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Symposium: Shifting Powers in the Federal Courts

This Changes Everything: A Call for a Directive, Goal-Oriented Principle to Guide the Exercise of Discretion by Federal Prosecutors

Mark Osler

THIS CHANGES EVERYTHING: A CALL FOR A DIRECTIVE, GOAL-ORIENTED PRINCIPLE TO GUIDE THE EXERCISE OF DISCRETION BY FEDERAL PROSECUTORS

Mark Osler*

I. INTRODUCTION

A. Power Games and Sentencing Law

In the past few years, nowhere has power shifted so quickly and so violently within the Federal Courts as it has in the realm of sentencing.[1] In 2003, Congress flexed its muscles, took power from judges, and reapportioned it to prosecutors through the Feeney Amendment.[2] Then, in January 2005, the Supreme Court dramatically ruled in *United States v. Booker*[3] that the federal sentencing guidelines could no longer be mandatory, thus jerking discretion away from prosecutors and giving it back to judges.[4] Now, some in Congress seem poised once again to take charge and shift power to prosecutors yet again.[5] This epic battle between the judicial and legislative branches of government over the power accorded to the administrative branch (in the person of the

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1 Shifts in power are inevitable, of course, where three branches of government compete for power. Kyron Huigens, *What Is and Is Not Pathological in Criminal Law,* 101 MICH. L. REV. 811, 812 (2002).

2 *See* Prosecutorial Remedies and Tools Against the Exploitation of Children Today ("PROTECT Act") of 2003 Pub. L. No. 108-21 § 401, 117 Stat. 650, 650 (2003). For a good discussion of the way the Feeney Act achieved this, see David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion,* 57 SMU L. REV. 211 (2004). It accomplished this shift by new rules, such as the rule requiring that the prosecutor file a motion if the defendant is to get the full measure of credit for "acceptance of responsibility" and pleading guilty. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(b) (2002).

3 125 S. Ct. 738 (2005).

4 *Id.* at 756.

5 Significantly, this includes Representative Tom Feeney of Florida, author of the Feeney Amendment, who on the day of the *Booker* decision announced that "[t]he Supreme Court's decision to place this extraordinary power to sentence a person solely in the hands of a single federal judge—who is accountable to no one—flies in the face of the clear will of Congress." Press Release, Tom Feeney, Feeney Comments on Supreme Court Sentencing Ruling (Jan. 12, 2005), *available at* http://www.house.gov/apps/list/press/fl24_feeney/SupremeCourtOpinion.html.

prosecutor) is far from finished. To key players like Justice Breyer, this fluctuation may feel somewhat like playing tennis,[6] but to criminal practitioners it may be more akin to being the scuffed-up yellow ball being whacked from baseline to baseline.[7]

B. The Constant of Prosecutorial Discretion

Regardless of where we are in this battle, one constant remains: Even given these sudden shifts, federal prosecutors today still wield tremendous discretion, even if it is less than that accorded to judges (for the moment).[8] Though they may not have the same ability post-*Booker* to leverage mandatory Sentencing Guidelines, prosecutors retain the power to guide investigations, accept or decline cases, draft charges, press for convictions through plea negotiation, and seek specific sentences.[9]

Beneath this continuing truth lies a crucial question: What guides federal prosecutors in exercising this discretion? One would think there would be an easy answer, a directive, goal-oriented principle that would consistently guide those important choices.[10] There is not.[11] Rather, discretion is exercised in an inconsistent manner by local U.S. Attorneys and Assistant U.S. Attorneys, who each employ their own distinctive and personal set of guiding principles.[12] For all that the Department of Justice ("DOJ") does, in the end it fails to direct any kind of principled, consistent exercise of discretion by hundreds of federal prosecutors. Instead, those prosecutors revolve in their own orbits of

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6 In *Booker*, Justice Breyer used the tennis analogy in concluding that "[o]urs, of course, is not the last word: The ball now lies in Congress' court." *Booker*, 125 S. Ct. at 768.

7 Both prosecutors and defense attorneys face the challenge of keeping pace with changing law. However, it may be more of a challenge for defense attorneys who maintain federal criminal practice as only a fraction of their work, compared to the prosecutor who does all of her work in federal court.

8 Some, I suspect, would say that prosecutors, even after *Booker*, have more power than judges. William J. Stuntz of Harvard has persuasively argued that the tremendous breadth of a prosecutor's discretion is taken largely from the legislature, not judges, and is largely built on a pathological overcriminalization via the expansion of the federal penal code. *See* William J. Stuntz, *The Pathological Politics of Criminal Law,* 100 MICH. L. REV. 505 (2001). He believes that "[a]s criminal law expands, both lawmaking and adjudication pass into the hands of police and prosecutors; law enforcers, not the law, determine who goes to prison and for how long." *Id* at 509.

9 *See* Bennett L. Gershman, *The New Prosecutors,* 53 U. PITT. L. REV. 393, 395-423 (1992) (discussing the powers of prosecutors prior to *Booker*).

10 I describe this guiding directive as a principle because that word seems the truest fit. The dictionary defines a "principle" as "a comprehensive and fundamental law, doctrine or assumption." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 987 (11th ed. 2004).

11 *See infra* Part III.

12 *See infra* Part III.

personal morality, a constellation of independent stars and galaxies each with their own hue of light.[13]

This article calls for a change. Specifically, it asks the Attorney General to articulate a directive, goal-oriented principle that would allow for the consistent and principled exercise of discretion and a true moral voice for the DOJ.

C. Discretion in the Real World

A young Assistant U.S. Attorney in a large city sits in a conference room with several agents of the local narcotics task force. The task force is presenting a case investigation, involving a conspiracy that is shipping cocaine into the city and distributing it. The agents have identified the following three levels of involvement: the *leader* of the organization, who directs the actions of others and retains the majority of the profits; three *managers* who subdivide bulk shipments and handle cash; and six *dealers* who sell the cocaine locally. The agents are ready to turn the case over for indictment or to continue the investigation without a charge. Either way, it would be helpful in making the case if some of the defendants would offer information and testimony against the others.

Over the course of this case, the prosecutor will wield tremendous discretion at every stage. Starting from the meeting with the agents and moving forward chronologically, the prosecutor will make key discretionary decisions not only in directing the investigation but also in accepting or declining the case for prosecution,[14] choosing what charge to lodge against each defendant,[15] crafting plea agreements,[16] and making sentencing recommendations to the court.[17] At each stage, as part of these decisions, she will also have to evaluate which defendants

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[13] To complete the analogy, Assistant U.S. Attorneys acting on their own would be stars, and groups of them clustered together under a U.S. Attorney would be a galaxy.

[14] Some commentators see this as an especially important area of prosecutorial discretion, as it is wholly unreviewable and not subjected to "rigorous checks and balances" found in other areas of the prosecutor's work. Michael Edmund O'Neill, *When Prosecutors Don't: Trends in Federal Prosecutorial Declinations,* 79 NOTRE DAME L. REV. 221, 222-23 (2003).

[15] The power to charge is now so fully in the prosecutor's hands that the Grand Jury may not issue an indictment without the signature of the prosecutor. FED. R. CRIM. P. 7(c)(1).

[16] FED. R. CRIM. P. 11(c)(1).

[17] Some sentencing choices, such as whether to adjust the sentence for cooperation after the initial sentencing, can only be addressed upon the motion of the prosecutor. FED. R. CRIM. P. 35(b).

should be allowed to cooperate with the government and receive a break at sentencing in return.

Different guiding principles will lead in radically different directions. Quite simply, if the prosecutor wants to lower crime by taking out those best able to run a drug organization, she will allow the lower-level dealers to cooperate against the others. On the other hand, if she wants to pursue as many lawbreakers as possible, she may choose to allow the leader to testify against all the others.

At present, how to approach the case is decided at the local level.[18] Without a national directive in the exercise of prosecutorial discretion, we are left to guess what will be important in any given case. Currently, the DOJ lacks a consistent moral voice, set of goals, or meaningful role in the larger political debate in our country.

D. A Call to Principle

The prosecutor described above is making important decisions on behalf of the larger society, largely without directive guidance. In attacking this lack of principle, this Article begins by briefly describing the following two ways in which federal prosecutors are unique: first, in their accumulation of power relative to others; and second, in their independence from an electorate. Next, in Part III, this Article examines the guidance in exercising discretion that federal prosecutors do receive. In Part IV, this Article sets out several types of guiding principles and discusses their relative merits. Finally, in Part V, this Article addresses problems with the present system and the changes that a centralized, directive principle might make in the practice of federal criminal law, using the key-man principle as an example.

However, this Article is not about prosecutorial "ethics," as ethics are generally addressed in codes of behavior that still allow prosecutors great amounts of discretion[19]—that is, what I am interested in here is not ethics, but the principled use of discretion within the bounds already set by ethical codes. Further, I do not seek to weigh in on the validity of the Sentencing Guidelines or sentencing reform in the wake of *Booker*, which I have already done elsewhere in articles and in testimony before the

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18 *See infra* Part III.

19 For example, in Texas the code of ethics permits prosecutors to prosecute any charge "supported by probable cause." Texas Rules of Professional Conduct, TEX. GOV'T CODE ANN. tit. 2, subtit. G, app. A, art. 10, § 9, R. 3.09(a) (Vernon 1998).

U.S. Sentencing Commission.[20] Nor is it a critique of the policies of the U.S. Justice Department.[21] Finally, it is not an attempt to weigh in on the debate over whether prosecutorial discretion is a good or bad thing; rather, I am using this moment to argue that prosecutors should use the discretion that they do have in a way that consistently follows publicly articulated, goal-oriented principles that are specific enough to direct discrete actions. What, exactly, is the "justice" being pursued by our increasingly powerful DOJ? It is time to put some meat on those bones and flesh out the exact nature of this justice that we are pursuing with such expense and intensity.

II. THE UNIQUE ROLE OF FEDERAL PROSECUTORS

Federal prosecutors are unique in the realm of criminal law in at least two respects. First, they have more power than almost anyone in the federal system (even after *Booker*).[22] Second, unlike nearly all state prosecutors,[23] they are not elected,[24] but rather, they are removed by several levels from an official (the President of the United States) who is publicly elected. Thus, federal prosecutors do not need to prepare for or respond to the expression of public will embodied in elections.[25] Because prosecutors simply have more discretion than anyone else (save the judge) and because they do not have elections as a check on their actions, the articulation of guiding, directive principles on the use of such discretion is made more important.

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[20] *See* WRITTEN TESTIMONY OF MARK OSLER BEFORE THE U.S. SENTENCING COMM. (Nov. 17, 2004), *available at* www.ussc.gov/hearings/11_16_04/osler.pdf; Mark Osler, *Indirect Harms and Proportionality: The Upside-Down World of Federal Sentencing*, 74 MISS. L. J. (2005) (forthcoming) [hereinafter Osler, *Indirect Harms*]; Mark Osler, *The Blakely Problem and the 3x Solution,* 16 FED. SENT. REP. 344 (2004) [hereinafter Osler, *The Blakely Problem*]; Mark Osler, *Uniformity and the Death of Traditional Sentencing Goals in the Age of Feeney*, 16 FED. SENT. REP. 253 (2004); Mark Osler, *Must Have Got Lost: Traditional Sentencing Goals, The False Trail of Uniformity and Process, and the Way Back Home,* 54 S.C. L.REV. 649 (2003) [hereinafter Osler, *Must Have Got Lost*].

[21] Admittedly, implicit in my argument is a critique of the DOJ insofar as it has failed to adopt the type of principle I urge here.

[22] Much of the power accorded prosecutors will continue under advisory guidelines. For example, it will still require a prosecutor's recommendation to get out from under a mandatory minimum sentence. *See* 18 U.S.C. § 3553(e) (2000).

[23] *See* BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, *Prosecutors in State Courts, 2001*, BUREAU OF JUSTICE STATISTICS BULLETIN 2 (July 1, 2002) [hereinafter *Prosecutors in State Courts*] (noting that only Alaska, Connecticut, the District of Columbia, and New Jersey do not elect their chief prosecutors).

[24] U.S. CONST. art. II, § 2.

[25] *See* Stuntz, *supra* note 8, at 544.

A. Empowered Prosecutors

1. Power Under Advisory Guidelines

Even under the post-*Booker* regime, which may change at any moment, should Congress enact new laws, prosecutors would wield tremendous power. The shift to advisory guidelines does not mean all former powers of prosecutors evaporate. Many judges may choose to follow the lead of the first federal District Court judge to rule in the post-*Booker* environment, Paul G. Cassell of Utah.[26] In a ruling the day after *Booker* was announced, Cassell ruled that he would continue to give the guidelines "considerable weight" in sentencing, and he proceeded to sentence the defendant precisely as the guidelines directed.[27] So long as judges similarly follow old practices, prosecutors' power will be undiminished.[28]

2. The Power to Evade Mandatory Minimums

Further, the *Booker* decision still leaves the discretion to evade mandatory minimums solely in the hands of prosecutors.[29] The judge, in contrast, has no similar unilateral method by which to evade mandatory minimums.[30] If a prosecutor charges the case as a qualifying felony, provides notice, and the defendant is properly convicted by plea or at trial, the judge does not have the option of reducing the sentence below the minimum.[31] Understandably, this has led to some resentment on the part of the judiciary and others.[32] Even from the bench, some federal judges have expressed their anger.[33]

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[26] United States v. Wilson, 350 F. Supp. 2d 910 (2005). Only a few days after Wilson was decided, federal District Court Judge Lynn Adelman of Wisconsin took a contrary view, holding that "[t]he approach espoused in *Wilson* is inconsistent with the holdings of the merits majority in *Booker*. . . ." United States v. Ranum, 353 F. Supp. 2d 984, 985 (E.D. Wis. 2005).

[27] *Wilson*, 350 F. Supp. 2d. at 925.

[28] Notably, the Wilson decision did not involve considerations such as cooperation with the government, which may have brought other factors into play. *Id*. at 926-31.

[29] *See* 18 U.S.C. § 3553(e) (2000).

[30] *See Id*.

[31] *See Id*.

[32] Mandatory minimum sentences under 21 U.S.C. § 841 have been especially controversial. In a recent book, even radio comedian Garrison Keillor specifically criticized this law, stating:

> [M]andatory minimum sentences for minor drug possession–guidelines in the 1986 Anti-Drug Abuse Act that sailed through Congress without benefit of public hearings, drafted before an election by Democrats afraid to be labeled 'soft on drugs'–and so a marijuana

3. The Power of the Cornucopia of Possible Charges

Moreover, much of the power of the prosecutor has nothing to do with the sentencing guidelines and mandatory minimums. The prosecutor's power flows from the vast array of choices federal law allows in charging a criminal case.[34] This subject cannot be addressed without mentioning the work of William Stuntz, who asserts that this smorgasbord of prosecutorial options effectively shifts both lawmaking and adjudication to a third party, the prosecutor,[35] and then leaves that absolute discretion in the hands of prosecutors, "subject to no review by anyone else."[36] This results in a system which is needlessly arbitrary because it "suffers from both too much law and too much discretion."[37]

Stuntz proposes two solutions to this problem of pathological over-criminalization: Either severely limit prosecutorial discretion, or take the job of crafting the penal code away from Congress.[38] Here, I propose a different solution to the same problem, which requires neither the external limitation of prosecutorial discretion nor the abdication of an essential function by Congress. The overbroad discretion should not be limited by a warring outside force, or massive changes in the law, but by the simple articulation of principle by the nation's chief law enforcement officer.[39]

> grower can land in prison for life without parole while a murderer might be in for eight years; no rational person can defend this, it is a Dostoevskian nightmare and it exists only because politicians fled in the face of danger."

GARRISON KEILLOR, HOMEGROWN DEMOCRAT 100-01 (Viking 2004). This is not so different than the point Harvard Law School's Stuntz makes in saying that "both major parties have participated in a kind of bidding war to see who can appropriate the label 'tough on crime.'" Stuntz, *supra* note 8, at 509.

33 Perhaps most notably, former U.S. Attorney and thirteen-year federal judge John S. Martin resigned and published an article in the *New York Times* asserting that he no longer wanted to be part of an "unjust" system. John S. Martin, *Let Judges Do Their Jobs,* N.Y. TIMES, June 24, 2003, at A31.

34 *See* 18 U.S.C. §§ 1-2721 (2000). Some penal laws, of course, are found in other sections of the federal code, such as the codification of many narcotics trafficking laws. *See, e.g.,* 21 U.S.C. § 841.

35 Stuntz, *supra* note 8, at 509.

36 William J. Stuntz, *Reply: Criminal Law's Pathology,* 101 MICH. L. REV. 828, 838 (2002).

37 Stuntz, *supra* note 8, at 579.

38 *Id*.

39 *See infra* Part V.

B. The Unelected Prosecutor

Unfortunately, the shift in discretion combines with a problem unique to the federal system making principles important. Because prosecutors are not elected in the federal system,[40] they avoid having to articulate principles publicly (in an election campaign) or to be subjected to public scrutiny that compares those stated principles to their actions (in subsequent elections).[41] Thus, we are shifting power to an entity with no need to respond to the will of the public.

In most states, the voting public elects a District Attorney, who then determines the policies governing prosecution in that district.[42] Elections force principles into the mix in two ways: first, they force prosecutors to state a reason, usually a principle, that they should be elected; second, they must run on their record once elected, and much of that record is, specifically, their employment of discretion that will be compared to the principle they articulated.[43] For example, if a candidate for District Attorney declares that she will seek jail time for all drunk drivers, she is making a promise about her future use of discretion that articulates the principle of similar treatment for all offenders, regardless of the situation. If the majority of voters agree, she is elected; if not, she loses.[44] If elected, and she starts to allow probation for drunk drivers, it is likely someone will run against her, decrying her broken promises. Thus, there is within the system some requirement that prosecutors articulate principles and live by them in their exercise of discretion.

There is no similar check within the federal system, no direct election to force the definition and articulation of guiding principles.[45] Rather, the President appoints and the Senate confirms ninety-three U.S. Attorneys, who serve at the pleasure of the President.[46] The DOJ, and its head, the Attorney General, can and do issue directives that bear on the

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40 U.S. CONST. art. II, § 2.

41 *See* Stuntz, *supra* note 8, at 544.

42 *Prosecutors in State Courts, supra* note 23, at 2 (noting that only Alaska, Connecticut, the District of Columbia, and New Jersey do not elect their chief prosecutors).

43 *See* Stuntz, *supra* note 8, at 544 ("Local district attorneys charge murders and rapes and robberies and drug deals because the local population demands it.").

44 *See id*.

45 William Stuntz argues that this allows federal prosecutors to focus on their own career advancement by, for example, pursuing high profile cases rather than the cases that make a bigger difference in society. *Id*.

46 Dale A. Oesterle, *Early Observations on the Prosecutions of Business Scandals 2002-2003: On Sideshow Prosecutions, Spitzer's Clash with Donaldson over Turf, the Choice of Civil or Criminal Actions, and the Tough Tactic of Coerced Cooperation*, 1 OHIO ST. J. CRIM. L. 443, 444 n.4 (2004).

employment of discretion,[47] but these are rarely if ever an issue in the election of Presidents. For example, in 2003, Attorney General John Ashcroft toughened the internal DOJ guidelines for charging defendants, directing that prosecutors, with limited exceptions, charge "the most serious, readily provable offense or offenses that are supported by the facts of the case."[48] Though many viewed this guideline as a significant change,[49] it was hardly an important issue in the presidential election of 2004.

Thus, unelected prosecutors in the federal system are only in the most indirect way forced to respond to public will or to articulate and defend the use of discretion, in sharp contrast to state prosecutors who can be thrown out every few years if they are out of step with the beliefs of the local public or untrue to their promises.

III. THE FAILURE OF THE DEPARTMENT OF JUSTICE TO ARTICULATE PRINCIPLES

Given the lack of elections to force the articulation of principles, it may not be surprising that the DOJ, through the Attorney General or elsewhere, has failed to assert the type of discretion-guiding principle discussed here.[50] At best, the DOJ has in the recent past pushed its prosecutors to treat defendants harshly, though even this does not appear to be consistently tied to any principle.

There are two national sources for guiding principles for prosecutors who actually try cases, including: Directives from the Attorney General and the *United States Attorney's Manual* ("*Manual*"), which sets out the policies for the DOJ. These two, of course, are mutually reinforcing—directives from the Attorney General will presumably be incorporated into the *Manual*.[51] Unfortunately, neither of these sources has recently espoused directives that meet the definition of principle I am using here. Guiding principles should be goal-oriented, directive to prosecutors in

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47 *See* Memorandum from Attorney General John Ashcroft, to All Federal Prosecutors (Sept. 22, 2003), *available at* http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm. [hereinafter Ashcroft Memorandum].

48 *Id.* at 2.

49 *But see* David Hechler, *Some See Little Change, Others a Mired System; Ashcroft Echoes Thornburgh*, NAT'L L.J., Sept. 29, 2003, at 25.

50 *See infra* Part III.A.- B.

51 For example, the gist of the Ashcroft Memo was incorporated into the *U.S. Attorney's Manual* at 9-27.300. U.S. DEP'T OF JUSTICE, U.S. ATTORNEY'S MANUAL § 9-27.300, *available at* www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm [hereinafter MANUAL].

the primary areas where discretion is employed, and consistently applied.

A. Directives of the Attorney General

Perhaps the closest we have come to an articulation of guiding principle is Attorney General Ashcroft's 2003 memorandum regarding charging procedures.[52] That memo, issued to "all federal prosecutors,"[53] directed prosecutors to "charge and pursue the most serious, readily provable offense,"[54] with six exceptions, which include the defendant's cooperation with the government (which, pursuant to the memo, can lead to either a reduction in sentence or no charge at all)[55] and other "exceptional" cases in which a supervisor's approval is received.[56] In that document, Ashcroft claimed that the new rules were imposed because, "[f]undamental fairness requires that all defendants prosecuted in the federal criminal justice system be subject to the same standards and treated in a consistent manner."[57]

While widely attacked as limiting the discretion of individual Assistant U.S. Attorneys,[58] a criticism that to some degree is probably true, the Ashcroft memorandum does not meet the definition used here for principled guidance (directive, goal-oriented, and consistent). First, while it may be considered nominally goal-oriented in stating that it seeks to subject criminals to the same standard and is consistent with the across-the-board approach discussed in Part IV.A, it only affects one of several areas of prosecutorial discretion.[59] Second, even with this limited application, the exceptions to the rule undermine any consistent achievement of that goal, and the federal system of prosecution is too decentralized for such a loose policy to have consistent effect.[60]

Nor is the Ashcroft memorandum very directive. On its face, the memorandum is not very directive as to two of the most important aspects of discretion available to federal prosecutors: whether to charge

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52 Ashcroft Memorandum, *supra* note 47.
53 *Id.* at 1.
54 *Id.* at 2.
55 *Id.* at 3.
56 *Id.* at 4.
57 *Id.* at 6.
58 *See* Amie N. Ely, Note, *Prosecutorial Discretion as an Ethical Necessity: The Ashcroft Memorandum's Curtailment of the Prosecutor's Duty to "Seek Justice,"* 90 CORNELL L. REV. 237 (2004).
59 Ashcroft Memorandum, *supra* note 47.
60 *Id.* at 2-4.

at all[61] and whether to dole out breaks in exchange for cooperation with the government. While the memorandum does make an exception to the rule for those who cooperate,[62] it does not offer further guidance on the crucial question of who gets the advantage of that exception, other than to require (as do the U.S. Sentencing Guidelines) that the assistance be substantial.[63] Thus, it offers no direction to the Assistant U.S. Attorney described in the hypothetical at the start of this Article.[64] Nor is the general directive of the Ashcroft Memorandum likely to be consistently employed, given the broad ability of nearly one hundred U.S. Attorneys to alter its terms on a case-by-case basis.

While it is fair to say that the Ashcroft Memorandum *limits* discretion, it cannot be said in equal measure that it provides *principled, goal-oriented*, and *consistent* guidance in the employment of discretion. Simply limiting discretion by demanding the harshest possible outcome is not a principled act without an honest articulation of the broader goals sought.[65]

B. The U.S. Attorney's Manual

The *Manual* is a book issued by the DOJ to U.S. Attorneys and their Assistants, setting out policies relating to prosecution.[66] At least nominally, it strives to set out principles, as well: Section 9-27, in fact, is titled "Principles of Federal Prosecution."[67] It sets out several sections specifically devoted to initiating prosecution,[68] selecting charges,[69] drafting plea agreements,[70] and entering into non-prosecution agreements in exchange for cooperation.[71]

One would hope that the *Manual* would provide exactly the sort of directive, goal-oriented principle capable of consistent application described here, but the *Manual* fails on all three counts. It is neither directive nor formulated in furtherance of a discernable goal of criminal

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61 As noted above, William Stuntz has argued that this is the most significant area of discretion. *Supra* Part II.A.3.

62 Ashcroft Memorandum, *supra* note 47, at 3.

63 U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2002).

64 *See supra* Part I.C.

65 The Ashcroft memo cannot be seen as mandating the across-the-board principle, for the reasons set out *infra* Part IV.A.

66 MANUAL, *supra* note 51.

67 *Id*.

68 *Id*. §§ 9-27.200-270.

69 *Id*. §§ 9-27.300-320.

70 *Id*. §§ 9-27.400-450.

71 *Id*. §§ 9-27.600-640.

law, and the direction it does provide is not capable of consistent application.

1. The *Manual* Is Not Directive

The first order of business in articulating principles through the *Manual*, it seems, is to put away any sense that the *Manual* is to provide concrete direction to individual prosecutors. Almost immediately, the *Manual* announces that "it is not intended that reference to these principles will require a particular prosecutorial decision in any given case."[72] Rather than providing firm direction, the *Manual* is best viewed as being vaguely advisory,[73] and further it hedges being directive at nearly every point of discrete decision by leaving real decision-making to the local level.

Consider, for example, the crucial discretion accorded prosecutors in deciding who may be afforded a sentencing break for cooperation. On this point, the *Manual* provides almost no guidance, saying only that the prosecutor should weigh "all relevant considerations," including:

> (1) The importance of the investigation or prosecution to an effective program of law enforcement; (2) The value of the person's cooperation to the investigation or prosecution; and (3) The person's relative culpability in connection with the offense or offenses being investigated or prosecuted and his/her history with respect to criminal activity.[74]

Certainly, these are important considerations, but they are not directive in a given case where several candidates for cooperation present themselves. For example, it is the most culpable target who almost always will have the most useful information, putting the first consideration in conflict with the third. In a real case, such as the one described at the start of this Article,[75] it does little to push the prosecutor toward using either the leader, the managers, or the dealers as cooperators.

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72 *Id.* § 9-27.120(B).

73 This vagueness may be intentional, so as to avoid creating a cause of action for defendants. However, this seems to be expressly barred by the text of the *Manual*. *Id.* § 9-27.150.

74 *Id.* § 9-27.620.

75 *See supra* Part I.C.

Elsewhere, the *Manual* cedes near-total authority to local supervisors who need only to articulate their reasoning. For example, in discussing the charges to be brought, the *Manual* sounds tough in saying (consistent with the Ashcroft memorandum)[76] that prosecutors should charge "the most serious offense that is consistent with the nature of the defendant's conduct and that is likely to result in a sustainable conviction."[77] In the end, however, the *Manual* allows that a prosecutor "may drop readily provable charges with the specific approval of the U.S. Attorney or designated supervisory level official for reasons set forth in the file of the case."[78] Thus, provided she can talk a supervisor into it, any charge can be dropped.[79] The *Manual* then goes so far as to suggest very broad reasons that a supervisor may want to approve dropping charges, including "because the United States Attorney's Office is particularly overburdened,"[80] and "the case would be time-consuming to try."[81]

Given that the *Manual* would provide support for nearly any decision as to the selection of cooperators and charges, it can hardly be seen as directive.

2. The *Manual* Is Not Goal-Oriented

The key to a principled system in the concrete and steel world of prosecution is that it firmly focus on a goal. Unfortunately, the *Manual* offers no consistent articulation of what it hopes to achieve in real terms subject to evaluation, and the direction it does offer is not informed by any such over-arching goal.

The goals it does articulate are unimpeachable but ultimately meaningless; the preface to the Principle of Federal Prosecution, for example, proudly announces that:

> The availability of this statement of principles to Federal law enforcement officials and to the public serves two important purposes: ensuring the fair and effective exercise of prosecutorial responsibility by attorneys for the government, and promoting confidence on the part of the public and individual defendants that important

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76 Ashcroft Memorandum, *supra* note 47, at 1.
77 MANUAL, *supra* note 51, § 9-27.300.
78 *Id.* § 9-27-400(B).
79 *Id.*
80 *Id.*
81 *Id.*

> prosecutorial decisions will be made rationally and objectively on the merits of each case.[82]

I think it is a good idea for prosecutorial decisions to be made "rationally."[83] Few could argue with prosecutors being "fair and effective."[84] The problem is that to the Assistant U.S. Attorney deciding who gets a break for cooperation, the goals of acting rationally and fairly do not address the issues at hand, as there are many rational and fair options available.[85] Sadly, this is as close as the *Manual* gets to articulating an overarching and principled goal for the project of federal prosecution.

Within the specific directives of the *Manual*, vague as they are, there is also little one could call goal-oriented. For example, the suggestion that the most serious readily provable offense be charged (unless, of course, the office is busy or the case might prove time-consuming),[86] goes nominally towards the goal of prosecuting all offenders to the fullest extent possible. This goal, however, is undercut not only by the exceptions built into the charging directive[87] but also by the *Manual*'s own discussion of those for whom the prosecutor can decline prosecution,[88] citing that the offense does not seem very serious,[89] that the target has not been in trouble before,[90] that the target is old (or young),[91] or that her sentence probably would not be very long.[92]

3. The *Manual* Is Not Amenable to Consistent Application

a. The decentralization of principle

Even to the limited degree that the *Manual* provides direction to individual prosecutors, that direction is unlikely to be consistently followed because of the degree of autonomy afforded to local U.S. Attorneys and the supervisors a notch below them in the pecking order.

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82 *Id.* § 9-27.001.
83 *Id.*
84 *Id.*
85 *See infra* Part IV.
86 MANUAL, *supra* note 51, § 9-27.400(B).
87 *See id.* § 9.27-300.
88 *See id.* § 9-27.230(B).
89 *Id.* § 9-27.230(B)(2).
90 *Id.* § 9-27.230(B)(5).
91 *Id.* § 9-27.230(B)(7).
92 *Id.* § 9-27.230(B)(8).

At each crucial stage of prosecution, as the *Manual* itself acknowledges, it is the Assistant U.S. Attorney assigned to the case and his immediate supervisor who make most important policy decisions without concrete guidance from the *Manual* (or elsewhere).[93] The choice to initiate or decline prosecution, for example, is left to the trial attorney, who is merely told to "weigh all relevant considerations" when considering whether or not there is a substantial federal interest.[94] Recently, the *Wall Street Journal*, in a front page article, exposed the unusual ways this choice is made by local prosecutors, including the prosecution of convenience-store robberies in Fort Worth, a crime that almost universally would be considered a state concern.[95]

At best, this allows for a principle to exist at the level of the individual U.S. Attorney, who can issue directives to his assistants who try criminal cases. Some see real benefits in such decentralization,[96] but in the end this decentralization frustrates the goal of a consistent and national law enforcement policy.[97]

By putting nearly all concrete policy-setting decisions in the hands of the DOJ's trial lawyers and their immediate supervisors, it is effectively guaranteed that the *Manual* will not create consistent national applications. Whether, for example, a convenience store robbery will be a federal concern is not resolved by a centralized, guiding principle articulated by the DOJ but by the whim and reasoning of the local prosecutor. In Fort Worth, it may be a federal concern; in Oklahoma City, it may not be.[98]

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93 *See supra* Part III.B.1-2.

94 MANUAL, *supra* note 51, § 9-27.230(A).

95 Gary Fields, *Sentencing Shift: In Criminal Trials, Venue Is Crucial but Often Arbitrary,* WALL S.J., December 30, 2004, at A1, *available at* 2004 WL-WSJ 98745848.

96 *See* Reena Raggi, *Local Concerns, Local Insights: Further Reasons for More Flexibility in Guideline Sentencing,* 5 FED. SENT. REP. 306 (1993).

97 To have such a policy does not destroy the ability to handle crime at the local level. It is not as if there is a dearth of local law enforcement mechanisms, after all. Even without federal law enforcement mechanisms, there are multiple layers of organization to address crime. For example, I write this as I sit at my desk at Baylor University in Waco, Texas. Should I decide to cook up some methamphetamine as I write, who could burst in to arrest me? Not only the Baylor police, but the Waco police, the county sheriff's deputies, the Texas Rangers, officers of the Texas Department of Public Safety, or members of the Agriplex Task force, a multi-agency force that focuses on methamphetamine cases. Even should the DEA or the FBI enter the scene, they would always be free to refer the case to state, rather than federal, prosecutors.

98 Fields, *supra* note 95.

Thus, the massive *Manual* consumes hundreds of pages but fails to direct any kind of principled, consistent exercise of discretion by federal prosecutors, robbing our leading law enforcers of the mantle of credible moral authority.

b. The problem of inconsistency

Is it a problem that the *Manual* and other sources fail to consistently guide the employment of discretion by federal prosecutors in a principled way? It is, in at least three respects: First, it prevents the federal government from seizing the moral high ground (and resulting public support) it would receive if its criminal law efforts were directed by an articulated moral basis reflected in actions. Second, it makes federal crime-fighting efforts nearly immune to any concrete calibration of success, as there is no set of articulated and principled goals defined against which results can be measured.[99] Third, decentralization of principle results in a moral mushiness which has effectively withdrawn criminal law issues from electoral politics at the federal level.

There is a problem when an issue as important as law enforcement is somehow left off the national political agenda. Which, of course, leads to the question of how the articulation of principle might help to solve that problem.

IV. FOUR GOAL-ORIENTED PRINCIPLES TO CONSISTENTLY GUIDE DISCRETION

What principles could be used to guide discretion? While this Article does not pretend to present the full range of possibilities, it will describe at least four principles that could be used to guide discretion consistently. As will become clear in my discussion of them, I do not view them as being of equal merit; I have a favorite,[100] but I do not deny that the others would also be directive, goal-oriented, and consistently guide discretion. I have chosen these four because they are the ones I

[99] Certainly, the DOJ at times seems to measure its success against statistics, such as the number of prosecutions brought, defendants convicted, or changes in the crime rate. For example, look at the statistics found at http://www.usdoj.gov/ag/annualreports/pr2004/TableofContents.htm. What is lacking, however, is a sense of how those statistics relate to principled goals. For example, an increase in the number of federal prosecutions means nothing in terms of crime control if it is simply replacing cases formerly dealt with by the states, but this may be seen as a measure of success if the principle informing prosecutorial action is across-the-board enforcement of federal laws.

[100] *See infra* Part V.B.

variously used to justify my actions in my own brief career as a federal prosecutor from 1995-2000.

In turn, these four principles include the following: (1) *Across-the-Board Law Enforcement,* which directs that anyone who breaks a law be aggressively prosecuted, with the goal of convicting as many wrong-doers as possible;[101] (2) *Leveling,* in which the affluent and advantaged are treated more harshly than those who have been disadvantaged;[102] (3) *Message Sending,* which seeks to achieve general deterrence through the use of prosecutorial discretion;[103] and (4) *Key-Man Targeting*, which seeks to incapacitate those who do the most harm to society.[104]

Notably, what is addressed here is precisely the prosecutorial sorting process that William Stuntz identifies as crucial because, "[w]hether prosecutors sort well determines whether the system allocates punishment well, or even decently."[105] My belief, built on that truth, is that the key to sorting well is a consistently-applied and goal-oriented principle.[106]

In discussing these principles, one thing becomes very clear: They are incompatible.[107] While it may seem simple to say, for example, that I am for *both* across-the-board law enforcement and for key-man targeting, this is impossible. At ground level, where real decisions must be made, these principles lead in opposite directions. By definition, targeting the key men means targeting some people and not others, immediately undercutting the principle of across-the-board law enforcement, which calls for the prosecutor to pursue all lawbreakers with equal vigor. Similarly, it is a lie to say we are pursuing both message-sending and key-man targeting, as they lead in different directions for targeting defendants.[108] William Stuntz, in fact, recognized that what I call across-the-board law enforcement is incompatible with message-sending in

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101 *Infra* Part IV.A.
102 *Infra* Part IV.B.
103 *Infra* Part IV.C.
104 *Infra* Part IV.D.
105 Stuntz, *supra* note 8, at 572.
106 *See infra* Part V.
107 Incompatible, at least, in the sense that they cannot be pursued effectively at the same time. Like many prosecutors, I used different principles at different times, and generally was an across-the-board prosecutor as a new Assistant U.S. Attorney and evolved into a key-man practitioner by the end of my short career.
108 This is true because there are key men even in cases where a message will not easily be sent, and the key man may not be the highest-profile individual yielding the strongest message.

noting that "[g]ood expression is worthless if no one can hear it . . . the sum of millions of arrest and prosecution decisions by thousands of police officers and prosecutors, seems designed to minimize visibility."[109] Thus, we must choose one principle or the other, because to say we are serving all of them is to abdicate principle at the outset.[110]

Interestingly, each of the principles I describe here focuses on a different one of the four traditional goals of criminal sentencing: punishment, rehabilitation, deterrence, and incapacitation.[111] Across-the-board law enforcement is principally concerned with maximum and even-handed punishment; leveling is concerned primarily with social reconstruction or rehabilitation; message-sending is based on the idea of general deterrence; and key-man targeting uses incapacitation as its primary tool.

A. Across-the-Board Law Enforcement

This principle expresses an undifferentiated belief in the value of punishment and seeks to punish as many people as possible who break the law, regardless of other factors or concerns. It views all laws as equal in weight and does not concern itself with relative culpability. In short, it mirrors the plain language of the penal code, which draws a bright line between acceptable and punishable acts, and does not differentiate between felonies, except insofar as they are classified and subject to different punishments mandated by Congress.

The principle informing across-the-board law enforcement is attractive: It reflects a profound belief in representative democracy, seeking to enforce equally all of those laws passed by the elected legislature. It defers the prioritization of crimes to Congress and then accepts the laws issued by Congress at face value.

1. Goals

The principle of across-the-board law enforcement has the following two goals: prosecute as many lawbreakers as possible, and treat them equally, but harshly, in sentencing (for example, by seeking the same maximum sentence for all defendants). These goals are consistent with

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109 Stuntz, *supra* note 8, at 522.

110 I do not question that it is politically possible to claim multiple principles. I do challenge the idea that to effectively pursue multiple principles simultaneously is possible.

111 Patricia M. Wald, *Why Focus on Women Offenders?*, 16 CRIM. JUST. 10, 11 (Spring 2001) (listing traditional goals of sentencing).

the bright-line nature of this principle—there is a right and a wrong, and those who do wrong should be prosecuted to the full extent of the law.

To the degree that the *Manual* expresses any principled goal at all, it is this one. For example, this principle seems to be the guiding force for the *Manual*'s suggestion that targets be charged with the "most serious offense that is consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction."[112] Thus, all criminals are to be pursued equally, regardless of most other factors (such as relative culpability or crime control considerations).

2. Directives

To sincerely put the principle of across-the-board prosecution into place, an Attorney General could direct that prosecutors are to charge anyone who has violated a federal law[113] and seek the highest possible sentence.[114] This principle would diverge considerably from the current language of the *Manual*. For example, the current policy allows individual prosecutors broad discretion to decline cases due to a lack of a "substantial Federal interest."[115] Were the principle of a bright line defined by Congress taken seriously, this discretion would be severely limited, and trial attorneys would be directed to charge anyone who broke a federal law; the fact that an action is proscribed by federal law in itself would be seen as defining a substantial federal interest. In other words, instead of substituting their own judgment for how federal jurisdiction should be defined, prosecutors would defer to the jurisdiction already defined by the legislature.

Similarly, prosecutors could be directed to consistently seek the highest possible sentence for each target, revoking the current discretion allowed to individual Assistant U.S. Attorneys to make sentencing recommendations they believe to be in the "public interest."[116]

3. Consistent Application

It certainly would be possible to prosecute anything that falls under federal law in federal court. In fact, the increasing federalization of

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112 MANUAL, *supra* note 51, § 9-27.300(A).

113 This would replace the current wishy-washy declination suggestions contained in §§ 9-27.200-260 of the *Manual*.

114 In place of the provisions of the *Manual* at § 9-27.710.

115 *Id.* § 9-27.230.

116 *Id.* § 9-27.730.

criminal law[117] seems to be moving in this direction.[118] By focusing on bright lines, the across-the-board philosophy provides a very clear guide to cabining the actions of individual prosecutors. However, to do so would be extremely expensive and inefficient, as described below.

4. Analysis

At a fundamental level, the across-the-board approach has some appeal. It would defer to the legislative branch the responsibility of defining what prosecutors should address. Such deference would make for great consistency. Perhaps not surprisingly, it appears to be this principle that compelled Congress to affirmatively mandate that "except as provided by law, each U.S. Attorney, within his district, *shall* (1) Prosecute for *all* offenses against the United States."[119]

On closer inspection, however, it becomes clear that this approach, while principled, is unworkable. First of all, there are a large number of federal laws that overlap with state laws.[120] Were the federal system to take on all those cases within the overlap that are currently handled by the states, the federal system would be quickly overwhelmed.[121]

Further, this system would make it difficult for prosecutors to build cases around cooperating defendants.[122] In a large criminal conspiracy, for example, this principle would urge seeking the cooperation of the most culpable defendants, as they are the ones with the most information about the largest number of potential defendants. Thus, it would lead to giving a break to the most culpable defendant so as to convict the largest number of targets, an outcome that would be troubling to many.

Finally, and most fundamentally, such a system defers decision to the legislature. While this is a principled choice, and one consistent with

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117 U.S. Sentencing Commissioner Michael O'Neill has termed it an "unrelenting expansion" of federal criminal law. O'Neill, *supra* note 14, at 222; *see also* Fields, *supra* note 95.

118 Fields, *supra* note 95.

119 28 U.S.C. § 547 (2000) (emphasis added).

120 For example, federal laws almost completely overlap with state laws as to narcotics trafficking, a major area of law enforcement activity. *See* 21 U.S.C. § 841 (2000).

121 Suntz, *supra* note 8, at 507; Franklin E. Zimring & Gordon Hawkins, *Legislating Federal Crime and Its Consequences: Toward a Principled Basis for Federal Criminal Legislation,* 543 ANNALS AM. ACAD. POL. & SOC. SCI. 15, 15-19 (1996).

122 The tendency to build a case around cooperators is particularly strong in the area of narcotics. Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment,* 68 FORDHAM L. REV. 917, 928 (1999).

the general structure of our government, it is unclear that Congress itself is particularly principled in legislating criminal laws and sentences. As has often been observed, federal criminal jurisdiction often expands but rarely contracts,[123] and sentences often go up but rarely go down,[124] due to the nature of electoral politics.[125] This general expansion and increasing harshness seems to be a function of electoral politics rather than a guiding principle.[126]

B. Leveling

The principle behind leveling as a guide to prosecution is simple and even instinctive to some. The principle behind leveling is that criminal law should be harshest to those who have been most advantaged and less harsh to those who have been disadvantaged. To some extent, we see leveling as a present impulse in criminal law; for example, in the fact that death penalty defendants are able to argue as a mitigating factor their own misfortunes in seeking to avoid the death penalty and thus are given an advantage not afforded those from a more privileged background.[127] Recently, some have seen leveling as part of the DOJ's motivation in the pursuit of Martha Stewart as a target of prosecution.[128] Others might think of New York Attorney General Elliot Spitzer as a leveler, in that he has targeted the Wall Street elite for prosecution and civil actions.[129]

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123 Stuntz, *supra* note 8, at 507 ("[A]ll change in criminal law seems to push in the same direction-toward more liability.").

124 Zlotnick, *supra* note 2, at 243 n.199.

125 William Stuntz of Harvard has convincingly described the mechanism by which this occurs. Stuntz, *supra* note 8, at 529-33.

126 *Id.*

127 Boyde v. California, 494 U.S. 370 (1990).

128 The satirical weekly *The Onion*, in its own way, critiqued the Stewart sentencing with an article entitled *Poll: Americans Feel Safer with Martha Stewart in Jail*, THE ONION, October 12, 2004, at 1. The article fictionally quoted Chicago welder Marvin Manckowicz as saying that "I don't know the technical aspects of it, but I know that Martha Stewart did something with the stock market. . . . I'm not sure if she was selling her own stock or someone else's, but I do know that everyone said it was wrong. I breathed easier when I found out she wasn't going to be doing any more of that again for five months." *Id.*; *see also* Stephen Moore, *What's Wrong with Insider Trading?*, NATIONAL REVIEW ONLINE, *available at* www.nationalreview.com/moore 200403090901.asp (March 9, 2004) (describing Stewart as a "victim of class warfare"); Wesley Pruden, *Saving the Streets from Martha Stewart*, WASHINGTON TIMES, March 9, 2004, at A4 (quoting a juror calling the verdict a victory for "the average guy").

129 E.g., Scott Walter, *N.Y.'s AG Hits Bulls-Eye with Ebbers Suit, but Will It Stick?*, JACKSON (MS) CLARION LEDGER, October 13, 2002, at 1C.

1. Goals

An Attorney General motivated by leveling would assert his resources towards pursuing those who are advantaged and provide less emphasis on pursuing the poor and disadvantaged, with the goal of leveling off the advantages and disadvantages provided by other aspects of society. In a sense, this could be considered rehabilitation for both types of defendant—the rich are rehabilitated by being humbled, and the poor are given a chance for rehabilitation through social services rather than prison. That is, they are both rehabilitated by being brought to the middle.

2. Directives

A few simple directives could promote leveling. First, it would target for prosecution those who are relatively powerful. In so doing, it would likely prioritize cases very differently than they are today; there would be a lessened emphasis on street crime prosecutions and a greater focus on financial crimes and industrial polluters. Within drug cases, this principle would lead to prosecutors being hard on the relatively affluent ringleaders and much less harsh on street-level users and dealers.[130]

In drafting plea agreements and making sentencing recommendations, Assistant U.S. Attorney's would also focus on relative advantage. Given that the overwhelming majority of defendants are from the undereducated, disadvantaged parts of society, at least for those defendants the Attorney General could direct a much greater focus on rehabilitation in sentencing.

3. Consistent Application

Insofar as relative advantage is apparent, this principle could be applied with some consistency. It would, however, require some research into the background of defendants prior to charging if true consistency was to be attained. Some subjectivity, of course, would remain as to the important judgment of who is advantaged and who is disadvantaged—some people may consider race to be a factor, others

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[130] In some instances, the key-man principle discussed below in Part IV.D may lead to the same tactic, but for different reasons—the key-man prosecutor cares about the leader not because he is rich but because he is essential to the running of the criminal organization. *Infra,* Part IV.D.

may consider only economic status, and still others may want to focus primarily on education.

4. Analysis

As noted above, some may feel that leveling is already a defining principle in the practices of some prosecutors, such as New York Attorney General Elliot Spitzer.[131] However, the core problem with this system is that it ignores the relative danger a particular target may present to society, and it may not even offer coincidental benefit in terms of lowering the crime rate.[132] For example, there are many cases declined by federal prosecutors in which the potential danger to society outstrips that posed by Martha Stewart.

Further, because of the broad scope of federal prosecution, some areas of crime are not easily considered by the guiding principle of leveling. The important area of gun crime, for example, often would not allow for direction based on this principle, as relative social or economic advantage may not be a factor. While leveling could be a guiding principle for certain decisions, particularly who to charge, it would not provide guidance for some broad areas of discretion.

Also, this principle could be problematic as applied to cooperators. The most advantaged defendant may not be the most culpable. For example, if a drug conspiracy involved several minority members from disadvantaged backgrounds and one rich college student, leveling might lead to harsher treatment of the college student, even if he were in the lower echelons of the organization.

Finally, and perhaps most importantly, the idea of leveling, particularly on racial or socio-economic grounds, likely violates the important (and constitutional) principle of equal protection.[133] There is something innately offensive to many Americans about the idea of targeting people for prosecution and harsh sentences based on race, social class, wealth, or education. In fact, recent trends have been to expressly bar such considerations in investigation and prosecution. For example, racial profiling laws bar the consideration of such factors in

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131 *Supra* note 129.

132 The across-the-board principle, though it does not have crime control as a central goal, will probably achieve some measure of crime control simply by addressing so much of the population.

133 U.S. SENTENCING GUIDELINES, § 5H1.10 (2004).

police investigations,[134] and the Federal Sentencing Guidelines have strictly barred race, sex, national origin, creed, religion, and socio-economic status from consideration in sentencing.[135]

In short, leveling may be appealing to some as social policy, but as a basis for the exercise of prosecutorial discretion, the use of wealth, education, and race as sorting factors raises practical problems and would invite attack as being contrary to the principle of equal protection both as embodied in the Constitution of the United States[136] and as expressed otherwise in contemporary society.

C. Message Sending

A third guiding principle for prosecution might be to construct prosecutions so as to send a message to prospective lawbreakers, in order to lower crime by deterring others through fear of punishment. The underlying principle here is that crime control is most important and that general deterrence is the best way to control crime.[137]

Message sending has clearly been a motivating principle to many prosecutors, though rarely in a systemic way. For example, when he was the U.S. Attorney for the Southern District of New York, Rudolph Giuliani often had targets arrested in the most public way possible.[138] Wall Street traders were arrested at their offices, then paraded past their colleagues in handcuffs, a calculated spectacle meant to send a clear message to those colleagues and others who might see the event on the evening news.[139] It cannot be doubted that this was intended to send a message to others.

Giuliani had other tactics for message-sending as well. For example, he chose one day a week to be "federal day," in which all street-level drug dealers were taken to federal instead of state court where they received much higher sentences. One such dealer, who would have been

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134 For example, Texas law flatly states that "[a] peace officer may not engage in racial profiling." TEX. CRIM. PROC. CODE ANN. § 2.131 (Vernon 2003).

135 U.S. SENTENCING GUIDELINES, § 5H1.10 (2004).

136 U.S. CONST. amend. XIV, § 1.

137 By general deterrence I mean something done to deter people other than the defendant; I would term things done to deter the defendant himself specific deterrence.

138 Shaun G. Clarke, *Beware Collision of Politics and Public Relations,* NEW ORLEANS TIMES PICAYUNE, August 1, 2002, at Metro p. 6.

139 *Id.*

subjected to a four-year term in state court, received life without parole in federal court. [140]

1. Goals

The principle goal of message sending is to reduce crime through general deterrence. It tries to do so efficiently, by using a few high-profile cases to convey the message of deterrence, in the hope of avoiding a larger number of crimes down the road because the potential criminals were deterred.

Interestingly, unlike leveling, a crime-control system can measure its results in a direct way; success would mean a decrease in crime rates. Thus, it offers an advantage over some other systems within the larger system of political debate in that it can be held to an objective standard.

2. Directives

To employ message sending, the Attorney General would have to require a conscious use of the media. Press coverage would be sought of the arrests, arraignments, pleas, trials, and sentencing of key targets. Central to the idea of message sending is that the message is communicated.[141]

As to the discrete decisions that constitute prosecutorial discretion, the targeting of defendants would certainly be affected—those targets most likely to have an emotional impact on the public are best chosen. However, in many cases, where none of the potential targets have a high profile, the principle of message-sending offers little guidance.

Similarly, as to the selection of who is going to be given an opportunity to cooperate, only limited direction could be offered. Ideally, low-profile targets would be offered the opportunity to testify against high-profile targets. Again, however, this directive does not apply in cases where none of the targets have a high profile.

3. Consistent Application

As to those areas where this policy could be directive, it would be amenable to consistent application. However, one area of subjectivity is

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[140] Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction,* 46 HASTINGS L.J. 979, 1000-01 (1995).

[141] Some may claim that messages are best sent through the informal network of neighborhoods and jails, but such communications are almost impossible to measure.

the decision as to which targets are high-profile. That could depend on the local media and sense of the community and would vary from place to place.

4. Analysis

Message sending has an obvious attraction: It provides a possible way to reduce crime without having to convict all those who violate the law. This system relies on relatively fewer convictions to deter others from committing crimes.

There are problems, however. First, as discussed above, in many cases, perhaps even the majority of cases, message sending is not possible because none of the potential targets are likely to garner much attention. Thus, this principle simply does not affect many of the prosecutorial exercises of discretion made at the federal level.

Second, this plan relies on effective communication of the message being sent. In turn, this means a reliance on the media with which many would be uncomfortable. Media outlets, of course, have their own biases and motivations that have little to do with justice or crime control. At any rate, there is not much precedent for effective, measurable message sending.[142]

Finally, message sending relies on the assumption that criminals are rational in their actions—that is, that they weigh the costs and benefits of committing a crime before they act. Even if this is true, it is more likely to be accurate with relation to some crimes (financial fraud, tax evasion) than others (manslaughter).

D. Key-Man Targeting

Like message sending, key-man targeting reflects the core belief that crime control is the primary goal of criminal law. It differs from message sending, however, in the way it attempts to lower crime rates. Rather than seeking general deterrence, key-man targeting attempts to lower crime by incapacitating those relatively few individuals who make many crimes possible. It does so by targeting two types of individual defendants, the dangerous recidivist and the key members of conspiracies or other criminal networks who have the rarest skills.

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[142] Stuntz, *supra* note 8, at 522. Stuntz notes that "if expressive criminal law is an ideal, the ideal is at odds with the system of law and law enforcement we now have." *Id.* at 523.

Dangerous recidivists are usually identified by their criminal histories.[143] Key members of conspiracies or criminal networks, in contrast, are identified by examining their roles in offenses. In either case, this principle reflects the belief that a relatively small number of people either commit many crimes or make many crimes possible.[144] Intriguingly, as applied to criminal networks and conspiracies, key-man targeting takes advantage of market forces to reduce crime.[145] For example, one might consider the problem of the theft of car radios on a military base. While the across-the-board adherent would attempt to convict every thief and the message-sender might seek media attention for the conviction of a few of these thieves, the key-man targeter is going to turn his sights elsewhere: toward the out-of-state fence who buys large volumes of the stolen goods. By taking away the market for stolen goods, he can control crime with fewer convictions.[146] The thieves would be given much lesser sentences or sent to the state for punishment,[147] with breaks given to those who provide worthwhile cooperation.[148]

Key-man targeting must take specific account of the market realities, including labor markets, of the businesses in which large conspiracies engage. For example, elsewhere I have described the crack trade at the street level as being analogous to a bagel shop.[149] The crack trade, like the bagel trade, is a business, and both rely on similar labor markets.

Within the crack business, powder cocaine is usually converted to crack on stovetops by people at the bottom rungs of the organization.

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143 The current federal sentencing Guidelines already go far towards the long-term incapacitation of such recidivists through provisions such as the career criminal provision, which mandates long terms for violent felons and drug offenders who have at least two prior convictions for that type of offense. U.S. SENTENCING GUIDELINES, § 4B1.1 (2004).

144 Note that this is distinct from the other crime-control system discussed here, such as message sending, which is neutral on how many potential law-breakers there are.

145 By "market forces," I mean either supply or demand of a commodity or service. Thus, cutting off the supply of precursor chemicals (such as anhydrous ammonia) through administrative action would make the manufacture of methamphetamine nearly impossible.

146 Of course, to be effective, one must truly go after the key man as opposed to trying to affect market forces by arresting large numbers of people. This is true for the simple reason that key men with special skills are hard to replace; drug users are easy to replace.

147 Some prosecutors already use this tactic individually. However, to do so they must pursue an individual more difficult to catch than the thief—to prove the fence guilty, the prosecutor must prove that the fence knew the goods were stolen. *E.g.*, 18 U.S.C. § 2313 (2000).

148 The sentencing guidelines, of course, already provide for a break for cooperation. U.S. SENTENCING GUIDELINES, § 5K1.1 (2004).

149 Osler, *Must Have Got Lost*, *supra* note 20, at 679 n.197.

Now think of your neighborhood bagel shop. Walk into that shop, and you will see relatively low-paid employees making and selling the bagels—the labor, in the same position as those who cook cocaine into crack. They convert the dough shipped to the store into the end product, bagels. The business is structured such that these low-paid workers can be easily replaced in the inevitable event the store suffers high turnover. The evidence is easy to see: The instructions to make the bagels are posted on the wall. The process is kept simple, and jobs are specialized to limit the amount of skill needed. If the goal is to close down that bagel shop, it would be futile to address the problem by arresting the counter help and bagel makers because the shop is structured for them to be easily replaced.[150] Instead, one would have to incapacitate the key men and women in the chain—those who control logistics, financing, or management through specialized skills not so easily replaced.[151]

The essence of key-man targeting is to pay much less attention to the easily-replaced "bagel makers" and refocus resources to catching and incapacitating the members of the network who are much less easily replaced.[152] After all, once the business owners with the ability to bring in the dough and buy the machines are gone, there is no one to employ the bagel makers.[153]

1. Goals

The key-man targeter is relatively single-minded toward the goal of reducing crime. This is capable of measurement and analysis, and success can be precisely evaluated. A follower of this principled tactic is probably going to take some political heat, as it would require that some crimes presently prosecuted in federal court would be turned over to the state or not prosecuted—maintaining this goal would probably make it impossible to claim to be addressing all violations of criminal law.

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150 *Id.*

151 *Id.*

152 The "bagel makers," of course, still have value to the system as informants and witnesses, and those who cooperated would be treated to the most significant breaks. However, they would be treated much more lightly than they are now whether or not they cooperated with the government and would not be charged to the fullest extent possible, as the DOJ currently directs. MANUAL, *supra* note 51, § 9-27.300.

153 The reverse does not work—if you take away the bagel makers, the business owner does not go away; rather, he just hires some more workers. He has structured his business, after all, to allow for the easy replacement of these often transient workers.

2. Directives

An Attorney General implementing key-man targeting would make several specific directives to federal prosecutors. First, she would revise the standards for selecting prosecution targets so that the primary basis for selection would be the direct effect on crime control. This would have concrete effects. For example, as discussed above, in addressing narcotics such an Attorney General would focus direct investigations toward those who have the key business skills that make such a drug organization work and are not easily replaceable: the money managers, the logistics men, and the importers. Street-level dealers and users would not be subjected to the same treatment.

At each stage of the process, the same imperatives would apply. Plea agreements would be structured so that those who are easily replaceable in a conspiracy would testify against those who are not easily replaceable. In sentencing, prosecutors would be specifically directed to seek long, incapacitating sentences against those who are most crucial to crime control. As a result, a prosecutor would seek a long sentence against the man who establishes a sophisticated boiler-room fraud operation but not for the operator who is paid to make the calls.[154]

3. Consistent Application

Key-man targeting would allow for consistent application of principle over a broad array of cases. While in conspiracy cases it would direct the irreplaceable to be targeted rather than the easily replaced, this principled tactic provides guidance even when the crime is committed by individual actors. In such cases, the targets would be evaluated according to the long-term threats they pose in the context of the larger picture. For example, a drug possessor would be unlikely to be prosecuted to the fullest extent possible, provided key parts of the drug network supplying him are being addressed. On the other hand, a two-time bank robber would be seen as an appropriate target for lengthy incapacitation because he poses a significant future risk, even absent the involvement of others. Even in the most mundane single-defendant cases, this principle would be directive by emphasizing the factor of criminal history, making repeat offenders much more important targets

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[154] This would be a different tactic than that urged by the current *Manual* and its directive to seek the maximum charge for each defendant. *See* MANUAL, *supra* note 51, § 9-27.300 (providing that the person making the calls and the man running the operation may well be charged with the same crime).

than first offenders. The theory is that the recidivist is more likely to cause more crime in the future and needs to be incapacitated.[155]

Of course, some areas of subjectivity would remain, creating inconsistencies from district to district. For example, the determination of who was a key-man, in most cases, would still be made locally and would be subject to varying interpretations.

4. Analysis

Because key-man prosecution is used as an example in the following section, much of the analysis of this principle is provided there.[156] However, it should be noted that while key-man prosecution could achieve the goal of reducing specific types of crime, it would have the side effect of limiting the scope of federal prosecution. Entire categories of crime that are currently addressed by federal prosecutors (such as drug possession) would be left to the states. Given the apparent impulse of Congress to constantly enlarge federal criminal jurisdiction,[157] the required contraction of the scope of actual federal prosecutions (albeit with the goal of greater gains) may prove to be politically unpopular.

V. THE CHANGES PRINCIPLE WOULD BRING

A. The Problems of a Decentralized System

Before describing what principle-based centralized guidance of prosecutorial discretion would do to federal criminal law, this Part reviews the problems caused by the lack of such an articulated principle, previously addressed in Part III.B.3.b.

1. Decentralization Muddies Morality

The present lack of a national organizing principle prevents the federal government from being a secular moral force within the nation.[158] Federal prosecutions, such as the Martha Stewart case, are often a topic

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155 Key-man targeting may even lead to incapacitation of serious recidivists more harsh than those that result under a straightforward application of the Guidelines. The *Booker* opinion, after all, would allow the judge to set aside the guideline range and value criminal history as a more important component than is reflected in the Guideline calculation. *See* Booker v. United States, 125 S. Ct. 738 (2005).

156 *See infra* Part V.

157 Zimring & Hawkins, *supra* note 121, at 15-19.

158 However one chooses to define morality, it will include principle. Thus, to be moral, our government must first be principled. The reverse, of course, is not true—one can hold principles that are immoral.

of national discussion or debate, but each case seems to reflect a different goal and a different morality. For example, Martha Stewart seems to be a case of leveling, and at any rate, it cannot be defended on crime control grounds. Obviously, a different goal must motivate the continuing prosecution of street-level drug dealers by federal agencies. Thus, any larger message or goal is swallowed up in the inevitable inconsistencies.[159]

2. Decentralization Makes It Impossible to Measure Success

Though crime statistics and prosecution numbers are often trumpeted by the DOJ, without a moral center there is no set of articulated and principled goals against which results can be measured. Success is consistently declared without a true meaning.

3. Decentralization Takes Criminal Law out of the National Political Debate

Finally, decentralization of principle means there are no articulations of principle to debate. Though I do not advocate the direct election of the Attorney General or U.S. Attorneys, a public articulation of guiding principles beyond standing against crime and for fairness would allow for a worthwhile debate of criminal law issues during the run-up to national elections.

B. What a National, Principled System Might Look Like

Part IV, in a very brief way, sets out the way four directive, goal-oriented, and consistent principles to guide prosecutorial discretion on a national basis might look. To better understand the results from such a change, consider one such hypothetical, the key-man crime control system. To put this principle into effect, the Attorney General would first have to publicly name and claim that principle, while honestly conceding this would mean that some other principles (for example, across-the-board enforcement) would not be pursued.

Second, the Attorney General would have to make the *Manual* more directive, more binding, and thoroughly attuned to the principle articulated. That would require the following changes (using key-man targeting as an example):

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[159] Those inconsistencies are inevitable in large part because of the over-criminalization others have so well described. Stuntz, *supra* note 8.

1. The Attorney General Would Publicly State the Principle

The Attorney General seems to have a wealth of media attention. She should, upon deciding on a principle goal for federal prosecution, state that principled goal clearly and publicly, including the measures by which the successful attainment of that goal will be evaluated.

2. The *Manual* Would Become Directive and Binding

No longer could the *Manual* effectively allow nearly every direction relating to the exercise of discretion to be defined at the local level. Rather, the *Manual* would have to present itself as mandatory instructions in approaching individual cases,[160] and the evaluation of individual prosecutors and supervisors would need to be based on how well those directions were followed. No longer could each prosecutor be a separate moral force, and no longer would the fate of a defendant depend largely on which Assistant U.S. Attorney received responsibility for the case.

Rather than leaving the acceptance or declination of cases largely up to the whims of individual prosecutors, much firmer guidelines would have to be designed.[161] For example, to reflect the key-man principle, the federal prosecution of drug possessors and street-level dealers might be limited,[162] as there is a potentially endless supply, and the process of incarcerating them does not seem to stem the tide. In other cases, prosecutors would be directed to accept only those cases where the incapacitation of the defendant would realistically deprive *others* of the ability to commit crimes in the future or who individually pose a special risk of future danger. This is a net through which Martha Stewart or a

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[160] Ironically, perhaps, as the sentencing guidelines become advisory rather than binding under *Booker*, I am suggesting that the *Manual* become more binding and less advisory. However, it is important to recognize that the more binding nature of the *Manual* simply means that the Attorney General would hold U.S. Attorneys and their assistants to the directives of the *Manual* through administrative action, and I do not contemplate creating a right of action through which defendants could seek to hold individual prosecutors to those directives, as discussed below.

[161] Much firmer than those found in sections 9-27.200-260 of the *Manual*.

[162] It would need to be limited in a way which allowed for there to still be pressure on such defendants to cooperate with the investigation. Such pressure, of course, can still be applied even when relative sentences are reduced or cases shifted to state prosecution. If the defendant stays in the federal system, he could be recommended for a sentence of probation, for example, if otherwise appropriate. If he is shifted to the state system, the prosecutor would have to cooperate closely with her colleague in the District Attorney's office.

drug possessor would not pass, but the drug importer, the internet fraud master and the counterfeiting printer would.

The selection of charges and formulation of plea agreements would follow the same principle, of course—rather than seeking the highest available charge against everyone, prosecutors would be directed to seek the highest available charge against those who would make the most difference through employment of their skills or future dangerousness.

Similarly, key-man prosecution would lead to the fairly specific goal, which is related to sentencing, incapacitating those who are most crucial to criminal networks or pose the greatest risk of committing serious federal crimes in the future. As to those targets, the key-man prosecutor has little use for the traditional sentencing goals of retribution, general deterrence, or rehabilitation. Thus, at least to those defendants, the goal of incapacitation would eclipse the others. As to non-key targets, however (for example, those lesser lights who cooperated against the kingpin), this principle would allow for a much broader consideration of rehabilitation than is seen in contemporary criminal law. Prosecutors would lock up the ones who make crime work and try to fix those who would be easily replaced anyways.

However, this does not mean that the *Manual* would create a cause of action for defendants. Quite simply, it would be wise to retain that part of the present *Manual* that provides that it does not "create a right or benefit, substantive or procedural, enforceable at law by a party to litigation with the United States."[163]

C. Benefits and Drawbacks of a National, Principled System

1. Benefits

Were the DOJ to accept the key-man principle and adopt the proposals set out above, several benefits seem obvious. First, it would address the problems of decentralization as described. Specifically, it would allow the DOJ to take a moral high ground and consistently defend its actions. Success could be measured over the long term against the specific goal of crime control in target areas of federal concern, and the key-man principle could be openly debated in the context of national elections.

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[163] MANUAL, *supra* note 51, § 9-27.150.

It would also save money while very possibly achieving better results. Because key-man prosecution uses market forces to achieve crime control (without a fence, there is no demand market for the thief; without the cocaine, there is no supply market for the street-level narcotics dealer), it would no longer be necessary to spend millions of dollars prosecuting and incarcerating lower-level criminals. At the same time, some areas of crime, such as gun offenses not related to illegal interstate sales, could be left to the states.

Finally, there is a fairness achieved through employment of this principle in a centralized way. The lottery aspect of federal criminal law, based on what jurisdiction a defendant is in and which prosecutor is assigned a given case, would decline. Simultaneously, and indirectly, this would eliminate or deemphasize some current practices that have subjected the DOJ to harsh criticism, such as the disproportionate treatment of crack cocaine relative to powder cocaine.[164]

2. Drawbacks

The two groups that would lose power under the key-man regime described here are Congress and local federal prosecutors. There is no doubt that many congressmen would chafe at the fact that some federal laws were being enforced with less vigor, but they would be relatively powerless to change the choices made by the Attorney General. U.S. Attorneys and their Assistants, similarly, would be subject to more binding direction and would be allowed less freedom to employ prosecutorial discretion. Therefore, they could be expected to object to this loss of power.

States may object to such a reapportionment of responsibility, as well, given that it would be expected to, at least temporarily, raise the caseloads of state prosecutors. In the longer term, of course, success in crime control would be to the ultimate advantage of the state.

Obviously, the key-man system would work best in top-down rather than bottom-up investigations, and this might take some changes to the prevailing culture of investigation. That is, it would be most efficient to target the key man directly, rather than relying on the cooperation of a number of underlings seeking plea deals. This would require the cultivation of new tactics. For example, rather than testimony,

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[164] Because crack cocaine is formulated by street level dealers out of powder cocaine, it is unlikely that those holding small amounts of crack cocaine would be considered "key men."

investigators may be better off emphasizing wiretaps to capture the conversations of key men, a technique that has the added advantage of being more reliable. Federal officials could also use their heightened access to intelligence information to reverse the process and start by investigating those at the top of the pyramid, for example by examining international financial transaction data.

Finally, commitment to key-man prosecution would represent a political risk. The articulation of a principled goal and the ready ability to measure success also means that the goal can be attacked and failures will be apparent.

The fact there is a risk, however, is not a reason to avoid action. In the end, we remember and revere the bold. In this time of tumult,[165] the field of sentencing calls out for an expression of principle from a source chosen by the President to represent us all: the Attorney General of the United States.

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165 *See supra* Part I.A.