

RETHINKING PROSECUTORS' CONFLICTS OF INTEREST

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Abstract

Conflicts of interest are endemic to almost all prosecutors' discretionary decisions, and are the source of many instances of misconduct and abuse. Prosecutors' decisions are riddled with complex motivations, beliefs, and interests that potentially divert them from their duty to do justice. Understood as any personal belief or interest that could interfere with the prosecutors' ability to serve the public interest, conflicts of interest threaten to undermine the efficacy and legitimacy of the criminal justice system. The traditional regulatory system barely addresses the problem and could never effectively do so. Drawing on experimentalism, which mandates that local actors design and test solutions to large social problems, we propose changes within prosecutors' offices to help align prosecutors' decisions with the public interest. Given how pervasive conflicts of interest are, our solution is, in essence, a proposal for a new way to regulate prosecutorial decisionmaking in general.

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INTRODUCTION

Prosecutors are often accused of conflicts of interest. Public officials recently questioned whether a brief meeting on an airport tarmac with former President Bill Clinton would taint U.S. Attorney General Loretta Lynch's decision whether to indict Hillary Clinton for using unsecure private email servers.¹ A state prosecutor, who posted thinly veiled racist and homophobic comments in the wake of the shooting at the Pulse nightclub in Orlando, was fired after a lawyer challenged the prosecutor's ability to make fair decisions in light of his beliefs.² And in several cases, critics argued that local prosecutors cannot fairly investigate white police officers for killing unarmed black men because of the prosecutors' relationship with local police departments.³ While these stories differ, each involves personal relationships or biases that threaten to undermine the prosecutors' ability to serve the public in a disinterested way.⁴

Prosecutors' conflicts of interest are unlike those of private attorneys. A private attorney has a conflict of interest when she is materially limited in her ability to serve her client due to a personal interest or relationship.⁵ Prosecutors' clients are sovereignties, abstract public entities whose interests are hard to define.⁶ How best to pursue the public interest is even more contested, making

¹ Mark Landler, *Meeting Between Bill Clinton and Loretta Lynch Provokes Political Furor*, NY Times, June 30, 2016.

² Tobias Salinger, *Prosecutor Fired Over Facebook Post Following Orlando Massacre*, NY DAILY NEWS, June 23, 2016.

³ Wesley Lowery, *Police Shoot Unarmed Black Men at Disproportionate Rates*, THE WASHINGTON POST, Apr. 7, 2016; Jay Sterling Silver, *Fixing the Conflict of Interest at the Core of Police Brutality Cases*, THE WASHINGTON POST, Dec. 4, 2014. After six police officers were charged with various crimes relating to the death of Freddie Gray in Baltimore, police representatives called for the appointment of a special prosecutor. Letter from Gene Ryan, President of Baltimore City Fraternal Order of Police, to Marilyn Mosby, State's Att'y, An Open Letter from Baltimore City Fraternal Order of Police (May 1, 2015) available at <http://media.trb.com/media/acrobat/2015-05/23456543977100-01082347.pdf> (calling for special prosecutor in Freddie Gray case). Following their indictment, the police officer defendants themselves filed a joint motion to dismiss. They alleged that the prosecutor, Mosby, should have recused herself because her personal experience with police brutality, her relationship with Gray's lawyer who had supported her politically, and the impact the prosecution would have on her husband's career with the Baltimore City Counsel, presented conflicts of interest. Def.'s Joint Mot. Dismiss, *State of Maryland v. Goodson*, (Md. Cir. Ct. 2015) (No. 6B02294452)

⁴ For a discussion of the prosecutors' role, see Model Rule of Prof'l Conduct, R 3.8.

⁵ Model Rule of Prof'l Conduct R 1.7(a).

⁶ *Berger v. United States*, 295 U.S. 78, 88 (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and

it difficult to determine what kind of personal interest would impermissibly distort the prosecuting attorney's judgment.⁷ Broadly construed, prosecutors' conflicts can arise not only out of personal and professional relationships and financial interests, but out of any personal belief, ambition, or institutional interest that undermines the prosecutors' ability to pursue justice in a disinterested way.

Understood in this way, prosecutors' conflicts are pervasive and endemic to almost all of their decisions. Any effort to rid prosecutors' offices of conflicts would be futile and potentially counterproductive. As Attorney General Lynch's conversation with Bill Clinton, the Orlando prosecutor's social media posts, and the police shootings illustrate, prosecutors' conflicts of interest are nonetheless a serious problem, which the law does not adequately address. Some conflicts are so severe that they call for disqualification under the current regime but most remain unregulated.

Prosecutors make discretionary decisions with significant consequences for criminal defendants and for criminal justice in general.⁸ The law presupposes that prosecutors make these decisions disinterestedly, unaffected by their own self-interest or the interests of others.⁹ Public confidence in the fairness of the criminal justice system demands this.¹⁰ Although prosecutors' conflicts are central to the project of criminal justice, scholars have largely ignored them or addressed them in isolation.¹¹ Discussions of how prosecutors' implicit biases

whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.”)

⁷ *Id.*; Model Rule of Prof'l Conduct R. 3.8, cmt 1.

⁸ There is a large body of literature on prosecutorial discretion and its consequences. See e.g., Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1 (1979); Wayne R. LaFare, *The Prosecutor's Discretion in the United States*, 18 AM. J. COM. L. 532 (1970); James Vorenberg, *Decent Restraint of Prosecutorial Discretion*, 94 HARV. L. REV. 1521 (1981);. The problem is not new and scholars noted the growing power of prosecutors as early as the 1920s. See RAYMOND MOLEY, *POLITICS AND CRIMINAL PROSECUTION* 46-48 (1929).

⁹ See Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WISC. L. REV. 837, 841-60 (discussing the role of neutrality in prosecutorial decisionmaking).

¹⁰ See STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 50 (2012); Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 397 (2001) (arguing that prosecutors decisions have the greatest effect on the legitimacy of the system).

¹¹ There are a few exceptions. See, e.g., Susan W. Brenner & James Geoffrey Durham, *Towards Resolving Prosecutor Conflicts of Interest*, 6 GEO. J. LEGAL ETHICS 415 (1993); Laurie L. Levenson, *Conflicts over Conflicts: Challenges in Redrafting the ABA Standards for Criminal Justice on Conflicts of Interest*, 38 HASTINGS CONST. L.Q. 879 (2011); Beth Nolan, *Removing Conflicts From the Administration of Justice: Conflicts of Interest and Independent Counsel Under the Ethics in Government Act*, 79 GEO. L. J. 1 (1990). For the most part, however, scholars address conflicts as an isolated problem. See e.g., Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV.

might distort prosecutors' exercise of discretion fail to identify this as a conflict of interest problem.¹² An examination of conflicts of interest recasts them as a chronic problem. Viewing it in this way helps in crafting a solution, which addresses the entire set of problems in a systemic way rather than individual cases as discrete symptoms.

The solution proposed here targets the root of the problem. Drawing on experimentalism – a pragmatic philosophy that mandates that those who are closest to the facts should also be trained to think in a complex way about relevant norms and values – we argue that prosecutors should be more deliberate and transparent in how they execute decisions. Prosecutors' work should be structured to encourage prosecutors to reflect on, memorialize, and address conflicts—including those arising from personal ambitions and institutional ties—that may distort prosecutors' ability to ascertain and pursue the public interest. Internal decisionmaking processes can help prosecutors digest that information and calibrate their responses. By showing how prosecutors' offices can acknowledge and minimize conflicts of interest, this article addresses a fundamental flaw in prosecutorial decisionmaking.

The article begins by exploring prosecutors' conflicts of interest and the current system of regulation. Part I explains how unique and pervasive the problem is. Part II surveys the current regulatory system, demonstrating that it barely addresses the problem. Courts and other public institutions may require recusal or overturn convictions in extreme situations where prosecutors are clearly biased, but considerations of separation of powers and institutional competence make it difficult, if not impossible, for traditional regulators to manage prosecutors' conflicts of interest effectively. Like prosecutorial decisionmaking in general, prosecutors' conflicts remain largely ungoverned by external forces.

The second half of the article turns to potential solutions. Part III argues that the solutions other scholars have proposed are partial, at best. Like efforts to treat a symptom of a disease, these solutions minimize how pervasive conflicts really are and overlook new problems created by their proposals. Finally, Part IV develops an alternative solution. Adopting experimentalism as a theoretical framework, it argues that prosecutors' offices can be redesigned to address conflicts of interest in an ongoing way. Rather than eradicating conflicts, prosecutors should seek to understand how their judgments can be distorted. They should grow sensitive of the complexity of the public interest and the

1447 (2016); Margaret H. Lemos and Max Minzner, *For Profit Public Enforcement*, 127 HARV. L. REV. 853 (2014).

¹² See e.g., Alafair S. Burke, *Improving Prosecutorial Decisionmaking: Some Lessons Of Cognitive Science*, 47 WILLIAM & MARY L. REV. 1587, 1603-13 (2006) [hereinafter Burke, *Improving Prosecutorial Decisionmaking*]; Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on Prosecutorial Discretion*, 35 SEATTLE L. REV. 795 (2012);

difficulties inherent in pursuing it. Decisions should be made with a nuanced understanding of justice and fairness along with an awareness of how prosecutors' personal interests may make that goal a difficult one. This internal deliberative model will allow prosecutors' offices to learn from their mistakes and alter their approach in response.

I. DEFINING PROSECUTORS' CONFLICTS

In the robust and expanding literature on prosecutorial abuses,¹³ prosecutors' conflicts of interest only occasionally garner serious attention.¹⁴ There are at least three likely reasons. First, prosecutors' conflicts of interest can be hard to identify, especially when they rest on subjective motivations.¹⁵ Second, their impact on prosecutors' visible conduct is indirect and often speculative.¹⁶ Third, insofar as scholars examine prosecutorial misconduct from a legal perspective, many conflicts are excluded, because the applicable law has limited reach, and conflicts of interest within reach tend to be technical, trivial or idiosyncratic.¹⁷

And yet, prosecutors' conflicts, broadly construed, are among the most significant problems of prosecutorial discretion. Prosecutors' conflicts are pervasive: Prosecutors have personal-interest conflicts in every case, and the potential impact of prosecutors' conflicts is broad: prosecutors' self-interest may improperly influence virtually all of their decisions, including the most important ones.¹⁸ Prosecutors' conflicts of interest are difficult to counteract precisely because, as illustrated below, their existence is often hidden, sometimes even from prosecutors themselves, and their impact is hard to gauge. The law cannot effectively address the problem precisely because prosecutors' conflicts are pervasive. This section shows that rather than an insignificant

¹³ See, e.g., David Keenan et al., *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203, 213 (2011), <http://www.yalelawjournal.org/images/pdfs/1018.pdf>; Hon. Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. xxxvi (2015), available at http://georgetownlawjournal.org/files/2015/06/Kozinski_Preface.pdf; Kathleen M. Ridolfi & Maurice Possley, *Preventable Error: A Report on Prosecutorial Misconduct in California 1997-2009* (Veritas Initiative Report, Northern California Innocence Project, Santa Clara University School of Law), available at <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1001&context=ncippubs>.

¹⁴ See, note 11, *supra*.

¹⁵ See Part I, *infra*.

¹⁶ *Id.*

¹⁷ See Part II, *infra*.

¹⁸ *Cf.* Cuyler v. Sullivan, 446 U.S. 335, 349 (1980) (Finding that "unconstitutional multiple representation [arising from a conflict of interest] is never harmless error").

problem, conflicts are foundational – the potential root of many other problems of prosecutorial abuse.

The starting point is to define prosecutors' conflicts. In general, a lawyer has a conflict of interest when the lawyer's representation of the client would be adversely affected by the lawyer's self-interest or the interests of another.¹⁹ For disciplinary purposes and other legal purposes, the law generally focuses on interests that are likely to influence a lawyer in a manner that is materially adverse to the client;²⁰ the law permits lawyers to ignore interests that may in theory affect the representation but where the risk is too conjectural or remote.²¹ But, broadly construed, a conflict of interest can involve a situation where there is *any* reasonable possibility that a lawyer's work in pursuit of a client's interests will be impaired, regardless of how extensive one ultimately concludes the risk to be. Our focus here is on conflicts broadly construed.

The concept of a conflict of interest is necessarily different and more complex for prosecutors than for private lawyers, because prosecutors do not have traditional clients.²² In a private representation, the lawyer ordinarily has an identifiable client who defines the objectives of the representation. The lawyer can ordinarily judge whether, at least in theory, a personal interest may compromise her ability to achieve the client's objectives. For prosecutors, however, there is room for debate about how to identify the client. If one believes that prosecutors represent the victim²³ or the police in some literal sense, then close alliances with the victim or law enforcement might not create a conflict but, to the contrary, might be said to strengthen the prosecutor's loyalty. However, the contemporary understanding is that prosecutors do not represent the victim²⁴ or the police, but that they represent the government, state or locality, or the public in an abstract sense,²⁵ and therefore serve the public interest.²⁶

¹⁹ See generally Restatement (Third) of the Law Governing Lawyers § 121 (2000).

²⁰ See generally ABA Model Rules of Professional Conduct, Rule 1.7.

²¹ *Id.*

²² Brenner & Durham, *supra* note 14, at 471-72.

²³ See, e.g., John W. Stickels et al., *Elected Texas District and County Attorneys' Perceptions of Crime Victim Involvement in Criminal Prosecutions*, 14 TEX. WESLEYAN L. REV. 1, 14 (2007) (“[M]any prosecutors indicated that they represent the crime victims in a prosecution.”).

²⁴ See *State ex rel. Romley v. Super. Ct. In and For County of Maricopa*, 891 P.2d 246, 250 (Ariz. App. 1st Div. 1995) (“[A] prosecutor does not ‘represent’ the victim in a criminal trial; therefore, the victim is not a ‘client’ of the prosecutor.”).

²⁵ See, e.g., *State v. Spano*, 64 N.J. 566, 568 (N.J. 1974) (finding that the prosecutor represents the government and people of the State); *People v. Sterling*, 449 N.Y.S.2d 574, 575 (N.Y. Co. Ct. 1982) (reasoning that prosecutors represent the government as the state's lawyer and is charged with the duty to see that the laws are faithfully executed and enforced in order to maintain the rule of law).

²⁶ See *Marshall v. Jericho Inc.*, 446 U.S. 238, 249 (1980) (noting that prosecutors

Like other public officials with ultimate decisionmaking authority, the chief prosecutor has no formula to discern the public interest and no one from whom to take direction.²⁷ While there is much discussion about prosecutors' general accountability to the public, prosecutors' offices do not answer literally to anyone. They do not consult with a client. They do not follow orders from the President, governor, or other official on behalf of the public or the public entity. Prosecutors are more than trial lawyers. The chief prosecutor – that is, in most states, the elected prosecutor – is a public official who makes decisions on behalf of the government, state or locality that a client would make in an ordinary representation.²⁸ That does not mean that the elected prosecutor is his own client, however; the prosecutor is not the party in whose name prosecutions are brought. It simply means that the prosecutor combines the fiduciary responsibilities of a public official with those of a lawyer-advocate.²⁹

Because prosecutors themselves define the relevant public interests and objectives of a criminal investigation or prosecution, determining whether an interest is likely to distort the prosecutor's judgment or conduct is complicated. For private lawyers, a conflicting interest is typically an interest or relationship that may make the lawyer *disloyal* to the client – that is, an interest that may divert the lawyer from serving the client's interests or furthering the client's objectives as defined by the client.³⁰ For prosecutors, the idea of loyalty is more abstract and less salient.

The imperative for prosecutors is better captured by the concept of disinterestedness than loyalty.³¹ Prosecutors make hosts of decisions that are important to the defendant and the public, including discretionary decisions about whom to investigate and charge, what charges to bring, and what plea

serve the public interest); *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 804 (1987) (stating that prosecutors are “appointed solely to pursue the public interest in vindication of the court's authority”); *Town of Newton v. Rumery*, 480 U.S. 386, 395 n.5 (1987) (“[T]he constituency of an elected prosecutor is the public, and such a prosecutor is likely to be influenced primarily by the general public interest.”); *Matter of Curtis*, 656 N.E.2d 258, 259 n.2 (Ind. 1995) (explaining that or purposes of the *Rules of Professional Conduct* the Prosecutor's client is the state).

²⁷ See Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Development*, 6 SETON HALL CIRCUIT REV. 1, 4 (2009) (prosecutors have broad discretion in granting immunity, accepting a plea bargain, and dismissing charges free from judicial review).

²⁸ See *Livas v. Petka*, 711 F.2d 798, 801 (7th Cir. 1983) (“[T]he public interest in the efficient administration of justice requires that decisions made by such assistant prosecutors conform with the broad objectives chosen by the prosecutor.”).

²⁹ See *Haraguchi v. Super. Ct.*, 182 P.3d 579, 582 (Cal. 2008) (prosecutors are public fiduciaries); *Hollywood v. Super. Ct.*, 182 P.3d 590, 599 (Cal. 2008) (prosecutors have a fiduciary obligation to exercise their discretionary duties fairly and justly).

³⁰ See generally ABA Model Rules of Prof'l Conduct, R. 1.7.

³¹ *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 814 (1987).

bargains to authorize.³² In making these decisions, prosecutors have a fiduciary obligation to act in the public interest, not in furtherance of private interests, including their own. Prosecutors are said to have a duty to “do justice,”³³ which requires, among other things, impartiality,³⁴ neutrality³⁵ and, especially, disinterestedness.³⁶ As scholars of prosecutorial discretion repeatedly note, this duty is hard to police because the vast majority of these decisions are judicially unreviewable.³⁷

Those schooled in private lawyers' conflicts might initially suppose that full-time prosecutors rarely have conflicts of interest, given the distinctive nature of their client and their work. Private lawyers most commonly have conflicts arising from their concurrent representation of multiple clients with competing interests. But full-time prosecutors represent only a single client. Private lawyers also have occasional conflicts arising out of their business dealings with clients or out of other financial interests implicated by a representation. But

³² See, e.g., Rachel E. Barkow, *supra* note, at 874-76 (2009); Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 982 (2009) [hereinafter Bibas, *Prosecutorial Regulation*]; Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 TEMP. POL. & CIV. RTS. L. REV. 369 (2010); Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43, 65 (1998).

³³ *Berger v. United States*, 295 U.S. 78, 88 (1935); *State v. Sha*, 193 N.W.2d 829, 831, (Minn. 1972). See generally Bruce A. Green, *Why Should Prosecutors Seek Justice?*, 26 FORDHAM URB. L.J. 607, 626 (1999)[hereinafter, Green, *Why Should Prosecutors Seek Justice*].

³⁴ *People v. Superior Court of Contra Costa County*, 561 P.2d 1164, 1172 (Ca. 1977):

³⁵ *People ex rel. Clancy v. Super. Ct.*, 705 P.2d 347, 351 (Cal. 1985) (government lawyer's neutrality is not only essential to a fair outcome for the litigants but to the proper function of the judicial process as a whole); Green & Zacharias, *Prosecutorial Neutrality*, *supra* note 9, at 847 n.40 (2004) (citing Michael W. 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...only interested in a just result”).

³⁶ See generally New York State Bar Association Committee on Professional Ethics, Opinion 683 (1996) (“In light of their duty to seek justice, individual prosecutors have a responsibility . . . to exercise their discretion in a disinterested, nonpartisan fashion . . .”); *Wright v. United States*, 732 F.2d 1048, 1056 (2d Cir. 1983) (Friendly, J.) (“[The prosecutor] is not disinterested if he has . . . an axe to grind against the defendant, as distinguished from the appropriate interest that members of society have in bringing a defendant to justice with respect to the crime with which he is charged.”); Green & Zacharias, *Prosecutorial Neutrality*, *supra* note 9, at 851 (“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.”).

³⁷ See *supra* note 27 and accompanying text.

such conflicts, although conceivable, would be unusual prosecutors, who do not often have private business interests that might be affected by a criminal case.

The assumption that prosecutors are relatively immune from conflicts overlooks the significance of non-financial self-interest. One treatise, addressing private lawyers, observed that a lawyer may have a conflict arising not only from the lawyer's past or current representations or from the lawyer's financial interests but from any "of the lawyer's political, social, and emotional interests, as well as the full spectrum of the lawyer's thoughts, beliefs, feelings, and creeds."³⁸ This risk may be more intense and frequent for prosecutors. Broadly construed, prosecutorial conflicts of interest can include any personal or professional interests, relationships, or beliefs that might lead prosecutors to act in their own self-interest or in others' interests, rather than disinterestedly. These might conceivably include personal or professional relationships, legal obligations or other motivations, inducements or incentives that might lead prosecutors to serve their own or other private interests in the context of a criminal investigation or prosecution. Prosecutors are expected to treat similarly situated individuals in roughly equal ways and not make decisions based on irrelevant considerations.³⁹ Therefore, self-interest is a matter of concern whether it would tend to influence the prosecutor to favor or disfavor a particular suspect or defendant as compared with others in a comparable situation.

Some personal-interest conflicts relate to a particular prosecutor in an idiosyncratic way. For example, a prosecutor's familial relationship to a defendant or victim may undermine the prosecutor's disinterestedness, leading the prosecutor to be unusually lenient where the defendant is a relative and unusually harsh where the victim is one.⁴⁰ Close personal and professional relationships may present similar risks of bias and favoritism, varying with the nature and strength of the relationship.⁴¹ Likewise, the prosecutor's own status as a victim of the particular crime might motivate the particular prosecutor to seek vengeance, whereas other prosecutors with no experience with the crime might be more measured.⁴² As discussed in Part II, these are the prosecutorial

³⁸ Roy D. Simon, *SIMON'S NEW YORK RULES OF PROFESSIONAL CONDUCT ANNOTATED* 384 (2015 ed.).

³⁹ See Green *Why Should Prosecutors Seek Justice?*, *supra* note 33, at 634.

⁴⁰ National District Attorneys Association, *National Prosecution Standards* § 1-3.3(c) (3d 2009) ("The prosecutor should excuse himself or herself from the investigation and prosecution of any person who is represented by a lawyer related to the prosecutor as a parent, child, sibling, spouse, or domestic partner, or who has a significant financial relationship with the prosecutor").

⁴¹ See, e.g., *People ex rel. N.R.*, 189 P.3d 671 (Colo. 2006) (rejecting premise that political indebtedness to campaign contributor was sufficient to require disqualification).

⁴² See generally *Recent Case: Criminal Law – Prosecutorial Disqualification – Rhode Island Supreme Court Holds that Threats by Defendants Cannot Disqualify Prosecutors – State v. McManus*, 941 A.2d 222 (R.I. 2008), 122 HARV. L. REV. 795 (2008).

conflicts most likely to come within the ambit of the law.⁴³ Such conflicts are not a major concern because they occur infrequently and are easy to cure by assigning a different prosecutor within the office to the case.

But public attention is increasingly focusing on two other kinds of prosecutorial conflicts – pervasive individual conflicts and institutional conflicts. Pervasive individual conflicts arise out of commonly-shared personal interests that may influence the decisionmaking of all prosecutors in an office. Institutional conflicts arise from the prosecutor's connection to the prosecutorial office as an institution rather than from any personal interest or relationship to another party.⁴⁴

To illustrate and distinguish these categories, consider the conflict-of-interest allegations that were directed at the elected local prosecutors and their subordinates who investigated alleged police killings of civilians in Ferguson, Staten Island and Baltimore. Individuals and organizations advocating for justice for the victims' families asserted in Ferguson and Staten Island that the prosecutors' close professional and personal ties to police and police departments drove them to impermissibly favor the interests of the officers who were under investigation.⁴⁵ The prosecutors' failure to recuse themselves was

⁴³ See *infra* Part II.

⁴⁴ Prosecutors' conflicts of interest are classified differently in Brenner & Durham, *Towards Resolving Prosecutor Conflicts of Interest*, *supra* note 14, which focuses on conflicts regulated by the disciplinary rules. The article refers to "systems conflicts," said to arise from the prosecutor's roles as minister of justice, advocate and elected official, *id.* at 468-69, "generic conflicts," said to arise from the prosecutor's relationships with outsiders, such as former clients, *id.* at 473, and "role conflicts" arising out of the role of part-time prosecutor. *Id.* at 483.

⁴⁵ Following the police shooting of Michael Brown in Ferguson, Missouri, various individuals and organizations called for the St. Louis prosecutor, Robert McCulloch, to recuse himself or for the governor to appoint a special prosecutor in his place, alleging that McCulloch had conflicts of interest arising out of his relationship with the police department. Most significantly, it was alleged that he would be biased in favor of Darren Wilson, the police officer under investigation, because he deals regularly with the police department. See, e.g., Complaint, *Griffin v. McCulloch*, (Office of the Chief Disciplinary Counsel, filed Jan. 5, 2015), available at, <https://s3.amazonaws.com/s3.documentcloud.org/documents/1390338/mcculloch-disciplinary-complaint.pdf>; Monroe Freedman & Paul Butler, *Ferguson Prosecutor Should have Bowed Out*, 37 *The Nat'l L.J.*, 30, 30 (2014); Frances Robles, *Lawman in Missouri Defends Objectivity*, *N.Y. Times*, Aug. 28, 2014, at A15.

Likewise, after Eric Garner was allegedly choked to death by police officers Daniel Pantaleo and Justin Damico in Staten Island, various individuals and organizations called for a special prosecutor to be appointed in place of the elected district attorney Daniel Donovan. The allegations of conflicts of interest included that not only did he work regularly and closely with the police department but police officers made up a large portion of his voting constituency, as Staten Island has the highest proportion of police officers in the five New York City boroughs. See Complaint-Grievance before

characterized as either legal error or as evidence of the law's inadequacy,⁴⁶ and in New York, the perceived deficiency prompted the Governor to issue an executive order reassigning responsibility for future cases to the state Attorney General's Office, which is considered to be more independent of the local police.⁴⁷ Although some alleged that the elected prosecutor in Ferguson had further personal ties to the police that might uniquely bias him,⁴⁸ the most plausible objections in both cases related to conflicts that could be characterized as both pervasive individual conflicts and as institutional conflicts. First, any prosecutors who worked regularly with police officers in the jurisdiction would have a personal interest in favoring the police officers who were on trial, in order to remain in other officers' good graces.⁴⁹ Second, even a prosecutor who did not work with the police might have been affected by the office's institutional interest in currying favor with the police department.⁵⁰ These allegations contrasted with the idiosyncratic conflicts raised in Baltimore, where the arrested police officers and their union complained that the elected chief prosecutor had personal and political ties unique to her that created biases *against* the police who were charged with killing Freddie Gray.⁵¹

the State of N.Y. Grievance Comm., *Staten Island Branch for the Advancement of Colored People re: Conduct of Richmond County District Attorney Daniel Donovan in the Matter of the Death of Eric Garner* (Dec. 17, 2014); Re: Conduct of Richmond County Dist. Att'y Daniel Donovan in the Matter of the Death of Eric Garner 2015 WL 1298678 (N.Y. Sup. 2015) (No. 3537-15).

⁴⁶ Freedman & Butler, *supra* note 45; Levine, *supra* note 11.

⁴⁷ N.Y. COMP. CODES, R. & REGS. tit. 9, § 8.147 (2015).

⁴⁸ Elizabeth Chuck, *Prosecutor in Michael Brown Case Has Deep Family Ties to Police*, NBC News, Aug. 20, 2014, <http://www.nbcnews.com/storyline/michael-brown-shooting/prosecutor-michael-brown-case-has-deep-family-ties-police-n183911> (reporting that the prosecutor's mother, brother, uncle and cousin worked for the St. Louis police department); Leigh Ann Caldwell, *Concerns Arise About Prosecutor in Michael Brown Case*, CNN, Aug. 20, 2014, <http://www.cnn.com/2014/08/19/us/ferguson-prosecutor-mcculloch> (noting that the prosecutor's judgment might be "clouded" because his "father was a police officer and was killed on the job in 1964 by an African-American man").

⁴⁹ See Freedman & Butler, *supra* note 45 (prosecutors have personal and professional relationships with police in their jurisdictions and police had threatened not to cooperate with prosecutors when a fellow officer is indicted). See also Levine *supra* note 11, at 1477.

⁵⁰ See Freedman & Butler *supra* note 45; Levine *supra* note 11 at 1483.

⁵¹ After six police officers were charged with various crimes relating to the death of Gray, police representatives called for the appointment of a special prosecutor. Letter from Gene Ryan, President of Baltimore City Fraternal Order of Police, to Marilyn Mosby, State's Att'y, An Open Letter from Baltimore City Fraternal Order of Police (May 1, 2015) available at <http://media.trb.com/media/acrobat/2015-05/23456543977100-01082347.pdf> (calling for special prosecutor in Freddie Gray case). Following their indictment, the police officer defendants themselves filed a joint motion to dismiss. They alleged that the prosecutor, Mosby, should have recused

A. Pervasive Individual Conflicts

The conflict arising out of individual prosecutors' relationship with police officers is far from the only example of conflicts that apply to prosecutors throughout an office. In federal cases, at one time, it was assumed that all prosecutors in the Department of Justice would have a conflict in cases involving high-ranking public officials because of the prosecutors' identification with the interests of the executive branch. This concern was once addressed by the Independent Counsel Act, which allowed federal judges to appoint private counsel to investigate high-ranking public officials.⁵² When Congress let the law sunset, some critics of the law expressed confidence that senior career prosecutors were as capable as private lawyers of conducting investigations and prosecutions in disinterested fashion in accordance with prevailing prosecutorial norms.⁵³

One might argue, however, that, to varying degrees, virtually all prosecutors' political preferences may influence their decisionmaking in cases involving public officials. Indeed, it is not unusual for critics to charge in such cases that prosecutors are biased, either because they are members of the same political party or because they are members of a different one.⁵⁴ The charge may be made

herself because her personal experience with police brutality, her relationship with Gray's lawyer who had supported her politically, and the impact the prosecution would have on her husband's career with the Baltimore City Counsel, presented conflicts of interest. Def.'s Joint Mot. Dismiss, *State of Maryland v. Goodson*, (Md. Cir. Ct. 2015) (No. 6B02294452).

⁵² *The Ethics in Government Act of 1978*, 28 U.S.C. §§ 591-599 (sunset 1994). For an overview of the Independent Counsel Act see *Morrison v. Olson*, 487 U.S. 654, 660-65 (1988) (providing review of the Act); Donald C. Smaltz, *The Independent Counsel: A View from Inside*, 86 GEO. L.J. 2307, 2327 (1998).

⁵³ See, e.g., Julie O'Sullivan, *The Independent Counsel Statute: Bad Law, Bad Policy*, 33 AM. CRIM. L. REV. 463, 475 (1996) ("DOJ prosecutors . . . are better positioned [then private lawyers] to exercise their discretion in a professional and equitable manner, and are accountable if they do not."); see also *Reauthorization of the Independent Counsel Statute: Hearing Before the Subcomm. On Commercial & Administrative Law of the H. Comm. on the Judiciary*, 106th Cong. 63 (statement of Eric Holder, Attorney General) ("Over the long course of American history, the Department has successfully prosecuted a number of high-level political officials. . . . Congress' substantial oversight and funding powers, when coupled with the power of the press, constitute a structure of accountability. It was for this reason that the American system of government survived for almost 200 years without an Independent Counsel Act.").

⁵⁴ See, e.g., Mark Barabak, *Texas Gov. Rick Perry, Others Cry Partisan Foul Over Felony Indictment*, L.A. TIMES (Aug. 16, 2014) (Jeb Bush reportedly called the indictment of Texas Governor Rick Perry "politically motivated"); *Who is Ken Starr?*,

more strongly where the prosecutor's political preference is more manifest or more strongly held. For example, congressional Republicans recently demanded that the Department of Justice replace a career prosecutor who was investigating potential wrongdoing by an IRS official.⁵⁵ The legislators asserted that as a contributor to Democratic candidates, the prosecutor would impermissibly favor an executive branch employee.⁵⁶ Presumably, the legislators would have been satisfied with a prosecutor who, although registered as a Democrat, did not make campaign contributions. But that prosecutor might hold an equally strong political preference that would be just as likely, or unlikely, to influence her discretionary decisions.

If conflicts of interest are broadly conceived to include any "political, social, and emotional interests" or "thoughts, beliefs, feelings, and creeds" that may affect the prosecutor's decisionmaking, then a similar allegation could be made no matter which prosecutor is assigned to a criminal case with political implications. A prosecutor of the defendant's own political party might favor the defendant, just as a member of a different party might be biased against the defendant. Even if the prosecutor is not registered as a member of a political party, she may have relevant subjective political preferences, whether or not publicly expressed. The conflict of interest arising out of prosecutors' political identification, a form of self-interest conflict, is likely to pervade a prosecution office because political leanings may influence any prosecutor to some degree

NIGHTLINE: LATE EVENING NEWS (ABC News Jan. 30, 1998), (statement by Ted Koppel) *transcript available at*, <http://www.pbs.org/wgbh/pages/frontline/shows/clinton/etc/01301998.html> (discussing allegation that Special Prosecutor Ken Starr had conflicts of interest in investigating President Clinton arising out of political hostility).

⁵⁵ See, e.g., *The Future of the Independent Counsel Act: Hearing Before the H. Comm. on Gov. Affairs 106th Cong. 106-131 (2002)*, <http://www.gpo.gov/fdsys/pkg/CHRG-106shrg56376/html/CHRG-106shrg56376.htm>; Jerome Corsi, *House Hears Call for Special IRS Prosecutor*, WND.COM, Feb. 26, 2014 ("At the hearing, five expert legal witnesses testified about what subcommittee chairman Rep. Jim Jordan, R-Ohio, characterized as the Obama administration's apparent unwillingness to conduct a 'serious and unbiased' investigation into allegations the IRS was discriminating against conservative groups applying for tax-exempt status.").

⁵⁶ Appointment of Special Counsel to Investigate Internal Revenue Service, Congressional Record House Articles, 113th Congress, Second Session, Mr. Goodlatte, Discussion of H. Res. 568, Page H3911 (May 7, 2014) *available at*, <https://www.congress.gov/congressional-record/2014/5/7/house-section/article/h3909-1>; Letter from Ted Cruz, U.S. Sen., to Eric Holder, Att'y Gen. of the U.S., on the need for a Special Prosecutor to Investigate the IRS's Illegal Targeting of Conservative Groups (Jan. 22, 2014) (available at <http://www.cruz.senate.gov>); Letter from Peter Kadzik, Principal Deputy Assistant Att'y Gen., to Ted Cruz, U.S. Sen., on the Criminal Investigation of the IRS (Mar. 10, 2014) (responding to Cruz's Jan. 22, 2014 letter).

except in the unlikely event that the prosecutor is truly politically indifferent. Chief prosecutors, who attain their position through an elected or appointed political system, and who have ultimate responsibility for decisions within the prosecutor's office, are especially unlikely to be politically disengaged.

B. Institutional Conflicts

Like conflicts of interest arising out of the relationship between prosecutors' offices and police departments, conflicts inherent in the enforcement of certain forfeiture laws are institutional conflicts.⁵⁷ Various federal and state laws allow prosecutors' offices to keep and use portions of assets that are forfeited by criminal defendants as ill-gotten gain.⁵⁸ Individual prosecutors may not pocket forfeited assets, but they may nevertheless identify with their office's interest in obtaining them. The institutional interest gives prosecutors an incentive to initiate cases in which forfeitable assets remain, while ignoring cases where the ill-gotten gain was spent.⁵⁹ That is presumably the legislature's intention when allowing prosecutors' offices to share in forfeited assets. The forfeiture law also gives prosecutors an incentive to offer leniency to defendants in exchange for asset forfeiture in situations where similarly situated defendants without forfeitable assets might be treated more harshly. Conflicts of interest such as this one motivate the office as an institution and influence the prosecutors indirectly because of their identification with the office and their interest in the office's

⁵⁷ Wayne Logan & Ronald Wright, *Mercenary Criminal Justice*, U. ILL. L. REV. 1175, 1195 (2014) p. 1195 (“Asset forfeiture laws allow governments to seize money and property from individuals or entities after proving some connection to commission of an offense. Such laws are commonly deployed in drug cases, with proceeds often going directly to police and prosecutors, presenting obvious enforcement incentives . . . forfeiture proceeds are known to influence fiscal appropriations, with state and local budgets relying on seizure amounts in place of tax revenue.”); Letter from Jim Sensenbrenner, Cong., John Conyers, Cong., Chuck Grassley, Sen., & Mike Lee, Sen., to Eric Holder, Att’y General, on Civil Asset Forfeiture Reform (Jan. 9, 2015) *available at*, <http://sensenbrenner.house.gov/news/documentsingle.aspx?DocumentID=397679>.

⁵⁸ See e.g., 18 U.S.C.A. § 1963(3)(e) (West 2009); 18 U.S.C.A. § 981(4)(e) (West 2016); 21 U.S.C.A. § 881(e)1(1)(A) (West 2002); Ind. Code Ann. § 34-24-1-3 (West 2011); Kan. Stat. Ann. § 60-4117 (West); N.J. Stat. Ann. § 2C:64-7 (West).

⁵⁹ See generally Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 69 (1998) (“For prosecutors as well [as police], funding exigencies have preempted other considerations. . . . [P]rosecution may be contingent on the presence of forfeitable assets, rather than forfeiture being an incident of prosecution.”); Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 HARV. L. REV. 853, 897 (2014) (explaining that some commentators “worry that agencies will fail to internalize the full public benefits of rigorous enforcement and thus may forego promising enforcement opportunities that avaricious private litigants and lawyers would pursue”).

success. In response to perceived abuses, some legislators have sought to amend forfeiture laws to direct forfeited assets into the general treasury, thereby eliminating prosecutors' incentive to promote their offices' financial interest.⁶⁰

White-collar cases can involve institutional conflicts when victimized corporations provide investigative assistance to the prosecution. In the most extreme and unusual cases, corporations pay prosecutors' offices, or pay their expenses, to offset the cost of investigating. Defendants have sometimes raised legal challenges based on the prosecutors' institutional incentive to pursue a corporate-funded prosecution when they might decline to prosecute otherwise identical cases.⁶¹ The premise is that the payment by the allegedly victimized corporation should be regarded as irrelevant to the decision of which alleged offender to pursue, but that individual prosecutors may be inappropriately influenced by the institutional interest in conserving resources.⁶²

Likewise, an institutional conflict may be said to exist in cases where the prosecutor's office is, or perceives itself to be, the victim. Obvious examples include where a witness in a case brought by the prosecutor's office is believed to have committed perjury or where an individual in such a case may otherwise have obstructed justice. Perceiving that the office has an institutional interest in avenging the wrong, a prosecutor may proceed more zealously or harshly than in a similar case where a different prosecutor's office was the victim.⁶³

⁶⁰ Senator Rand Paul and Representative Tim Walberg introduced the FAIR Act, which requires that all forfeiture funds flow to the general treasury, rather than to the unaccountable Asset Forfeiture Fund. Fifth Amendment Integrity Restoration Act of 2015, H.R. 540, 114th Cong. (2015). This problem was also recently addressed by the Department of Justice. See Press Release, Eric Holder, Office of the Attorney General, *Interim Policy on Use of Funds: Prohibition on Certain Federal Adoptions of Seized State and Local Law Enforcement Agencies* (Jan. 16, 2015) (http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/01/16/attorney_general_order_prohibiting_adoptions.pdf).

⁶¹ See, e.g., *People v. Eubanks*, 927 P.3d 310 (Ca. 1996); *Hambarian v. Superior Court*, 105 Cal. Rptr. 2d 566 (Cal. App. 4th Dist. 2001); *State v. Culbreath*, 30 S.W. 3d 309 (Tenn. 2000). See generally Joseph E. Kennedy, *Private Financing of Criminal Prosecutions and the Differing Protections of Liberty and Equality in the Criminal Justice System*, 24 HASTINGS CONST. L.Q. 665 (1997); Rebecca Pinto, Note, *The Public Interest and Private Financing of Criminal Prosecutions*, 77 WASH. U.L.Q. 1343 (1999).

⁶² Similar concerns have not been raised, but could be, in the common situation where a corporation provides investigative help beyond what is legally required – e.g., where its lawyers and other professionals conduct a multi-million dollar investigations in which they collect and review voluminous documents and conduct extensive interviews and then turn over their work product to prosecutors. Whether corporations provide cash or in-kind services, their contributions may provide an institutional incentive to pursue individual suspects in situations where similarly situated individuals would be overlooked.

⁶³ Of course, even prosecutors in other offices may pursue these cases harshly out

C. Why Prosecutorial Conflicts Are Ubiquitous

While cases involving police shootings, political actors, forfeitable assets, corporate investigations, and obstruction of the office's prosecutions are significant, they comprise only a fraction of the prosecutorial docket. Even collectively, the interests implicated in these cases – affecting prosecutors individually or their offices institutionally – do not substantiate the claim that prosecutors' conflicts may be at the root of nearly all prosecutorial evil. But certain other prosecutorial conflicts apply to all prosecutors and affect all cases – namely, those arising from a prosecutor's personal interest, and office's interest, in their appearance to others. For individual prosecutors, this includes an interest in self-image, professional reputation, and, in many cases, career advancement within or outside the office.

When commentators looking at prosecutorial misconduct speculate about its causes, attention almost invariably turns to a failure of disinterestedness.⁶⁴ The problem is not always labeled a conflict of interest, perhaps because the conflict is not one recognized by the law. But even so, the prevailing assumption is not that prosecutors who abuse their power are ignorant of the applicable norms or venal, but that in most cases, the prosecutors are motivated, consciously or unconsciously, to serve self-interests rather than the public interest.⁶⁵ This is, by definition, a conflict of interest.

In some cases, a particular prosecutor's interest in personal advancement may

of appreciation for the impediment that perjury imposes for their work and out of some sense of identification with the victimized office. Thus, prosecutors may be more zealous when perjury occurs in criminal than in civil cases. But even so, a prosecutor who is further removed from the case where the wrongdoing occurred is likely to look at the conduct somewhat more dispassionately and objectively – i.e., disinterestedly.

⁶⁴ See Barkow, *supra* note 32, at 883 (“Prosecutors may feel the need to be able to point to a record of convictions and long sentences if they want to be promoted or to land high-powered jobs outside the government.”); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2471 (2004) [hereinafter, Bibas, *Plea Bargaining*](asserting that prosecutors can be promoted more quickly with good win-loss records); Sarah Helene Duggin, *The McNulty Memorandum, the KPMG Decision and Corporate Cooperation: Individual Rights and Legal Ethics*, 21 GEO. J. LEGAL ETHICS 341, 393 (2008) (observing that “prosecutors do not get ahead in the government, or further their own career ambitions, on the basis of decisions not to prosecute”); Dan M. Kahan, *Three Conceptions of Federal Criminal-Lawmaking*, 1 BUFF. CRIM. L. REV. 5, 16 (1997) (maintaining that prosecutors' political ambitions lead them to bring cases based on overly aggressive interpretations of criminal statutes).

⁶⁵ See Green & Zacharias, *Prosecutorial Neutrality*, *supra* note 9, at 847-52 (prosecutors face unconscious biases rising from personal beliefs, personal and economic self-interests, and political pressures).

seem highly specific and idiosyncratic. For example, it may be argued that an elected prosecutor's decisions will be affected by the interest in reelection,⁶⁶ or in advancing to other public office,⁶⁷ but that subordinate prosecutors will be unaffected. But even in this example, subordinate prosecutors' judgments may be skewed in the same direction because of their personal interest in pleasing their superiors.⁶⁸

More importantly, on a general level, virtually all prosecutors have a personal interest in appearing successful – to themselves if not to others in their offices and beyond. Every prosecutor wants to appear competent, skilled, and prudent. Some may also have an interest in conveying toughness or strength. Even prosecutors who do not seek professional advancement are jealous of their professional reputation. This broad self-interest can come into play in every criminal case in ways that are inconsistent with the expectations of disinterested prosecution.⁶⁹ For example, once a prosecutor has charged a defendant or otherwise publicly asserted that a defendant is guilty, dropping the charges may be viewed as a public concession that the prosecutor previously made a mistake. All prosecutors' personal interest in their public image undermines their ability to view evidence objectively. This may explain some prosecutors' failure to avert or correct wrongful convictions. Prosecutors' self-interest provides an incentive to continue cases once they are initiated even if new evidence casts doubt on the defendant's guilt. Likewise, prosecutors might fail to admit reversible errors due to their interest in preserving their image both in their own eyes and that of the public.⁷⁰ These examples reflect not only pervasive personal-interest conflicts, but also institutional conflicts, because the office as an institution has a similar interest in avoiding embarrassment. Even if a

⁶⁶ See, e.g., Brenner & Durham, *supra* note 14, at 469-72 (arguing that the prosecutor's conflict of interest arising out of electoral ambitions is an "actual conflict" that should be regulated by rules of professional conduct); see also Adam S. Zimmerman & David M. Jaros, *The Criminal Class Action*, 159 U. PA. L. REV. 1385, 1399 (2011) (noting that "[p]olitically ambitious prosecutors" may make decisions that "prioritize . . . big headlines"); cf. Ben Trachtenberg, *NO, You "Stand Up": Why Prosecutors Should Stop Hiding Behind Grand Juries*, 80 MO. L. REV. 1099, 1107 (2015) ("If a prosecutor believes that political realities – that is, the desire to win reelection – preclude her from offering a straightforward defense of her decision not to bring charges in a particular case, she is free to recuse herself.").

⁶⁷ See J. Vincent Aprile II, "May Practicing Prosecutors Ethically Run for Judgeships," [ABA] Criminal Justice, Spring 2015, at 31.

⁶⁸ See, e.g., William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 535 (2001) (suggesting that subordinate prosecutors who seek the prosecutor's favor have a vicarious interest in making decisions with an eye toward the voting public).

⁶⁹ See, e.g., Kenneth Bresler, "I Never Lost a Trial": When Prosecutors Keep Score of Criminal Convictions, 9 GEO. J. LEGAL ETHICS 537, 541 (1996).

⁷⁰ See, e.g., Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 134 (2004).

prosecutor overseeing a post-conviction investigation was not involved in the original prosecution, the prosecutor may be concerned with the office's interest in avoiding public opprobrium from having convicted an innocent person.⁷¹

Furthermore, given that prosecutors, like private lawyers, may be improperly influenced by private "thoughts, beliefs, feelings, and creeds" that diverge from the ordinary, prevailing professional understandings, then virtually every prosecutor with discretionary authority has a conflict of interest arising out of their unique preferences. Every prosecutor, in deciding whether or not to investigate or charge an individual, what charges to bring, or what sentence to pursue, may potentially be improperly influenced, if only subtly, by the interest in advancing one's own subjective preferences, whenever those preferences are not perfectly aligned with the public interest.

To take a recent, and disturbing, example: In May 2014, and then again in June 2016 following the tragic shooting at the Pulse nightclub in Orlando, an assistant state prosecutor from that city posted derogatory opinions of the city, its residents and others, that were characterized as "racially insensitive" and perceived as demonstrating "inherent racial bias."⁷² In response, a lawyer for the family of a rape and murder victim asked the prosecutor's office to remove the assistant prosecutor from the prosecution of the alleged perpetrator, expressing concern about whether the prosecutor's advocacy would be affected by "his personal opinion of [the victim's] race, choice of downtown address, and life choices."⁷³ Although the office in 2014 was unable to discern that the prosecutor's opinions adversely affected his discretionary decisionmaking,⁷⁴ it suspended and then fired him two years later for violating the office's social media policy.⁷⁵ As this incident reflects, one might reasonably worry that a

⁷¹ Hence, in North Carolina, a separate institution was established to investigate wrongful conviction claims. See N.C. GEN. STAT. ANN. § 15A-1462 (West, 2006); see generally Christine C. Mumma, *The North Carolina Actual Innocence Commission: Uncommon Perspectives Joined by a Common Cause*, 52 DRAKE L. REV. 647 (2004).

⁷² Joe Kemp, *Florida Prosecutor Sparks Outrage Over Rude Facebook Rants*, NEW YORK DAILY NEWS, MAY 22, 2014, <http://www.nydailynews.com/news/national/florida-prosecutor-sparks-outrage-rude-facebook-rants-article-1.1801757>.

⁷³ Letter from Abe George to Jeffrey L. Ashton, State Attorney for the Ninth Judicial Circuit (June 21, 2016) (available at http://mediaweb.wftv.com/document_dev/2016/06/23/Ken%20Lewis%200062316_5009280_ver1.0.pdf).

⁷⁴ Jeff Weiner, *Review Finds No Evidence Of Bias By Prosecutor In 'Crack Hoers' Dispute*, ORLANDO SENTINEL, Oct. 14, 2014, <http://www.orlandosentinel.com/news/breaking-news/os-facebook-prosecutor-crack-hoers-cleared-20141014-story.html>.

⁷⁵ Andrew Blake, *Kenneth Lewis, Florida Prosecutor, Fired Over Orlando Shooting Comments*, THE WASHINGTON POST, June 24, 2016, <http://www.washingtontimes.com/news/2016/jun/24/kenneth-lewis-florida->

prosecutor's illegitimate racial and class biases, or other illegitimate subjective beliefs and preferences, could adversely affect the prosecutor's discretionary decisions in ways that are not readily discernible.

Prosecutors' commitment to philosophical preferences might also be thought to give rise to a conflict. This was allegedly the case in the mid-1990s when the Bronx District Attorney publicly expressed opposition to the death penalty. In 1995, after New York reinstated the death penalty, the elected prosecutor in the Bronx publicly announced an unwillingness to seek the death penalty in eligible murder cases. He later explained that this decision was based upon "his 'intense respect for the value and sanctity of human life,' his fear of convicting an innocent person, and his skepticism regarding the death penalty's deterrent effect and the fairness of its application, as well as his belief that "the commitment of time and resources required by a death penalty prosecution were [not] worthwhile given the uncertainty that a jury would impose it or that its imposition would be upheld on appeal."⁷⁶ The next year, after a police officer was killed in the Bronx, the Governor issued an executive order, which the courts upheld, removing the Bronx District Attorney from the prosecution of the alleged assailant and assigning the case to another prosecutor.⁷⁷ The Governor's rationale was, in effect, that the District Attorney had a conflict of interest – that is, a philosophical preference that influenced him to act inconsistently with the faithful execution of the criminal law. While a disinterested prosecutor, weighing all the circumstances, might decline to seek the death penalty in individual death-penalty eligible cases for legally legitimate reasons, the Governor's assumption was that the Bronx District Attorney's subjective preferences, leading to a declination in every eligible case, were illegitimate.

In many cases, prosecutors' predispositions, preferences and philosophies will not be publicly evident, because they will not be reflected in public postings and announcements and, if evident, their effect on prosecutors' decisionmaking may not be traceable, because prosecutors need not explain their decisions and rarely do so. Moreover, in some cases, prosecutors' subjective preferences and their influence may be hidden from prosecutors themselves. The professional literature has traditionally assumed that private lawyers' conflicting interests can influence their exercise of professional judgment in unconscious ways.⁷⁸ This is no less true for prosecutors. The contemporary social science literature

prosecutor-fired-over-orland/.

⁷⁶ Jonathan DeMay, *A District Attorney's Decision Whether to Seek the Death Penalty: Toward an Improved Process*, 26 *FORDHAM URB. L.J.* 767, 768 n.6 (1999) (quoting *Matter of Johnson v. Pataki*, No. 1714/96, slip op. at 5 (N.Y. Sup. Ct., July 9, 1996)).

⁷⁷ *Johnson v. Pataki*, 655 N.Y.S.2d 463 (App. Div. 1997).

⁷⁸ See, e.g., *Developments in the Law - Conflicts of Interest in Private Practice*, 94 *HARV. L. REV.* 1284, 1296 (1981); Tigran W. Eldred, *The Psychology of Conflicts of Interest in Criminal Cases*, 58 *U. KAN. L. REV.* 43, 48 (2009).

on cognitive and implicit biases reinforces this insight.⁷⁹ Although prosecutors' cognitive biases do not invariably arise out of self-interest, there is a close connection in some situations between prosecutors' personal interest conflicts and cognitive biases. For example, insofar as a prosecutor is influenced unconsciously to minimize the significance of new exculpatory evidence, in order to avoid acknowledging a mistake in charging or trying the case, one might characterize this as an example of implicit bias.⁸⁰ But one might equally characterize this as a conflict arising out of the prosecutor's self-interest that may influence decisionmaking in ways of which the prosecutor is unaware.⁸¹

None of this is to say that, in all of the examples described above, prosecutors' judgment will necessarily be skewed by the particular pervasive or institutional conflict of interest or that the risk to prosecutorial disinterestedness is so significant in all these examples that the law should intervene, assuming a legal remedy could be found. But, broadly speaking, prosecutorial conflicts are ubiquitous. They threaten prosecutors' exercise of discretion in all cases, and pose multiple threats in some cases. They ought to be taken seriously, if not by the law, then by prosecutors' offices as a matter of internal self-governance.

II. THE LAW OF PROSECUTORS' CONFLICTS

This Part reviews the legal frameworks governing prosecutors' conflicts in the five principal procedural contexts in which they arise: (1) disciplinary actions against the prosecutor directly and personally; (2) defendants' applications to dismiss an indictment or overturn a conviction; (3) judicial rulings and executive orders disqualifying or replacing prosecutors with perceived conflicts; (4) prosecutors' voluntary recusal as a matter of self-governance; and (5) judicial review of legislation that arguably gives rise to prosecutors' conflicts. Despite these many outlets for judicial oversight, courts rarely displace prosecutors or afford other remedies when prosecutors have what might conventionally be regarded as a conflict of interest – in other words, in situations such as those identified in Part I where prosecutors appear to have a

⁷⁹ See, e.g., Alafair Burke, *Neutralizing Cognitive Bias: An Invitation to Prosecutors*, 2 N.Y.U. J.L. & LIBERTY 512 (2007); Alafair Burke, *Talking About Prosecutors*, 31 CARDOZO L. REV. 2119 (2010).

⁸⁰ See, e.g., Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L.J. 475, 479 (2006); Darryl K. Brown, *The Decline of Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CAL. L. REV. 1585, 1600 (2005); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 316.

⁸¹ For a discussion of the significance of social science research for criminal defense lawyers' conflicts of interest, see Eldred, *supra* note 78.

significant incentive to make decisions or otherwise act for self-interested or otherwise illegitimate reasons.

A. Professional Discipline

A prosecutor's conflict might be raised in a disciplinary action or other action against the prosecutor personally. For example, a lawyer disciplinary authority might seek to punish a prosecutor who allegedly had an impermissible conflict of interest.⁸² Alternatively, discipline may be pursued by an internal regulatory authority or executive branch authority such as, in the case of federal prosecutors, the U.S. Department of Justice Office of Professional Responsibility.⁸³ A subordinate prosecutor with conflicts of interest may also be disciplined by the prosecutor's office.⁸⁴ In extreme cases, such as when there are allegations of corruption, a prosecutor's conflict of interest may even become the predicate for a criminal prosecution.⁸⁵

In the professional disciplinary setting, where direct actions for prosecutorial misconduct are most likely to be pursued, the standard of conduct is established by rules adopted by the state supreme court to govern members of the bar.⁸⁶ On their face, professional conduct rules apply to all lawyers, including prosecutors. Under state conflict rules based on ABA Model Rule 1.7(a)(2), lawyers have a conflict of interest when "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."⁸⁷ In such circumstances, the representation may be permissible with the client's informed consent if it is likely that the lawyer can provide competent representation notwithstanding the conflict.⁸⁸

⁸² See, e.g., *In Re Doe*, 801 F. Supp. 478, 479 (D. N.M. 1992); *In Re Ryan*, 824 N.E.2d 687, 689 (Ind. 2005) *Office of Lawyer Disciplinary Counsel v. Plants*, 759 S.E.2d 220,224 (W. Va. 2014) (citing *Office of Disciplinary Counsel v. Battistelli*, 457 S.E.2d 652, 653 (1995)).

⁸³ OFFICE OF PROFESSIONAL RESPONSIBILITY, U.S. DEP'T OF JUSTICE, OPR, FISCAL YEAR 2014 ANNUAL REPORT 15-16 (describing conflict of interest allegations), available at: <https://www.justice.gov/opr/file/798006/download>.

⁸⁴ See, e.g., notes 56-59 and accompanying text, *supra*.

⁸⁵ See *State v. Maloney*, 709 N.W. 2d 436, 444 (Wis. 2005) (prosecutor was convicted of misconduct for accepting 22 bribes in connection with cases he prosecuted); *In Re Reinstatement of Hird*, 364 P.3d 628, 631 n.5 ("[The prosecutor] received federal felony convictions for multiple instances of accepting bribes or conspiring to accept bribes in return for interference in pending criminal investigations and litigation in his capacity as . . . a prosecutor . . .")

⁸⁶ In the case of internal discipline, prosecutors might also be subject to internal rules, regulations or policies..

⁸⁷ MODEL RULES OF PROFESSIONAL CONDUCT, r. 1.7(a)(2) (AM. BAR ASS'N 2014).

⁸⁸ *Id.* at (b)(1),(4).

Prosecutors are rarely disciplined for anything, much less for conflicts of interest.⁸⁹ Prosecutors have occasionally been sanctioned for obvious conflicts arising out of their duties to current or former private clients (or, in the case of part-time prosecutors, duties to current clients).⁹⁰ Professional discipline has played little role in addressing prosecutors' conflicts arising out of non-financial self-interest and no role in addressing conflicts arising out of prosecutors' institutional self-interest. For example, while some academics and members of the public recently argued that ethics rules should be read to forbid elected prosecutors from investigating killings by members of the police department with which the prosecutor's office regularly works,⁹¹ no disciplinary authority initiated proceedings on this basis.⁹²

The boldest disciplinary application of the conflict rules to prosecutors was in the proceedings against the Maricopa County Attorney, Andrew Thomas, and his deputy, who were ultimately disbarred for a host of wrongs, conflicts of interest among them.⁹³ The conflict charges grew out of their prosecutions of the County Supervisor, who was Thomas's political nemesis, and of a judge who had ruled against Thomas's office. From the fact that the prosecutions were

⁸⁹Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 763 (2001). Because lawyers in some jurisdictions can be disciplined privately it is impossible to identify all disciplinary proceedings against prosecutors. Internal discipline is also likely to be private.

⁹⁰ See, e.g., *Matter of Ridgely*, 106 A.2d 464 (Del 1954) (disciplining lawyer for prosecuting case while representing the victim in related civil litigation); *Matter of Cole*, 738 N.E.2d 1035 (Ind. 2000) (disciplining part-time prosecutor for appearing as a prosecutor in cases involving private clients); *In re Toups*, 773 So.2d 709 (La. 2000) (sanctioning part-time prosecutor for appearing as prosecutor against spouse's of private divorce clients); *Virginia State Bar v. Gunter*, 11 Va. Cir. 349 (Corp. Ct. 1969) (reprimanding part-time prosecutor who filed bigamy charge against a man while representing the man's wife in a divorce action). Prosecuting cases involving private clients risks disloyalty to both the private client (who may perceive that his lawyer is being disloyal by appearing against him) and the public (because of the likelihood that the prosecutor will favor the client). See generally Richard H. Underwood, *Part-time Prosecutors and Conflicts of Interest: A Survey and Some Proposals*, 81 KY. L.J. 1 (1992-93); Fairfax, *supra* note 6.

⁹¹ Freedman & Butler, *supra* note 45; Kate Levine, *supra* note 11; see also Peter A. Joy & Kevin C. McMunigal, *Prosecutorial Conflicts of Interest & Executive Use of Force by the Police*, 30 Criminal Justice 47, 53 (2015) (proposing that ethics committees issue opinions to "provide a stronger basis for possible discipline against prosecutors who ignore this type of conflict.").

⁹² See note 45 and accompanying text, *supra*; see also *McCall v. Divine*, 777 N.E.2d 405, 414 (Ill. App. Ct., 2002) (finding that prosecutor and police department were not so linked as to prevent the prosecutor from conducting an impartial prosecution).

⁹³ *In re State Bar of Arizona v. Thomas*, PDJ-2011-9002 (Ariz. Apr. 10, 2012), available at <http://kjzz.org/sites/default/files/SB-12-0039-AP.pdf>.

brought without evidentiary support and from other improprieties, the disciplinary judge inferred that Thomas was motivated by personal animosity, which amounted to a conflicting interest under the disciplinary rule.⁹⁴ The conflict of interest paled compared to the prosecutors' other disciplinary misconduct, but the conflict did serve to explain the prosecutors' motivation for the baseless prosecutions and other wrongdoing. It is hard to know how much to make of this. Had the prosecutions of the County Supervisor and judge been adequately supported by incriminating evidence, it seems doubtful that Thomas would have been sanctioned for proceeding against a political foe, even if, in theory, there remained the same risk that the prosecutor's discretionary judgments would be distorted.

It is uncertain whether any prosecutors other than these two in Arizona have ever been publicly disciplined for prosecuting a case on the ground that purely subjective motivations such as antipathy toward a political rival may have undermined disinterestedness. Disciplinary authorities have overlooked notorious cases where prosecutors' personal ambitions and political preferences may have influenced their judgment. For example, in a federal appeals decision rejecting a grievance filed against Independent Counsel Kenneth Starr based in part on an alleged conflict of interest,⁹⁵ a concurring judge described the history in government corruption cases of appointing prosecutors from "highly partisan backgrounds and [with] strong personal political ambitions."⁹⁶ The concurrence maintained that both the costs of judicial intervention and the benefits provided by appointing politically engaged lawyers from the private bar counseled against judicial disciplinary oversight: "If judges undertake to 'investigate the investigators,' using vague standards such as apparent political conflict of interest, it will inevitably politicize the judiciary and weaken legitimate efforts to weed out [government] misconduct."⁹⁷

As the decision in Independent Counsel Starr's case illustrates, there are procedural and substantive reasons why disciplinary authorities, and the courts that oversee them, would eschew professional discipline as a mechanism for addressing prosecutors' conflicts arising out of political preferences or other pervasive or institutional conflicts. Notably, Rule 1.7(a)(2) does not apply to all of the situations described in Part I in which, from a lay perspective, a prosecutor may have an incentive to subordinate the public interest to personal or institutional interests. The rule applies only where there is a "significant risk" that the lawyer's self-interest will compromise the lawyer's professional work. There is no foolproof barometer for measuring risk. Deciding whether a prosecutor or other lawyer has a conflict of interest that creates a significant risk requires a judgment informed by common sense, experience, and conventional

⁹⁴ *Id.* at ¶¶ 105-09, 300-02, 483-85.

⁹⁵ *In re Independent Counsel Kenneth W. Starr*, 152 F.3d 741, 753 (8th Cir. 1998) (Beam, J., concurring).

⁹⁶ *Id.* at 754.

⁹⁷ *Id.* at 755-56.

professional understandings. Disciplinary authorities are unlikely to proceed against prosecutors in recurring situations involving arguable conflicts for which prosecutors have not conventionally been sanctioned. Moreover, prosecutors' decisions about how to address arguable conflicts typically reflect an institutional judgment for which it may seem inappropriate to punish a lawyer personally.

Disciplinary authorities might also hesitate to address prosecutors' conflicts because of uncertainty about how the rules apply, other than where the conflict arises out of the former or concurrent representations of private clients. It might be argued that, if anything, the conflict rule should be applied particularly forcefully to self-interested prosecutors given prosecutors' power and the absence of any check on their use of it.⁹⁸ But the conflict rules are often read in light of the client's sophistication and the extent to which the client needs protection. The prosecutor's client – the sovereignty – is among the most powerful and sophisticated clients, least in need of protection, and most capable of creating internal rules to protect against prosecutorial self-interest. Finally, it would be especially problematic to apply the imputed disqualification rule so as to require a prosecutor's entire office to be replaced.⁹⁹ Interpreting conflict rules to require the substitution of an unelected lawyer for a democratically elected prosecutor is very different from interpreting them to require replacing one private law firm with another.

B. Overturning Indictments or Convictions

When the prosecutor involved in a criminal case has a conflict of interest, the defense may argue that the indictment or conviction should be set aside based on the due process right to a disinterested prosecutor.¹⁰⁰ State and lower federal

⁹⁸ Considerations such as these were once the predicate of a view that the government cannot consent to conflicts of interest to which individuals ordinarily could consent. *See, e.g.*, New York State Bar Association Committee on Professional Ethics, Opinion 654 n.4 (1993) (“client consent . . . is not available . . . because there is no mechanism by which the People, whom the district attorney represents in prosecuting criminal cases, may meaningfully consent”); West Virginia *ex rel.* Bailey v. Facemire, 413 S.E.2d 183, 189 (W. Va. 1991) (noting that government cannot consent to conflicts).

⁹⁹ Rule 1.10(a) provided for the imputation of conflicts among lawyers who “are associated in a firm.”

¹⁰⁰ *See, e.g.*, People v. Zimmer, 51 N.Y.2d 390, 394, 434 N.Y.S.2d 206, 207 (1980) (reversing criminal conviction and dismissing indictment where District Attorney, at the time he presented the case to the grand jury, was also counsel to and a stockholder of the corporation that the defendant allegedly victimized); People v. Baker, 99 A.D.2d 656, 472 N.Y.S.2d 57 (4th Dep't 1984), appeal dismissed, 64 N.Y.2d 1027, 489 N.Y.S.2d 56 (1985) (reversing sodomy conviction and dismissing indictment where assistant district attorney who presented case to grand jury was stepmother of

courts have recognized this constitutional right.¹⁰¹ Without necessarily finding a constitutional violation, a court may also set aside an indictment or a conviction based on its inherent authority to ensure fair process in criminal cases.¹⁰² Either way, courts ordinarily hesitate to grant a remedy, especially reversal of a criminal conviction, unless the prosecutor's conflict was serious, both because there is an interest in judicial economy and finality and because many courts defer to prosecutors on questions of prosecutorial administration unrelated to courtroom conduct.

The leading Supreme Court decision is *Vuitton*,¹⁰³ in which a federal district judge appointed a manufacturer's lawyers to prosecute individuals who had violated a judicial injunction against infringing the manufacturer's trademark. Although trial courts do not generally have authority to appoint prosecutors, they may do so to redress disobedience to the court. The district court could have appointed a member of the private bar with no relationship to the controversy, but it saw an obvious benefit to appointing the manufacturer's lawyers, who were familiar with the facts and willing to work without government compensation. The problem, of course, was that these lawyers were bound by professional duty to the victim and therefore motivated to make prosecutorial decisions to further the victim's interests, which might not entirely coincide with the public interest. Here, the manufacturer's lawyers prosecuted four individuals, securing convictions and prison sentences of up to five years.

Rather than deciding whether prosecution by the corporate victim's lawyers violated due process, the Court invoked its supervisory authority over federal criminal justice to overturn the convictions, holding that the manufacturer's lawyers did not meet "[t]he requirement of a disinterested prosecutor."¹⁰⁴ The Court recognized that, although prosecutors need not be as disinterested as judges,¹⁰⁵ their responsibility is to pursue solely the public interest.¹⁰⁶ It noted that to prevent federal prosecutors from compromising the public interest, they must abide by not only the conflict of interest rules of the ABA's model ethics code,¹⁰⁷ but also by federal law forbidding them from overseeing matters "in which they, their family, or their business associates have any interest."¹⁰⁸

corroborating witness and friend of two victims). In most cases setting aside convictions for prosecutorial conflicts, the problem has not been a lack of disinterestedness but that the prosecutor was in a position to exploit confidential information learned in a prior representation, typically of the defendant himself. *See, e.g.,* *Faulkner v. State*, 260 P.3d 430 (Okl. 2011).

¹⁰¹ *See, e.g.,* *Wright v. United States*, 732 F.2d 1048, 1055 (2d. Cir. 1984).

¹⁰² *Zimmer*, 51 N.Y.2d 394.

¹⁰³ *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 793 (1987).

¹⁰⁴ *Vuitton*, 481 U.S. at 808.

¹⁰⁵ *Id.* at 807.

¹⁰⁶ *Id.* at 803-04.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 803 (citing 18 U.S.C. § 208(a)).

Federal prosecutors complying with this restriction would not have found themselves in a situation comparable to that of the court-appointed private lawyers, who owed a fiduciary duty of loyalty to a private client, the victimized manufacturer. The lawyers' duty to the manufacturer legally bound them to take account of its interests.¹⁰⁹ Whether or not the lawyers engaged in any actual misconduct, the Court decided, there was an intolerable risk that in making discretionary decisions about what investigative methods to employ, and about whom to investigate, whom to prosecute or whether to plea bargain, the lawyers would be improperly motivated by their private client's interests.¹¹⁰

Defense lawyers may have been heartened by the Court's expectation of prosecutorial disinterestedness. But in hindsight, *Vuitton* did not dictate either a robust right to a disinterested prosecutor or a strong judicial role in regulating prosecutors' conflicts of interest. The court appointed prosecutors had an egregious conflict: They could not serve the public disinterestedly without betraying the private client, and vice versa. But, even so, the Court declined to hold that there was a due process right to a disinterested prosecutor.¹¹¹

The Court in *Vuitton* also left undecided whether a due process right, if it exists, would lead to a meaningful remedy, or whether defendants would have the virtually insurmountable burden of proving that the prosecutor's decisionmaking was adversely affected by the conflict. A frequently cited federal appellate decision held that a prosecutorial conflict, amounting to a denial of due process, required overturning a conviction unless the prosecution could prove the violation was harmless beyond a reasonable doubt.¹¹² The court reasoned that a conflict's impact on the exercise of discretion is hard to ascertain, but apparently assumed that prosecutors can sometimes prove that

¹⁰⁹ *Id.* at 807 n.18.

¹¹⁰ *Id.*

¹¹¹ Among other things, the decision left open the constitutionality of private prosecutions. The use of private prosecutors, typically employed by victims or their families or by individuals with potential civil lawsuits that will benefit from a criminal conviction, predates the American revolution, continued through the nineteenth century in many states, and remains at least a theoretical possibility in some states today. John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 515-21 (1994). Since the nineteenth century, some state courts have found it unconstitutional for a private lawyer, paid by an individual, to serve as a prosecutor. *E.g.*, *Commonwealth v. Williams*, 56 Mass. (2 Cush.) 582 (1849); *Meister v. People*, 31 Mich. 99 (1875); *but see* Bessler, *supra* note 111, at 519 n. 29 (citing authority allowing private prosecutions); *Biemel v. State*, 37 N.W. 244 (Wis. 1988). Had the Court decided *Vuitton* based on due process rather than judicial supervisory authority, the practice of private prosecutions would have been called into serious question, whereas after *Vuitton*, some states continued to allow private prosecutors, even if in most cases subject to the elected prosecutor's consent and supervision. Bessler, *supra* note 111, at 529-43.

¹¹² *Ganger v. Peyton*, 379 F.2d 709 (4th Cir. 1967).

they were unaffected.¹¹³ Other courts have held that an impermissible prosecutorial conflict will result in automatic dismissal of an indictment or reversal of a conviction.¹¹⁴ But some have held that due process is not violated unless the defendant can show “actual prejudice,”¹¹⁵ meaning that the prosecutor’s conflict led the prosecutor to exercise discretion more harshly than if he had been disinterested. This is nearly impossible to show, given that there is no discovery of prosecutors’ internal decision making and, in any event, prosecutors themselves may be unaware of the cognitive impact of a conflict.

C. Disqualification by the Court or Executive

When a prosecutor in a criminal case has a conflict of interest, the court may disqualify the prosecutor, and, in some jurisdictions, the executive may seek to appoint an alternative prosecutor or the Attorney General may intervene to substitute for the local prosecutor. Like professional discipline and judicial remedies in criminal cases, these actions are undertaken sparingly.

1. Disqualification by the Court

Disqualification motions are occasionally filed in criminal cases, although less frequently than in civil cases. In some states, criminal procedure rules establish courts’ authority to disqualify prosecutors with conflicts of interest.¹¹⁶ Where there is no applicable legislation, courts may invoke their inherent authority to regulate the bar, as they do in civil litigation, to justify granting a disqualification motion. Whether legislative authority supersedes inherent judicial authority is an open question.¹¹⁷

¹¹³ *Id.* at 712, 714.

¹¹⁴ *See* *Sinclair v. State*, 363 A.2d 468, 475 (Md. 1976) (“[I]f a prosecutor who should have been disqualified is involved in his official capacity in the bringing of the charges . . . against the defendant, then upon timely objection the charges will be dismissed, or if such a prosecutor participates in his official capacity in the prosecution of the case, then upon timely objection any resulting conviction will be reversed and a new trial ordered.”); *See e.g.*, *Vuitton*, 481 U.S. at 809 (“An error is fundamental if it undermines confidence in the integrity of the original proceeding. The appointment of an interested prosecutor raises such doubts.”).

¹¹⁵ *See, e.g.*, *Commonwealth v. Dunlap*, 377 A.2d 975 (Pa. 1976) (affirming a trial judge’s ruling that defendant failed to prove he was actually prejudiced because of the prosecutor’s conflict).

¹¹⁶ *E.g.*, *Leonetti* at 89 n. 194 (citing state statutes authorizing courts to disqualify lawyers to avoid conflicts of interest).

¹¹⁷ Eli Wald has argued that state statutes cannot restrict courts’ exercise of inherent authority to disqualify based on conflicts of interest. *See* Eli Wald, *Disqualifying a District Attorney When a Government Witness Was Once the District Attorney’s Client*:

Courts have rejected arguments that separation-of-powers principles entirely preclude invoking supervisory authority to disqualify duly elected prosecutors.¹¹⁸ But courts are not indifferent to separation-of-powers considerations,¹¹⁹ and they take varying views of the extent of their authority.

The Law Between the Courts and the State, 85 DENV. U.L. REV. 369, 377-81 (2007). But this is not so clear. In some states, legislatures are barred from encroaching on judicial authority to regulate lawyers, but not in all. Further, whether to disqualify a prosecutor based on a conflict does not seem like a question of regulation of the bar so much as a question of regulation of criminal process: Decisions about who can prosecute reflects underlying policy considerations about criminal justice, expertise and accountability as much as it reflects considerations about regulation of lawyers.

¹¹⁸ See, e.g., *People v. Superior Court of Contra Costa County*, 561 P.2d 1164 (Ca. 1977). Although courts universally assume that they have some authority to regulate prosecutors' conflicts, the strong separation-of-powers argument is not implausible. Absent constitutional authority, courts do not review prosecutors' charging decisions and are deferential to many other discretionary decisions based on separation-of-powers considerations. The deferential standard of judicial review of prosecutorial decisionmaking makes it particularly important that prosecutors be disinterested. But, one can argue that the question of whether the prosecutor is sufficiently disinterested or should be recused is just one more discretionary prosecutorial judgment to which courts should defer. Moreover, the decision whether a prosecutor is disinterested relates primarily to the prosecutor's role as a public official, making decisions that are traditionally made by the client, not to the prosecutor's role as courtroom advocate. Courts have a stronger justification for regulating prosecutors' work as advocates than for regulating their work as official decisionmakers. Arguably, prosecutors' conflicts as public officials should principally be a matter for legislation, self-regulation, and public accountability. See generally Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381, 446-49, 460-62 (2002).

¹¹⁹ See, e.g., *In re Schumer v. Holtzman*, 454 N.E.2d 522, 526 (N.Y. 1983) (finding that: "A court may intervene to disqualify an attorney only under limited circumstances. Particularly is this so in the case of a District Attorney who is a constitutional officer chosen by the electorate and whose removal by a court implicates separation of powers considerations"). In *Morrison v. Olson*, 487 U.S. 654 (1988), a nearly unanimous Supreme Court rejected a separation-of-powers challenge to the Ethics in Government Act of 1978, which provided for court-appointed special prosecutors in cases involving executive branch officials, but state disqualification statutes have occasionally been struck down on this and other grounds. See, e.g., *Maryland v. Yates*, 348 A.2d 837 (Md. 1975) (striking down law creating office of an independent state prosecutor); *State ex rel. Hamlin v. Butler*, 73 A. 560 (Me. 1909) (striking down law authorizing the Governor to appoint a special prosecutor to enforce liquor laws); *Smith v. Gallagher*, 185 A.2d 135 (Pa. 1962) (holding that adjudication is required before appointing a special prosecutor). This reflects a consideration that is inapplicable to private lawyers' conflicts, namely, that chief prosecutors are executive branch officials who, in many cases, are elected to office pursuant to statutory or constitutional law establishing their office. For a court or other public official to displace an elected prosecutor is in tension, if not at odds, with the governing statutory or constitutional scheme for allocating

Texas courts hold that “[a] trial court may not disqualify a prosecutor on the basis of a conflict of interest unless that conflict rises to the level of a due-process violation.”¹²⁰ Otherwise, they say, the appropriate remedy is professional discipline.¹²¹ California courts, on the other hand, expressly reject the view that the constitution sets the relevant standard,¹²² and appear to be the most aggressive in regulating prosecutors’ conflicts by this means.

Courts use their authority much more sparingly than commentators believe they should.¹²³ When courts disqualify prosecutors, they most commonly do so, not to ensure disinterested prosecutorial decisionmaking, but to protect the confidentiality rights of a defendant who is a former client.¹²⁴ When courts regard disqualification to be necessary to ensure prosecutorial disinterestedness, the conflict in question is typically an idiosyncratic personal one – for example, where an individual prosecutor has a relationship with a victim or other interested party.¹²⁵

Courts have been generally unreceptive, if not hostile, to attempts to disqualify prosecutors based on pervasive and institutional conflicts.¹²⁶ For

prosecutorial authority. Particularly if an unelected member of the private bar rather than a different elected official is appointed as a substitute, the public is essentially disenfranchised.

¹²⁰ *In re Goodman*, 210 S.W. 3d 805, 808 (Tex. App. 2006); *see e.g.*, *State v. Hunter*, 313 S.C. 53, 54 (1993) (applying a due process disqualification standard).

¹²¹ *In re Goodman*, 210 S.W. 3d at 809.

¹²² Superior Court of Contra Costa County, 561 P.2d at 1170 (“The trial judge need not delay until the last straw of prejudice is added . . .”). The court held that in a homicide prosecution, the trial judge did not abuse his discretion in disqualifying the prosecutor’s office where the victim was a child of a member of the prosecutor’s staff.

¹²³ *See, e.g.*, Wald, *supra* note 117.

¹²⁴ *See, e.g.*, *State ex rel. Meyers v. Tippecanoe County Court*, 432 N.E.2d 1377 (Ind. 1982); *Commonwealth v. Ford*, 122 A.3d 414 (Pa. Super. 2015); *State ex rel. McClanahan v. Hamilton*, 430 S.E.2d 569 (W. Va. 1993).

¹²⁵ *See, e.g.* *People v Jiminez*, 528 P.2d 913 (Colo. 1974); *State v Gaddy*, 578 P.2d 1023 (Ariz. App. 1978).

¹²⁶ The rare disqualification order based on the prosecution’s institutional conflict of interest was issued in *People v. Eubanks*, 927 P.2d 310 (Ca. 1996), in which a corporation, believing its trade secrets had been stolen, contributed approximately \$13,000 to reimburse a portion of the prosecution’s investigation. *Id.* at 312. Upholding the trial judge’s disqualification order, the California Supreme Court held that trial courts have authority to disqualify prosecutors for institutional as well as personal conflicts – in particular, where “institutional arrangements link the prosecutor too closely to a private party, for example a victim, who in turn has a personal interest in the defendant’s prosecution and conviction.” *Id.* at 320. It agreed that the financial contribution could bias the prosecutors by giving them “a sense of obligation” to the corporation, *id.* at 324, and it distinguished the financial contribution of other valuable investigative assistance routinely provided by victims, especially corporate victims. *Id.* at 321. *Eubanks* is not entirely unique. *See United States v. Culbreath*, 30 S.W.23d 309 (Tenn. 2000) (upholding disqualification of prosecutors’ office which accepted services

example, a Nevada public defender moved to disqualify the elected prosecutor in a murder case, arguing that in an election year in which the prosecutor had campaigned as being “tough on crime,” the prosecutor had an improper political motivation to seek the death penalty. The trial judge found the argument so baseless as to be punishable, and the state supreme court agreed, upholding the imposition of a monetary sanction against the defense lawyer for alleging that the prosecutor had a conflict.¹²⁷

Likewise, the California Supreme Court rejected the suggestion that a prosecutor should be disqualified in a high-profile case about which he had consulted with filmmakers and contemplated writing a book.¹²⁸ The Court reasoned that, having at least momentarily shelved plans for the book, the prosecutor was “left with the same interest in burnishing his legacy that every attorney has in a high-profile case Success in high-profile cases brings acclaim; it is endemic to such matters.”¹²⁹ Insofar as ambition makes prosecutors self-interested, the court said, “the problem is not one recusal can solve, as the same issue would arise equally for any theoretical replacement prosecutor. In such matters, we must rely on our prosecutors to carry out their fiduciary obligation to exercise their discretionary duties fairly and justly.”¹³⁰ The court implied that it would have been different if the prosecutor still had a book contract, as the prosecutor himself acknowledged.¹³¹ In that event, disqualification might be warranted because the prosecutor’s idiosyncratic financial interest in the book’s success might influence his discretionary decisionmaking.¹³² From a real-world, commonsense perspective, however, one might doubt that the pervasive prosecutorial interest in garnering public recognition is less influential than the idiosyncratic financial interest in book sales. But courts necessarily minimize conflicts arising out of the desire for fame as opposed to fortune, because, as the California court recognized, this ambition pervades the prosecutors’ office.

of a private attorney who was paid more than \$400,000 by an anti-pornography organization to investigate sexually oriented businesses). But courts do not ordinarily disqualify prosecutors’ offices for accepting support from alleged crime victims, and there are few if any other situations where courts have found institutional conflicts to be disqualifying. See, e.g., *Hambarian v. Superior Court*, 105 Cal. Rptr. 2d 566, 573 (Cal. App. 4th Dist. 2001) (denying disqualification where the city, the alleged victim of a fraud and embezzlement, hired an accountant to assist investigators).

¹²⁷ *Young v. District Court*, 818 P.2d 844 (Nev. 1991),

¹²⁸ *Hollywood v. Superior Court* 182 P.3d 590 (2008); see also *Haraguchi v. Superior Court*, 182 P.3d 579 (Ca. 2008) (finding that prosecutor did not have a conflict of interest arising out of her publication of a book about other criminal cases).

¹²⁹ *Hollywood*, 182 P.3d at 599.

¹³⁰ *Id.*

¹³¹ *Id.* at 598.

¹³² See, e.g., *Camm v. State*, 957 N.E.2d 205 (Ind. App. 2011) (disqualifying prosecutor who was committed to writing a book about the case).

2. Executive Removal or Attorney General Substitution

Various state laws allow the Governor to remove a prosecutor or allow the state Attorney General to substitute for the prosecutor.¹³³ The laws may assign these powers specifically in cases where the elected prosecutor is perceived to have a conflict of interest or they may provide broader authority that can be employed in conflict cases among others.¹³⁴

Part I described two situations where Governors of New York used their authority to replace elected prosecutors based on purported conflicts of interest. In the mid-1990s, the Governor reassigned a death-penalty eligible case after concluding that the Bronx prosecutor's refusal to seek the death penalty was improperly based on philosophical views that undermined the faithful execution of the law.¹³⁵ More recently, in the wake of the Ferguson and Staten Island cases, a different Governor issued an order providing that, in all cases involving police shootings of civilians, the Attorney General will supersede the local

¹³³ See Abby L. Dennis, *Reigning In The Minister of Justice: Prosecutorial Oversight and The Superseder Power*, 57 DUKE L.J. 131, 151 (“Executive superseder power, either by a governor or an attorney general, provides the third means by which to remove a local prosecuting attorney from a case and appoint a special prosecutor.”); Roger A. Fairfax, *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U.C. DAVIS L. REV. 413, 429 n.62 (2009) (discussing “the ability of the state attorney general or the governor to appoint a special prosecutor to replace the original prosecutor in a given case”); see also Lawrence T. Kurlander & Valerie Friedlander, *Perilous Executive Power—Perspective on Special Prosecutors In New York*, 16 HOFSTRA L. REV. 35, 49 n.103 (1987) (discussing the frequent use of this power by numerous New York Governors, for example, Governor Hughes on 18 occasions).

¹³⁴ *Id.* at 155-54 (“New York governors have not limited its use to traditional cases of disqualification, such as when the local prosecuting attorney possesses a direct personal interest. Rather, they have employed the power in a variety of situations that threatened the public trust, including cases involving police corruption, racial tension, and the death penalty.”). See also Kurlander & Friedlander, *supra* note 74, at 56-58 (discussing the appointment of a special prosecutor by a New York Governor due to mistrust of the local district attorney in the case of a racial attack); Maurice H. Nadjari, *New York State's Office of the Special Prosecutor: A Creation Born of Necessity*, 2 HOFSTRA L. REV. 97, 100-02 (1974) (discussing Governor Rockefeller's appointment of a special prosecutor to supersede the district attorney in investigating and prosecuting corruption in the criminal process).

¹³⁵ *Supra* note 57; see also *Johnson v. Pataki*, 655 N.Y.S.2d 463, 466 (App. Div. 1997) (noting that “[t]he wide discretionary authority that any district attorney [] retain[s] . . . must be held subservient to . . . the [Governor's] overriding interest [in assuring that the state's laws are faithfully executed].”)

elected prosecutor.¹³⁶ In one of the first police shooting cases after the order was issued, a court rejected the Rensselaer County district attorney's attempt to retain jurisdiction.¹³⁷

One might question whether either the Governor or Attorney General is an appropriate institutional actor to decide whether an elected prosecutor has a disabling conflict of interest in a particular case or classes of cases. Arguably, the legislature should determine prosecutors' jurisdiction. In individual cases, one might argue that, unlike a court deciding a disqualification motion, other executive officials are not better situated than the prosecutor who has declined to recuse himself: the other officials are probably less knowledgeable about the relevant facts, they are not politically disinterested, and they do not have greater expertise. Moreover, executive removal of a prosecutor sets up an intra-branch conflict, and, from the public's perspective, the decision may seem less legitimate than when undertaken by a court. Not surprisingly, these executive powers are rarely used over a prosecutor's objection.

D. Voluntary Recusal

Laws allow prosecutors with conflicts of interest to voluntarily recuse themselves and to be replaced by prosecutors from other localities¹³⁸ or by lawyers appointed by the court.¹³⁹ New York's high court recently held that elected prosecutors do not have unreviewable discretion to recuse themselves voluntarily to avoid conflicts of interest: "To allow a district attorney to disqualify himself and his office in his sole discretion would value too lightly the public interest in having prosecutorial duties performed, where possible, by the 'constitutional officer chosen by the electorate.'"¹⁴⁰ But as a practical matter, courts defer to prosecutors' requests for a replacement.

¹³⁶ N.Y. Comp. Codes R. & Regs. tit. 9A, § 8.147.4 (2015).

¹³⁷ Following the April 17, 2016 death of Edson Thevenin who was shot by a police officer, Rensselaer County District Attorney Joel Abelove sought to retain jurisdiction of the case after a Grand Jury declined to indict the officer involved. New York Attorney General Eric Schneiderman filed suit against Abelove, enjoining him from exercising jurisdiction over the case pursuant to Executive Order No. 147. Press Release, N.Y. Attorney General Eric T. Schneiderman, A.G. Schneiderman Sues To Compel Rensselaer County District Attorney To Comply With Governor's Executive Order In Case Of Civilian Death Caused By Police Officer In Troy (Apr. 27, 2016).

¹³⁸ See, e.g., IND. CODE ANN. § 33-39-10-2 (West 2014); N.Y. COUNTY LAW § 701 (McKinney 1972).

¹³⁹ *People ex rel. Lindsley v. District Court of Second Judicial Dist.*, 66 P. 896 (Colo. 1901) (upholding court appointment of special prosecutor pursuant to state statute "provid[ing] that if the district attorney is interested or shall have been employed as counsel in a case, the court having criminal jurisdiction may appoint some other person to prosecute").

¹⁴⁰ *In re Working Families Party v. Fisher*, 15 N.E.3d 1181, 1185 (N.Y. 2014). The

Not all prosecutorial conflicts require an entire office's recusal.¹⁴¹ If a supervising prosecutor perceives that a subordinate prosecutor has an idiosyncratic conflict of interest, or the subordinate thinks she has one, the supervisor will presumably assign the case to a different prosecutor who is not affected or "tainted" by the conflict.¹⁴² There would rarely be a public record of these decisions, and so it is hard to know how often cases are reassigned because of conflicts and the nature of such conflicts.

Where it is the chief prosecutor who has a conflict of interest, it does not necessarily solve the problem to let unconflicted lawyers in the office handle the case. That is because the chief prosecutor has ultimate authority for all cases, and assistant prosecutors' authority is merely derivative.¹⁴³ Therefore, in cases where the chief prosecutor perceives that she has a conflict, the prosecutor may ask the court to appoint a substitute either from the private bar or from another jurisdiction.¹⁴⁴ Various unenforceable guidelines advise prosecutors when to step aside voluntarily.¹⁴⁵ There is no history of courts strictly reviewing recusal motions, and one would expect courts to be highly deferential.¹⁴⁶ There is no mechanism for an adversarial testing of prosecutors' recusal decisions, since the very existence of an investigation from which the prosecutor seeks recusal may be secret, and even after a prosecution commences, a defendant may lack

court held that the applicable standard is highly deferential, however: "Where there is legitimate doubt as to whether a district attorney and his office may proceed with a case, the district attorney is not barred from resolving that doubt by choosing to step aside." *Id.* Thus, not surprisingly, prosecutors may recuse themselves in situations where courts would not necessarily disqualify them.

¹⁴¹ See, e.g., *Anderson v. Comm'r of Corr.*, 15 A.3d 658 (Conn. App. 2011) (subordinate government lawyers' conflicts are not imputed to the entire office); *State v. Lemasters*, 456 S.W.3d 416 (Mo 2015) (same).

¹⁴² See, e.g., *State v. Camacho*, 291 P.3d 1073 (Ks. App. 2013) (finding disqualification was properly denied where prosecutor assigned to case was not the one whose parents were the victims); *but see Toro v. Gil*, 110 F. Supp.2d 28 (D. P.R. 2000) (upholding U.S. Attorney's refusal to reassign case against trespassers at Vieques naval base at request of subordinate prosecutor who asserted a conflict of interest arising from her moral opposition).

¹⁴³ See, e.g., *McLaughlin v. Payne*, 761 S.E.2d 289 (Ga. 2014) (entire office should have been disqualified where chief prosecutor had a personal conflict); *but see State v. Balfour*, 198 P.3d 471 (Utah 2008) (where elected prosecutor recused himself because of business and political connection with the defendant, the rest of the office did not have to be disqualified).

¹⁴⁴ In some jurisdictions, a prosecutor may not require judicial approval for recusal, and the substitution of counsel may be self-executing.

¹⁴⁵ *National Prosecution Standards*, NATIONAL DISTRICT ATTORNEY'S ASSOCIATION, Standards 1-3.1 et seq. (3d ed. 2009); *Standards for Criminal Justice* § 3-1.3 (AM. BAR ASS'N, 3d ed. 1993).

¹⁴⁶ *People v. Aryee*, 356 P.3d 918, 921 (Colo. 2014); *In re Working Families Party* 15 N.E.3d at 1181.

standing to challenge the prosecutor's recusal.¹⁴⁷ Further, courts might fairly assume that a prosecutor is unlikely to step aside without a good reason. Since prosecutors need not create a public record justifying their voluntary recusal, it is uncertain how often and why prosecutors voluntarily step aside because of perceived conflicts of interest. There is no reason to believe that prosecutors collectively or individually exercise significant self-restraint as an ethical matter in many situations where they have conflicts of interest, broadly defined. Prosecutors undoubtedly recuse themselves at times even if the law would not necessarily require it, for a combination of reasons: to avoid an appearance of impropriety, to avoid unnecessary litigation over a disqualification motion, and to err on the side of caution where the legal lines are unclear.¹⁴⁸ But there is nothing to suggest that they employ recusal or make assignments to avoid, or reduce the impact of, conflicts of interest in cases where there is no legal risk. Nothing in the professional literature suggests that prosecutors view conflicts as an ethical or political, as distinct from legal, problem. On the contrary, prosecutors' recent refusal to recuse themselves in police shooting cases, despite public calls for them to do so, suggests that prosecutors generally opt to retain jurisdiction absent a close legal question. Further, there is no reason to believe that prosecutors' offices are concerned about the risk that discretionary decisions will be improperly influenced by self-interests that are not legally cognizable or that they adopt internal institutional measures to reduce this risk. On the contrary, professional standards might be read to imply that, in situations where individual prosecutors have conflicts that do not require disqualification, they can avoid self-interested decisionmaking simply through force of will or strength of character.¹⁴⁹ Prosecutors may assume that, because conflicts are addressed to some extent by law, they need not be concerned with situations that

¹⁴⁷ See, e.g., *State v. Mantooth*, 2016 Ga. App. LEXIS 396 (July 1, 2016) (holding that defendant did not have standing to challenge prosecutor's recusal).

¹⁴⁸ See, e.g., *State v. Waddell*, 2014 W. Va. LEXIS 169 (Mar. 7, 2014) (finding the chief prosecutor was more cautious than necessary in recusing himself, and therefore it was not necessary for the entire office to be disqualified).

¹⁴⁹ For example, the ABA's guidelines for prosecutors imply that in situations where prosecutors' professional and personal ambitions and other self-interests are implicated, rather than recusing themselves, they can simply avoid thinking about their self-interest and otherwise avoid having their discretionary decisions affected. See ABA Standards, *The Prosecution Function*, Standard 3-1.7(f) ("The prosecutor should not permit the prosecutor's professional judgment or obligations to be affected by the prosecutor's personal, political, financial, professional, business, property, or other interests or relationships. A prosecutor should not allow interests in personal advancement or aggrandizement to affect judgments regarding what is in the best interests of justice in any case."); *id.*, Standard 3-4.4(b) ("(b) In exercising discretion to file and maintain charges, the prosecutor should not consider: (i) partisan or other improper political or personal considerations; [or] (ii) hostility or personal animus towards a potential subject, or any other improper motive of the prosecutor").

the law does not define as an impermissible conflict. This is not, of course, how other professionals regard conflicts, or how individuals regard the relationship between law and ethics in general: It is not ordinarily assumed that simply because conduct is legal, it is professionally or ethically acceptable. In the absence of robust prosecutorial self-governance, one might question whether prosecutors faced with pervasive and institutional conflicts can be trusted to exercise discretion in accordance with conventional expectations of neutrality, objectivity and disinterestedness.

E. Judicial review of legislation implicating prosecutorial conflicts

Sometimes, legislation engendering institutional conflicts is challenged on due process grounds.¹⁵⁰ Courts typically analyze these based on *Marshall v. Jerrico, Inc.*,¹⁵¹ in which the Supreme Court rejected a due process challenge to a civil statute that entitled an agency to civil fines awarded in enforcement proceedings it oversaw, as reimbursement of its expenses. One might characterize the institutional conflict in *Marshall* as a design defect: whoever served as the administrative prosecutor would have a legislatively-created incentive to exercise discretion based on an alleged impermissible consideration – the financial benefit to the agency. But for at least two reasons, the Court's reluctance to intervene was unsurprising. First, the effect of a theoretical financial incentive on executive decisionmaking is inherently speculative. Second, in allowing the agency to retain civil penalties, Congress arguably made an implicit judgment that the incentives built into the forfeiture law would not unfairly influence administrative prosecutors' exercise of discretion. Ordinarily, courts accept legislative judgments of this nature, both because of legislative advantages as fact-finders and because the legislature is democratically elected.

Although the Court did not unquestioningly accept the implicit legislative judgment underlying the civil fine provision in *Marshall*, its decision illustrates that, at least when a purported conflict is not personal to an individual prosecutor, courts will be skeptical of a due process challenge. The Court

¹⁵⁰ See, e.g., *Commonwealth v. Ellis*, 8 Mass. L. Rptr. 678 (Mass. Super. 1998) (rejecting due process challenge to legislation authorizing a private association of insurers to investigate insurance fraud cases and refer them to the state Attorney General's office for criminal prosecution); *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 950 P.2d 1086 (Ca. 1998) (upholding statute authorizing private prosecution for unfair competition, reasoning that it is for the legislature to decide whether "the 'essential neutrality' that engenders public confidence in prosecutors is missing when a partisan advocate, seeking a client's (rather than the public's) best interest, relies upon a penal statute").

¹⁵¹ *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980).

recognized that the agency head functioned like a prosecutor,¹⁵² and that due process imposes some limits on the partisanship of administrative prosecutors, but not the same strict requirement of neutrality as it imposes on judges.¹⁵³ As public officials, enforcement officers must serve the public,¹⁵⁴ and a legislative “scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions.”¹⁵⁵ But here, the Court found that the legislative scheme in question did not raise a serious constitutional question because “the influence alleged to impose bias is exceptionally remote,” and there was no “realistic possibility that [the agency head’s] judgment will be distorted by the prospect of institutional gain as a result of zealous enforcement efforts.”¹⁵⁶ Among other things, it reasoned that no individual official profited personally, and the agency was sufficiently well funded that it was not dependent on penalties.¹⁵⁷ The Court also noted that financial incentives, while contributing to general zealotry, did not encourage targeting particular persons,¹⁵⁸ and that those targeted were entitled to an administrative hearing before a neutral hearing officer.¹⁵⁹ Finally, and most significantly, the Court observed that civil penalties were not allocated internally in proportion to the amount assessed and collected.¹⁶⁰ This reduced the incentive of any given enforcement officer to initiate proceedings for the agency’s gain. In other words, an agency, through internal structuring, could minimize the extent to which its decisionmaking would be biased by a financial inducement. Based on the Court’s decision, as one might expect, lower courts have generally rejected challenges to laws that give prosecutors’ offices a financial motivation to exercise discretion in particular ways.¹⁶¹ For example, in a decision upholding New Jersey’s forfeiture law, from which local prosecutors’ offices profited, a New Jersey appeals court concluded that the law’s challengers failed “to overcome the presumption that public officials,

¹⁵² *Id.* at 243.

¹⁵³ *Id.* at 242-43.

¹⁵⁴ *Id.* at 249.

¹⁵⁵ *Id.* at 249-50.

¹⁵⁶ *Id.* at 250.

¹⁵⁷ *Id.* at 250-51.

¹⁵⁸ *Id.* at 250 n.12.

¹⁵⁹ *Id.* at 247 & n.9.

¹⁶⁰ *Id.* at 250-51.

¹⁶¹ See *O’Connell v. City of Stockton*, 128 Cal. App. 4th 831 (2005); *State ex rel. Cumberland v. One 1990 Ford Thunderbird*, 852 A.2d 1114, 1118-24 (N.J. Super. Ct. App. Div. 2004); *El-Ali v. Texas*, 388 S.W.3d 890, 894-96 (Tex. App. 2012). However, in *Sourovellis v. Philadelphia*, 2105 U.S. Dist. LEXIS 61796, at * 32-33 (E.D. Pa. May 12, 2015), the district court refused to dismiss a claim that the Philadelphia prosecutor’s office’s retention of forfeited property and funds violates due process, finding that the claim raised disputed fact questions.

when following statutorily established procedures, are proceeding in good faith and in a proper exercise of the power and discretion reposed in them.”¹⁶² In acknowledging legislative and executive-branch judgments underlying the adoption and implementation of the forfeiture law, the court suggested that, in light of separation-of-powers considerations, the constitutional presumption that prosecutors were acting disinterestedly would be hard to overcome.

F. Concluding Thoughts

One might argue that with regard to prosecutors' conflicts, courts should undertake an enhanced regulatory role to compensate for the absence of client regulation. In private representations, clients have the principal responsibility for regulating lawyers' conflicts of interest: Private clients decide whether to retain and discharge lawyers whose relationships, interests and competing loyalties may undermine their representation,¹⁶³ and disclosure and consent rules facilitate client oversight.¹⁶⁴ Courts serve a secondary regulatory role by establishing and enforcing relevant disciplinary rules and disqualifying private lawyers with severe conflicts of interest. In contrast, a prosecutor's dual role as decisionmaking official and public advocate means that there is no separate client or client representative to decide whether a prosecutor's conflict is tolerable. This may be less of a problem when a subordinate prosecutor has an idiosyncratic conflict, because a disinterested supervising prosecutor can decide whether to assign a different prosecutor and, if not, she can monitor the conflicted lawyer as a check on subsequent self-interested decisionmaking. But when the conflict is pervasive or institutional, there is no disinterested official to serve these functions. Courts might assume strong oversight of prosecutors, as they do of class action counsel,¹⁶⁵ to protect beneficiaries of the lawyers' services – in this case, members of the public – who have no control over the representation.

But courts' relatively deferential approach, especially in situations involving pervasive and institutional conflicts, is understandable for several reasons. First, in many situations, the conflict results from a decision about how to allocate

¹⁶² State ex rel. Cumberland v. One 1990 Ford Thunderbird, 852 A.2d at 1125.

¹⁶³ David B. Wilkins, *How Should We Determine Who Should Regulate Lawyers—Managing Conflict & Context in Professional Regulation*, 65 Fordham L. Rev. 465, 483 (1996).

¹⁶⁴ E.g., rules based on ABA Model Rule 1.7, requiring informed client consent to the representation when a lawyer has a conflict of interest.

¹⁶⁵ See *Third Circuit Task Force Report on Selection of Class Counsel*, 74 TEMP. L. REV. 689, 689-90 (2001); *In Re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 801 (3d Cir. 1995) (“Courts examining settlement classes have emphasized the special need to assure that class counsel: (1) possessed adequate experience; (2) vigorously prosecuted the action; and (3) acted at arm's length from the defendant.”).

prosecutorial authority or some other constitutional or legislative decision. For example, in the United States, unlike some other countries, many chief prosecutors are elected, and there is significant movement between the prosecution and private bar. The result is that elected prosecutors will have conflicts arising out of their political ambitions and virtually all prosecutors will have conflicts arising out of their professional ambitions. Further, the investigative, charging and trial functions are combined in a single prosecutorial office, with the result that prosecutors at the trial stage will have conflicts arising out of their investigative and charging role: they may be reluctant to concede earlier mistakes. Jurisdictional legislation, such as a law assigning local prosecutors authority over crimes committed by police within their geographic locale, or a law giving prosecutors authority over crimes against their own offices, create conflicts. Other laws, such as those allowing prosecutors' offices to receive a percentage of forfeited funds, also generate prosecutorial self-interest. In all these situations, conflicts of interest are essentially a political question. Courts generally defer to the implicit constitutional or statutory judgment that the resulting prosecutorial conflicts are insignificant or tolerable.

Second, courts also defer to the executive branch regarding matters within its expertise. While courts traditionally oversee lawyers, and have authority to regulate prosecutors in their role as lawyers, judicial rules and rulings regarding which prosecutors will have responsibility for a prosecution interfere with the discretionary judgments made by prosecutors as executive branch officials regarding precisely the same question. In general, courts are highly deferential to prosecutors' discretionary decisionmaking.¹⁶⁶ Perhaps not all of the justifications for judicial deference are present when a prosecutor decides not to recuse herself because of a conflict of interest. But some of these justifications apply. Prosecutors likely have greater mastery of the facts relevant to disqualification. They have greater experience with the internal prosecutorial decisionmaking process and therefore are better equipped to assess whether particular interest are likely to distort prosecutorial decisionmaking. Judicial fact-findings into prosecutors' conflicts and orders requiring another lawyer to take charge of a prosecution will delay and potentially impede investigations and prosecutions.

Finally, particularly where a purported conflict arises out of a personal philosophical conviction, judicial involvement may interfere with the prosecutor's authority to determine enforcement priorities. The distinction between legitimate public policy considerations and illegitimate personal commitments is unclear. Criminal justice legislation, which allows prosecutors broad charging discretion, presupposes that prosecutors will implement

¹⁶⁶ See, e.g., *United States v. Fokker Services B.V.*, 818 F.3d 733 (D.C. Cir. 2016). In some states, courts are less deferential. See Darryl K. Brown, *Judicial Power to Regulate Plea Bargaining*, 57 WILLIAM & MARY L. REV. 1225, 1233 (2016).

differing criminal justice philosophies.¹⁶⁷ Although general philosophies almost certainly derive from relationships and experiences over time, that does not make either the philosophy or its source an “interest” that conflicts with the prosecutor’s duties to the public.

Consider, for example, the decision whether to seek the death penalty in eligible murder cases. A prosecutor, based in part on religious identification or personal moral philosophy, or on the influence of readings, teachers or family members, may favor capital punishment as an appropriate form of public retribution, on one hand, or disfavor it as inconsistent with the sanctity of human life, on the other. Based on empirical and social assumptions, a prosecutor may favor the death penalty as an effective deterrent, on one hand, or disfavor it as a financial drain with no proven deterrent benefit. Drawn by political parties’ differing platforms, prosecutors may espouse differing views about the relative importance of finality versus error-correction, or differing assumptions about the prevalence of factual and procedural error in criminal cases, leading them either to favor the death penalty as a way to give victims’ families closure or to disfavor it because of the risk of wrongful conviction.

Some of these assumptions and beliefs might be characterized as criminal justice philosophies, others probably not, but these are the kinds of attitudes that all prosecutors, as people, invariably bring to their work, all potentially influence decisionmaking, and it is unclear that prosecutors should be professionally obligated to rule any of them out. As is true of most decisions prosecutors make, legislation establishes no framework for the decision whether to pursue capital punishment. The law does not require seeking it whenever the evidence would permit. Prosecutors have discretion that is not subject to meaningful judicial review. One might assert that prosecutors in death-penalty states are impermissibly promoting their personal philosophies when they act on their moral beliefs about capital punishment, but it is unclear that there is a meaningful distinction between a personal and professional philosophy, a meaningful distinction between moral views and social-science assumptions, or a meaningful distinction between criminal justice philosophy and other beliefs. Surely, prosecutors are expected to implement their professional philosophies about criminal justice, including about the moral legitimacy of capital punishment, given that criminal law rests significantly on moral foundations. In deciding not to pursue the death penalty in an eligible case out of moral qualms, a prosecutor is doing exactly what he was elected to do, as would be a prosecutor who did just the opposite based on different moral premises. Further, any or all

¹⁶⁷ For example, different prosecutors may have different views on whether and, if so, how aggressively to prosecute violations and misdemeanors such as fare-beating, loitering and vandalism. One may subscribe to the implicit legislative judgment that these are not serious wrongs, while another might embrace a “broken window theory,” viewing strict enforcement as important to deterrence of more serious wrongs. One can debate the legitimacy or efficacy of the competing views, but no one would view the prosecutor’s position as conflicting personal interests.

of these attitudes may have been influenced by an affiliation with some individuals or organizations, but it is doubtful that the underlying relationships are “interests” conflicting with the public interest, not just background life experiences.

III. THE GRAVITY OF THE PROBLEM AND THE INADEQUACY OF PROPOSED SOLUTIONS

This section begins by emphasizing the significance of prosecutors' conflicts of interest. Traditional regulators' inability to address prosecutors' conflicts adequately, which Part II explored, is not a mere academic issue. The pressures confronting prosecutors can cloud their judgment, divert them from their obligation to serve the public, and undermine their ability to assess the public interest. Cognitive bias and professional or political aspirations almost invariably complicate prosecutors' effort to conduct a just and disinterested prosecution. This section then argues that the solutions scholars and policy makers have proposed are incomplete and flawed.

A. *The Significance of Prosecutors' Conflicts of Interest*

Currently, prosecutors' offices address only extreme conflicts of interest, those that almost anyone would consider improper.¹⁶⁸ When conflicts are less serious, courts cannot disqualify prosecutors or overturn convictions without potentially exceeding their constitutional or statutory authority.¹⁶⁹ The election or appointment of a prosecutor as a public official is an act of political will with which courts cannot lightly interfere.¹⁷⁰ Consequently, there are many situations where prosecutors' judgment may be affected, but not significantly enough for a court or the prosecutor herself to deny the public its chosen counsel.¹⁷¹

By default, the assigned prosecutor determines the scope and severity of the conflict.¹⁷² The prosecutor cannot defer to a client, as a private attorney would.¹⁷³ Left to their own devices, individual prosecutors may address the question without much thought or deliberation. Even when prosecutors do consider conflicts, their thought processes are invariably internal, opaque, and

¹⁶⁸ See *supra* Part II.

¹⁶⁹ *Id.*

¹⁷⁰ In his dissent in *Morrison v. Olson*, Justice Scalia argued that the main check on prosecutorial power is political. 487 U.S. 654, 728 (1988) (J. Scalia dissenting).

¹⁷¹ Many scholars disagree and call for a more aggressive policing of prosecutorial decisions. See notes 198-201 and accompanying text, *infra*.

¹⁷² Levine, *supra* note 11, at 9.

¹⁷³ Model Rules of Prof'l Conduct, R. 1.7, cmts 18-19 (emphasizing the importance of consulting with a client).

clouded by biases and presuppositions.¹⁷⁴ If individual prosecutors do analyze the question thoughtfully, others in the office cannot benefit from their thinking when they later encounter similar problems.¹⁷⁵

Particularly in high profile cases, the most self-interested prosecutors are usually responsible for recusal decisions. Those in the office with the most at stake and the greater likelihood of being swayed by the interests of the institution may have sole responsibility for making the decision on whether or not to recuse.¹⁷⁶ The chief prosecutor may also have substantial power to influence the decisions in that case if she chooses to proceed despite the conflict. Even if the process is collaborative, prosecutors offices do not necessarily record their deliberations and therefore need not address conflicts in a consistent and principled way.¹⁷⁷ Once a prosecutor or office decides against recusal, the prosecutors in the case may fail to consider the effect that their conflicting interests could have on their discretionary decisions.¹⁷⁸ Although a new Department of Justice policy requires that all prosecutors receive training in implicit biases,¹⁷⁹ which often overlap with conflicts of interest,¹⁸⁰ the Department does not offer comparable training in how to acknowledge and minimize the effect of conflicts of interest in general.

Prosecutors' failure to recuse themselves from investigating local police in civilian shootings has undermined public confidence,¹⁸¹ leading to violent

¹⁷⁴ Burke, *Improving Prosecutorial Decisionmaking*, *supra* note 12, at 1603-13.

¹⁷⁵ Consistency or at least rationality should certainly be a goal in prosecutorial decisionmaking. In administrative law, courts have recognized the importance of following precedent. See Yoav Dotan, *Making Consistency Consistent*, 57 ADMIN. L. REV. 995, 1009-1010 (2005).

¹⁷⁶ For a discussion of the political motivations of chief prosecutors in high-profile cases, see Medwed, *supra* note 71, at 182-83.

¹⁷⁷ For a description of how courts enforce consistency in the administrative law context, see *id.*, at 1008-1029.

¹⁷⁸ Green & Zacharias, *Prosecutorial Neutrality*, *supra* note 9, at 839 (discussing how prosecutors are often criticized for a lack of neutrality).

¹⁷⁹ Press Release, *Department of Justice Announces New Department-Wide Implicit Bias Training for Personnel*, June 27, 2016, available at <https://www.justice.gov/opa/pr/departement-justice-announces-new-department-wide-implicit-bias-training-personnel>.

¹⁸⁰ See notes 78-81 and accompanying text, *supra*.

¹⁸¹ David A. Lieb, *Court Report Raises Conflict of Interest Concern in Ferguson*, WASHINGTON TIMES, May 11, 2015. More recently, civil rights attorneys filed a petition seeking appointment of a special prosecutor to prosecute a police officer in Chicago, accused of shooting teenager Laquan McDonald sixteen times. The petition alleged that the Cook County State's Attorney has a conflict of interest because of her close relationship with the Fraternal Order of Police and her political endorsement from the police union. Rummana Hussein, *Rev. Jesse Jackson Joins Others in Seeking Special Prosecutor for Jason Van Dyke Case*, CHICAGO SUN TIMES, Feb. 26, 2016.

protests.¹⁸² The lack of transparency in the recusal decision and the presumed lack of rigor in the deliberations have deepened public suspicion of the criminal justice system among certain groups of citizens – particularly African Americans.¹⁸³ Of course, the problem of police force is complex, and no simple prosecutorial reform could repair the relationship between African American communities and the criminal justice system. But together with other structural reforms, addressing this problem might help assure the public of the legitimacy of controversial decisions. The abuse of police power lends urgency to the need to improve the quality of prosecutors' decisionmaking.¹⁸⁴ Internal reform addressing the root cause of defects in prosecutorial decisionmaking may strengthen public confidence.

Even in ordinary cases, prosecutors are not necessarily disinterested. They suffer from biases as well as pressures to succeed within the office and in their careers generally.¹⁸⁵ We cannot, nor would we want to, eliminate these pressures entirely. They are entwined with desirable qualities such as personal conviction and passion. But changes in institutional design can help prosecutors acknowledge hidden motivations and address them more deliberately.¹⁸⁶ Even when conflicts do not require recusal, they are a significant problem that should be addressed.

B. Proposals to Regulate Prosecutors' Conflicts of Interest

Prior proposals to regulate prosecutorial decisionmaking are inadequate in that they look at conflicts of interest selectively or overlook them altogether. This section reviews the principal proposals and argues that none adequately address this problem.

¹⁸² Mariah Stewart, *Ferguson Protests Flare as Baltimore Reignites the Cause*, HUFFINGTON POST, Apr. 30, 2015.

¹⁸³ Lydia Polgreen, *From Ferguson to Charleston and Beyond: Anguish About Race Keeps Building*, N.Y. TIMES, June 20, 2015.

¹⁸⁴ Many states considered reforms in the wake of police shootings. Reid Wilson, *Police Accountability Measures Flood State Legislatures After Ferguson*, *Staten Island*, WASH. POST, Feb. 4, 2015. President Obama convened a task force to address the problem of police force. Establishment of the President's Task Force on 21st Century Policing, 79 Fed. Reg. 246 (Dec. 23, 2014), available at <http://www.gpo.gov/fdsys/pkg/FR-2014-12-23/pdf/2014-30195.pdf>; President's Task Force on 21st Century Policing, OFFICE OF CMTY. ORIENTED POLICING SERVS., U.S. DEP'T OF JUST., <http://www.cops.usdoj.gov/policingtaskforce>.

¹⁸⁵ Burke, *Improving Prosecutorial Decisionmaking*, *supra* note 12, at 1588-93; Thomas A. Hagemann, *Confessions From a Scorekeeper: A Reply to Mr. Bresler*, 10 GEO. J. L. ETHICS 151, 152 (1996); Bibas, *Plea Bargaining*, *supra* note 64 at 2471.

¹⁸⁶ Burke, *Improving Prosecutorial Decisionmaking*, *supra* note 12, at 1613-30.

1. Automatic Disqualification and Special Prosecutors

One potential reform is to identify classes of cases where prosecutors have conflicts of interest and require that someone else take jurisdiction. Several scholars have called for this response in police use of force cases in particular.¹⁸⁷ But automatically disqualifying local prosecutors from pursuing cases against police officers in their jurisdiction poses several problems. First, our political system creates a role for prosecutors within the executive branch. The public has chosen the chief prosecutor to represent its interests in criminal cases. Shifting responsibility to another attorney, especially a member of the private bar, disenfranchises the public and tends to undermine the democratic legitimacy of the system.¹⁸⁸ Second, the new prosecutor may have an equally troubling conflict but not be publicly accountable.¹⁸⁹ If Marilyn Mosby, the Baltimore prosecutor, overzealously pursued the police officers in response to public pressure, a specially appointed prosecutor might be too unresponsive to legitimate public concerns. Third, even if it is appropriate to require recusal, we cannot possibly require recusal in all cases where institutional ties would warp a prosecutors' judgment.

Kate Levine recently argued that local prosecutors are too close to police officers to be impartial¹⁹⁰ and should be replaced automatically in cases involving police wrongdoing.¹⁹¹ She suggests that prosecutorial recusal, like judicial recusal, should be triggered by an appearance of impropriety.¹⁹² But the relationship between police and prosecutors is more fraught than Levine portrays, a prosecutor's role is more complex than that of a judge.¹⁹³ Further, as the Supreme Court has recognized, prosecutors, though disinterested, are not expected to be impartial like judges.¹⁹⁴

Those arguing for special prosecutors in police shooting cases may be overstating the illegitimacy of prosecutors' regard for the police. When critics charge prosecutors with a bias toward the police, they are not suggesting that the prosecutors' judgment might be skewed because of a relationship with the particular officers under investigation but that the prosecutors have some

¹⁸⁷ Freedman & Butler, *supra* note 45; Levine, *supra* note 11.

¹⁸⁸ G. Bingham Powell, Jr., *Elections as Instruments of Democracy* 3 (2000) (arguing that democratic legitimacy turns on voters being able to choose policymakers in free and competitive elections).

¹⁸⁹ *Id.* at 47 (arguing that accountability is the key to democracy).

¹⁹⁰ Levine, *supra* note 11, at 1449-52.

¹⁹¹ *Id.* at 1452.

¹⁹² *Id.* at 1457-59.

¹⁹³ For a description of the complex relationship between prosecutors and police, see JOAN E. JACOBY, *THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY* 110-111 (1980) (observing that: "In many instances, the two work together more in an atmosphere of sullen resignation than in one of trust and cooperation.").

¹⁹⁴ *See* note 105, *supra*, and accompanying text.

particular sympathy toward police officers in general. But this is not necessarily a disqualifying bias. Prosecutors and the police serve the same law-enforcement interests. Arguably, prosecutors will be aware of the dangers police face and the difficulties they encounter on the job, making prosecutors too likely to overlook police abuses or credit police officers' testimony. But, even if so, it is hard to say that this sympathy is illegitimate, since any prosecutor will have general attitudes of one kind or another relevant to the work of the police and their general credibility. Conceptualizing conflicts of interest to incorporate personal predispositions built up over a lifetime of experiences and education, possibly including professional interaction with police, is impractical. Likewise, prosecutors' institutional interest in maintaining good working relationships with the relevant police department is not necessarily illegitimate. Prosecutors take account of many institutional interests, such as in conserving and expanding resources, and in obtaining investigative assistance in current and future cases. Prosecutors give leniency to individuals who come forward with evidence against others, and to individuals who plead guilty, largely to promote administrative interests such as these. Securing police cooperation is one administrative interest among many, and it is not obvious that prosecutors should be indifferent to it.

Likewise, critics may be overstating the difficulty of maintaining distance from the police. Levine's insistence that "a prosecutor [cannot] simply switch roles from ally to adversary the moment an officer is accused of criminal wrongdoing"¹⁹⁵ oversimplifies the relationship between the police and prosecutors.¹⁹⁶ As Daniel Richman has shown, prosecutors can serve an important role in educating and monitoring the police.¹⁹⁷ Even if prosecutors are generally allied with the police, prosecutors are consistently asked to shift alliances. For example, prosecutors may rely on cooperating witnesses but later prosecute them for perjury¹⁹⁸ or other criminal wrongdoing.¹⁹⁹

The federal independent counsel law, which provided for courts to appoint members of the private bar to investigate and prosecute certain federal officials, suffered from similar defects.²⁰⁰ Drafted as a response to the Watergate scandal, the act was designed to ensure that prosecutors were not too beholden to the

¹⁹⁵ Levine, *supra* note 11, at 25.

¹⁹⁶ JACOBY, *supra* note 193, at 110-11.

¹⁹⁷ Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 755-94 (2003)[hereinafter, Richman, *Prosecutors and Their Agents*].

¹⁹⁸ *Id.*

¹⁹⁹ For a discussion of the complex relationship between prosecutors and cooperating witnesses, see Steven M. Cohen, *What is True?: Perspectives From a Former Prosecutor*, 23 CARDOZO L. REV. 817, 820-25 (2002).

²⁰⁰ Ethics in Government Act of 1978, 18 U.S.C. § 591 et seq.

officials whom they were asked to investigate.²⁰¹ But after Whitewater, critics grew concerned that an independent counsel from the opposite political party might be overzealous. The law ultimately undermined public confidence in investigations and prosecutions of public officials, and Congress let it sunset in part due to these concerns.²⁰² Thereafter, the Department of Justice adopted regulations to govern its internal recusal decisions in political investigations.²⁰³

In any event, shifting authority to a state-wide prosecutor, special prosecutor, or a court-appointed prosecutor in particular classes of cases, such as those involving police shootings or government corruption, would be an incomplete solution to the problem of prosecutors' conflicts. For example, prosecutors' sympathy for the police and interest in preserving their trust are implicated in virtually any case where police credibility or the integrity of a police investigation is challenged. Nor could this approach begin to address cases where prosecutors' ambitions are at play. It would be hard to find enough lawyers lacking in ambition to staff all prosecutors' offices and it is questionable whether lawyers who are indifferent to their reputations will be sufficiently motivated to perform at a high level.

2. Dividing the prosecutors' offices into distinct tasks

Other scholars suggest curing problems inherent in prosecutorial decisionmaking by dividing responsibility among different prosecutors. Drawing on the administrative law model, Rachel Barkow suggests that separate teams of prosecutors assume adjudicatory and advocacy roles to avoid the effect of cognitive biases on charging decisions. She argues that one person cannot zealously investigate and conduct trials while exercising judgment and protecting defendants' rights in making charging decisions.²⁰⁴ This approach, however, fails to account for the blurring between what she terms "adjudicative" and "prosecutorial" functions.²⁰⁵ Prosecutors' tasks invariably serve both functions, because even mundane choices about trial strategy must be informed by both the adversary goal of convicting the guilty and the adjudicatory task of preserving fairness, integrity, and justice.²⁰⁶ It is not only impossible, but also counterproductive to attempt to separate the adjudicative from the prosecutorial function. Dividing functions would intensify the cognitive bias of those who are assigned the "adversarial" tasks, whereas

²⁰¹ John Padilla and Alex Wagner, Note, *The Outing of Valerie Plame: Conflicts of Interest in Political Investigations After the Independent Counsel Act's Demise*, 17 GEO. J. LEGAL ETHICS 977, 981-84 (2004).

²⁰² *Id.*

²⁰³ 20 C.F.R. §600.1

²⁰⁴ Barkow, *supra* note 32, at 896.

²⁰⁵ *Id.*

²⁰⁶ Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 48 (1991).

combining functions helps train prosecutors engaged in advocacy to look at their case from another perspective.

Dividing functions also means assigning critical decisions to attorneys who are least familiar with the facts. Like supervisors, the “adjudicative” prosecutors are removed from the witnesses and evidence in the case. They have not personally assessed the witnesses’ credibility. Those closest to the case often have a better sense of its strength or weakness, a critical factor in determining appropriate charges and plea bargaining positions.²⁰⁷ They are also in the better position to determine whether to drop a case that is too weak to prosecute.²⁰⁸ or counteract wrongdoing of investigators and witnesses.²⁰⁹

Administrative law provides one lens to analyze prosecutorial decisionmaking but agencies differ from prosecutors’ offices. Agencies have clearly delineated adjudicative functions, which are distinct from their other duties.²¹⁰ Prosecutors are expected to act as investigators, litigators, and gatekeepers at the same time. Their conflicts, which arise from this combined role, are a part of the job.

3. Altering the legal framework

Some critics acknowledge that prosecutorial decisionmaking is flawed and propose that courts more aggressively police the boundaries of prosecutors’ work.²¹¹ Albert Altschuler and Stephen Schulhofer have argued, for example,

²⁰⁷ Ellen S. Podger, *Race-ing Prosecutors’ Ethics Codes*, 44 HARV. C.R.-C.L. L. REV. 461, 462 (2009).

²⁰⁸ In the well-known prosecution for the murder of a bouncer outside the Palladium nightclub, the investigating assistant, Daniel Bibb, determined that the two individuals in prison were not responsible for the murder. His supervisors disagreed and asked him to go to court and let the judge determine whether they should receive a new trial. Bibb followed the advice of his supervisor but instead of presenting the prosecution’s evidence he “threw the case.” David Luban, *The Conscience of Prosecutor*, 46 VAL. L. REV. 1, 1-14 (2010).

²⁰⁹ Richman, *Prosecutors and Their Agents*, *supra* note 197, at 778-85.

²¹⁰ For an explanation of how and why the SEC separates the adjudicatory and prosecutorial function, see Manuel F. Cohen & Joel J. Rabin, *Broker-Dealer Selling Practice Standards: The Importance of Administrative Adjudication in Their Development*, 29 LAW & CONTEMP. PROBS. 691, 719-24 (1964).

²¹¹ Andrew B. Loewenstein, *Note, Judicial Review and the Limits of Prosecutorial Discretion*, 38 AM. CRIM. L. REV. 351, 369 (2001) (arguing that the judiciary should be more vigilant when interpreting a statute); Lynn R. Singband, *The Hyde Amendment and Prosecutorial Investigation*, 28 FORDHAM URBAN L. J. 1967, 1997-2002 (2001) (arguing that the Hyde Amendment invites courts to police the exercise of prosecutorial discretion); Robert Heller, *Selective Prosecution and the Federalization of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion*, 145 U. PENN. L. REV. 1409 (1997); Ronald F. Wright, *Prosecutorial Guidelines and the New*

that legislatures should abolish or severely restrict plea bargaining because prosecutors cannot be trusted to pursue the public interest.²¹² But legislatures are unable to gather the facts needed to supervise prosecutors. Legislation is broad and crude, and cannot take into account the particulars of given cases.²¹³

Other scholars argue that courts ought to expand their review of prosecutors' discretionary decisions,²¹⁴ but doing so would be difficult. Our system of intra-branch checks and balances makes a broad shift in power away from the executive unlikely.²¹⁵ In addition, the principles animating the separation of powers doctrine make sense. Prosecutors, who are closest to the facts of individual cases, are in a better position to make decisions. Legislatures are clumsy, and courts lack the intimate knowledge of the case necessary to make important nuanced determinations. Courts, like outside special prosecutors, may also bring their own biases to bear on the problem.²¹⁶

4. Greater supervision within prosecutors' offices and by the public

Other proposals involve increasing internal or external oversight of prosecutors' decisions. Stephanos Bibas, for instance, advocates that juries review plea-bargain sentence recommendations,²¹⁷ And Josh Bowers suggests giving lay people a role in charging decisions.²¹⁸ These models conceptualize

Terrain in New Jersey, 109 PENN. ST. L. REV. 1087, 1098-1102 (2005) (drawing on New Jersey law to suggest judicial restraints on prosecutorial discretion).

²¹² Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 52, 105-12 (1968); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 2003-08 (1992). William Stuntz and Daniel Richman argue that legislatures should redefine the criminal code to allow greater public oversight. Daniel C. Richman & William J. Stuntz, Essay, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 630 (2005).

²¹³ Bibas, *Prosecutorial Regulation*, *supra* note 32, at 996-1015.

²¹⁴ Brown, *supra* note 166; Steven Alan Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. PA. L. REV. 1365, 1365-66, 1476-77 (1987).

²¹⁵ For a description of modern separation of powers doctrine, *see generally* Mark Tushnet, *The Ambiguous Legacy of Watergate for Separation of Powers Theory: Why Separation of Powers Law is Not "Richard Nixon" Law*, 18 NOVA L. REV. 1765 (1999).

²¹⁶ For a discussion of how judges decide cases, *see generally* Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007) (arguing that judges use their intuition but then sometimes override intuition with deliberation).

²¹⁷ Stephanos Bibas, *Observers as Participants: Letting the Public Monitor the Criminal Justice Bureaucracy*, 127 HARV. L. R. FORUM 342 (2014); Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911 (2006); Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2177 (2014).

²¹⁸ Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655 (2010).

prosecutors as agents whom the public should better supervise. But this is a misconception. Prosecutors are public officials who independently exercise their knowledge, expertise and judgment in the interest of the public. This often involves ignoring the general public sentiment or preference in order to carry out a complex set of duties that include protecting defendants' rights, avoiding racial and class bias, and promoting proportional punishment. As professionals, prosecutors are supposed to serve to check the power of a public inflamed by a particular issue or out to get an unpopular defendant.²¹⁹

These proposals understate the role of professional expertise²²⁰ and overstate the value and relevance of local public values.²²¹ While greater transparency, especially regarding prosecutors' general policies and principles, would be a beneficial check on abuses of prosecutorial power and would encourage greater thoughtfulness and consistency, greater public control would be a mixed blessing. Prosecutorial independence, expertise and professionalism are also a check on public excesses and biases. In any case, as Bibas acknowledges, as a practical matter, lay involvement cannot be incorporated into all prosecutorial decisionmaking.

Bibas also recommends that the leaders within the prosecutors' office exercise greater control in setting the tone of the office, establishing the moral agenda, and creating a culture devoted to it.²²² This argument assumes that supervisors will be more devoted to the public interest, more concerned about promoting defendants' rights, and less focused on pursuing convictions and high sentences. This may be true in some instances, but as the institutional conflicts example makes clear, line prosecutors are sometimes in a better position to assess and pursue the complex public interest than the elected official and the supervisors within the office.²²³ Even when they are not, their proximity to the facts and ability to respond quickly to new information makes them indispensable to the process of reform.

5. Financial incentives

²¹⁹ For a discussion of how some groups, particularly those with cognitive ability, experience, and training can avoid error, see generally Jeffrey Rachlinski, *Cognitive Errors, Individual Differences, and Paternalism*, 73 U. Chi. L. Rev. 207 (2006).

²²⁰ On the decline in faith in professional expertise, see Rebecca Roiphe, *The Decline of Professionalism*, 29 GEO. J. OF LEGAL ETHICS 649, 672-78 (2016).

²²¹ Daniel Richman, *Accounting for Prosecutors*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2757811 (arguing that the unsupervised local nature of the criminal justice system has produced many of its most serious inequities) [hereinafter Richman, *Accounting for Prosecutors*].

²²² Bibas, *Prosecutorial Regulation*, *supra* note 32, at 996-1015.

²²³ Ronald Wright & Kay Levine, *The Cure for Young Prosecutors' Syndrome*, 56 ARIZ. L. REV. 1065, 1066-71 (2014).

Some argue that individual or institutional self-interest can be redressed through financial incentives. William Stuntz, for instance, argued that part of the cause of mass incarceration, is that local prosecutors' offices have political incentives to appear tough on crime.²²⁴ These same prosecutors have fewer restraints because states are responsible for prison budgets.²²⁵ Shifting some of the cost of incarceration to prosecutors' offices might serve as a counter-incentive.²²⁶ Alternatively, individual prosecutors might be rewarded personally for disinterested decisionmaking.²²⁷ It is doubtful, however, that financial incentives alone cannot alter institutional cultures.²²⁸ Even if financial incentives are, on a macro level, a cause of some of the dysfunction in the criminal justice system, there are micro causes as well that deserve attention if any incentive program is to succeed.²²⁹ Politics and local institutional cultures play as much a role as finances in prosecutorial decisionmaking.²³⁰ None of this is to say that financial incentives have no possible role, but simply that they are not enough in themselves to align prosecutors' decisionmaking with the public interest.

IV. A PROPOSAL FOR CHANGE

This Article has shown that prosecutors' conflicts of interest are a significant problem that the current legal system does not adequately address. Courts and other outside regulators have largely left it to prosecutors to decide how to

²²⁴ WILLIAM STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 244 (2011)[hereinafter, STUNTZ, *COLLAPSE*].

²²⁵ *Id.*

²²⁶ *Id.* at 289. There is, however, evidence that fiscal based reform has limited utility. John F. Pfaff, *Review, The Complicated Efforts of Prison Reform*, 114 MICH. L. REV. 951, 954-59 (2016)[hereinafter, Pfaff, *The Complicated Efforts of Prison Reform*].

²²⁷ Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 891 (1995).

²²⁸ For a description of one such attempt to use financial incentives to influence prosecutorial conduct, see generally THOMAS W. CHURCH & MILTON HEUMANN, *SPEEDY DISPOSITION: MONETARY INCENTIVES AND POLICY REFORM IN CRIMINAL COURTS* (1992). The success of this program using financial incentives to reduce the number of detainees housed in New York jails was ambiguous. Meares, *supra* note 227, at 859-60. Such programs would need to be coupled with experience, expertise, and local commitment. *Id.*

²²⁹ Incentives in the criminal justice system are multiple and complex. See, e.g., Bibas, *Plea Bargaining*, *supra* note 64, at 2464-70.

²³⁰ John F. Pfaff, *Review, The Complicated Efforts of Prison Reform*, *supra* note 225, at 952-53; John F. Pfaff, *Escaping From the Standard Story: Why The Conventional Wisdom on Prison Growth Is Wrong*, 26 FED. SENT. RPTR. 265, 269 (2014).

address conflicts of interest. Scholars proposed solutions are incomplete. Institutional and personal interests are so pervasive that any effort to rid prosecutors of them is bound to fail.

Prosecutors' offices are largely indifferent, however, when a conflict is not a serious idiosyncratic one that is so severe as to warrant recusal. There is nothing to suggest that if they choose to proceed despite the pressures, prosecutors assigned to the case will give much thought to the conflicts of interest and how they might affect their decisions. Rather than attempt to eliminate conflicts of interest, we propose an admittedly paradoxical solution: Prosecutors offices should use those who are at the greatest risk for conflicts to address and minimize the problem. Rather than bringing in outsiders to neutralize the threat, our solution enlists those who are most prone to conflicts to minimize that danger.

We reach this conclusion by relying on experimentalism, a pragmatic approach to social problems, which mandates a local, flexible response to the problem of prosecutorial decisionmaking. We argue that the criminal justice system needs to enlist prosecutors' offices themselves. Prosecutors are best situated to address the problem and revise their approach if it proves flawed.

After briefly elaborating on experimentalism, this Part argues that the experimentalist approach is particularly suited to address the problems of regulating conflicts of interest in particular and prosecutorial discretion in general. It then distills the features of an experimentalist approach to prosecutors' conflicts of interest. Finally, it illustrates what this approach might look like in the context of severe institutional conflicts and pervasive individual conflicts.

A. *Theoretical Framework*

Experimentalism, a philosophy derived from John Dewey's pragmatism, suggests a solution to the problem that conflicts of interest pose to the criminal justice system.²³¹ Experimentalism calls for a local, flexible response to broad social problems.²³² It engages those who are closest to the particular facts of each problem in the larger normative questions. This section first explains experimentalism and then discusses why this framework makes sense given the problem of prosecutorial conflicts of interest. Finally, this section brings social sciences insights to bear on how to make an institution work so as to promote an experimentalist agenda.

²³¹ See generally Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998) [hereinafter Dorf & Sabel, *A Constitution*]; Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Experimentalist Government*, 53 VAND. L. REV. 831 (2000) [hereinafter, Dorf & Sabel, *Drug Treatment Courts*].

²³² *Id.* at 270.

1. Experimentalism and Professional Ethics

a. Experimentalism Defined

Advocates of experimentalism argue that experimentation and local problem solving is the most effective way to guide conduct.²³³ Experimentalism, which has its roots in pragmatism, suggests that society address problems in a way that enables it to assess the results of provisional solutions and revise its approach in response.²³⁴ While experimentalism rejects hierarchical control, it is not the same as local or minimalist government. It is, instead, a way to allow local actors to experiment with how best to implement broader, communal norms in local settings.²³⁵ It has the benefit of being nimble and responsive to public opinion while still maintaining checks on corruption and bias.²³⁶ It harnesses the benefits of locally democratic solutions without abdicating communal norms or succumbing to the occasional prejudice of local communities.²³⁷

²³³ *Id.* at 316-23 (1998). Dorf and Sabel argue that we should decentralize power so that citizens can take part in defining norms and crafting them to suit local conditions. The law should encourage social actors to take constitutional considerations into account in devising solutions to every-day problems. The conflicts working group embodies this goal by asking prosecutors to consider the right of the defendant to conflict free counsel alongside the public's right to counsel of choice. Our proposal adds to this calculation by drawing on prosecutors' professional obligations. Professionalism ought to help guide local decisionmaking so that it conforms to broader norms articulated by courts. See Rebecca Roiphe, *Decline of Professionalism*, GEO. J. LEGAL ETHICS (forthcoming 2016) (arguing that professionalism has an important role to play in democratic government).

²³⁴ Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L. J. 53, 78 (2011).

²³⁵ In the administrative law context, experimentalism has bred a theory called "new governance." New governance suggests that in the regulatory context, partnerships between private and public actors will help bring about the pragmatic ideal. Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 344 (2005). Drug treatment courts offer a similar sort of approach to experimentalist design. See Dorf & Sabel, *Drug Treatment Courts*, *supra* note 231.

²³⁶ While experimentalism advocates bringing market ideas into government, it does not abdicate central control. It is not the same as minimalism, because ideally an experimentalist solution maintains communal norms and missions, which shape the local solution. Sabel & Simon, *supra* note 234, at 54-56.

²³⁷ As Brandon Garrett and James Liebman argue, experimentalism offers a Madisonian solution to the problem of equal protection. Local democratic control can leave vulnerable minority interests at the mercy of often unforgiving majorities. Experimentalism ensures that those majorities are accountable by establishing broad principles and a mechanism for review. Brandon L. Garrett & James S. Liebman, *Experimentalist Equal Protection*, 22 YALE L. & POL'Y REV. 261, 299-301 (2006).

Experimentalism takes advantage of legal indeterminacy to encourage local actors to help define legal norms.²³⁸ Problem solving courts, an example of experimentalist design, are local entities that enlist the help of organizations in the community. These sorts of individuals and entities can respond quickly to evidence that solutions are not working. Drug treatment courts, for instance, revise their approach if they learn that certain programs are not successful. And, in doing so, they gradually reduce the amount of indeterminacy.²³⁹ While prosecutors' offices are not problem solving courts, they can be restructured to act in much the same way. The question of how to proceed in the public interest given the pressures that invariably weigh on prosecutors is a question without an easy answer. By deliberating, acting, and revising in response to the results, prosecutors' offices, like the problem solving courts, can reduce indeterminacy by gradually giving meaning to the elusive norm of doing justice.

As Charles Sabel and William Simon argue, experimentalism is particularly promising when it is hard to identify both the nature of the problem and the appropriate solution.²⁴⁰ It is a useful approach when a problem proves immune to traditional regulatory or market measures.²⁴¹ As Part II shows, prosecutorial decisionmaking in general, and conflicts of interest in particular, are precisely this type of problem. Prosecutors, especially those on the front lines, have the benefit of greatest familiarity with the facts. An experimentalist approach would enable prosecutors to innovate, while remaining flexible and responsive to new information. To benefit from their position, prosecutors' offices should monitor their decisions and keep track of the results.²⁴² Prosecutors also have the advantage of working in a professional community, which has the power to create accountability and encourage certain conduct through shared networks and collegial relationships.²⁴³ Ultimately, this approach promises to reduce the arbitrariness of prosecutorial decisionmaking and gradually give meaning to the obligation to seek justice.

²³⁸ Michael Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 935-79 (2003)[hereinafter, Dorf, *Legal Indeterminacy*].

²³⁹ *Id.* at 942-43

²⁴⁰ Sabel & Simon, *supra* note 234, at 56.

²⁴¹ Grainne De Búrca, *New Governance and Experimentalism: An Introduction*, 2010 Wisc. L. Rev. 227, 232. (arguing that experimentalism is particularly useful when there is a "need to address complex policy problems which have not shown themselves to be readily amenable to resolution whether through hierarchy, market, or otherwise"). Dorf also discusses the way in which experimentalist design increases the legitimacy of the rules. Dorf, *Legal Indeterminacy*, *supra* note 238, at 943.

²⁴² Experimentalism requires pooling information. Dorf & Sabel, *Drug Treatment Courts*, *supra* note 231, at 841.

²⁴³ RICHARD MULGAN, HOLDING POWER TO ACCOUNT: ACCOUNTABILITY IN MODERN DEMOCRACIES 34 (2003). Daniel Richman relies on Mulgan to argue that prosecutors play a key role in liberal democracies. Richman, *Accounting for Prosecutors*, *supra* note 221, at 23.

Another benefit of experimentalism is that by definition, the solution enlists the help of those subject to regulation. If prosecutors themselves take part in creating the rules, they will likely have a greater sense of ownership and investment in them, and the rules will have greater force and legitimacy.²⁴⁴

This Article adds to a growing body of scholarship advocating for internal reform within prosecutors' offices to address distortions in judgment that plague the criminal justice system.²⁴⁵ Its approach to conflicts and prosecutorial decisionmaking in general, however, casts doubt on some of the prescriptions in prior scholarship. Unlike those urging top-down solutions, we argue that decisionmaking designed to minimize conflicts must include line prosecutors, who are closest to the facts and least identified with the entity as a whole.²⁴⁶ Further, unlike those who advocate dividing the roles of advocate and public servant, we suggest training prosecutors to think more critically about both components of their complex mission at the same time.²⁴⁷

b. Why experimentalism?

Proponents of prosecutorial reform have drawn on various frameworks, including administrative law.²⁴⁸ Some look to cognitive psychology²⁴⁹ or to the

²⁴⁴ Katherine Kruse, *Instituting Innocence Reform: Wisconsin's New Governance Experiment*, 2006 WIS. L. REV. 645, 679-80 (arguing that enlisting the help of those who are governed by rules increases democratic legitimacy).

²⁴⁵ Barkow, *supra* note 32, at 870-72; Bibas, *Prosecutorial Regulation*, *supra* note 32, at 978-79; Green & Zacharias, *Prosecutorial Neutrality*, *supra* note 9, at 897; Marc L. Miller and Ronald Wright, *The Black Box*, 94 IOWA L. REV. 125, 129 (2008); H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695, 1716 (2000).

²⁴⁶ Bibas, *Prosecutorial Regulation*, *supra* note 32.

²⁴⁷ Barkow, *supra* note 32. For a similar argument about the impossibility of combining roles, see Eric Fish, *Prosecutorial Constitutionalism*, S. Cal. L. Rev. (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2643065.

²⁴⁸ Barkow, *supra* note 32, at 873; Bubany & Skillern, *Taming the Dragon: An Administrative Law for Prosecutorial Decision Making*, 13 AM. CRIM. L. REV. 473 (1976); Dan M. Kahan, *Three Conceptions of Federal Criminal-Lawmaking*, 1 BUFF. CRIM. L. REV. 5, 16 (1997) (arguing for an administrative law conception of federal criminal law); Kami Chavis Simmons, *New Governance and the "New Paradigm" of Police Accountability: A Democratic Approach to Police Reform*, 59 CATH. U. L. REV. 373, 400 (2010) (arguing for an administrative law concept of police departments).

²⁴⁹ Barkow, *supra* note 26, at 895-906 (applying the lessons of institutional design in administrative law to propose means of curbing abuses of prosecutorial discretion and enhancing supervision); Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801, 828-34 (2004). Others look to law and economics. See Gary Becker, *Crime and Punishment: An Economic Approach*, in *ESSAYS IN THE ECONOMICS OF CRIME AND*

teachings of other social and behavioral sciences.²⁵⁰ Still others draw on democratic or other political theories for insights into regulating prosecutorial discretion.²⁵¹ We draw on experimentalism for several reasons.

First, the criminal justice system is already in many ways structured as an experimentalist one would be. There is a history of enlisting local prosecutors to address and resolve key questions about criminal justice.²⁵² As discussed above, courts and legislatures tend to police only the outskirts of prosecutorial decisionmaking.²⁵³ Separation of powers, federalist concerns, and the adversary system of justice leave much of the decisionmaking to those who are closest to the facts.²⁵⁴ An experimentalist approach to prosecutorial decisionmaking would not require radical restructuring of the government, nor would it have collateral impact on other branches. It would not require massive expenditure of resources to implement and it would optimize the value of the actors who are already situated to play a role in the democratic process.

Second, experimentalism works best where traditional hierarchal and market forms of regulation have failed to address the problem.²⁵⁵ As discussed above, courts and legislatures have left the vast landscape of conflicts, and prosecutorial decisionmaking in general, untouched. The rules of professional ethics are poorly suited to the kinds of institutional and pervasive conflicts that face prosecutors, and even if they could be altered to address these kinds of problems, regulatory authorities are notoriously bad at policing prosecutorial misconduct. Political mechanisms, which are essentially a market form of regulation in this context, similarly fail. It is not clear that politics forces prosecutors to be disinterested. On the contrary, political self-interest is assumed to distort prosecutors' judgment.²⁵⁶

PUNISHMENT 9 (Gary Becker & William Landes eds., 1974).

²⁵⁰ See, e.g., Burke, *Improving Prosecutorial Decisionmaking*, *supra* note 12, at 1593-1602; Daniel Richman, *Prosecutors and Their Agents*, *supra* note 197, at 752.

²⁵¹ Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, 34 *CRIME & JUSTICE* 377, 380 (2006).

²⁵² JOAN E. JACOBY, *THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY VIII* (1980).

²⁵³ See *supra* Part II.

²⁵⁴ Daniel Richman, *Accounting for Prosecutors*, *supra* note 221.

²⁵⁵ Sabel & Simon, *supra* note 234, at 56.

²⁵⁶ Stuntz argues that the problem arises from a political system, which gives disproportionate power to those who are not directly affected by criminal justice policies. So, over the course of a century, control over the criminal justice system shifted from local communities to white, middle class suburban voters who are less directly affected. STUNTZ, *COLLAPSE*, *supra* note 224, at 6. He argues that we need to shift control back to urban communities, which may be more likely to favor less punitive forms of criminal justice. *Id.* at 39. This may help but it assumes that all local communities favor a greater degree of leniency or a more collaborative form of social control. Even his own historical analysis shows that this is not always the case. *Id.* at

Finally, scholars have acknowledged that local pathologies have much to do with the current state of the criminal justice system.²⁵⁷ While more work needs to be done to understand how decisions on the county level affect broad trends, it is clear that solutions ought to target not only broad-level structural incentives but the culture of different local prosecutors' offices.²⁵⁸

2. Institutional Design

The social sciences offer lessons in how prosecutors' offices can work as an experimentalist form of governance. Simply asking individuals trained as prosecutors to address a different sort of problem may not be effective. The goal is to make the institution work to promote innovation, adherence to norms, and a broader social mission. Social science literature suggests how to design mechanisms within the prosecutors' office to help align its decisions with a very complex and evolving set of values that make up the public interest. Increasingly, social scientists have explored how to design institutions to achieve these sorts of socially useful goals.²⁵⁹ Administrative law and corporate law theorists have borrowed from these social sciences to conceive institutional safeguards to prevent bad decisionmaking.²⁶⁰ We have done the same for prosecutors' offices.

A word of caution – experimentalism bars blind faith in the state of knowledge at a particular time. Nor does it approve fixed solutions. The solution is always a series of solutions tested and revised.²⁶¹ The social sciences do not provide a clear solution to the problem. They do not paint a coherent worldview, which could lead to obvious conclusions about how best to regulate public officials.²⁶² But they do help conceive and evaluate new proposals, in light of the aim of regulating prosecutorial decisionmaking by responding to new information and rationalizing the process.²⁶³ Not only are the social sciences far from monolithic, they are also constantly evolving. We borrow

99-129.

²⁵⁷ John F. Pfaff, *Escaping From the Standard Story: Why The Conventional Wisdom on Prison Growth Is Wrong*, 26 *FED. SENTENCING REPORTER* 265, 269 (2014) (arguing that prison growth is likely the result of multiple decisions made by local prosecutors).

²⁵⁸ *Id.*

²⁵⁹ Stephen L. Elkin & Karol Edward Solton, *Preface*, in *A NEW CONSTITUTIONALISM: DESIGNING POLITICAL INSTITUTIONS FOR A GOOD SOCIETY* (Stephen L. Elkin & Karol Edward Solton eds. 1993).

²⁶⁰ Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 *CORNELL L. REV.* 549 (2002) [hereinafter, Rachlinski & Farina, *Cognitive Psychology*].

²⁶¹ See *supra* Part IV.A.1.

²⁶² William Eskridge & John Ferejohn, *Structuring Lawmaking to Reduce Cognitive Bias: A Critical View*, 87 *CORNELL L. REV.* 616, 626-34 (2002).

²⁶³ *Id.*

wisdom from these fields with a recognition that the specifics may change as the social sciences themselves evolves.²⁶⁴

Public choice theory, which emerged along with the law and economics literature, argues that government officials like citizens in general are rational actors. They pursue their own self-interest and maximize their own wellbeing at the expense of others and the system in general. The literature suggesting greater external control of prosecutors' offices tend to view prosecutors in this way. These scholars implicitly assume that prosecutors will only reform if the cost of behaving badly is too high.²⁶⁵

Behavioral economists, however, have modified public choice theory, arguing that individuals are not so rational. Their motives are mixed and confused, filled with self-contradiction.²⁶⁶ Even well-meaning actors must use heuristics to make choices and those shortcuts often lead to error.²⁶⁷ Recently, scholars have contributed to this literature, by arguing that individuals are motivated, among other things, by the need to find meaning in their lives.²⁶⁸ Once we reconceive individuals with even a degree of complexity, it is harder to envision how to control their behavior. This Part of the Article seeks to identify ways to alter prosecutors' offices to promote innovation. In order for the innovation to be beneficial, social science offers insight into how to access the better motives, weed out the bad ones, and avoid mistakes without creating an ossified structure impervious to change.

The social sciences have several insights into how best to do this. The first is that group deliberations generally lead to better outcomes than solitary decisionmaking.²⁶⁹ Discussions are especially helpful when an individual lacks

²⁶⁴ Recent studies by Google question whether groups are always more efficient and innovative than individuals. Charles Duhigg, *What Google Learned From Its Quest to Build the Perfect Team*, N.Y. TIMES, Feb. 25, 2016.

²⁶⁵ See e.g., Ellen Yaroshevsky, *Wrongful Convictions: It's Time to Take Prosecution Discipline Seriously*, 8 U. OF D.C. L. REV. 275, 278 (2004).

²⁶⁶ Daniel McFadden, *Rationality for Economists?*, 19 J. RISK & UNCERTAINTY 73, 83 (1999); Robert A. Prentice & Jonathan J. Koehler, *A Normality Bias in Legal Decision Making*, 88 CORNELL L. REV. 583, 643 (2003) (arguing that judges and jurors are affected by a whole host of considerations that defy economic assumptions). A new field of behavioral law and economics has come to recognize how irrational actors can be. Owen D. Jones, *Time-Shifted Rationality and the Law of Law's Leverage: Behavioral Economics Meets Behavioral Biology*, 95 NW. U. L. REV. 1141, 1141-42 (2001)

²⁶⁷ DANIEL KAHNEMAN, PAUL SLOVIC, & AMOS TVERSKY, EDS, *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 3 (Cambridge 1982)

²⁶⁸ Edward L. Rubin, *Public Choice, Phenomenology, and the Meaning of the Modern State: Keep the Bathwater, but Throw Out That Baby*, 87 CORNELL L. REV. 309 (2002).

²⁶⁹ See Garold Stasser & William Titus, *Pooling of Unshared Information in Group Decision Making: Biased Information Sampling During Discussion*, 48 J.

all the information to make an appropriate decision or would be led astray by some kind of bias.²⁷⁰

Experts are generally better than lay people at making decisions. That is not to say that they don't suffer from their own biases.²⁷¹ But with adequate safeguards, it is preferable to entrust decisions to those with both knowledge and experience.²⁷² Social scientists have demonstrated that experts are particularly important in complex situations. Knowledge is helpful and experts can reduce error by developing competence in a particular kind of problem.²⁷³ By formalizing the process of deliberation and decisionmaking, prosecutors can use their facility with facts to avoid the pitfalls that might arise.²⁷⁴ By including line prosecutors who have less experience, the group can minimize the mistakes that the more experienced prosecutors tend to make.²⁷⁵

While experts generally make fewer mistakes, they too use shortcuts that can cause errors, often because an overly strong sense of confidence leads them to disregard certain facts or options. Experts often assume that their approach or their solution is best without hearing alternatives. Including less experienced prosecutors can counteract that danger, especially if the facilitator of the group ensures that all perspectives are heard before a final decision or conclusion is drawn.²⁷⁶

PERSONALITY AND SOC. PSYCHOLOGY 1467, 1467 (1985); Cass R. Sunstein, *Group Judgments: Statistical Means, Deliberation, and Information Markets*, 80 N.Y.U.L.REV. 962, 1012-21 (2005) [hereinafter Sunstein, *Group Judgments*]. Recently, a Google investigation of its own teams questions this conclusion. See Duhigg, *supra* note 264. The study did conclude, however, that there were ways to improve group dynamics to promote better results than any individual within that group could have achieved. *Id.*

²⁷⁰ Stasser & Titus, *supra* note 269, at 1478.

²⁷¹ Burke, *Improving Prosecutorial Decisionmaking*, *supra* note 12.

²⁷² Daniel Kahneman & Dan Lovallo, *Timid Choices and Bold Forecasts: A Cognitive Perspective on Risk Taking*, 39 MGMT. SCI. 17, 23 (1993), cited in Rachlinski & Farina, *supra* note 260, at 559, n. 48. Experts can fall prey to their own mistakes and errors, pitfalls that flow from overconfidence. There are ways to avoid those kinds of errors, specifically organizing decisionmaking process such that experts aren't permitted to come to a conclusion before all the sides have been analyzed. Rachlinski & Farina, *supra* note 260, at 561-62.

²⁷³ Jeremy Blumenthal, *Expert Paternalism*, 64 FLA. L. REV. 721, 750-54 (2012) (“[E]xperts' reasoning and decisionmaking strategies, by virtue of their expertise in a particular area, are typically less vulnerable to [many] biases than are laypeople, and experts are better at compensating for them, consciously or unconsciously.”).

²⁷⁴ Daniel Kahneman & Dan Lovallo, *Timid Choices and Bold Forecasts: A Cognitive Perspective on Risk Taking*, 39 MGMT. SCI. 17, 23 (1993), cited in Rachlinski & Farina, *supra* note 260, at 559, n. 48.

²⁷⁵ Gregory N. Mandel, *Technology Wars: The Failure of Democratic Discourse*, 11 MICH. TELECOMM. & TECH. L. REV. 117, 186 (2005) (arguing that in the technology context, it is best if experts and laypeople deliberate together).

²⁷⁶ *Id.*

Groups can suffer from informational or reputational “cascades,” in which the group tends to conform to the most powerful member. They also run the risk of polarization – groups of people with similar sensibilities can grow more extreme when they deliberate, feeding off of each other’s like-minded values. But mechanisms to encourage information gathering and deliberation can counter those effects as well.²⁷⁷

Public choice and strict law and economics theorists discount the power of groups to contribute to the decisionmaking process. According to them, the ultimate determination will reflect the interest of the most powerful faction within the group.²⁷⁸ However, legal scholars and political scientists have relied on more recent cognitive psychology and sociology research to argue that groups can engage in true deliberation, which will enhance the outcome of decisions.²⁷⁹ Even these “republican” theorists recognize that there are risks inherent in group deliberations. Cass Sunstein, one of the early proponents of deliberative democracy, for instance, argues the importance of minimizing the polarization effect, or the tendency for like-minded individuals to reach an extreme conclusion when asked to deliberate.²⁸⁰ Google’s most recent effort to maximize the productivity and efficacy of groups concluded that psychological safety, or the willingness of all members to take risks, was essential. These group norms can and should be encouraged by the facilitator or group leader.²⁸¹

A moderator who conveys the purpose and mission of the group can help ensure that the process of deliberation improves decisions.²⁸² Encouraging ground rules and strategies for deliberation can help minimize the risks involved in group decisions.²⁸³ First, the group should be instructed to gather as much information as possible before it comes to a conclusion.²⁸⁴ Members should be encouraged to voice contrary views. Those with greater power within the group should refrain from voicing their own opinions until the deliberations have proceeded for some time.²⁸⁵ Everyone within the group should be encouraged to speak and everyone should be encouraged to listen and withhold judgment.²⁸⁶

²⁷⁷ Cass R. Sunstein, *Group Judgments*, *supra* note 269, at 982.

²⁷⁸ Cass R. Sunstein, *Deliberative Trouble: Why Groups Go to Extremes*, 110 YALE L. J. 71, 77-85 (2000) [hereinafter Sunstein, *Deliberative Trouble*].

²⁷⁹ Frank I. Michelman, *The Supreme Court, 1985 Term--Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Symposium, *The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988)

²⁸⁰ Sunstein, *Deliberative Trouble?*, *supra* note 278, at 88-94.

²⁸¹ Duhigg, *supra* note 264.

²⁸² Sunstein, *Group Judgments*, *supra* note 269 at 1011; Duhigg, *supra* note 264.

²⁸³ Sunstein, *Group Judgments*, *supra* note 269, at 1009 (arguing that deliberations improve the accuracy of decisionmaking); Nicholas R. Miller, *Pluralism and Social Choice*, 77 AM.POL.SCI.REV. 734, 735 (1983)

²⁸⁴ Sunstein, *Group Judgments*, *supra* note 269 at 983.

²⁸⁵ *Id.* at 1020.

²⁸⁶ Duhigg, *supra* note 264.

To avoid a cascading effect, the more powerful members of the group should express sympathy for a variety of opinions and, on occasion, encourage or assign others to express contrary views even if doing so is merely adopting a stance for the purpose of argument.²⁸⁷ This will help the more junior members of the group to feel comfortable in expressing contrary views.²⁸⁸ Similarly, anonymous polling or ballots before or during deliberations can also help ensure that the deliberations are productive.²⁸⁹

In these and perhaps other ways, the social sciences inform an experimentalist solution which will be flexible, responsive to facts, and attuned to the broader norms and social goals. The nature of the internal process, however, will change depending such considerations as the size of the office, the severity of the conflict in question, and whether it affects individual prosecutors or the institution as a whole.

B. An Experimentalist Approach to Prosecutorial Decisionmaking

As discussed above, almost all decisions within prosecutors' offices may be affected to some degree by conflicts of interest. The line prosecutor, for instance, is often motivated, at least in part, by professional advancement,²⁹⁰ and the career prosecutor's political ambitions may well affect almost every important decision.²⁹¹ Most prosecutors will seek to please their supervisors, or at the very least, allow their own experience and perspective within the criminal justice system to dictate the proper resolution of a case.²⁹² Personal biases and preferences can make it difficult to assess the public's interest in any given situation. Even if a prosecutor could avoid these diversions, cognitive bias itself often interferes with the ability of a prosecutor to assess and pursue the public interest in a disinterested way.²⁹³ None of these kinds of conflicts can be effectively addressed by recusal but they nonetheless deserve attention. This section describes how an experimentalist approach would address these sorts of pervasive conflicts in prosecutorial decisionmaking.

To capture the benefit of the pragmatic, flexible, experimental approach, prosecutors' offices would have to restructure decisionmaking. Not all offices are the same.²⁹⁴ Not all decisions demand the same type or level of process, but

²⁸⁷ Sunstein, *supra* note 269, at 1020-21.

²⁸⁸ *Id.* at 1017.

²⁸⁹ *Id.* at 1018.

²⁹⁰ Meares, *supra* note 227, at 900. Young prosecutors may be less balanced in their approach to their professional role. See Wright & Levine, *supra* note 223, at 1066-71.

²⁹¹ Sandra Caran George, *Prosecutorial Discretion: What's Politics Got to Do With It*, 18 GEO. J. L. ETHICS 739, 740 (2005).

²⁹² Burke, *Improving Prosecutorial Decisionmaking*, *supra* note 12.

²⁹³ *Id.*

²⁹⁴ Duren Banks and Steven W. Perry, *Bureau of Justice Statistics – Prosecutors in State Courts*, 2007 (Dec. 2011), available at

an experimentalist approach would be notably different. It would be deliberate, self-conscious, and responsive to new information. We have distilled certain common features of any process, which will capture the advantages discussed above.

Where possible, important decisions should be made by groups rather than individual prosecutors. It is impractical to require team oversight of all prosecutorial decisions and in some offices and under some circumstances team oversight would be impossible. In some instances, a documented conversation between a supervisor and line prosecutor would suffice. A prosecutor in a small office could consult with a counterpart in a nearby county. If the conflict is minimal and the dangers are few, an explicit recognition that the two discussed the potential pressures, a list of those conflicts, and a stated resolution would be an improvement over the current approach.

Experimentalism teaches that those close to facts can learn from their errors and reduce indeterminacy by developing a principled approach to problems over time. Prosecutors need to articulate reasons for their actions and to learn from their mistakes.²⁹⁵ Over time, they need to elaborate policies and principles that govern their decisions. To do so, there must be a record to provide institutional memory. Therefore, the conversation should not only be explicit but memorialized,²⁹⁶ which should be easy given current technology. If prosecutors are to effectively experiment with different approaches to conflicts, there must be a means of gathering information and a metric for success. Prosecutors must monitor each other and there must be a mechanism for periodically revisiting the policies and principles as each office gathers new evidence and experiences. The National Association of District Attorneys could be responsible for gathering information, distilling it, and feeding it back to individual prosecutors' offices. The Department of Justice could do the same for federal prosecutors.

Finally, all prosecutors should be trained in recognizing and addressing conflicts of interest of all kinds and magnitudes. Prosecutors should understand how racial bias and other cognitive biases can distort their judgment. As noted, the Department of Justice has recently implemented implicit bias training.²⁹⁷ This could be expanded to address conflicts of interest. While education or self-

<http://www.bjs.gov/index.cfm?ty=pbdetail&iid=1749>

²⁹⁵ Richman, *Accounting for Prosecutors*, supra note 221, at 23 (explaining Germany's requirement that prosecutors document their choices and reasoning and train new prosecutors to do the same).

²⁹⁶ Some offices have effectively gathered information on prosecutorial decision-making. See Miller & Wright, supra note 245, at 129. Miller and Wright call for more information and a greater attention to data. *Id.*

²⁹⁷ Press Release, *Department of Justice Announces New Department-Wide Implicit Bias Training for Personnel*, June 26, 2016, available at <https://www.justice.gov/opa/pr/department-justice-announces-new-department-wide-implicit-bias-training-personnel>

education regarding conflicts of interest may be less easily accessible for state and local prosecutors' offices, it is not unattainable. To experiment with different solutions to the problem of conflicts of interest, line prosecutors and their supervisors must understand how they operate. Similarly, training alone will not suffice. Prosecutors must apply the knowledge in context, assess results, and revise their approach. Our proposal provides a structure for practical application of the abstract understanding of bias and other conflicts.

A. An Experimentalist Approach to Institutional Conflicts of Interest and Pervasive Individual Conflicts

1. Institutional Conflicts of Interest

While not necessarily more complex, the larger conflicts that affect prosecutors' offices as a whole can require more attention. They have the potential to undermine the legitimacy of the criminal justice system in a more immediate way, and at the extreme, these sorts of conflicts may call for the prosecutors' office to recuse itself. The nature of the conflict is harder to identify because it affects the individual only indirectly through her identification or connection with the entity. Those in the top ranks of the office are more likely to be affected than line prosecutors.

There are essentially two layers to the problem. The first issue is what prosecutors' offices should do when the law allows recusal but does not require it. The second, perhaps more crucial question, is how the prosecutors' office should make decisions when it chooses to proceed with a prosecution, despite the fact that the prosecutors have a conflict that may affect their decisionmaking.

To rationalize the decisionmaking process, prosecutors' offices should add a layer of process to the current system to address both of these issues. We sketch out a possible approach while acknowledging, in the spirit of experimentalism, that it may not be the optimal or ultimate one: Better approaches may develop over time, as knowledge is tested through experience, and, in any event, no single decisionmaking structure may be ideal for all prosecutors' offices.

To begin with, larger offices should convene an internal committee comprised of lawyers at all levels of the office, both line prosecutors and supervisors, to advise the chief prosecutor with regard to conflicts and to review important decisions when the office chooses to retain jurisdiction despite conflicts. This working group would initially help determine whether the office should recuse itself in a given case. More importantly, this conflicts committee would continue to monitor cases where there are significant internal pressures that do not necessitate recusal. Monitoring should involve a periodic meeting in which the committee reviews the major upcoming decisions, deliberates, and suggests how the prosecutors assigned to the case should proceed.

a. Details of the internal process

The nature of the internal process will depend on the scope of the conflict and the size and resources of the office. This section outlines a possible approach to institutional conflicts for a mid-size to large prosecutors' office.

The chief prosecutor would make the ultimate determination of whether a conflict requires recusal with the assistance of a report and recommendation from a conflicts group. The group would identify applicable conflicts, consider the likelihood that they would affect decisionmaking given the relevant public interest in, and the policy goals of, a prosecution, and make a recommendation in a report detailing its findings, reasoning and deliberative process. After reviewing the report and after any further communications with the group, the chief prosecutor would decide whether recusal is the best course. If not, the conflicts group would reconvene periodically to revisit the conflicts question, reviewing major decisions to ensure that impermissible considerations have not driven the discretionary choices. Ideally, the group would include prosecutors at all levels – supervisors, unit leaders, and line prosecutors serving significant terms before being replaced.

Three general conclusions can be drawn about the nature of the process to address institutional conflicts of interest. First, groups or teams within the prosecutors' office are best situated to make complex and controversial decisions involving multiple interests and values.²⁹⁸ Second, the group should not only include the leadership of the office. Line prosecutors should take an active role in the discussion and conclusion. Third, the decisionmaking process should be transparent, deliberate, and memorialized. It should engage not only with the norms of the office but also public conceptions of prosecutors and their roles as well as past experience in similar cases.

b. Groups to address conflicts

Prosecutors' offices already employ internal groups to make complex decisions. The Department of Justice has a committee to review cases eligible for the death penalty,²⁹⁹ and some state prosecutors have experimented with

²⁹⁸ See Eric Talley, *Taking the "I" out of "Team": Intra-Firm Monitoring and the Content of Fiduciary Duties*, 24 J. CORP. L. 1001, 1002-04 (1999); see also, e.g., Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999); Bengt Holmstrom, *Moral Hazard in Teams*, 13 BELL J. ECON. 324 (1982).

²⁹⁹ Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 FORDHAM URBAN L. J. 347, 407-420 (1999). Scholars have proposed similar groups to determine whether or not the prosecutor should seek the death penalty on the state level. Edward C. Brewer, III, *Let's Play Jeopardy: Where the Question Comes After the Answer for Stopping Prosecutorial Misconduct in Death-Penalty Cases*, 28 N. KY. L. REV. 34 (2001); Adam M.

similar groups to promote consistency in death penalty prosecutions.³⁰⁰ The nature and complexity of this problem warrants diverse perspectives. Group deliberation can help untangle illegitimate interests from policy preferences, preserve institutional memory, and respond to evolving social science in a way that courts and legislatures may be unable to do.

At least one federal prosecutors' office has implicitly recognized the value of team oversight in complex and charged instances when a prosecutor has a conflict of interest. The United States Attorneys' Office for the Southern District of New York has a process of review whenever a line prosecutor chooses to defer prosecution. Presumably, the concern is that the prosecutor might be driven by her reputational self-interest in avoiding a public loss in some cases where the public interest would be best served by a prosecution. This institutional review process, like the internal deliberative process proposed here to address conflicts of interest, offers an opportunity for the involvement of prosecutors who are less likely to be affected by self-interest in making the particular judgment. Our proposal, like this policy, still includes those with greatest knowledge of the facts and proximity to daily operations in the process of reform.

While some assume that groups merely reflect the interests of their participants and the power dynamics among them, there is evidence that, when structured properly, groups can deliberate and devise disinterested solutions to public problems.³⁰¹ Individuals and interest groups, according to "republican" theorists, do not have set preferences and agendas. Their assumptions and beliefs are always, at least to some degree, formed and refined in the process of interaction and deliberation.³⁰²

c. Prosecutors from all levels within the office

Gershowitz, *Statewide Capital Punishment: The Case for Eliminating Counties' Control of the Death Penalty*, 63 VANDERBILT L. REV. 307, 355-58 (2010); 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); Nicci Lovre-Laughlin, *Lethal Decisions: Examining the Role of Prosecutorial Discretion in Capital Cases in South Dakota and the Federal Justice System*, 50 S.D. L. REV. 550 (2005).

³⁰⁰ Several states have proposed statewide committees to make charging decisions in death penalty eligible cases. State of Illinois, Report of the Governor's Commission on Capital Punishment 84, Recommendation 30 (2002), available at http://illinoismurderindictments.law.northwestern.edu/docs/Illinois_Moratorium_Commission_complete-report.pdf; Ohio To Release Death Penalty Reforms (2011), Death Penalty Information Center, available at <http://www.deathpenaltyinfo.org/node/5742>.

³⁰¹ Frank I. Michelman, *The Supreme Court, 1985 Term--Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Symposium, *The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988).

³⁰² *Id.*

Some scholars emphasize the responsibility of the chief prosecutor and immediate superiors for ensuring public-interested decisionmaking.³⁰³ An experimentalist approach challenges this assumption, at least in addressing institutional conflicts. The chief prosecutor is more likely than line prosecutors to respond to institutional self-interest because of the chief prosecutor's closer identification with the office and its success. In a forfeiture case, for example, the elected District Attorney will be more likely to care that a forfeiture could help fund the office's operations. Line prosecutors may be influenced by a desire to please supervisors and by a more inchoate affinity with the office, but their self-interest will likely be less. By including line prosecutors and unit leaders, the group can dilute the impact of the chief prosecutor's self-interest.³⁰⁴ In addition, because line prosecutors are closest to the facts, they are in the best position to identify concerns if they are given responsibility to do so.³⁰⁵

In addition, the group will benefit from diverse viewpoints. While the chief prosecutor as lone decisionmaker would draw on only one set of assumptions and policy preferences, multiple prosecutors will have different understandings of the public interest and how best to obtain it. Diverse viewpoints are useful in evaluating whether there is a conflict and its severity.³⁰⁶ The variety of views also provide incentive for group members to gather information necessary for the decision,³⁰⁷ and lend legitimacy to the outcome.³⁰⁸ Discussion among individuals with diverse viewpoints should also help in distinguishing illegitimate interests and preferences from legitimate public policies or criminal justice philosophies that may not be universally shared.

For some complex and controversial decisions, the Department of Justice currently requires individual line prosecutors to seek the approval of the office's chief prosecutor. Sometimes, the prosecutor must go further and obtain

³⁰³ Bibas, *Prosecutorial Regulation*, *supra* note 64, at 996-1015.

³⁰⁴ The process could also help mitigate the overly aggressive approach of some young prosecutors. *See* Wright and Levine, *supra* note 215, at 1066-71.

³⁰⁵ *See supra*, Part IV.A.

³⁰⁶ In other contexts, scholars have noted the value of diversity in decision-making when the chief decision-maker has a strong bias. Ginesh Sitaramen and David Zionts, *Behavioral War Powers*, 90 N.Y.U. L. REV. 516, 584 (2015) (arguing that commissions with diverse viewpoints can help counteract the strong biases that Presidents have when exercising their war powers); Cass Sunstein, *Group Judgments: Statistical Means, Deliberation, and Information Markets*, 80 N.Y.U. L. Rev. 962, 1009 (2005) (arguing that deliberation with the proper safeguards improve the accuracy of decisionmaking.)

³⁰⁷ Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1472 (2011).

³⁰⁸ *See* Christina S. Carbone & Victoria C. Plaut, *Diversity and the Civil Jury*, 55 WM. & MARY L. REV. 837 (2014) (arguing that diversity within juries improves the legitimacy of their decision).

permission to pursue the case from an assistant Attorney General. For example, approval is required when a federal prosecutor wants to pursue a prosecution substantially similar to one that has already occurred in state court,³⁰⁹ or when seeking immunity for a witness who has asserted the privilege against compelled self-incrimination.³¹⁰ The underlying assumption is that higher-ranking officials are most likely to protect individual rights at the expense of a conviction or harsher punishment. With conflicts of interest, this assumption will not always hold. Career prosecutors or junior prosecutors will usually be less susceptible to political and professional pressures that could distort the assessment of the larger policy objectives.

The composition of the group should rotate and include prosecutors engaged in advocacy, in part because they are more likely to obey rules if they have had a role in creating them.³¹¹ Allowing rank-and-file prosecutors to participate in decisions involving conflicts will also help them identify with the broader mission of the office and develop their ability to think about how to identify and balance potentially competing public interests. This, in turn, should help them make future decisions about how to prioritize the public's interest in obtaining convictions, preserving defendant's rights, and ensuring just results, in all phases of their cases.³¹²

d. Memorialized and transparent deliberations

Group deliberation promises not only to dilute the chief prosecutor's incentives, but also to render ethical considerations, which would otherwise remain solitary and opaque, deliberate and explicit. As Milton Regan has noted regarding corporate decisionmaking, people tend to avoid viewing their own conduct as ethically questionable and as a result, often deceive themselves into believing they are acting ethically while acting in their own self interest.³¹³

³⁰⁹ U.S. Dep't of Justice, United States Attorney Manual, §9-2.031 (2015).

³¹⁰ *Id.*, §9-23.200.

³¹¹ John Rappaport, *Second-Order Regulation of Law Enforcement*, 103 CAL. L. REV. 205, 241-242 (2015).

³¹² In discussing how best to regulate police departments, John Rappaport cites numerous studies showing that a top-down approach is not as effective as one incorporating rank-and-file officers. *Id.* A case study in Madison, Wisconsin showed that officers who participated in governing their own behavior were more satisfied and identified more closely with the mission of the office. MARY ANN WYCOFF & WESLEY G. SKOGAN, *COMMUNITY POLICING IN MADISON* (1994); Mary Ann Wycoff & Wesley G. Skogan, *The Effect of a Community Policing Management Style on Officers' Attitudes*, 40 CRIME & DELINQ. 371 (1994). An Oklahoma study reached a similar conclusion. Brigitte Steinheider & Todd Wuestewald, *From the Bottom-Up: Sharing Leadership in a Police Agency*, in POLICE REFORM FROM THE BOTTOM UP 43. (Monique Marks & David Sklansky eds., 2012).

³¹³ David J. Luban, *The Ethics of Wrongful Obedience*, in ETHICS IN PRACTICE:

Organizations relying on scripts or pre-fabricated structures to deal with complex decisions often contribute to this sort of ethical fading by allowing individuals to disguise immoral decisions and mask the unethical as simply following protocol. Many prosecutors' offices maintain these sorts of procedures and checklists and some scholars even advocate these mechanisms to deal with decisionmaking.³¹⁴ Requiring prosecutors to articulate their reasoning to others in a group would counter this tendency.

As noted above, deliberation improves decisionmaking as long as certain safeguards are in place.³¹⁵ Individual prosecutors in the conflicts group should be encouraged to think critically and voice their views, rather than reflexively concur. An assigned member could ensure that high-ranking and powerful group members defer voicing their views until others weigh in.³¹⁶ The moderator should express sympathy for a variety of opinions and, on occasion, encourage others to express contrary views if only for the sake of argument.³¹⁷ This will encourage subordinate prosecutors to express opinions without fear of retribution.³¹⁸ Anonymous polling may also help promote this end at times.³¹⁹

The conflicts group should keep an internal record of its decisions to memorialize evolving principles regarding conflicts of interest and decision making in general. Standards set in past deliberations will guide and help rationalize later exercise of prosecutorial discretion, making it harder for prosecutors to employ inconsistent reasoning on different occasions to rationalize self-interested decisions. As others have noted, prosecutors' offices are prone to exercise discretion arbitrarily because their decisions are not governed by standards or reviewed by courts or outside regulators.³²⁰ An

LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION 94, 95-97 (Deborah L. Rhode ed., 2000); Milton C. Regan, Jr., *Moral Intuitions and Organizational Culture*, 51 ST. LOUIS U. L. J. 941, 943-44 (2007); Ann E. Tensbrunsel & David M. Messick, *Ethical Fading: The Role of Self-Deception in Unethical Behavior*, 17 SOC. JUST. RES. 223 (2004).

³¹⁴ *New Perspectives on Brady and Other Disclosure Obligations—Report of the Working Group on Best Practices*, 31 CARDOZO L. REV. 1961, 1974-77 (2010); Lissa Griffin, *Pretrial Procedures for Innocent People: Reforming Brady*, 56 N.Y.L. SCH. L. REV. 969, 1000 (2011-2012)

³¹⁵ Nicholas R. Miller, *Pluralism and Social Choice*, 77 AM. POL. SCI. REV. 734, 735 (1983); Sunstein, *Group Judgments*, *supra* note 269, at 1009 (arguing that deliberations improve the accuracy of decisionmaking).

³¹⁶ *Sunstein, Group Judgments*, *supra* note 269, at 1020.

³¹⁷ *Id.* at 1020-21.

³¹⁸ *Id.* at 1017.

³¹⁹ *Id.* at 1018.

³²⁰ ANGELA DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 16 (Oxford U. Pr. 2007) (arguing that “[t]he lack of enforceable standards and effective accountability to the public has resulted in decision making that often appears arbitrary, especially during the critical charging and plea-bargaining stages of

experimental approach should address this deficiency by encouraging prosecutors' offices to make discretionary decisions explicit, deliberate, and principled at least when conflicts of interest are implicated.

The Department of Justice has developed comparable standards to guide prosecutorial discretion in other contexts. As noted above, federal prosecutors need approval to grant use immunity to witnesses. The United States Attorney's Manual identifies considerations to guide the decision. Recognizing the complexity of the decision, especially for an office motivated primarily to seek a conviction, the manual focuses on the relevant public interests.³²¹ The policy regarding successive state and federal prosecutions provides similar substantive guidance.³²² Over time, a conflicts group could develop a similar list of considerations for each local office to explicitly guide future discretionary decisionmaking in the face of conflicting interests that do not necessitate recusal.³²³ A national study of these records, which distills information and compares data, could provide important feedback to allow local offices to assess and revise their approach.

e. The experimentalist approach: an example

In discussing institutional conflicts, we used the examples of the prosecution of police officers, prosecutions involving forfeited funds or other financial incentives, and prosecutions of high level political officials. To illustrate the experimentalist approach, we will focus on the first of these examples.

The investigation or prosecution of police officers undoubtedly places significant pressure on the office. Prosecutors work with police officers. The office depends on the police to bring them cases and testify in court. It would be difficult if not impossible for the prosecutors' office to ignore the public pressure in these sorts of cases.³²⁴

In the proposed process, a conflicts committee would convene soon after a police shooting or use of force to decide whether to proceed with the prosecution. The committee would be comprised of line prosecutors and supervisors within the office. The rotation would have been set ahead of time so members would be quickly convened. The facilitator could be a prosecutor who has addressed similar issues before, an appellate attorney, or ethics counsel if one exists. One person would be assigned to serve as reporter to take notes on important points and create a record of the discussion.

the process."'). See also Ellen S. Podgor, *Race-ing Prosecutors' Ethics Codes*, 44 HARV. C.R.-C.L. L. REV. 462, 466-67 (2009) (arguing that prosecutors should not focus on single cases without considering the cultural context and analyzing similar cases).

³²¹ United States Attorney Manual, at §9-23.210

³²² *Id.* at §9-2.031(4).

³²³ *Id.*

³²⁴ Levine, *supra* note 11, at 1464-87.

The committee would first consider whether the office should recuse itself. The full committee would receive and review all the evidence. Members would record their initial thoughts and be encouraged to voice any views, even potentially unpopular ones. Starting with junior prosecutors, members would then be asked to read their responses and discuss how or why they formed their initial impressions. . After some discussion, the facilitator could solicit or offer contrary views. The committee would consider all the facts of the case as well as the records in similar cases if there were any. They would factor in the need to preserve and promote the legitimacy of the system as well as fairness to the accused officer. They should also talk about the need for deterrence as well as the concern about over-deterring police officers from doing their jobs.

After discussion, prosecutors in the group would vote using anonymous ballots. The outcome of the vote and the notes of the deliberation would be provided to the chief elected or appointed official who would ultimately decidewhether to recuse the office. If the office retains jurisdiction, the committee wouldlater reconvene as necessary during the investigation or prosecution to serve as a check against self-interested decisionmaking, especially when it came to deciding whether to present evidence to a grand jury, whether charges should be brought, and, if so, whether to offer a plea deal.

To ensure that offices implement these procedures, courts, which asked to consider disqualification, take into account the nature and extent of the internal process within the office to analyze and manage the potential conflict. A federal investigation will invariably consider how carefully the local prosecutors' office has managed the question.

2. Pervasive personal conflicts of interest

Even a large prosecutors' office would lack the resources to engage in group decisionmaking in everyday cases in which prosecutors' ambitions and other pervasive self-interests may play a role. An experimentalist approach can be scaled in relation to the scope and prevalence of the problem, as well as the nature and size of the prosecutors' office.

First, all prosecutors should receive training regarding personal conflicts of interest that continues and develops as they encounter real cases with real challenges. To achieve this personal experimentation, each prosecutor should acknowledge potential conflicts of interest at the beginning of each case, articulating how personal ambitions, cognitive bias, or other self-interests may distort judgment, and identifying decisions in the case that may be affected. Before making these decisions, the prosecutor should discuss the conflict with a pre-designated colleague, share and document relevant concerns, and determine what decision best serves the public interest without regard to the delineated self-interest. Prosecutors would memorialize and later share their

experiences of deliberating collectively and self-consciously in this matter. The records would be collected so that in future trainings and deliberations, new prosecutors would benefit from wisdom gathered over time.

Insofar as possible, prosecutors' offices might attempt to assess these experiences³²⁵ and engage in sufficient oversight to ensure that prosecutors take the process seriously.³²⁶ Small offices may not be able to mimic the approaches of their larger counterparts but they might still learn from their experience.

CONCLUSION

Conflicts of interest, which are endemic to prosecutorial decisionmaking, threaten the legitimacy and efficacy of the criminal justice system. Institutional conflicts make it difficult for prosecutors to serve the public interest because of their identification with the office as a whole. Pervasive personal conflicts of interest, such as reputational self-interest or political aspirations, similarly interfere with prosecutors' ability to act in a disinterested way. Traditional forms of regulation fail to monitor the vast majority of conflicts of interest. Scholarly proposals similarly fall short of addressing the problem. The proposed experimentalist approach will fill this void by altering the design of prosecutors' offices to encourage prosecutors themselves to experiment with different solutions in context.

Ultimately, this article urges rethinking prosecutors' conflicts of interest in four senses. First, we suggest that prosecutors' conflicts arise not only from idiosyncratic personal interests like those recognized by law. Rather, in considering how best to regulate prosecutors' decisionmaking, we should think about, and take account of, all of the pervasive individual interests and institutional interests that might impair prosecutors' exercise of discretion and judgment. Second, we should rethink standard ways of responding to prosecutors' conflicts and standard academic proposals for reform. The full range of prosecutors' self-interests cannot be realistically addressed by judicial oversight or other external institutional oversight, on one hand, or simply by reallocating or restructuring decisionmaking within prosecutors' offices, on the other. Rather, attention must specifically be paid to how prosecutors deliberate regarding decisions that may be influenced by conflicts. Third, prosecutors offices should not forget about conflicts once they make threshold decisions regarding whether to disqualify themselves. When they decide not to step aside,

³²⁵ Some guidance might be provided by efforts to assess the results of implicit bias trainings. *See, e.g.,* Project Implicit, available at <https://implicit.harvard.edu/implicit/aboutus.html>

³²⁶ Corporations' internal compliance programs might provide some guidance regarding oversight of the internal deliberative process. *See* Rachel Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 *CARDOZO L. REV.* 2089, 2105-2109 (2010).

prosecutors should continue thinking about how conflicts might affect the office's resolution of important questions and take steps to minimize conflicts' impact. Finally, in addressing conflicts of interest internally, prosecutors' offices should proceed in the spirit of experimentalism, continually reassessing and seeking to improve their deliberative processes. In the end, taking conflicts of interest as a paradigm, this article provides a way to rethink not only prosecutors' conflicts of interest specifically but the exercise of prosecutorial discretion in general.

The American prosecutor's job is complex, an odd hybrid of advocate and minister of justice, lawyer and public official.³²⁷ Unlike privately retained lawyers, prosecutors have a duty to seek justice, which derives from their unique position as state actors charged with enforcing the law.³²⁸ The prosecutor's client is abstract, a public or sovereignty whose interests include both convicting the guilty and preserving the rights and liberties of those accused of a crime.³²⁹ The interests are in tension with one another and contested. Reasonable prosecutors can and do disagree about how to prioritize the public's many interests and on how best to serve them..

An experimentalist approach suggests that alternatives, including dividing roles³³⁰ or resorting to approval from the most senior prosecutor,³³¹ will not adequately address prosecutors' conflicts of interest. At every stage of the prosecution, the prosecutor must consider aggressively pursuing a conviction, upholding the law, and preserving the justness and legitimacy of the system in light of personal and institutional pressures that may undermine her ability to do so. This combination of roles is not unique to one stage of the prosecution. Prosecutors who are in the midst of trying cases – the most adversary phase of a criminal proceeding – make decisions that require identifying and prioritizing various components of the public interest. Line prosecutors, for instance, determine what evidence to produce in discovery, whether to impeach a seemingly truthful witness, and whether to introduce evidence that may be prejudicial. It is not practical to outsource these decisions, but they require the aggressive advocate to temper her role so as to serve as a minister of justice.³³²

³²⁷ See, e.g., Model Rules of Prof'l Conduct R. 3.8 cmt. 1 (2013) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.").

³²⁸ See note 33 and accompanying text, *supra*.

³²⁹ Green, *Why Should Prosecutors' Seek Justice*, *supra* note 33, at 610-12.

³³⁰ Barkow, *supra* note 32; Richman, *Prosecutors and Their Agents*, *supra* note 197 at 803.

³³¹ Bibas, *Prosecutorial Regulation*, *supra* note 32, at 996-1015.

³³² Wright & Levine, *supra* note 223.

The conflicts committee will help train line prosecutors to think simultaneously about their roles as advocates and public officials despite the obvious tension. Rather than give up on the effort to combine the two aspects of a prosecutor's job, the experimentalist approach calls for embracing the tension, by training prosecutors to engage in a more sophisticated negotiation of the two roles.

Ultimately, the experimentalist approach provides guidance for all discretionary decisionmaking in prosecutors' offices. By recognizing how entwined the roles of advocate and public official inevitably are, the conflicts working group and the collaborative decisionmaking process provide a model for training prosecutors to think more critically about their public function. The proposal recognizes that all prosecutors – even those plea bargaining and trying cases – must consider aspects of the public interest in addition to convicting the guilty. They too are responsible for giving content and meaning to the vague aspirational notion of seeking justice. Collective deliberation about conflicts of interest and about discretionary decisions that might be affected by them will situate prosecutors as problem solvers and train them to become aware of how their own interests might consciously or unconsciously distort their judgment. More generally, the discussions, memorialized for the future benefit of other prosecutors, will promote sophisticated thinking about the public interest and how seeking convictions fits into the broader mission of the office.

So, ironically, the pervasive and chronic problem of conflicts of interest itself suggests the solution. The context in which prosecutors operate, including the inevitable pressures on the pursuit of justice, can offer an opportunity to inspire the complex entity to come closer to its ideal. Rather than eradicate conflicts of interest, which would be impossible, the experimentalist approach would use the problem to inspire the institution to devise the solution. Each prosecutors' office will find a way to define and pursue the public interest with greater flexibility and sophistication. Part of the problem, as discussed above, is the absence of consensus about the meaning of justice and how to pursue it. Rather than trying to forge a consensus, prosecutors' offices should engage in ongoing conversations about what justice means and what it requires in particular cases. Decisionmaking will be grounded in fact and experience, more transparent, more deliberate, and less isolated.

Social science suggests that organizations are made up of more than formal rules and commands. The explicit mandates always co-exist with informal laws or what one might call organizational culture.³³³ Because people are socialized through their actions, the best way to ensure that individuals and groups within

³³³ Peter Selznick, *Foundations of the Theory of Organizations*, 13 AM. SOC. REV. 25, 27 (1948). See also AMITAI ETZIONI, *COMPLEX ORGANIZATIONS: A SOCIOLOGICAL READER* (2d. ed. 1961); CHARLES PERROW, *ORGANIZATIONAL ANALYSIS: A SOCIOLOGICAL VIEW* (1970); HERBERT A. SIMON, *ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATION* (1946); JAMES D. THOMPSON, *ORGANIZATIONS IN ACTION: SOCIAL SCIENCE BASES OF ADMINISTRATIVE THEORY* (1967).

prosecutors' offices focus on pursuing justice broadly rather than simply accumulating convictions, is to ask prosecutors consciously to engage in the question of what justice entails, and make decisions based on this analysis, in an ongoing and thoughtful way. A concrete discussion regarding pervasive and institutional conflicts of interest offers an opportunity to create this kind of dialogue in a concrete setting while resolving a question relevant to a particular prosecution.

What is absent from most proposals to rethink prosecutorial discretion is professionalism. The experimentalist approach asks each office to give concrete meaning to professional norms. This will result in prosecutors, who are invested in the mission - and offices which are constantly searching for new ways to fulfill it.³³⁴

³³⁴ Rappaport, *supra* note 311, at 242; Kruse, *supra* note 244, at 679-80.