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## **The Black Box of Prosecutor Declinations**

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This article explores some facets of *internal* regulation—efforts within the executive branch, and indeed within individual prosecutors’ offices, to control and legitimize prosecutorial discretion.

Our thesis is simple but profound. We believe that the office policies and practices of thoughtful chief prosecutors can produce the predictable and consistent choices, respectful of statutory and doctrinal constraints, that lawyers ordinarily expect from traditional legal regulation. Indeed, we believe that internal regulation can deliver even more than advocates of external regulation could hope to achieve.

In Part I, we describe four distinct sources for the internal regulations visibly at work in New Orleans. Some internal regulations reflect procedural constraints, including constitutional criminal procedure, where prosecutors decline cases if they believe that the police violated the rules of search and seizure or other investigation constraints. This “executive exclusion” function can both predict the ultimate reaction of courts to these cases, and perhaps add to the procedural requirements that courts might impose. A second source of internal regulation comes from a most unexpected legal guest at the prosecutorial table, as prosecutors rely on doctrines in the substantive criminal law (particularly *mens rea* requirements) to sort cases. Third, some internal regulations derive from practical problems of proof and evidence, particularly when prosecutors account for the role and preferences of victims. Fourth, prosecutors account for various kinds of regularized policies, including the hostility to plea bargains examined in our earlier study. Together these four kinds of reasons have a surprisingly comfortable and familiar feel.

In Part II, we explore a particular area of concern for scholars and search for evidence of systematic race and gender bias in prosecutorial decision-making. In doing so we hope to test the early signs of principled internal decision-making revealed in Part I against one of the strongest claims of potential (and unconstitutional) abuse.

New Orleans is no stranger to racial tensions, as a largely white group of prosecutors made decisions regarding an overwhelmingly black population. Nevertheless, our analyses show little evidence of such systematic bias *introduced or exacerbated by prosecutors*. Racial proportions among offenders in cases that the police recommend are mirrored in the charges that prosecutors ultimately file.

[Article co-authored with Mark L. Miller]