisfy the public's desires if their decisions have some implications for their careers.

A desire for public accountability arguably led Congress to let the federal Independent Counsel Act lapse. Congress wanted government corruption cases to be handled by prosecutors more answerable to the electorate and the appointing official than independent counsel previously selected under the Independent Counsel Act had been. This vision of public accountability, however, is in tension with that aspect of depersonalized decisionmaking that envisions prosecutors who completely ignore the impact of public reactions on their own career interests.

There are ways to resolve these issues. Perhaps one should view the system's focus on accountability to be more limited – to emphasize accountability in the sense of performing well, according to the precepts of neutral prosecutions. Overall, society may prefer prosecutors who engage in depersonalized decisionmaking to those who pander to society's second-order preferences. Neutral prosecutors arguably are those who can cabin and set aside career interests in their own minds. Whatever the merits of such approaches, however, it is clear that they compete with the apparent systemic bias in favor of prosecutors who heed society's reactions to the results of their decisions.

E. Tensions Within the Dimensions Themselves

Although the three dimensions of neutrality are theoretically reconcilable,[177] tensions inevitably develop when the theory is applied to particular cases. We have noted some of the tensions earlier, so will not belabor the point here. A few examples, however, highlight the problem.

Consider a prosecutor in an abortion-related controversy.[178] Being nonpartisan and non-biased simultaneously may be difficult for her. The interests of at least some of the various constituents she "represents" will be religiously based.[179] Even if she tries to reach a nonpartisan decision, she must, in the end, implement the interests of some constituents – potentially favoring one religious perspective over another. Moreover, to the extent the prosecutor's nonpartisan decision rests upon her non-religious moral or public policy views, she arguably also acts in biased fashion, because she has emphasized her own values.[180] These eventualities may

---

[177] *See supra* text accompanying note 168.

[178] For example, a case involving prosecution under an anti-abortion statute, on the one hand, and a case involving a law forbidding protests near abortion clinics, on the other.

[179] *See supra* text accompanying note 108.

[180] Barry M. Horstman, *Simon Leis Jr.: He's Waged a Three-decade Crusade*,

simply present a problem of perception (*i.e.*, whether observers can determine the prosecutor's actual motivation) or they may reflect actual instances of bias.[181]

In part, this scenario simply illustrates the difficulty of avoiding the appearance of religious bias when a case implicates religious considerations. But it also illustrates an inherent tension between the non-bias and nonpartisanship conceptions of neutrality. One can argue that the prosecutor's independence from the community is contrary to the idea of non-bias, because the authority to reach independent decisions gives too much weight to the prosecutor's personal beliefs which, intentionally or subliminally, always will be implicated in cases such as these.[182] Conversely, however, attempting to remain faithful to the community's values rather than one's own in cases in which the community is divided could effectively undermine any possibility of true nonpartisanship. In practice, some prosecutors probably can perceive and reconcile the competing aspects of these dimensions of neutrality, but the tension may lead other prosecutors astray.

Additional tensions arise among the specific criteria, or sub-principles, that prosecutors might rely upon to achieve principled neutrality. Consider, for example, this recurring situation: a prosecutor reviews a set of evidence without bias, determines objectively that there is probable

---

CINCINNATI POST, Dec. 3, 1999, at C1 (describing the statement of Cincinnati prosecutor Simon Leis that "In [obscenity] matters . . ., there's no such thing as moral neutrality").

[181] These issues were the basis of the criticism of Simon Leis, a notorious Cincinnati prosecutor who undertook a modern-day crusade to fully enforce obscenity laws either to further his own principles or to garner personal publicity. *See, e.g.*, Isabel Wilkerson, *Profiles From Cincinnati: Cutting Edge of Art Scrapes Deeply Held Beliefs; Sheriff: When a Crusade Is a Career*, N.Y. TIMES, Apr. 4, 1990, at A6 ("[Leis] who is considered the leading guardian of morality...is arguably the most popular politician in Hamilton County, one who has won by wide margins almost every office he has ever sought"); Horstman, *supra* note 180, 181 at C1 ("Prosecutors have discretion over which cases to pursue and how to proceed, and Leis adopted a frontal assault on any magazine, movie or play that offended his sensibilities"). In one sense, this prosecutor merely abided by the legislative will, for the pornography laws he enforced were on the books. But in using the legislative will as a neutral justification for advancing his career publicly, the prosecutor arguably violated the non-bias principle; he may have considered personal advancement and the desire for personal notoriety in reaching his decisions. The theoretical problem this scenario illustrates is significant: the appeal to a neutral principle – here, executing the legislative will - by definition justifies impermissible behavior. The scenario suggests the limitations of neutrality reasoning in identifying appropriate exercises of prosecutorial discretion.

[182] *See supra* text accompanying note 68; *cf.* Anthony C. Thompson, *It Takes a Community to Prosecute*, 77 NOTRE DAME L. REV. 321, 352-53 (2002) (contending that, although the historical shift from private to public prosecutions stemmed from concerns about miscarriages of justice produced by both victims and defendants, "the desire for [prosecutorial] neutrality has driven a wedge between prosecutors and those individuals and communities that need their services").

cause to believe a crime has been committed, but personally has a reasonable doubt about guilt (or even believes that the defendant is not guilty). If committed to the neutral principle that only the guilty should be punished, the neutral prosecutor arguably should rely on her view of the defendant's innocence. Yet institutional, systemic imperatives militate in favor of leaving that judgment to the jury.[183] The prosecutor's commitment to these neutral systemic principles of criminal law enforcement may conflict with her commitment to the neutral principle regarding convictions of the innocent.

In a broader sense, some conceptions of prosecutorial neutrality (*e.g.*, objectivity, independence) elevate the importance of the exercise of individual prosecutors' judgment. Those approaches are inherently in tension with conceptions that emphasize deference – for example, deference to legislative will or to fixed neutral principles that should guide prosecutors' conduct.[184]

The potential irreconcilability of specific decisionmaking criteria or neutral sub-principles does not establish that the more general dimensions of neutrality are inconsistent. But it does suggest the difficulty of implementing a conception of neutrality in a way that can

---

[183] Presumably, the jury is supposed to determine the facts. When a real dispute exists, the victim arguably is entitled to have her day in court and to have the jury do its job. Society has an interest in permitting the trial process to function as the mechanism for achieving accurate and appropriate results. In allowing a prosecutor to proceed based on a minimal "probable cause" standard, the professional rules arguably suggest that the prosecutor should set aside her belief regarding the ultimate facts to be adjudicated and allow the fact-finders to proceed. *See, e.g.*, AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.8(a) (2002) ("The prosecutor in a criminal case shall: (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause") [hereinafter "MODEL RULES"].

[184] The problem is magnified when prosecutors resort to highly malleable neutral principles to justify their decisionmaking, such as the need to pursue "fairness." Consider the prosecutor who believes it to be unfair to prosecute someone found with a small amount of marijuana. Or suppose a prosecutor questions the fairness of using dubious indictments to force cooperation of defendants in the war on terrorism. When these prosecutors implement their potentially legitimate feelings regarding fairness, they in effect emphasize their own beliefs over those of their constituents (*e.g.*, other governmental agencies). Their quest for fairness may contradict other principles that sometimes are said to bind neutral prosecutors - including the legislative will (*e.g.*, in punishing marijuana possession) and the need to make decisions with reference only to law enforcement policies. In part, this illustrates the importance of developing more concrete neutral principles, but it also shows that the pursuit of some principles can lead to forms of partisanship or lack of objectivity.

It also illustrates the tension between inherently context-based principles such as fairness and principles that rely on prosecutors to act based on fixed criteria – for example, the existence of a statutory directive or the fact of guilt or innocence. A fairness approach also may conflict with other contextually-based criteria that militate in the same direction in particular cases - for example, law enforcement policies (*e.g.*, the need for incapacitation and deterrence).

achieve consensus. More importantly, for our purposes, the illustrations suggest that it is not helpful for commentators to characterize prosecutorial failure to satisfy one possible neutral principle as a failure to act neutrally. For an accusation that the prosecutor was not "neutral" to have meaning, commentators must first acknowledge the essential complexity of the term.

VI. SOME IMPLICATIONS OF PROSECUTORIAL NEUTRALITY'S WEAKNESSES AS A GOVERNING PRINCIPLE

Prosecutorial neutrality, as a general concept, has considerable rhetorical force. Yet, as this Article has shown, the concept has no fixed meaning or, rather, has many different meanings. At some level, each dimension of neutrality might gain broad acceptance. Most would agree, for example, that prosecutors should be non-biased, if all that signifies is that prosecutors should not treat similarly situated defendants differently based on their race, religion or gender; that prosecutors should be nonpartisan, if that means only that prosecutors ought not invariably defer to the police or to victims; and that prosecutors should be principled, at least to the extent of consistently applying decisionmaking criteria that the legislature explicitly directs them to apply. But beyond the core of these dimensions, each is uncertain in theory and application.[185] It is equally unclear how the various conceptions fit together, since there are tensions among them.[186]

The most obvious implication of this analysis is for observers and commentators. For the moment at least,[187] one should not criticize particular prosecutorial conduct as lacking neutrality without stating in what sense one is using the term. It is easy to point to the absence of neutrality, in some sense, whenever one has a gut feeling that an individual prosecutor acted wrongfully. Yet because neutrality has multiple interpretations, it is just as easy for the prosecutor to respond that she acted neutrally, though perhaps in a different respect. Unless and until society develops a shared understanding of what neutrality entails, the concept fails to provide a useful norm.

This Article's analysis suggests that the public holds prosecutors to a high standard. The notion of neutrality is imprecise because it stands for many sub-principles, or even alternative principles, each of which is important. Although prosecutors sometimes have been called "ministers of justice,"[188] prosecuting is not a ministerial task. It calls for the exercise of judgment at virtually every step. Society has lofty expectations for how prosecutors should make those judgments, though those expectations are vague and not universally shared in all their details.[189]

---

[185] *See supra* Parts II-IV.

[186] *See supra* Part V.

[187] In other words, until a better understanding of neutrality develops.

[188] *See, e.g.*, MODEL RULES, Rule 3.8 cmt. ("A prosecutor has the responsibility of a minister of justice").

[189] Despite the tensions among the dimensions of neutrality, the dimensions do suggest

A second implication of this Article therefore is that prosecutors and the public need to develop clearer understandings about how prosecutors should make judgments. First-order principles, such as that prosecutors should be neutral or should seek justice,[190] may serve as a point of departure for analyses of prosecutorial discretion, but they are just a beginning. Standing alone, they are of dubious value precisely because they are so broad and over-arching. It thus is important not only to clarify first-order principles governing prosecutorial decisionmaking, but also to identify the second-order or sub-principles that we consider to be at their core. These likely will apply more narrowly, but they also may focus more specifically on the factors that society wishes prosecutors to implement or ignore. If, for example, we expect prosecutors to be non-biased, nonpartisan, and principled, what do each of those ideas mean and how do they interrelate?[191]

This raises the crucial question of how to identify both first- and second-order principles of decisionmaking. As a practical matter, this is not a task that individual assistant prosecutors can easily accomplish on their own. None have enough time, given their ordinary responsibilities. As a theoretical matter, societally acceptable principles or sub-principles are unlikely to emerge without public deliberation among prosecutors and others who represent a range of perspectives and experiences.

When individual prosecutors are forced to determine how to proceed in the absence of

---

one common theme. In exercising discretion, prosecutors have a personal responsibility to reach appropriate decisions. All of the conceptions seem to embrace the notion that prosecutors cannot simply accept conclusions that they are given (*e.g.*, by the police or the public). Even the conceptions that call upon prosecutors to follow law enforcement principles or explicit legislative directives assign individual prosecutors the task of determining the content of the underlying principles or directives.

[190] The "seek justice" standard has been incorporated in lawyer codes of conduct to express the drafters' general expectation of prosecutorial conduct. The lawyer codes include a handful of more specific rules dealing with particular aspects of prosecutorial conduct. Although the duty to "seek justice" might, in theory, fill in the gaps, the standard does not give much additional guidance to prosecutors and, not surprisingly, has rarely been used as a disciplinary standard.

There is an argument to be made that the very nature of discretionary decisions should immunize them from disciplinary rules, except at the extremes. Even if one were to accept this position, however, the organized bar could still play a central role in working with prosecutors to identify more precise principles of prosecution. To a limited extent, the AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE purport to serve that function. Although this Article is not the place for a full analysis of the Standards, we think it plain that they are incomplete and not adequate to the task.

[191] For example, how persuasive must the evidence be to justify bringing or continuing a prosecution or defending a conviction once obtained; when is a law too antiquated to be enforced; when should a prosecutor decline to proceed against someone even though there is adequate proof of guilt?

defined standards, their ordinary response is to base their decisions on intuitions, informed by individual values, experience, and prosecutorial tradition. This approach is unlikely to result in "neutral" decisionmaking in any of the senses we have identified. One can have little confidence that decisionmaking will be unbiased, nonpartisan, and principled unless prosecutors have adequate criteria to guide their decisionmaking and are willing to engage in conscious deliberation regarding the reasons for their decisions.[192]

A third implication of this Article's analysis is therefore that, in the absence of publicly-defined principles, chief prosecutors should identify principles and sub-principles to govern decisionmaking in their offices and should communicate those principles and supervise individual prosecutors to ensure that the principles are applied.[193]

---

[192] To avoid acting aimlessly, a prosecutor must at a minimum identify for herself which lodestar, or lodestars, are guiding her. Only by doing so can she assess her own conduct. Because a prosecutor's decisionmaking inevitably will be contextual, she is likely to rely on multiple conceptions of neutrality, each of varying applicability. Identifying the conceptions that are significant to her may enable the prosecutor to engage in some prioritization. It may enable her to explicitly reject some conceptions as well. Perhaps more importantly, identifying the basis for her exercise of discretion enables her office to engage in meaningful supervision and review – both for the purpose of managing her conduct and for the purpose of ordering the mass of decisions that all prosecutors in the office make.

[193] For example, the office's guidelines would be expected to address the office's conception of the prosecutors' role as gatekeepers to prevent the conviction of innocent individuals and, at various levels of specificity or generality, any sub-principles that, in the office's view, grow out of that role. An office that takes an expansive view of the prosecutors' gatekeeper role might say that prosecutors in the office have an obligation at every stage of a criminal proceeding, including post-conviction, to prevent the conviction and punishment of individuals who are factually innocent. From this it might follow, among other things, that prosecutors must not initiate or continue a prosecution when, viewed objectively, the evidence raises a reasonable doubt about the defendant's guilt; that prosecutors must make reasonable efforts to seek exculpatory evidence; and that prosecutors must reevaluate the evidence at any stage when new evidence is found that casts doubt on the defendant's guilt. On the other hand, an office that views the prosecutor's gatekeeper role more narrowly might announce very different principles, such as that the prosecutor may initiate and continue a prosecution as long as there is probable cause, and then leave it to the adversary process to resolve questions of guilt and innocence.

Similarly, the office's guidelines would be expected to address, at various levels of generality and specificity, how prosecutors should make discretionary decisions in cases where evidence of guilt is sufficiently persuasive. By way of analogy, federal law provides that a juvenile may not be tried as an adult in federal court unless the court determines that prosecution as an adult is "in the interest of justice." 18 U.S.C. § 5032. At a greater level of specificity, the statute then identifies six factors that the district court must consider in making such determination: the age and social background of the juvenile; the nature of the alleged offense;

As we have discussed, however,[194] even the development of internal administrative guidelines is unlikely to solve the problem of inconsistent application of the guidelines by individual prosecutors. Chief prosecutors thus must consider which discretionary decisions to assign to individual prosecutors, when the decisions should be reviewed by senior prosecutors, and when they should be taken out of individual prosecutors' hands altogether.[195] There is a cost to having decisions differ depending on which assistant prosecutor is assigned to a case.[196] Enhanced supervision of individual prosecutorial decisions can reduce the negative consequences of disparate decisionmaking, but that often results in inefficient use of resources. As a consequence, the chief prosecutor might prefer to develop procedures through which categories of decisions can be referred to a particular supervisory prosecutor, or to a board of prosecutors, who are better able to decide similar cases uniformly. These decisionmakers, at least, may be in a position to develop a "common law" for how the office approaches specific issues.[197]

It is important to note that some dimensions of neutrality may be especially difficult for individual prosecutors to implement well at particular stages of prosecutions. For example, prosecutors in the midst of trial typically are less able than other prosecutors to maintain objectivity in reviewing evidence;[198] at that stage, prosecutors have already adopted a partisan

---

the extent and nature of the juvenile's prior delinquency record; the juvenile's present intellectual development and psychological maturity; the nature of past treatment efforts and the juvenile's response to such efforts; the availability of programs designed to treat the juvenile's behavioral problems. *Id.* Presumably, over time, judicial decisions under the statute have offered guidance to courts in future cases about how these factors should be applied. In like manner, prosecutors' offices could identify general standards for making decisions such as whether to prosecute a juvenile, relevant factors, and examples of how the standards have been or should be applied in particular cases.

[194] *See supra* text accompanying note 173.

[195] For example, in homicide cases where the death penalty might be sought, the decision whether to bring a capital murder charge and, if so, whether to accept a plea in exchange for a lesser sentence, might be made by a high-ranking prosecutor or by a committee of high-ranking prosecutors.

[196] These costs include, *inter alia*, disparity in prosecution decisions, the sense on the part of defendants that the system operates inequitably, and a loss of faith in the process by the public. Moreover, haphazard prosecutions create pressure for judicial action to harmonize cases, which in turn may lead to apparent haphazardness in judicial decisionmaking.

[197] The office common law may take the form of an enhanced institutional memory or more formal record-keeping of office decisions and why they were made.

[198] *Cf.* Leonard N. Sasnov, *Separation of Powers Shell Game: The Federal Witness Immunity Act*, 73 TEMPLE L. REV. 171, 203 (2000) ("In the heat of trial, there is [little] reason to

advocate's posture.[199] Professor Uviller thus has suggested that, under some circumstances, discretionary decisionmaking responsibility should be split among different prosecutors, or parts of prosecutors' offices, even with respect to individual cases.[200]

Prosecutors, and particularly chief prosecutors, clearly have a dominant role to play in defining the principles and sub-principles that will govern neutral decisionmaking. They have the most familiarity with the exercise of prosecutorial discretion. In part, the application of any criteria that are identified depends upon resources and structural issues relating to each prosecutors' office.[201]

Yet some conceptions of neutrality depend upon decisions by other actors and, as a consequence, inevitably include those actors in the process of ordering prosecutorial decisionmaking. Consider, for example, the role of legislators in defining appropriate principles and sub-principles of prosecutorial decisionmaking. Prosecutors typically help establish the contours of legislation,[202] but society probably has at least a general preference for prosecutorial obedience to the lawmakers' will.[203] The problem that this Article has noted is that legislatures rarely adopt laws anticipating that they will be fully and uniformly enforced.[204]

---

trust a prosecutor 'to maintain the requisite neutrality' to decide which potential witnesses with valid Fifth Amendment claims should be forced to testify in the public interest").

[199] *See* Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 U.C.L.A. L. REV. 105, 171 (1994) ("It is easier before a case has begun to try to remain impartial, objective, and detached"); Zacharias, *Structuring the Ethics*, *supra* note 93, at 56 (discussing the need for prosecutors to be partisan advocates at trial); *see also* Lee, *supra* note 59, at 235-36 (arguing that, at the sentencing stage, "the prosecutor is not a completely neutral, unbiased party").

[200] Uviller, *supra* note 40, at 1714 ("I believe that for the office of prosecutor faithfully to discharge the incompatible roles of advocate and arbiter, the investigators and adjudicators should be segregated from the advocates"); *see also* George C. Harris, *The Communitarian Function of the Criminal Jury Trial and the Rights of the Accused*, 74 NEB. L. REV. 804, 815 (1995) (noting "an unbearable tension between two prosecutorial roles: that of litigant in an adversary system and that of neutral agent of justice. . . . [A prosecutor] cannot realistically remain a neutral agent of justice above the adversary fray at the time that she is asked to consent to jury waiver").

[201] For example, the supervisory structure in an office, the number of prosecutors it contains, and the ability of the office to segregate functions each prosecutor performs.

[202] *See supra* text accompanying note 123.

[203] Individual prosecutors are not lawmakers. The source of their authority to override legislation is unclear, particularly when one recalls that different prosecutors within a single office may reach inconsistent public policy conclusions.

[204] At a minimum, resource constraints prevent universal prosecution and incarceration of

Accordingly, it becomes difficult – even for prosecutors willing to obey legislative mandates – to identify the legislature's true will. A fourth, clear implication of this Article's analysis is that, as a practical matter, legislators can obviate prosecutors' dilemmas in many cases simply by drafting the pertinent statutes more explicitly.[205]

Conversely, however, legislators should not tie prosecutors' hands unless they truly mean to do so. In practice, many of the laws that pose problems for prosecutors[206] reflect legislative ambivalence. Lawmakers may wish to take a public position - for example, an anti-crime position, as in mandatory minimum sentencing and three-strikes schemes – fully expecting prosecutors and courts to reduce the impact of the laws.[207] Yet by appearing to channel prosecutorial discretion, laws such as these make it difficult for prosecutors to satisfy legitimate public expectations. The laws force prosecutors to choose between conflicting demands – obeisance to the apparent legislative will, on the one hand, and the commitment to ordinary ideas of retribution and deterrence, on the other. Our analysis suggests that legislators should take care when they incorporate specific expectations into law and should minimize *hidden* reliance on the exercise of prosecutorial discretion.

Finally, what are the implications of our analysis for judges or bar associations in drafting rules of professional conduct to regulate, or help to define, the appropriate exercise of prosecutorial discretion.[208] Until now, prosecutors have been regulated by the rules of conduct

---

all offenders who technically have violated the law.

[205] *See* Frank J. Remington, *The Future of the Substantive Criminal Law Codification Movement – Theoretical and Practical Concerns*, 19 RUTGERS L.J. 867, 894 (1988) (suggesting that the penal code "try to specify those provisions that should be fully enforced and those allowing discretion to enforce and, if discretion is allowed, indicate by whom that choice can be made and in accordance with what standards").

[206] At the extremes, the prosecutorial decisionmaking process is manageable. Prosecutors know that they cannot base all their decisions on legislative judgments. Conversely, most prosecutors typically will not violate specific legal mandates. Within the middle ground, some prosecutors adopt the posture that they must defer to legislative judgements only when such judgments are explicit in the statutory scheme. Others defer to legislative judgments whenever they are reasonably ascertainable.

[207] *Cf*. Fred C. Zacharias, *What Lawyers Do When Nobody's Watching: Legal Advertising as a Case Study of the Impact of Underenforced Professional Rules*, 87 IOWA L. REV. 971, 1011 (2002) (noting the phenomenon of professional rulemakers adopting "broad but popular rules – even altogether inappropriate rules – with the expectation that they will not be enforced as written").

[208] Although the American Bar Association (ABA) has historically drafted model rules of professional conduct for proposed adoption by the state courts, it may be argued that the ABA is not well suited to develop rules for prosecutors in particular, and that judicial committees ought to oversee this project. Bruce A. Green, *supra* note 25, at __.

that apply generally to lawyers, but which may be interpreted differently as applied to prosecutors, and by a handful of additional rules that essentially restate prosecutors' preexisting legal obligations.[209] In commentary, the professional codes also posit that prosecutors have additional professional obligations that the codes do not identify and may not expect to be enforced in the disciplinary process, arising out the prosecutor's general duty to seek "justice".[210] Although this first order principle cannot be characterized as wrong, the failure to define its requirements has led, in part, to the same generalized and unproductive criticism as commentators' reliance on neutrality rhetoric. The traditional approach has not furthered the development of standards for appropriate prosecutorial conduct.

The code drafters' approach has many possible explanations.[211] A likely one, given recent controversies over prosecutorial ethics, is that the ABA cannot stomach the resistance it knows it will meet if it attempts to develop more substantial rules to constrain prosecutorial conduct. Another may be the realization that, particularly with respect to discretionary decisionmaking, "prosecutors may be in a better position than courts [and rule drafters] to determine what standards to apply, because prosecutors have 'superior experience, expertise or knowledge."[212] Code drafters may also think it is too difficult to identify suitable rules to constrain prosecutorial decisionmaking, given the variety of factors relevant to prosecutors' work and the factually complex nature of their cases. Or they may think that vague, unenforceable statements suffice.

Whatever the explanations, the codes' approach to prosecutorial justice has costs. Most importantly, it leads courts and commentators to believe, and act as if, loose characterizations of prosecutorial functions have sufficient meat to resolve hard cases. It diverts attention from the important task of regulating prosecutors and providing them guidance.

Regardless of whether more rules are needed, and whether the ABA or courts have the political wherewithal to adopt them, code drafters can do better than leaving it to others to apply, or ignore, the vague injunction to "seek justice." First, the ABA and courts can flesh out general societal expectations. There is no reason why prosecutors alone should decide whether it is desirable to be "neutral" in any or all of the respects that we have identified, and to decide for themselves what neutrality entails. In the absence of enforceable rules to constrain prosecutors' discretion, the ABA and others who traditionally draft rules of professional conduct should take the lead in identifying appropriate *principles* of prosecutorial conduct that will both guide prosecutors and provide a standard by which the public can measure their visible conduct.

Further, rule drafters should give more serious thought to whether additional rules are in fact needed. When code drafters adopt general standards, as they have in the case of prosecutors,

---

[209] *E.g.*, MODEL RULES, Rule 3.8.

[210] *See e.g.*, MODEL RULES, Rule 3.8 cmt. ("A prosecutor has the responsibility of a minister of justice").

[211] These explanations are discussed more fully in Green, *supra* note 25, at __-__.

[212] *Id. at __*.

they often expect disciplinary agencies to spell out the details in common law fashion.[213] Yet historically, disciplinary agencies rarely have addressed prosecutorial conduct.[214]

In fairness, because of the contextual nature of prosecutors' responsibilities and the range of legitimate prosecutorial discretion, disciplinary agencies probably only can target extreme instances of prosecutorial misconduct. Nevertheless, because of the issues this Article raises, it may be particularly important for disciplinary agencies to take a proactive approach to identifying those instances in which the obligation of prosecutorial neutrality can be defined.[215] Even more importantly, disciplinary agencies should focus on cases in which the results will be well-publicized, and the agencies should take care to disseminate those results.[216] Doing so can inform the public debate regarding the appropriate meaning of neutrality and can help educate prosecutors regarding their actual responsibilities.

VII. CONCLUSION

Because most specific prosecutorial decisions are unreviewable, there is an obvious need for informed public discussion about how these decisions are made. The difficulty, of course, is that much of what prosecutors do is never made public. Even when their work is visible, prosecutors rarely explain how their decisions came to be and rarely identify the facts upon which the decisions were based.

The practical realities of the criminal justice system, including the sheer volume of cases that need to be disposed of, to a large extent require society to trust prosecutors to make decisions in the right way and on the right grounds. Prosecutors would be far less effective if their work were transparent. Full transparency might also compromise the safety and privacy of agents, witnesses, and others.

Yet the fact remains that, for better or worse, prosecutors are among the least accountable public officials. As a result, in evaluating prosecutors' work, the public tends to overemphasize the measurable or obvious aspects of what prosecutors do (*e.g.*, the number of convictions they obtain, the length of sentences, and prosecutors' behavior in public trials) and tend to overlook more momentous decisions that occur behind the scenes.[217]

---

[213] *See* Zacharias, *supra* note 207, at 1011-12 (describing how "inartfully drafted provisions" can be saved through disciplinary decisions conducted in secret)

[214] *See* Zacharias, *supra* note 37, at 744-45 (reporting the infrequent discipline of prosecutors)

[215] *See id.* at 774 (describing and urging proactive discipline of prosecutors).

[216] *See* Zacharias, *supra* note 207, at 1019-20 ("it is incumbent upon the bar to take an especially active approach to addressing public rule violations").

[217] Take, for example, a defendant who is arrested for selling narcotics three times to an undercover officer. If the prosecutor charges the defendant with three counts of selling narcotics

Prosecutors' limited public accountability might be acceptable, or at least more acceptable, if there were well-established normative standards governing prosecutors' discretionary decisionmaking. In that event, the public could elect people of integrity to serve as prosecutors, or higher officials could appoint them, and then trust them faithfully to apply accepted criteria. But our analysis of the concept of "prosecutorial neutrality" demonstrates that there are no settled understandings, except perhaps at the most general and abstract level. All might agree that prosecutors should be "neutral," just as they might agree that prosecutors should be "fair" or that they should "seek justice." But none of these terms has a fixed meaning. They are proxies for a constellation of other, sometimes equally vague, normative expectations about how prosecutors should make decisions.

As we have shown, neutrality has been used in different contexts to denote a range of expectations that can be grouped under three different conceptions: non-bias, nonpartisanship, and principled decisionmaking. These dimensions of neutrality, though somewhat more concrete than the umbrella term, still have variable content. Nor is it clear how the conceptions fit together. In the end, therefore, these too fall short in providing meaningful guidance for the discretionary decisions that prosecutors routinely must make.

Consequently, there is a need for more robust commentary and analysis. It is neither helpful simply to ask prosecutors to be "neutral" nor fair to criticize prosecutors for alleged failures to act "neutrally." Indeed, the neutrality rhetoric is singularly unpersuasive as criticism, because even the most egregious prosecutorial decisions can ordinarily be defended as "neutral" in some sense of the term.

Ultimately, our analysis suggests a need for deeper thinking by prosecutors and for a public articulation of clearer first- and second-order principles that can guide prosecutors' decisions. Although "neutrality" may have a variety of possible meanings, virtually every conception presupposes that prosecutors should make decisions based on the consistent application of norms derived from the law and common societal understandings. There are good reasons for prosecutors not to explain, or even to reveal, their rationales for decisions in some individual cases, but there is no justification for failing to identify the principles and sub-principles that generally govern their decisionmaking.

Thus, if the "neutrality" standard does not provide a benchmark for critiquing individual prosecutors' specific decisions, it does offer a basis for criticizing prosecutors' widespread failure to offer a coherent account of what they do. Of course, the problem is not merely one of secrecy. The core difficulty is that prosecutors have never identified, even among themselves, a coherent workable set of decisionmaking criteria. Consequently, they cannot possibly act in uniformly principled fashion.

This, then, is our main prescriptive point: each prosecutor's office should attempt to articulate standards. As the Article has shown, specific rules or criteria constraining prosecutorial decisionmaking cannot be formulated without first identifying fundamental governing norms.

---

and later permits the defendant to plead guilty to only one count, the prosecutor's discretionary decision will be visible, and may be criticized as too lenient. On the other hand, the prosecutor may reach the same agreement with the defendant before charges are filed, and then file a one-count indictment to which the defendant pleads guilty. While the result will be the same, the prosecutor's discretionary decision will be less obvious and may be entirely invisible.

Although these norms need not be universally accepted, they ought to have some claim to public support.

Identifying these baselines will be no easy task, but the first step seems clear. It is difficult to imagine the development of any consensus regarding appropriate prosecutorial behavior resulting from a unilateral effort by prosecutors – without public input, review, and debate. Commentators, bar representatives, and legislatures need to participate in the process. It is time for a collective effort to identify meaningful principles to govern prosecutors' exercise of discretion.