

Prosecutorial Agnosticism

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Most legal ethicists maintain that an ethical prosecutor should pursue criminal charges against a defendant only if the prosecutor personally believes that the defendant is guilty. The assumption is that the obligation to “do justice” encompasses a duty to act as initial case-screener, scrutinizing the evidence against the defendant not just for sufficient proof to avoid a judgment of acquittal, but for proof that persuades the prosecutor of the defendant’s guilt beyond a reasonable doubt in her own mind. From this perspective, prosecutors act not simply as advocates of conviction in an adversarial system, but as a first and ever-present protector of the innocent, capable at any moment of declining or dismissing charges based on her own conclusions as a juror. Rather than resist this description, most prosecutors embrace it, priding themselves on their nearly unrivaled power to do justice through unreviewable compassion.

This Article challenges the prevailing assumption and argues, both descriptively and normatively, that ethical prosecutors can be agnostic about a defendant’s guilt. As a descriptive matter, ethical prosecutors routinely pursue charges despite personal doubts about their applicability. For example, few question a prosecutor’s ability to pursue charges in the alternative, as when she is uncertain if a homicide was malicious or provoked, if an assault was purposeful or reckless, or if the value of stolen property exceeded a statutorily required amount. Similarly, ethical prosecutors pursue charges even when they carry doubts about the applicability of a defense such as self-defense or duress. Indeed, prosecutors have been able to challenge antiquated judicially-created defenses such as the year-and-a-day rule only by charging defendants who otherwise would have relied on such defenses. This Article extends the logic prosecutors invoke in such cases, allowing them to pursue charges not only when they are uncertain about legal guilt, but also when they carry doubts about factual guilt.

As a normative matter, this Article argues that agnostic prosecutors might be better defenders of the innocent than those who pride themselves on their roles as supreme jurors. Whereas ethicists have emphasized the merciful power of a prosecutor who believes in a defendant’s innocence, commentators have only recently begun to explore the distorting effects of a prosecutor’s personal belief in guilt on her subsequent decision making. Drawing on the cognitive science literature, this Article argues that the protection to defendants provided by the prosecutor’s personal fact-finding function are outweighed by the adverse affects on prosecutorial neutrality once the prosecutor’s belief in guilt is formed. As an initial matter, the prosecutor’s case-screening for guilt may not be especially protective of the defendant. Because of confirmation bias, prosecutors “testing” a hypothesis of the defendant’s guilt may be likely to search the case evidence for proof confirming that hypothesis, to the detriment of exculpatory evidence. Once the prosecutor forms a personal belief in guilt, that belief becomes “sticky” as selective information processing, belief perseverance, and cognitive consistency will prevent the prosecutor from revisiting her conclusion. Tunnel vision also impairs the prosecutor’s ability to identify material, exculpatory evidence to which the defense is entitled under *Brady v.*

Maryland, as selective information processing will cause the prosecutor to overestimate the strength of her case without the evidence at issue and to underestimate the evidence's potential exculpatory value. Finally, the prosecutor's role as a first and constant case screener may lead to cascading effects in judges, grand jurors, and petit jurors, who might be less scrutinizing for reasonable doubt because of an assumption that charges are pursued only against the guilty.

In defending agnostic prosecutors, this Article argues for a transformation of our understanding of the prosecutorial function. The claim that prosecutors pursue charges only when they are personally persuaded of the defendant's guilt is largely mythical. Being transparent about that fact might enable not only prosecutors, but also other actors in the criminal justice system, to mitigate bias in their decision making, leading to greater protection of the innocent and reducing wrongful convictions.