

# THE NATURE AND FUNCTION OF PROSECUTORIAL POWER

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*The key to the growing prominence of prosecutors, both in the United States and elsewhere, lies in the prosecutor's preeminent ability to bridge organizational and conceptual divides in criminal justice. Above all else, prosecutors are mediating figures, straddling the frontiers between adversarial and inquisitorial justice, between the police and the courts, and between law and discretion. By blurring these boundaries, prosecutors provide the criminal justice system with three different kinds of flexibility—ideological, institutional, and operational—and they strengthen their own hands in a legal culture that increasingly disfavors institutional rigidity and hard-and-fast commitments. At the same time, though, the mediating role of the prosecutor frustrates traditional strategies for holding government accountable. The bridges that prosecutors provide—between law and politics, rules and discretion, courts and police, advocacy and objectivity—make curtailing prosecutorial power and taming prosecutorial discretion trickier business than is often suggested, or at least a different kind of business.*

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## INTRODUCTION

Much of what is wrong with American criminal justice—its racial inequity, its excessive severity, its propensity for error—is increasingly blamed on prosecutors.<sup>1</sup> Moreover, prosecutors seem to be getting ever more powerful, not just in the United States, but in much of the rest of the world as well.<sup>2</sup> The nature of prosecutorial power and the reasons for its growth remain murky, though. As a result, it is hard to know exactly what to make of prosecutors or what we should expect from them. There is plenty of thoughtful, well-informed scholarship on prosecutors, especially in the United States, but most of this work is self-consciously pragmatic. It takes the modern prosecutor's office as a given, a dragon that we find living in our midst and wish to tame. My goal here is slightly different, less immediately reformist. I want to step back and try to understand the dragon: what kind of animal it is and why it is with us.

The haze surrounding prosecutors is both descriptive and conceptual. On the descriptive side, we know much less about prosecutors than we do about the other main officials in the criminal justice system: judges and the police. Unlike judges, prosecutors generally do not announce the grounds for their decisions—or even, often, the fact that they have made a decision. And unlike the police, prosecutors carry out most of their work behind closed doors. Although law enforcement remains in many ways a secretive occupation, the bulk of patrol work is necessarily done in public, and it has become common over the past half-century for large police departments to

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<sup>1</sup> See, e.g., John F. Pfaff, *Escaping from the Standard Story: Why the Conventional Wisdom on Prison Growth is Wrong, and Where We Can Go From Here*, 26 FED. SENT'G REP. 265 (2014) (prison growth); Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L.J. 2, 6 (2013) (racial inequity); Editorial, *152 Innocents, Marked for Death*, N.Y. TIMES, Apr. 13, 2015, at A18 (wrongful convictions).

<sup>2</sup> See, e.g., Erik Luna & Marianne L. Wade, *Introduction to Adversarial and Inquisitorial Systems—Distinctive Aspects and Convergent Trends*, in THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE 177 (Erik Luna & Marianne L. Wade eds., 2012); Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 874, 921 (2009); Michael Tonry, *Prosecutors and Politics in Comparative Perspective*, 41 CRIME & JUST. 1 (2012).

open themselves to outside researchers.<sup>3</sup> As a result, we now have qualitative, observational accounts of virtually every sort of task that police officers carry out. We have nothing like that for prosecutors.<sup>4</sup> At the quantitative level, as well, we have detailed information about the demographics of police workforces and fine-grained statistics about investigatory stops, citations, summonses, and arrests.<sup>5</sup> We have good data on judges and on judicial case management, too, from bail decisions through sentencing.<sup>6</sup> By comparison the statistics on prosecutors and their exercises of discretion are meager.<sup>7</sup>

If anything, the conceptual fog around prosecutors is even thicker. Evaluating prosecutors who seek reelection is difficult not just because the available information about how they run their offices is so limited,<sup>8</sup> but also because it is unclear what information we should want. Even when what prosecutors have done is reasonably plain, it can be hard to know how to assess it. In the second half of 2014, for example, prosecutors in Missouri and New York failed to indict the white police officers responsible for separate, widely publicized killings of unarmed black men. In each case, the prosecutors said they had provided a grand jury with all of the relevant evidence, both incriminating and exculpatory, and the grand jurors had made their own, independent assessment that no charges were justified.<sup>9</sup> Modern grand juries are famously docile,<sup>10</sup> so pinning the

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<sup>3</sup> See, e.g., NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE (Wesley Skogan & Kathleen Frydl eds., 2004) [hereinafter FAIRNESS AND EFFECTIVENESS IN POLICING].

<sup>4</sup> See, e.g., Tonry, *supra* note 2, at 25–26.

<sup>5</sup> See, e.g., David Alan Sklansky, *Not Your Father's Police Department: Making Sense of the New Demographics of Law Enforcement*, 96 J. CRIM. L. & CRIMINOLOGY 1209 (2006); FAIRNESS AND EFFECTIVENESS IN POLICING, *supra* note 3.

<sup>6</sup> See, e.g., NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN OVERVIEW OF 2013 STATE COURT CASELOADS (2015); U.S. SENTENCING COMM'N, OVERVIEW OF FEDERAL CRIMINAL CASES: FISCAL YEAR 2014 (2015).

<sup>7</sup> See, e.g., KATHERINE J. BIES ET AL., STANFORD CRIMINAL JUSTICE CTR., STANFORD LAW SCH., STUCK IN THE '70S: THE DEMOGRAPHICS OF CALIFORNIA PROSECUTORS 7–8 (2015); John F. Pfaff, *The War on Drugs and Prison Growth: Limited Importance, Limited Legislative Options*, 52 HARV. J. ON LEGIS. 173, 177 (2015); Ronald F. Wright et al., *The Many Faces of Prosecution*, 1 STAN. J. CRIM. L. & POL'Y 27, 32–34 (2014).

<sup>8</sup> See, e.g., ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 166–67 (2007); Russell M. Gold, *Promoting Democracy in Prosecution*, 86 WASH. L. REV. 69 (2011).

<sup>9</sup> See, e.g., Rebecca Davis O'Brien, *Sizing Up a Prosecutor's Performance: Staten Island District Attorney Gets Mixed Reviews on Handling of Grand Jury in Eric Garner Case*, WALL ST. J., Dec. 5, 2014, at A20; David Zucchini, *Grand Jury Move Stokes Controversy*, L.A. TIMES, Nov. 26, 2014, at A11.

<sup>10</sup> See, e.g., Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the*

decision on them sounded a little like Mr. Spewlow blaming his law partner for his own stinginess—explaining with “gentle melancholy” that “it is an irksome incident in my professional life, that I am not at liberty to consult my own wishes.”<sup>11</sup> But what *should* the prosecutors have done? Some critics faulted them for presenting exculpatory information to the grand jurors: that was acting like defense attorneys, not like prosecutors.<sup>12</sup> But prosecutors are often attacked precisely for *failing* to present the evidence to grand juries evenhandedly.<sup>13</sup> Some observers thought the prosecutors in the Missouri and New York cases were insufficiently responsive to their constituents.<sup>14</sup> Others said the prosecutors, at least in Staten Island, may have been *too* responsive to their constituents.<sup>15</sup> But how should public opinion influence prosecutorial decisions? In what ways, if any, do we want prosecutors to be politically accountable?

These questions are so thorny in large part because our expectations of

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*Accused*, 80 CORNELL L. REV. 260 (1995). In 2015, California required prosecutors to decide for themselves whether to file homicide charges against police officers; tellingly, the California District Attorneys Association opposed the change on the ground that the “option” of grand jury proceedings “should remain available as a tool for prosecutors.” Melody Gutierrez, *State Ends Secret Hearings in Police Killings of Civilians*, S.F. CHRON. (Aug. 11, 2015), <http://www.sfgate.com/politics/article/California-eliminates-use-of-grand-juries-to-6438501.php>.

<sup>11</sup> CHARLES DICKENS, *DAVID COPPERFIELD* 473 (Nonesuch Press 1937) (1850).

<sup>12</sup> See, e.g., Alice Ollstein & Kira Lerner, *Experts Blast Ferguson Prosecutor’s Press Conference, Legal Strategy*, THINKPROGRESS (Nov. 25, 2014), <https://thinkprogress.org/experts-blast-ferguson-prosecutors-press-conference-legal-strategy-202dfd230ad3#.i060qg575>.

<sup>13</sup> In fact, the American Bar Association’s *Criminal Justice Standards for the Prosecution Function*, although lacking legal force, explicitly direct that “[n]o prosecutor should knowingly fail to disclose to the grand jury evidence which tends to negate guilt or mitigate the offense.” CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION, § 3-3.6(b) (2015). The commentary to Rule 3.8 of the Model Rules of Professional Conduct—the only provision of the rules directly addressing prosecutors—also used to make clear that prosecutors should disclose exculpatory evidence to grand juries, but that language was deleted in 2002. See DAVIS, *supra* note 8, at 152. The Supreme Court, for its part, has ruled that federal prosecutors have no legal obligation to present exculpatory evidence to grand juries. See *United States v. Williams*, 504 U.S. 36, 51–54 (1992). The National District Attorneys Association ducks the question by recommending that prosecutors disclose exculpatory evidence to grand juries “as required by law or applicable rules of ethical conduct.” NATIONAL PROSECUTION STANDARDS § 3-3.5(a) (Nat’l Dist. Attorneys Ass’n 2009).

<sup>14</sup> See, e.g., Alex Altman, *Grand Jury Process Raises Questions About a Ferguson Indictment*, TIME (Sept. 18, 2014), <http://time.com/3399022/ferguson-michael-brown-darren-wilson-grand-jury/>.

<sup>15</sup> Cf. Tonry, *supra* note 2, at 12 (arguing against “democratic accountability” for prosecutors, “since it seems self-evident that external considerations should be irrelevant to decisions in individual cases”).

prosecutors are so conflicting.<sup>16</sup> We want them to be zealous advocates and impartial reviewers of the facts, crime fighters and instruments of mercy, law enforcement leaders and officers of the court, loyal public servants and independent professionals, champions of community values and defenders of the rule of law. We have conflicting expectations of other officials, too, but not to the same extent. I will argue that this is actually the key to understanding prosecutors: above all else, they are mediating figures, bridging organizational and theoretical divides in criminal justice. The boundary-blurring nature of prosecutorial power, I will suggest, helps to explain its rise and is critical to thinking sensibly about its control, reformation, or replacement.

First, though, I need to lay some groundwork. Part I of this Article will address the perception and reality of prosecutorial power. What do people mean when they say that prosecutors are the most influential actors in the criminal justice system and are growing increasingly more powerful, and what evidence supports these claims? Part I will also examine the extent to which prosecutorial power is a distinctly American phenomenon or a worldwide trend. Two or three decades ago it was conventional wisdom that prosecutors in the United States had no parallels overseas,<sup>17</sup> and even today it is common to stress the uniqueness of the American prosecutor.<sup>18</sup> But there is also a growing literature suggesting that prosecutorial power is on the rise elsewhere in the world, especially in Europe.<sup>19</sup> So how exceptional *is* the United States in this regard? Finally, Part I will assess and ultimately reject a common, two-part explanation for the rise of prosecutorial power: burgeoning caseloads and the growth of plea bargaining. The story is that as criminal caseloads have ballooned, the system has been forced to forego trials in favor of consensual settlements, and the haggling over outcomes has made prosecutors more important and

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<sup>16</sup> They are thorny also, in part, because we have competing ideas about democracy. See David Alan Sklansky, *Unpacking the Relationship Between Prosecutors and Democracy in the United States*, in PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY (Máximo Langer & David Alan Sklansky eds., forthcoming 2017).

<sup>17</sup> See, e.g., JOAN E. JACOBY, *THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY* xv, 6 (1980); William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 OHIO ST. L.J. 1325 (1993).

<sup>18</sup> See, e.g., John L. Worrall, *Prosecution in America: A Historical and Comparative Account*, in THE CHANGING ROLE OF THE AMERICAN PROSECUTOR 3, 4 (John L. Worrall & M. Elaine Nugent-Borakove eds., 2008); Tonry, *supra* note 2.

<sup>19</sup> See, e.g., Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413, 1427 (2010).

more powerful.<sup>20</sup> The biggest problem with this explanation is the direction of causation. It is unclear whether rising caseloads have led to more plea bargaining, or whether plea bargaining instead has increased caseloads by expanding the system's capacity, the way that widening a highway can bring more traffic.<sup>21</sup> Nor is it clear whether prosecutorial power has been boosted by the rise of plea bargaining, or for that matter by swelling caseloads, as opposed to vice versa. It is not even obvious, as an initial matter, why more criminal cases or more plea bargaining should be *expected* to bolster prosecutorial power.

Part II of the Article will advance a different explanation for the growing clout of prosecutors, rooted in a specific understanding of the prosecutor's role. I will argue that prosecutors are first and foremost mediating figures. They mediate between law and discretion, between vengeance and mercy, between the adversarial and inquisitorial systems, and between courts and police. This mediating role is what distinguishes prosecutors most significantly from other actors in the criminal justice system, and it is likely why the system has come to rely on them so heavily. Accordingly, Part III of the Article will suggest that the mediating functions performed by prosecutors must be taken into account if we are to think productively about curtailing the power of prosecutors, refashioning their self-image, or altering their behavior.

One sign of our impoverished thinking about prosecutors is that the agenda for prosecutorial reform in recent years has so often been cribbed from police reform. "Community policing" seemed successful, so why not "community prosecution"?<sup>22</sup> "Intelligence-led policing" and "predictive policing" lead to talk of "intelligence-driven prosecution"<sup>23</sup> and "predictive prosecution."<sup>24</sup> And when our aspirations for prosecutors do not echo the

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<sup>20</sup> See, e.g., *id.* at 1439–40; Chris Lewis, *The Evolving Role of the English Crown Prosecution Service*, in *THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE* 214, 219 (Erik Luna & Marianne L. Wade eds., 2012); Josef Zila, *Prosecutorial Powers and Policy Making in Sweden and the Other Nordic Countries*, in *THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE* 235, 249 (Erik Luna & Marianne L. Wade eds., 2012).

<sup>21</sup> See, e.g., DARRYL K. BROWN, *FREE MARKET CRIMINAL JUSTICE: HOW DEMOCRACY AND LAISSEZ FAIRE UNDERMINE THE RULE OF LAW* 158–64 (2016).

<sup>22</sup> See, e.g., WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 305 (2011); Anthony V. Alfieri, *Community Prosecutors*, 90 CALIF. L. REV. 1465 (2002); Anthony C. Thompson, *It Takes a Community to Prosecute*, 77 NOTRE DAME L. REV. 321 (2002); Ronald F. Wright, *Community Prosecution, Comparative Prosecution*, 47 WAKE FOREST L. REV. 361 (2012).

<sup>23</sup> Chip Brown, *Cyrus Vance Jr.'s 'Moneyball' Approach to Crime*, N.Y. TIMES MAG. (Dec. 3, 2014), <http://www.nytimes.com/2014/12/07/magazine/cyrus-vance-jrs-moneyball-approach-to-crime.html>.

<sup>24</sup> Heather Mac Donald, *Opinion, A Smarter Way to Prosecute*, L.A. TIMES, Aug. 10,

latest buzzwords in policing, they are often close to vacuous. Attorney General Robert Jackson's famous 1940 address to the United States Attorneys asked them to rededicate themselves "to the spirit of fair play and decency."<sup>25</sup> Jackson explained that "[t]he qualities of a good prosecutor are as elusive and as impossible to define as those which mark a gentleman," and "those who need to be told would not understand it anyway."<sup>26</sup> Pretty much the most Jackson could say was that the good prosecutor "tempers zeal with human kindness, . . . seeks truth and not victims, . . . serves the law and not factional purposes, and . . . approaches his task with humility."<sup>27</sup> Justice Sutherland's equally celebrated remarks five years earlier for the Supreme Court in *Berger v. United States* urged prosecutors to proceed with "earnestness and vigor"—striking "hard blows" but not "foul ones," forswearing "improper methods calculated to produce a wrongful conviction" but employing "every legitimate means to bring about a just one."<sup>28</sup>

Jackson's speech and *Berger* are hallowed texts;<sup>29</sup> they are for prosecutors what the Peelian Principles are for police officers.<sup>30</sup> And like

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2014, at A24.

<sup>25</sup> Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 4 (1940).

<sup>26</sup> *Id.* at 6.

<sup>27</sup> *Id.*

<sup>28</sup> 295 U.S. 78, 88 (1935). Like Jackson, Justice Sutherland seemed to think that being a good prosecutor was something like being a gentleman; he faulted the prosecutor in *Berger* for conduct that was "undignified," "intemperate," and "thoroughly indecorous and improper." *Id.* at 84, 85.

<sup>29</sup> For an utterly typical invocation of *Berger*, see Memorandum from David W. Ogden, Deputy Attorney Gen., U.S. Dep't of Justice, to Dep't Prosecutors, U.S. Dep't of Justice (Jan. 4, 2010) (declaring that "Justice Sutherland's observations regarding the role of a prosecutor are as true today as they were when he wrote them over 70 years ago"). Ogden also noted, as federal prosecutors are wont to do, that an inscription outside the Attorney General's office declares that "[t]he United States wins its point whenever justice is done its citizens in the courts"—echoing both Justice Sutherland's observation in *Berger* that a United States Attorney's interest in a criminal case is simply "that justice shall be done," 295 U.S. at 88, and Jackson's virtually identical pronouncement that "[a]lthough the government technically loses its case, it has really won if justice has been done," Jackson, *supra* note 25, at 4. It is worth noting the passive voice in all of these formulations, which in its own way reflects the notion that the prosecutor's role is to mediate within the criminal justice system. The prosecutor's job is not to do justice but to see that it "is done": the prosecutor is less an independent minister of justice than a kind of systemic lubricant or catalyst.

<sup>30</sup> Regarding the principles of policing attributed (probably in error) to Sir Robert Peel, see generally Susan A. Lentz & Robert H. Chaires, *The Invention of Peel's Principles: A Study of Policing 'Textbook' History*, 35 J. CRIM. JUST. 69 (2007). The Peelian Principles, which famously declare that "the police are the public and the public are the police" and counsel the police to "secure the willing cooperation of the public" without "catering to the

the Peelian Principles they serve too often as a substitute for thought. With some justification, Ian Loader faults the Peelian Principles not only for saying too little but also for lacking legal force.<sup>31</sup> They are paragons of specificity, though, compared with “fair play,” “decency,” and striking “hard blows” but not “foul ones.” (Jackson’s speech actually had a bit more content than that, but the content, as we will see, is usually disregarded in favor of the bromides.<sup>32</sup>) Furthermore, while the Peelian Principles themselves do not have constitutional stature, they are supplemented both in Britain and in the United States with systems of restraints on the exercise of police discretion far more extensive than anything either country has developed for prosecutors<sup>33</sup>—restraints that themselves reflect, particularly in the United States, nuanced if not always consistent ideas about the role of the police in a democratic society.<sup>34</sup> We have nothing like that for prosecutors, and the absence of coherent aspirations may go a long way toward explaining the dearth of meaningful rules.

### I. POWER

The starting point for virtually every discussion of prosecutors in the United States is their tremendous clout. “The American prosecutor rules the criminal justice system,”<sup>35</sup> exercising “almost limitless discretion”<sup>36</sup>

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public opinion,” *see, e.g.*, William J. Bratton, *Sir Robert Peel’s Nine Principles of Policing*, N.Y. TIMES, Apr. 15, 2014, <http://www.nytimes.com/2014/04/16/nyregion/sir-robert-peels-nine-principles-of-policing.html>, have become “central to the self-understanding of Anglo-American policing.” Ian Loader, *Recasting Civic Policing: Beyond “Peelian” Principles, in The Future of Criminal Law: Working Papers from the 2014 Annual Conference of the Robina Institute of Criminal Law and Criminal Justice 1, 1* (Michelle Madden Dempsey et al eds., 2014). Former New York City Police Commissioner William Bratton, for example, singled out the Peelian Principles as the foundational text of modern law enforcement, “as relevant and meaningful today as they were in the 1830s.” William Bratton, *Peel’s Nine Principles of Policing*, COMMISSIONER’S CORNER (Mar. 6, 2014) (on file with author).

<sup>31</sup> Loader, *supra* note 30, at 1.

<sup>32</sup> *See infra* text accompanying note 62.

<sup>33</sup> Regarding the possibility, minimally realized, that prosecutors in the United States might be regulated by professional rules and standards, *see supra* note 13; *infra* notes 161 & 233, and accompanying text.

<sup>34</sup> *See generally* DAVID ALAN SKLANSKY, *DEMOCRACY AND THE POLICE* (2008).

<sup>35</sup> Erik Luna & Marianne L. Wade, *Preface to THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE* xi, xi (Erik Luna & Marianne L. Wade eds., 2012).

<sup>36</sup> Erik Luna & Marianne L. Wade, *supra* note 19, at 1414–15; *cf., e.g.*, Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1049 (2006) (describing the “almost unbridled discretion” of prosecutors to “make all the key judgments” in criminal cases); STUNTZ, *supra* note 22, at 87 (stressing the “enormous discretionary power” of prosecutors in the United States).



and “virtually absolute power.”<sup>37</sup> The concentration of power in the hands of prosecutors has been called the “overriding evil” of American criminal justice<sup>38</sup>—which is saying something, given the range and magnitude of the system’s problems. Nor is this a new concern. Since at least the early twentieth century, “[t]he immense authority of the public prosecutor over criminal justice has been a universally recognized feature of American criminal prosecution . . . .”<sup>39</sup> Robert Jackson took it as obvious in 1940 that “[t]he prosecutor has more control over life, liberty, and reputation than any other person in America.”<sup>40</sup> Since then, prosecutors in the United States are widely thought to have grown significantly more powerful,<sup>41</sup> and prosecutors elsewhere may be catching up. There are reports, in particular, that “the European prosecutor is beginning to look like his American counterpart, with the de facto and sometimes de jure authority to adjudicate cases.”<sup>42</sup> In Europe, as in the United States, prosecutors are now said to “loom[] over [judges] both in power and importance.”<sup>43</sup> Before turning to

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<sup>37</sup> Marc L. Miller, *Domination and Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1252 (2004); see also, e.g., Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 960–61 (2009); Erik Luna, *Prosecutor King*, 1 STAN. J. CRIM. L. & POL’Y 48, 57–70 (2014); Ronald F. Wright & Kay L. Levine, *The Cure for Young Prosecutors’ Syndrome*, 56 ARIZ. L. REV. 1065, 1067 (2014); DAVIS, *supra* note 8, at 3–5; Barkow, *supra* note 2, at 874–75.

<sup>38</sup> Donald A. Dripps, *Reinventing Plea Bargaining*, in *The Future of Criminal Law: Working Papers from the 2014 Annual Conference of the Robina Institute of Criminal Law and Criminal Justice*, *supra* note 30, at 55, 60; see also Barkow, *supra* note 2, at 871; Luna, *supra* note 37, at 102.

<sup>39</sup> Allen Steinberg, *From Private Prosecution to Plea Bargaining: Criminal Prosecution, the District Attorney, and American Legal History*, 30 CRIME & DELINQ. 568, 568 (1984); see also, e.g., Newman F. Baker, *The Prosecutor—Initiation of Prosecution*, 23 J. CRIM. L. & CRIMINOLOGY 770, 796 (1933) (arguing that the prosecutor’s discretionary charging decisions effectively constitute “the ‘law’ to the ordinary man”); Pizzi, *supra* note 17, at 1336 (observing that the “premise from which all proposals to reform the American prosecutor seem to begin” is concern that essentially limitless charging discretion makes American prosecutors “nearly omnipotent”).

<sup>40</sup> Jackson, *supra* note 25, at 25.

<sup>41</sup> See, e.g., GEORGE FISHER, *PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* 210–30 (2003); William T. Pizzi, *A Perfect Storm: Prosecutorial Discretion in the United States*, in *THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE* 189, 190 (Erik Luna & Marianne L. Wade eds., 2012); Wesley M. Oliver, *Charles Lindbergh, Caryl Chessman, and the Exception Proving the (Potentially Waning) Rule of Broad Prosecutorial Discretion*, 20 BERKELEY J. CRIM. L. 1, 9 (2015); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1573 (1981).

<sup>42</sup> Luna, *supra* note 37, at 67.

<sup>43</sup> Stephen C. Thaman, *The Penal Order: Prosecutorial Sentencing as a Model for Criminal Justice Reform?*, in *THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE* 156, 156 (Erik Luna & Marianne L. Wade eds., 2012).

the common explanations for these developments, it is worth taking a closer look at the nature of the power that prosecutors exercise, as well as the degree to which the American prosecutor remains unique from a global perspective.

#### A. DESCRIBING AND MEASURING PROSECUTORIAL POWER

Discussions of prosecutorial power almost always proceed on the unstated assumption that we know what “power” means in this context and how to assess it. But power is a notoriously “elusive concept”<sup>44</sup>; there is a long, unsettled debate among social scientists about how best to define it.<sup>45</sup> So what kind of power is it that American prosecutors seem to have so much of?

Social scientists commonly understand power either in terms of *influence*—controlling the actions that other people take—or in terms of *outcomes*—controlling what happens to other people. Thus, power can be understood as the ability to “get [someone else] to do something he [or she] would not otherwise do,”<sup>46</sup> or alternatively as the ability to “modify others’ states by providing or withholding resources or administering punishments.”<sup>47</sup> Under either view, power is relational, defined in part by its *subjects*: “one cannot say that someone has power without specifying

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<sup>44</sup> KEITH M. DOWDING, *RATIONAL CHOICE AND POLITICAL POWER* 1 (1991); *see also* STEWART R. CLEGG, *FRAMEWORKS OF POWER* xv (1989) (calling power the “most ‘contested’ of concepts”); DENNIS H. WRONG, *POWER: ITS FORMS, BASES, AND USES* vii–ix, xxvii (1995) (surveying the “conflations and ambiguities” plaguing the “elusive” concept of power); John C. Turner, *Explaining the Nature of Power: A Three-Process Theory*, 35 *EUR. J. SOC. PSYCHOL.* 1, 5 (2005) (observing that the definition of power “has long been a murky business”).

<sup>45</sup> *See, e.g.*, Susan T. Fiske & Jennifer Berdahl, *Social Power*, in *SOCIAL PSYCHOLOGY: HANDBOOK OF BASIC PRINCIPLES* 678, 678 (Arie W. Kruglanski & E. Tory Higgins eds., 2d ed. 2007); Robert A. Dahl, *The Concept of Power*, 2 *BEHAV. SCI.* 201, 201 (1957); Dacher Keltner et al., *Power, Approach, and Inhibition*, 110 *PSYCHOL. REV.* 265, 265 (2003); DOWDING, *supra* note 44, at 3–16; WRONG, *supra* note 44, at 2.

<sup>46</sup> Dahl, *supra* note 45, at 204; *see also*, John R. P. French, Jr. & Bertram Raven, *The Bases of Social Power*, in *STUDIES IN SOCIAL POWER* 150, 150 (Dorwin Cartwright ed., 1959).

<sup>47</sup> Keltner et al., *supra* note 45, at 265; *see also* Dorwin Cartwright, *A Field Theoretical Conception of Power*, in *STUDIES IN SOCIAL POWER*, *supra* note 46, at 183, 193; WRONG, *supra* note 44, at 2, 21; Ezra Stotland, *Peer Groups and Reactions to Power Figures*, in *STUDIES IN SOCIAL POWER*, *supra* note 46, at 53, 54; Fiske & Berdahl, *supra* note 45, at 679. Wrong draws a useful distinction between “power over” (by which he means the ability to get other people to do things) and “power to” (by which he means, roughly, the ability to change outcomes); he argues that the former is simply a special case of the latter, distinguished by the motive of the power wielder. *See* WRONG, *supra* note 44, at 220–21.

over *whom*.”<sup>48</sup> And under either view power is further demarcated, typically, by its *scope* and its *magnitude*—that is to say, by the range of actions or outcomes it controls, and by how completely it controls those things.<sup>49</sup>

Prosecutorial power is most naturally defined in terms of outcomes, but it also can be understood—and sometimes may need to be understood—as a matter of influence. The power of prosecutors, Jackson said, resides in their “control over life, liberty, and reputation.”<sup>50</sup> He explained that the prosecutor:

can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. . . . The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial. He may dismiss the case before trial, in which case the defense never has a chance to be heard. Or he may go on with a public trial. If he obtains a conviction, the prosecutor can still make recommendations as to sentence, as to whether the prisoner should get probation or a suspended sentence, and after he is put away, as to whether he is a fit subject for parole.<sup>51</sup>

This is the way prosecutorial power is usually described. It is the power to wreck lives, to put people on trial, and to lock them up—in short, to create dire outcomes.<sup>52</sup> But even in Jackson’s canonical account, the prosecutor’s power depends in part on an ability to “make recommendations” that others—judges and parole boards—then follow.<sup>53</sup> And when you think about it, pretty much everything a prosecutor does is done through others. The prosecutor gets law enforcement officers to investigate, magistrates to issue warrants, grand juries to indict, defendants to plead guilty (or, if necessary, trial juries to convict), and judges to imprison. Little of this is done by actually ordering anyone to do anything; almost all of it is influence.<sup>54</sup> We might say that the power of prosecutors is the ability to cause outcomes through influence.<sup>55</sup>

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<sup>48</sup> Fiske & Berdahl, *supra* note 45, at 680; *see also* WRONG, *supra* note 44, at xxi; Dahl, *supra* note 45, at 206.

<sup>49</sup> *See* Dahl, *supra* note 45, at 203, 205–06.

<sup>50</sup> Jackson, *supra* note 25, at 3.

<sup>51</sup> *Id.*

<sup>52</sup> *See, e.g.*, Luna, *supra* note 34, at 57–60.

<sup>53</sup> Jackson, *supra* note 25, at 3.

<sup>54</sup> *See, e.g.*, Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749 (2003).

<sup>55</sup> In this respect, prosecutorial power exemplifies what Dowding calls “social power”—“the ability of an actor deliberately to change the incentive structure of another actor or actors to bring about, or help bring about outcomes.” DOWDING, *supra* note 44, at 48. Dowding distinguishes social power from “outcome power,” which does not necessarily

Much of the prosecutor's influence depends, in turn, on an ability to threaten outcomes; this is notably true in the context of plea bargaining, and it is true as well when prosecutors agree to forego charges against organizations in exchange for commitments for institutional reform and self-monitoring—arrangements commonly called “non-prosecution agreements” or “deferred prosecution agreements.”<sup>56</sup> But some of the prosecutors' influence stems less from their ability to make threats or promises than from their air of authority and their ongoing relationships with judges, probation officers, law enforcement agents, and legislators.<sup>57</sup>

What can be said about the *subjects*, the *scope*, and the *magnitude* of prosecutorial power? Set aside *magnitude* for the moment; we will return to it shortly. The *subjects* of prosecutorial power are criminal defendants and potential criminal defendants, and the *scope*, traditionally, has been limited to the results of criminal cases. Prosecutors have no greater ability than anyone else to hail a cab during rush hour or to get Congress to create a new national park. Obviously, though, criminal cases are important, so even powers exercised only in this context are worth worrying about. And the restrictions on the subjects and scope of prosecutorial power have significantly loosened over the past several decades.

The most important development in this regard probably has *not* been the expanding scope of criminal prohibitions in the United States, despite the widespread concern that “overcriminalization” has made a larger and larger range of conduct potentially the subject of a criminal prosecution.<sup>58</sup> The scope of prosecutorial power plainly has been increased by some expansions in the range of criminalization: the treatment of immigration

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require a social relationship; outcome power is simply “the ability of an actor to bring about or help to bring about outcomes.” *Id.* Social power, as Dowding defines it, is part of what Turner calls the “standard theory of power” in the social sciences—a theory that defines power as “the capacity to influence other people” through “the control of resources (positive and negative outcomes, rewards and costs, information, etc.) that are desired, valued or needed by others.” Turner, *supra* note 44, at 2.

<sup>56</sup> See, e.g., Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853 (2007).

<sup>57</sup> See, e.g., Richman, *supra* note 54, at 755–94. In this respect prosecutors may provide support for recent suggestions by some social scientists that power should be understood as having less to do with “dependence relationships” than with group dynamics and “the basis of organized, collective action.” Turner, *supra* note 44, at 2; see also JOHN KENNETH GALBRAITH, *THE ANATOMY OF POWER* 4–6 (1983) (distinguishing “condign power,” based on threats, from “compensatory power,” based on rewards, and “conditioned power,” which is “exercised through changing belief” by “education, or . . . social commitment”).

<sup>58</sup> See, e.g., Erik Luna, *Prosecutorial Decriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 785, 793–95 (2012).

violations as criminal offenses is a good example.<sup>59</sup> But it is not clear, on the whole, that criminal prohibitions reach further today than in the past. Many things that did not used to be crimes now are, but the converse is true as well: there are also lots of things that used be crimes—adultery, sodomy, loitering, buying and selling alcohol—that are not anymore.<sup>60</sup>

What do seem to have changed, though, are public and professional attitudes about using the criminal law as a lever to reach conduct that might not itself be criminally punishable. There is growing comfort with, and even enthusiasm for, what used to be called “pretextual prosecutions”: criminal cases in which the offense charged is just an expedient way to convict, lock up, or exert leverage over a defendant targeted for other reasons.<sup>61</sup> In his speech to the United States Attorneys, Robert Jackson located “the most dangerous power of the prosecutor” in the ability to pick defendants instead of picking cases:

With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him.<sup>62</sup>

Part of Jackson’s worry was that prosecutions of this kind could easily become “personal.”<sup>63</sup> The “real crime” might simply be that the defendant was “unpopular with the predominant or governing group,” had “the wrong political views,” or was “personally obnoxious to or in the way of the prosecutor.”<sup>64</sup> But his warning plainly reflected a broader discomfort with giving prosecutors the authority to determine who deserved punishment, for whatever reason, as long as they could rummage around and find a charge to file. The unease was captured in the once widespread intuition that there

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<sup>59</sup> See, e.g., David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 *NEW CRIM. L. REV.* 157, 194–96 (2012).

<sup>60</sup> See generally Darryl K. Brown, *Democracy and Decriminalization*, 86 *TEX. L. REV.* 223 (2007). Reviewing the long history of legislatures “repealing or narrowing criminal statutes, reducing offense severity, and converting low-level crimes to civil infractions,” Brown argues plausibly that “criminal law’s substantive scope is almost surely narrower in most respects than in the past, at least in its effect on most citizens.” *Id.* at 225–26 (emphasis omitted).

<sup>61</sup> See generally Daniel C. Richman & William J. Stuntz, *Al Capone’s Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 *COLUM. L. REV.* 583 (2005).

<sup>62</sup> Jackson, *supra* note 25, at 5. Justice Scalia quoted this passage toward the end of his now celebrated dissent in *Morrison v. Olson*, 487 U.S. 654, 727–28 (1988) (Scalia, J., dissenting).

<sup>63</sup> Jackson, *supra* note 25, at 5.

<sup>64</sup> *Id.*

was something wrong with a “pretextual prosecution.”<sup>65</sup> But that intuition has weakened, and the term itself has begun to sound archaic. More and more, prosecutors are *applauded* for “picking the man and then searching the law books, or putting investigators to work, to pin some offense on him.”<sup>66</sup> This is exactly what is meant, for example, by “intelligence-driven prosecution.”<sup>67</sup> Here is how a supervisor with the Manhattan District Attorney’s office describes the strategy: “We figured out who are the people driving crime in Manhattan, and for four years we focused on taking them out.”<sup>68</sup>

The fading stigma associated with pretextual prosecutions is part of a broader trend in legal consciousness. For want of a better term, this larger trend might be called “ad hoc instrumentalism”; it is the tendency to view legal procedures as a set of interchangeable tools, which government officials can and should apply on a case-by-case basis, depending on what promises to be effective in addressing a particular problem or particular individuals thought to be dangerous or undesirable.<sup>69</sup> Deferred prosecution and non-prosecution agreements reached with large organizations reflect this same trend: they allow prosecutors to use the criminal law as a bludgeon to coerce broad, organizational reform.<sup>70</sup> Crimmigration—the blurring of the line between criminal law and immigration—is part of this trend, too; so is the use of parole and probation revocations as a parallel system of criminal justice.<sup>71</sup> Each of these developments has served to increase the subjects and the scope of prosecutorial power, by expanding the range of individuals who are potential defendants in criminal cases, and—more importantly—by expanding the range of conduct that it seems appropriate for prosecutors to coerce.

The bottom line is that the *subjects* and *scope* of prosecutorial power, while very far from unlimited, have long been appreciable and have

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<sup>65</sup> See, e.g., Richman & Stuntz, *supra* note 61.

<sup>66</sup> Jackson, *supra* note 25, at 5.

<sup>67</sup> See Brown, *supra* note 23; Mac Donald, *supra* note 24.

<sup>68</sup> See Brown, *supra* note 23 (quoting Karen Friedman Agnifilo); cf. Jessica Anderson & Justin Fenton, *Mosby Announces New Leadership, Strategies*, BALT. SUN (Jan. 14, 2015), <http://www.baltimoresun.com/news/maryland/crime/bs-md-ci-mosby-staff-changes-20150114-story.html> (describing creation of new unit in Baltimore State’s Attorney’s Office to “help target problem individuals”).

<sup>69</sup> See Sklansky, *supra* note 59. This was the set of ideas that California prosecutors reflexively, if unsuccessfully, invoked when they argued for keeping grand jury proceedings available as an optional “tool” in cases involving deaths at the hands of the police. See Gutierrez, *supra* note 10.

<sup>70</sup> See, e.g., Garrett, *supra* note 56.

<sup>71</sup> See Sklansky, *supra* note 59, at 197–208.

recently grown larger. What about the *magnitude* of prosecutorial power? By “magnitude” I mean roughly what Robert Dahl called the “amount” of power: “the change in probabilities” caused by the exercise of power.<sup>72</sup> In other words, how strongly can a prosecutor change the likelihood that a particular subject of prosecutorial power will engage in certain conduct within the scope of prosecutorial power? How much more likely can a prosecutor make it that, say, a defendant will be convicted, that a noncitizen will be deported, or that a corporation will change its accounting procedures?

The core of prosecutorial power is the ability to convict people of crimes. More particularly, the core of prosecutorial power in the United States today, as it is generally described, is the ability to coerce guilty pleas. So let us begin there. What can be said about the magnitude of this core aspect of prosecutorial power?

It will not do simply to say that prosecutors must have “virtually absolute power” since “[e]veryone pleads guilty.”<sup>73</sup> Everyone doesn’t plead guilty. Most people are never charged, and many people who are charged have their cases thrown out.<sup>74</sup> It is true that criminal defendants whose cases are not dismissed plead guilty at very high rates, upwards of 90%. Guilty pleas vastly outnumber trials.<sup>75</sup> But some of that, obviously, is case selection. Conviction rates are high in part because prosecutors choose their defendants and because judges dismiss the weakest cases.<sup>76</sup> Another part of the explanation for high conviction rates is that prosecutors trade things away: that is what makes a plea bargain a plea bargain. The majority of civil cases wind up settling, too,<sup>77</sup> but most people do not take this as proof that civil plaintiffs have vast power, or even that they have the upper hand.<sup>78</sup>

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<sup>72</sup> Dahl, *supra* note 45, at 203, 206. On Dahl’s views of power and their impact, see, e.g., CLEGG, *supra* note 44, at 1–59.

<sup>73</sup> Miller, *supra* note 37, at 1252.

<sup>74</sup> See David A. Sklansky & Stephen C. Yeazell, *Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 94 GEO. L.J. 683, 696 n.37 (2006).

<sup>75</sup> See, e.g., *id.*

<sup>76</sup> Cf. Dahl, *supra* note 45, at 202 (“Suppose I stand on a street corner and say to myself, ‘I command all automobile drivers on this street to drive on the right side of the road’; suppose further that all the drivers actually do as I ‘command’ them to do; still, most people will regard me as mentally ill if I insist that I have enough power over automobile drivers to compel them to use the right side of the road.”). Dahl stressed that power is the ability to convince someone to do something that he or she “would not otherwise do.” *Id.* at 203; accord WRONG, *supra* note 44, at 5–6.

<sup>77</sup> See Sklansky & Yeazell, *supra* note 74, at 696.

<sup>78</sup> The corporate defense bar sometimes argues along these lines, but the corporate

In assessing the magnitude of prosecutorial power, it may be helpful to supplement Dahl's probabilistic measure with what Dennis Wrong calls the "intensity" of power: the "limits . . . to the actions which the power holder can influence the power subject to perform."<sup>79</sup> The rate at which defendants plead guilty is a weak measure of the intensity of prosecutorial power: it does not tell us how far prosecutors could push defendants, or what limits there are to the consequences defendants would accept as the price of a deal.

It is widely thought that prosecutors have enormous leverage when negotiating plea agreements—far more leverage than criminal defendants.<sup>80</sup> This may well be true, but it is difficult to measure the extent of this leverage or even to define it with precision. Sometimes it is suggested that prosecutors can dictate whatever outcomes they want, or, equivalently, that they have no reason to trade away anything in plea bargaining, because going to trial is essentially costless for them: it does not appreciably tax their resources, and their risk of losing is insignificant. That is, at best, an exaggeration. If prosecutors had no incentive to bargain, they would not, and they do. How *much* they are willing to bargain away is, of course, a different question. The broad consensus among scholars is that prosecutors today are able to bargain for the results they want without giving up much that is important to them, because the outcomes they can credibly threaten under modern sentencing statutes are extraordinarily harsh.<sup>81</sup> If that is so, however, the fault could be said—and sometimes is said—to lie with the sentencing statutes, not with prosecutorial power per se.

Four more points about prosecutorial power: first, concerns about prosecutorial *power* are bound up with but distinguishable from concerns about prosecutorial *discretion*. Concerns about prosecutorial power are concerns about the prosecutor's ability to influence or determine the outcome of criminal cases; in the context of plea bargaining, concerns about prosecutorial power are concerns about the prosecutor's clout vis-à-vis the defendant. Concerns about prosecutorial discretion are concerns about the ability of individual prosecutors, or their offices, to exercise their power unilaterally, without checks by other government officials. Excessive prosecutorial power can raise concerns even when prosecutors act within a web of constraints imposed by their superiors, by courts, or by other

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defense bar is not most people.

<sup>79</sup> WRONG, *supra* note 44, at 5–6. This measure obviously makes sense only for what Wrong calls "power over." See *supra* note 47 and accompanying text.

<sup>80</sup> See, e.g., Dripps, *supra* note 38, at 56.

<sup>81</sup> See, e.g., *id.*; United States v. Kupa, 976 F. Supp. 2d 417, 419–20 (E.D.N.Y. 2013); Barkow, *supra* note 2, at 881; Miller, *supra* note 37.



government agencies; even when subject to checks and balances, prosecutorial power is a particularly coercive form of government power, and therefore worth worrying about. And there can be concerns about prosecutorial discretion even when prosecutorial power is relatively limited: even if prosecutors have difficulty securing convictions or securing plea bargains, their discretion to forego charging altogether may be troubling. Still, the more discretion that prosecutors have, the greater will be the concern, generally speaking, about the power they exercise and vice versa. Moreover, the line between power and discretion, as I am using those terms, is not always sharp. Mandatory sentencing rules can be understood to increase the power of prosecutors by increasing their ability to control the outcome of criminal cases,<sup>82</sup> but those laws can also be understood as increasing prosecutors' discretion, by eliminating what would otherwise function as a judicial check on charging decisions.

Second, concerns about prosecutorial power and about prosecutorial discretion are often intertwined with concerns about prosecutors breaking the law. This is because there are legal constraints on what prosecutors can do, curtailing both their power and their discretion, but the constraints are often weakly enforced. For example, prosecutors are required to disclose exculpatory evidence to the defense,<sup>83</sup> but when they fail to do so, the violation may never come to light, or it may come to light when it is too late for the evidence to be useful.<sup>84</sup> Prosecutors are prohibited from exercising peremptory challenges against prospective jurors on the basis of race or gender,<sup>85</sup> but proving that they have done so is notoriously difficult.<sup>86</sup> It is even more difficult to prove that prosecutors have relied on race, ethnicity, or political affiliation when making charging decisions, although they are prohibited from doing that as well.<sup>87</sup> Prosecutorial illegality is objectionable in part precisely because it can vitiate constraints on prosecutorial power and prosecutorial discretion, but often it is also objectionable on other

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<sup>82</sup> See, e.g., Starr & Rehati, *supra* note 1, at 13 (arguing that federal sentencing guidelines “did not really increase prosecutors’ discretion, which was already almost boundless,” but “increased their power,” because “the choices prosecutors made more conclusively determined the sentence”).

<sup>83</sup> See *Brady v. Maryland*, 373 U.S. 83, 86–87 (1963).

<sup>84</sup> See, e.g., DAVIS, *supra* note 8, at 130–35.

<sup>85</sup> See *J.E.B. v. Alabama*, 511 U.S. 127, 146 (1993); *Batson v. Kentucky*, 476 U.S. 79, 84 (1986).

<sup>86</sup> See, e.g., Adam Liptak, *New Questions on Racial Gap in Filling Juries*, N.Y. TIMES, Aug. 7, 2015, at A1.

<sup>87</sup> See *United States v. Armstrong*, 517 U.S. 456, 464–70 (1996); Angela J. Davis, *Racial Fairness in the Criminal Justice System: The Role of the Prosecutor*, 39 COLUM. HUM. RTS. L. REV. 202, 210–18 (2007).

grounds.

Third, we have been focusing on the prosecutor's power to control the outcome of particular criminal cases, but prosecutors also have an ability to shape criminal justice policy at a broader level. They get investigatory agencies to change their priorities, they block some legislation and push through other laws, and they set the agenda for public discussions about crime and punishment.<sup>88</sup> Elected district attorneys and presidentially-appointed United States Attorneys, in particular, often serve as *de facto* leaders of the criminal justice system. Unlike the prosecutor's control over particular criminal cases, which is typically exercised through express or implied coercion, the prosecutor's influence on criminal justice policy usually relies on other forms of persuasion, ranging from rhetorical appeals to promises of shared prestige.<sup>89</sup> The prosecutor's coercive power is typically what people have in mind when they worry about prosecutorial power.<sup>90</sup> By contrast, when people think of prosecutors as potential solutions to the ills of the criminal justice, they often have in mind the prosecutor's ability to influence policy.<sup>91</sup>

Fourth and finally, the limitations on the *subjects* and *scope* of prosecutorial power—despite their gradual loosening—may help to explain the expansive *magnitude* of prosecutorial power. There is often an inverse relationship between the range of power and its weight or intensity, in part because of the logistical difficulties created when power is exercised over a greater number of people.<sup>92</sup> In the case of prosecutors, another factor is at work: the fact that prosecutorial power mainly affects criminal defendants

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<sup>88</sup> See, e.g., Nirej Sekhon, *The Pedagogical Prosecutor*, 44 SETON HALL L. REV. 1 (2014).

<sup>89</sup> In Galbraith's terms, "conditioned power" or "compensatory power" rather than "condign power." See *supra* note 57 and accompanying text.

<sup>90</sup> But not always: over the past decade, in particular, concerns have often been raised about the political power of prosecutors. See, e.g., JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 33–74 (2007); Bob Egelko, Opinion, *Voters, not Law, Determine Punishments in California*, S.F. CHRON. (Aug. 28, 2015) <http://www.sfchronicle.com/opinion/article/Voters-not-law-determine-punishments-in-6471595.php>; Barkow, *supra* note 2, at 911.

<sup>91</sup> See, e.g., Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 165–66 (2008).

<sup>92</sup> See WRONG, *supra* note 44, at 20. "First, the greater the number of power subjects, the greater the difficulty of supervising all of their activities. Second, the greater the number of power subjects, the more extended and differentiated the chain of command necessary to control them, creating new subordinate centres of power that can be played off against each other and that may themselves become foci of opposition to the integral power-holder. Third, the greater the number of subjects, the greater the likelihood of wide variation in their attitudes toward the power-holder." *Id.*

and criminal suspects means that most people do not imagine that they may be subject to prosecutorial power, and they have limited sympathy for the people they suppose *will* wind up in that category.<sup>93</sup> That may lead them to be more tolerant of concentrating power in the hands of prosecutors than they would be if prosecutors made decisions that directly affected things other than criminal cases, things that people imagine might wind up affecting *them*. It does not explain, though, why prosecutors have such broad *discretion*—including the virtually unfettered freedom to decline to file charges. Nor does it explain why American prosecutors, at least, seem to have so much more power than the police or than judges in criminal cases.

#### B. AMERICAN EXCEPTIONALISM AND UNEXCEPTIONALISM

Prosecutorial power has long been thought a “uniquely American” phenomenon.<sup>94</sup> The American prosecutor, it is often said, “has no equal throughout the world.”<sup>95</sup> “Police, courts, and corrections systems are much the same in all developed countries, but prosecutors differ radically,” particularly when American prosecutors are compared their counterparts overseas.<sup>96</sup>

The unparalleled authority of the American prosecutor has often been attributed to the fact that district attorneys in the United States are elected, county-level officials. Prosecutorial power, in this view, is an outgrowth of the peculiar emphasis the United States places on local, democratic control.<sup>97</sup> The “locally elected status” of American prosecuting attorneys provides them with an “independent source of power” and is the reason they enjoy “discretionary privilege unmatched in the world.”<sup>98</sup>

This view of prosecutorial power—tying it to the local, democratic selection of district attorneys—has always had some weaknesses. To begin with, not all district attorneys in the United States are elected, and there is little indication that they are less powerful in the states where they are appointed.<sup>99</sup> Nor is there any indication that sheriffs, who generally are

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<sup>93</sup> See, e.g., Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don't Legislatures Give a Damn About the Rights of the Accused*, 44 SYRACUSE L. REV. 1079 (1993); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 782–83 (2006).

<sup>94</sup> JACOBY, *supra* note 17, at xv; see also *id.* at 5–6.

<sup>95</sup> Worrall, *supra* note 18, at 4.

<sup>96</sup> Tonry, *supra* note 2, at 1, 5.

<sup>97</sup> See JACOBY, *supra* note 17, at xvii, xxi, 22–23; Pizzi, *supra* note 17, at 1343–44.

<sup>98</sup> JACOBY, *supra* note 17, at xxi, 3.

<sup>99</sup> Chief prosecuting attorneys are appointed by the state attorney general, rather than

elected, are more powerful than police chiefs, who generally are appointed. All of these officials are locally selected, of course, even if not by popular vote, but federal law enforcement officials—including, in particular, United States Attorneys—seem at least as powerful as their local counterparts.<sup>100</sup>

The biggest problem with tracing prosecutorial power to the local election of district attorneys, though, is that American prosecutors no longer seem so exceptional.

European prosecutors, in particular, look more and more like their United States counterparts.<sup>101</sup> Supervisory power over police investigations in Europe is increasingly relocated from investigating magistrates—a position in sharp decline—either to prosecutors or to the police themselves.<sup>102</sup> Meanwhile, prosecutors across Europe have gained new powers to negotiate settlements of criminal cases and often to implement those settlements with little or no judicial involvement.<sup>103</sup> One important development in this regard is increased use of the “penal order”—essentially an adjudication and sentence, typically for a minor offense, entirely crafted by the prosecutor.<sup>104</sup> In theory, a penal order can be appealed to a judge, but in practice, it rarely is; in exchange for foregoing a judicial forum the defendant gains a measure of lenience. For all practical purposes, penal orders are thus a form of plea bargaining, a practice that European countries used to eschew, at least nominally.<sup>105</sup> But “the advance

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elected locally, in Alaska, Connecticut, Rhode Island, Delaware and New Jersey. See Ronald F. Wright, *Beyond Prosecutor Elections*, 67 SMU L. REV. 593, 598–99 (2014).

<sup>100</sup> See, e.g., Lauren M. Ouziel, *Legitimacy and the Federal Criminal Enforcement Power*, 123 YALE L.J. 2236 (2014).

<sup>101</sup> Prosecutors are more powerful in Japan than in Europe or even the United States, but Japan in its own ways is a special case, in part because of heavy reliance it places on elite bureaucracies more broadly. See DAVID T. JOHNSON, *THE JAPANESE WAY OF JUSTICE: PROSECUTING CRIME IN JAPAN* 3, 48, 127–30 (2002). The rise of prosecutorial power in Europe is harder to explain away.

<sup>102</sup> See Thomas Weigend, *A Judge by Another Name? Comparative Perspectives on the Role of the Public Prosecutor*, in *THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE* 377, 378–79 (Erik Luna & Marianne L. Wade eds., 2012).

<sup>103</sup> See *id.* at 383–87; Jörg-Martin Jehle, *The Function of Public Prosecution Within the Criminal Justice System: Aim, Approach and Outcome of a European Comparative Study*, in *COPING WITH OVERLOADED CRIMINAL JUSTICE SYSTEMS: THE RISE OF PROSECUTORIAL POWER ACROSS EUROPE* 3, 6 (Jörg-Martin Jehle & Marianne Wade eds., 2006); Luna & Wade, *supra* note 19, at 1414–15.

<sup>104</sup> See, e.g., Thaman, *supra* note 43, at 159–73; Josef Zila, *Prosecutorial Powers and Policy Making in Sweden and the Other Nordic Countries*, in *THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE* 235, 249 (Erik Luna & Marianne L. Wade eds., 2012).

<sup>105</sup> See, e.g., Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT’L L.J. 1 (2004).

of negotiated criminal judgments over the last twenty years has been the signature development on the European continent,<sup>106</sup> and the “banner-carrier” in this advance has been the prosecutor, “a ‘standing magistrate’ who today looms over his or her ‘sitting’ colleague in the courts both in power and importance.”<sup>107</sup>

Even in Germany—praised by American scholars a generation ago as a “land without plea bargaining”<sup>108</sup>—consensual case resolutions have become the norm,<sup>109</sup> and “prosecutors now submit less than 20 percent of the cases that cross their desks to the court for a full adjudicative hearing.”<sup>110</sup> Decisions by German prosecutors today “shape, if not determine, outcomes in the vast majority of cases, with the shape of that discretion bounded only weakly by the law.”<sup>111</sup>

In theory, prosecutors in some European countries still operate under the “principle of legality” rather than the “principle of expediency,”<sup>112</sup> which means that they still lack a key aspect of the discretion explicitly granted to American prosecutors: the leeway to forego pursuit of a criminal case altogether. However, the legality principle is “far from absolute in practice.”<sup>113</sup> In Germany, for example, mandatory prosecution is “reserved

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<sup>106</sup> Weigend, *supra* note 102, at 387. See also Langer, *supra* note 105.

<sup>107</sup> Thaman, *supra* note 43, at 156. Prosecutors also loom over judges in significance in most if not all of the international criminal tribunals created in recent decades. Discussions of the International Criminal Court, for example, tend to focus heavily on the decisions of its chief prosecutor. See, e.g., Somini Sengupta, *Is the War Crimes Court Still Relevant?*, N.Y. TIMES, Jan. 11, 2015, at SR4.

<sup>108</sup> E.g., John H. Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204 (1979); see also KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 194 (1969).

<sup>109</sup> Thomas Weigend & Jenia Iontcheva Turner, *The Constitutionality of Negotiated Criminal Judgments in Germany*, 15 GERMAN L.J. 81, 82–83 (2014).

<sup>110</sup> Shawn Boyne, *Is the Journey from the In-Box to the Out-Box a Straight Line? The Drive for Efficiency and the Prosecution of Low-Level Criminality in Germany*, in *THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE* 37, 38 (Erik Luna & Marianne L. Wade eds., 2012) (citing figures by Jehle and Wade).

<sup>111</sup> *Id.* at 42. German plea bargaining appears to have begun, slowly at first, in the 1970s. See Markus Dirk Dubber, *American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure*, 49 STAN. L. REV. 547, 549–50 (1997); Joachim Herrman, *Bargaining Justice—A Bargain for German Criminal Justice?*, 53 U. PITT. L. REV. 755, 755 (1992).

<sup>112</sup> See Mirjan Damaška, *The Reality of Prosecutorial Discretion: Comments on a German Monograph*, 29 AM. J. COMP. L. 119, 120–21 (1981).

<sup>113</sup> Michele Caianiello, *The Italian Public Prosecutor: An Inquisitorial Figure in Adversarial Proceedings?*, in *THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE* 250, 255 (Erik Luna & Marianne L. Wade eds., 2012); see also, e.g., Jehle, *supra* note 103, at 24.

for only the most serious crimes,”<sup>114</sup> which makes any difference from the United States in this regard largely a matter of form.<sup>115</sup>

Three caveats are necessary. First, prosecutorial authority has expanded further in some countries than in others. In England, Finland, and Hungary, for example, prosecutors still submit the majority of the cases that cross their desk for full adjudicative resolution.<sup>116</sup> England’s Crown Prosecution Service has grown “more confident and influential” over the past couple of decades, but it is still very far from exercising the kind of power that American prosecutors—or, increasingly, Continental prosecutors—have over investigations, sentences, and negotiated case-endings.<sup>117</sup> Second, even in countries where prosecutors have gained a measure of *discretion* approaching what they have in the United States, their *power*, in important respects, may remain much more circumscribed, simply because the available sanctions in criminal cases are much less severe.<sup>118</sup> Third, and probably most important, even if the formal authority of some European prosecutors now approaches that of their American counterparts, the scholarly consensus still tends to see American prosecutors as unique—and, usually, as uniquely threatening—both because prosecutorial offices in the United States are thought to lack the internal bureaucratic safeguards of European prosecution services, and because the professional culture of prosecutors in the United States is thought to be less professional and more adversarial than in Europe.<sup>119</sup>

Still, the growing power of European prosecutors, no matter how tamed it is by professional culture and internal oversight, makes it increasingly difficult to see prosecutorial power as the straightforward consequence of America’s commitment to local, democratic government. It also makes it more important than ever to try to understand why prosecutors

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<sup>114</sup> Boyne, *supra* note 107, at 41.

<sup>115</sup> See, e.g., BESIKI KUTATELADZE ET AL., *VERA INST. OF JUSTICE, RACE AND PROSECUTION IN MANHATTAN* 3–4 (2014) (noting that the Manhattan District Attorney’s Office “prosecutes nearly all cases brought by the police, including 94 percent of felonies, 96 percent of misdemeanors, and 89 percent of violations”).

<sup>116</sup> See Boyne, *supra* note 110, at 38.

<sup>117</sup> Lewis, *supra* note 20, at 219, 233.

<sup>118</sup> See, e.g., Erik Luna & Marianne L. Wade, *Introduction* to OVERVIEW AND OUTLOOK—TOWARD COMPARATIVE PROSECUTION STUDIES, in *THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE* 365, 376 (Erik Luna & Marianne L. Wade eds., 2012).

<sup>119</sup> See *id.*; Damaška, *supra* note 112, at 136–38; Pizzi, *supra* note 17, at 1350; Tonry, *supra* note 2, at 7, 17–18. The same is true when comparing American prosecutors with their Japanese counterparts, who are equally if not more powerful, but work more collectively and with far more bureaucratic oversight. See JOHNSON, *supra* note 101, at 119–43.

have been given so much authority and why they seem to keep accumulating more.

### C. PLEA BARGAINING AND CASELOADS

There is an orthodox explanation for the rise of prosecutorial power both in the United States and in Europe, and it is relatively simple. Criminal caseloads have risen, overtaking traditional, trial-based systems of adjudication. That has forced greater and greater reliance on plea bargaining, and the reliance on plea bargaining has in turn expanded the role and the influence of prosecutors. The growing power of prosecutors on both sides of the Atlantic is attributed to “the intense pressure created by overloaded criminal dockets, forcing systems to find means other than full-fledged trials to deal with their ever-increasing caseloads.”<sup>120</sup>

It is easy to see the appeal of this explanation. Plea bargaining *has* been on the rise for over a century in the United States<sup>121</sup> and for the past few decades in Europe.<sup>122</sup> And plea bargains are simpler and quicker than trials, so it seems entirely plausible that burgeoning caseloads lie behind the “triumphal march of consensual procedural forms”<sup>123</sup> in criminal adjudication.

Nonetheless the argument tracing prosecutorial power to surging criminal caseloads has two serious weaknesses. First, it is not clear that plea bargaining has risen in response to rising caseloads, as opposed to vice versa. George Fisher, in his careful history of plea bargaining in the United States, takes it as obvious that rising caseloads increase the pressure on prosecutors to resolve cases before trial, but he also stresses that caseload pressure is neither a necessary nor a sufficient condition for plea bargaining.<sup>124</sup> Prosecutors plea bargain whenever they can, partly to reduce

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<sup>120</sup> Luna & Wade, *supra* note 118, at 365; *see also, e.g.*, Marc L. Miller & Ronald F. Wright, *Reporting for Duty: The Universal Prosecutorial Accountability Puzzle and an Experimental Transparency Alternative*, in *THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE* 392, 400 (Erik Luna & Marianne L. Wade eds., 2012); Boyne, *supra* note 110, at 41; Jehle, *supra* note 103; Lewis, *supra* note 20, at 219; Luna & Wade, *supra* note 19, at 1439–40; Thaman, *supra* note 43, at 156; Weigend, *supra* note 102, at 383, 387; Zila, *supra* note 20, at 249.

<sup>121</sup> *See* FISHER, *supra* note 41.

<sup>122</sup> *See, e.g.*, Boyne, *supra* note 110, at 38; Langer, *supra* note 105, at 35–62; Thaman, *supra* note 43, at 156.

<sup>123</sup> Thaman, *supra* note 43, at 156 (quoting Thomas Weigend, *Die Reform des Strafverfahrens Eu: Europäische und deutsche Tendenzen und Probleme*, [The Reform of Criminal Proceedings: European and German Trends and Problems], in 104 *ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT* 486, 492 (1992)).

<sup>124</sup> *See* FISHER, *supra* note 41, at 44.

their workload and partly to avoid the risk of acquittal.<sup>125</sup> And once plea bargaining begins, it tends to become entrenched by virtue of “its sheer efficiency . . . as a means of clearing cases”; it allows caseloads to rise without commensurate increases in staffing.<sup>126</sup> Because “the cost and availability of services, including the services of judges and prosecutors, affects demand for them,” caseloads may rise to meet the capacity of the adjudication system, in the same way that building more lanes brings more cars onto the road.<sup>127</sup> Traffic engineers call this the “fundamental law of highway congestion”: vehicle-miles traveled increase in direct proportion to space on the road.<sup>128</sup> And “[a]dding court capacity may work like adding highway capacity.”<sup>129</sup>

Second, plea bargaining does not necessarily increase prosecutorial power. It may be the *result* of prosecutorial power, or at least one particular form of prosecutorial discretion, namely the discretion to drop charges. Alternatively, it may be a sign of prosecutorial *weakness*: the inability to

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<sup>125</sup> See, e.g., *id.* at 90, 178; Vorenberg, *supra* note 41, at 1532–33. Accordingly, Vorenberg noted that “[e]ven when the docket is manageable, plea bargaining may still be used freely.” *Id.* at 1533. Studying Connecticut trial courts several decades ago, Malcolm Feeley found no connection between caseloads and rates of plea bargaining. MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 244–67 (paperback ed. 1992). Based on his observations and on a review of English court records from the eighteenth and nineteenth centuries, Feeley concluded that plea bargaining emerged hand-in-hand with the modern, adversarial criminal trial. See generally Malcolm M. Feeley, *Legal Complexity and the Transformation of the Criminal Process: The Origins of Plea Bargaining*, 31 *ISR. L. REV.* 183 (1997).

<sup>126</sup> See FISHER, *supra* note 41, at 176.

<sup>127</sup> Darryl K. Brown, *Reforming the Judge’s Role in Plea Bargaining*, in *The Future of Criminal Law: Working Papers from the 2014 Annual Conference of the Robina Institute of Criminal Law and Criminal Justice*, *supra* note 30, at 75, 84; see also BROWN, *supra* note 21, at 158–64.

<sup>128</sup> Gilles Duranton & Matthew A. Turner, *The Fundamental Law of Road Congestion: Evidence from US Cities*, 101 *AM. ECON. REV.* 2616, 2616 (2011); see also ANTHONY DOWNS, *STUCK IN TRAFFIC: COPING WITH PEAK-HOUR TRAFFIC CONGESTION* 27–31 (1992).

<sup>129</sup> Brown, *supra* note 127, at 83. Rising criminal caseloads are sometimes attributed to rising crime rates. See, e.g., Jehle, *supra* note 103, at 5; Thaman, *supra* note 43, at 156. But the chief measures of crime are notoriously unreliable, and the most common measures—arrests and convictions—are determined in large part by levels of enforcement. Moreover, regardless how they are measured, crime rates are a function of what society chooses to classify as criminal, and that decision, too, can be influenced by the case-processing capacity of the adjudicatory system. See, e.g., BROWN, *supra* note 21, at 158–59. Rates of homicide—a crime with a relatively stable definition and consistently high rates of reporting—have been in long-term decline for centuries both in Europe and in North America, and the periods of increase do not correlate well with rises in plea bargaining or in prosecutorial power. It is worth noting, too, that the western society with arguably the most powerful prosecutors—Japan—has neither high crime rates nor high caseloads. See JOHNSON, *supra* note 101, at 22–24.



proceed to trial with confidence of victory. But the mere fact that cases are resolved consensually does not increase prosecutorial power in any obvious way, any more than a rise in civil settlements boosts the power of plaintiffs.<sup>130</sup> Nor is it immediately clear why prosecutors, as opposed to judges or defense attorneys, should be the “banner-carrier”<sup>131</sup> in the shift away from criminal trials. Fisher argues that plea bargaining triumphed in the United States only because all three principal courtroom actors in the criminal courts—prosecutors, defendants, and judges—found it advantageous.<sup>132</sup>

Occasionally, the growing clout of American prosecutors—or at least the failure of courts and legislators to do anything about it—has been blamed not on plea bargaining or burgeoning caseloads, but on something at once simpler and deeper: the politics of crime.<sup>133</sup> Escalating crime rates, it has sometimes been suggested, created a one-way ratchet for tougher and tougher law enforcement, and giving prosecutors more leeway was just part of the package.<sup>134</sup> But prosecutors have been accumulating power for more than a century; the trend began well before the emergence of the late twentieth century “culture of control.”<sup>135</sup> Furthermore, the waning fear of crime in recent years<sup>136</sup> has done nothing to reverse the growth of prosecutorial power. Over the past decade all kinds of proposals have gained traction for making American criminal justice less punitive and heavy-handed, from restrictions on investigative stops to lower sentences, expanded opportunities for parole, and lower hurdles for clemency.<sup>137</sup> In a small but noteworthy number of recent cases, elected prosecutors made promises that not long ago might have been political suicide: less punitive policies, greater vigilance against wrongful convictions, or more scrutiny of

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<sup>130</sup> See, e.g., Feeley, *supra* note 125, at 221 (suggesting that plea bargaining may have “expanded and not contracted the powers of the accused”); cf. Barkow, *supra* note 2, at 909–10 (arguing that a reduction or elimination of plea bargaining would not significantly reduce prosecutorial power, because “[i]f charging discretion exists, so does the power to adjudicate”).

<sup>131</sup> Thaman, *supra* note 43, at 156.

<sup>132</sup> See FISHER, *supra* note 41, at 110, 178, 198–200.

<sup>133</sup> See, e.g., Barkow, *supra* note 2, at 884–87, 910, 912–13, 921.

<sup>134</sup> See, e.g., SIMON, *supra* note 90, at 33–34, 53–60, 70–74, 102.

<sup>135</sup> DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 1–26 (2001).

<sup>136</sup> See, e.g., FRANKLIN E. ZIMRING, *THE GREAT AMERICAN CRIME DECLINE* (2006); David Cole, *Turning the Corner on Mass Incarceration?*, 9 OHIO ST. J. CRIM. L. 27, 35 (2011).

<sup>137</sup> See, e.g., JOSEPH R. BIDEN, JR. ET AL., *SOLUTIONS: AMERICAN LEADERS SPEAK OUT ON CRIMINAL JUSTICE* (Inimai Chettiar & Michael Waldman eds., 2015); Jennifer Steinhauer, *Bipartisan Push Builds to Relax Sentencing Laws*, N.Y. TIMES, July 29, 2015, at A1.

the police.<sup>138</sup> But neither prosecutorial power nor prosecutorial discretion has been significantly curtailed.

Sometimes the rise of prosecutorial power has been attributed not to plea bargaining and not to the politics of crime but to “the growing complexity” of the criminal justice system.<sup>139</sup> This is said to make it harder for judges to supervise prosecutors,<sup>140</sup> harder for judges rather than prosecutors to supervise the police,<sup>141</sup> and easier for prosecutors to steer cases to the outcomes they think appropriate.<sup>142</sup> The complexity explanation, like the caseloads explanation and the fear-of-crime explanation, is radically incomplete. One wants to know what it is about prosecutors that makes them outcompete judges and other officials in an environment of complexity. But focusing on complexity sends us down the right path.

## II. INTERMEDIATION

If virtually every discussion of prosecutors begins with their power, most soon take note of one or another organizational or conceptual divide that prosecutors seem to bestride. Prosecutors “straddle a line that separates courts from politics.”<sup>143</sup> They operate “in a dual capacity . . . as both attorney and client.”<sup>144</sup> They “ha[ve] always been situated in an (uncomfortable) tug and pull between the partisan advocacy sphere of trial and impartial justice-seeking.”<sup>145</sup> They exercise “both executive and judicial power,”<sup>146</sup> playing “a quasi-magisterial role, somewhere between police officer and judge.”<sup>147</sup> It is rare for more than one of these boundary crossings to be noted in the same argument, and usually the ambiguity of the prosecutor’s role is mentioned only in passing, as a kind of expository

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<sup>138</sup> See David Alan Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 OHIO ST. J. CRIM. L. (forthcoming 2017).

<sup>139</sup> Caianiello, *supra* note 113, at 255; see also Weigend, *supra* note 102, at 384.

<sup>140</sup> See Damaška, *supra* note 112, at 130.

<sup>141</sup> See Weigend, *supra* note 102, at 379.

<sup>142</sup> See *id.* at 384.

<sup>143</sup> Worrall, *supra* note 18, at 4.

<sup>144</sup> *People v. Kelley*, 142 Cal. Rptr. 457, 466 (Ct. App. 1977).

<sup>145</sup> Jennifer E. Laurin, *Quasi-Inquisitorialism: Accounting for Deference in Pretrial Criminal Procedure*, 90 NOTRE DAME L. REV. 783, 823 (2014); see also, e.g., *Cheney v. United States Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 386 (2004) (noting that a prosecutor is obligated “not only to win and zealously to advocate for his client but also to serve the cause of justice”).

<sup>146</sup> Barkow, *supra* note 36, at 1048.

<sup>147</sup> JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY* 193 (Christine Cardone ed., 3d ed. 1994).

scaffolding, the way a guidebook might describe some travel destination as a “land of many contrasts.”<sup>148</sup> On other occasions the category-defying nature of prosecutors is stressed as a way of underscoring how poorly they fit within the legal order they are supposed to serve.<sup>149</sup>

I want to suggest something different here: that boundary-blurring is central rather than incidental to the prosecutor’s role and a critical part of the explanation for the growth of prosecutorial power. I will start by discussing three particularly important divides that prosecutors bridge: between adversarial and inquisitorial justice, between the police and the courts, and between law and discretion. The first and third of these divides are conceptual and the second is organizational, but each will help to demonstrate, I hope, the extent to which prosecutors operate as “mediating figures,”<sup>150</sup> akin in some ways to the “ritual specialists”<sup>151</sup> and other “culture-brokers”<sup>152</sup> who, anthropologists tell us, “negotiate different social interests” by “tread[ing] across natural and cultural boundaries.”<sup>153</sup> After discussing the ways in which prosecutors soften the adversarial/inquisitorial divide, bridge the gap between law enforcement and adjudication, and straddle the line between law and discretion, I will try to specify the functions that prosecutors serve by blurring these boundaries, and the ways in which the mediating nature of the prosecutor’s role can help to explain the rise of prosecutorial power. The growing complexity of criminal justice systems will be part of that explanation.

#### A. ADVERSARIAL AND INQUISITORIAL JUSTICE

It is hard to think of a distinction more fundamental in criminal procedure, more venerable, or more frequently invoked, than the divide between adversarial and inquisitorial forms of justice. American lawyers, in particular, tend to treat their system’s commitment to adversarial justice—and its rejection of the inquisitorial system—as its central defining feature; certainly the lawyers who sit on the Supreme Court of the United

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<sup>148</sup> *But cf.* JACOBY, *supra* note 17, at xv (remarking that “[t]he prosecutor has a vague image in the public eye, and much of this arises because the prosecutor’s own self-image is fuzzy”).

<sup>149</sup> *See, e.g.*, Barkow, *supra* note 36, at 1048; Caianiello, *supra* note 113, at 266; Luna, *supra* note 37, at 57.

<sup>150</sup> Susan J. Rasmussen, *Only Women Know Trees: Medicine Women and the Role of Herbal Healing in Tuareg Culture*, 54 J. ANTHROPOLOGICAL RES. 147, 147 (1998).

<sup>151</sup> *Id.*

<sup>152</sup> Susan J. Rasmussen, *When the Field Space Comes to the Home Space: New Constructions of Ethnographic Knowledge in a New African Diaspora*, 76 ANTHROPOLOGICAL Q. 7, 7 (2003).

<sup>153</sup> Rasmussen, *supra* note 150, at 147; *see also id.* at 154.

States often think this way.<sup>154</sup> Europeans sometimes identify their systems as inquisitorial; more often they see them as combining elements of both the adversarial and inquisitorial traditions.<sup>155</sup> Either way, though, European discussions of criminal procedure also tend to be shaped by the distinction between adversarial and inquisitorial institutions, although not always so strongly as in the United States.

While it is notoriously difficult to pin down the differences between adversarial and inquisitorial justice—there is a fair amount of vagueness in the way the terms are defined<sup>156</sup>—the core distinction, it is generally agreed, is between forms of adjudication that rely on a contest between two adversaries and those that depend instead on an official, impartial inquiry.<sup>157</sup> Prosecutors are conspicuously difficult to categorize within this scheme. The prosecutor is a kind of “impartial party,”<sup>158</sup> with a “dual role as an advocate for the government and as an administrator of justice.”<sup>159</sup> It has long been “customary to note that while prosecutors act as the government’s representative in the adversary system, they are expected to be more (or is it less?) than an adversary.”<sup>160</sup> One consequence of this in-between status is that prosecutors are only loosely regulated by the rules of professional conduct promulgated by bar associations: “[f]ew professional conduct provisions specifically target their work, and those provisions are mostly undemanding,” and “[c]ourts often interpret the generally applicable

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<sup>154</sup> See David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1636–38 (2009).

<sup>155</sup> See *id.* at 1640; MALGORZATA WĄSEK-WIADEREK, THE PRINCIPLE OF “EQUALITY OF ARMS” IN CRIMINAL PROCEDURE UNDER ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS FUNCTIONS IN CRIMINAL JUSTICE OF SELECTED EUROPEAN COUNTRIES: A COMPARATIVE VIEW 48 (2000).

<sup>156</sup> See Sklansky, *supra* note 154, at 1639, 1680–83.

<sup>157</sup> See MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS 3 (1986); Langer, *supra* note 105, at 17.

<sup>158</sup> Caianiello, *supra* note 113, at 251 (quoting Pietro Calamandrei).

<sup>159</sup> Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 51–52 (1998); see also, e.g., MODEL RULES OF PROF’L CONDUCT r. 3.8 cmt. (2007) (noting that “[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate”); ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION § 3-1.2(b) (2015) (describing the prosecutor as “an administrator of justice, an advocate, and an officer of the court”); Eric S. Fish, *Prosecutorial Constitutionalism*, S. CAL. L. REV. (forthcoming 2016) (noting that “[p]rosecutors in the American system play an odd double role” as “partisan advocates” and as “neutral implementer[s] of constitutional protections”).

<sup>160</sup> Vorenberg, *supra* note 41, at 1557; cf. NAT’L PROSECUTION STANDARDS, pt. 1 cmt. (Nat’l Dist. Attorneys Ass’n 2009) (noting that “[a] prosecutor is not a mere advocate”); Miller & Wright, *supra* note 91, at 178 (describing the prosecutor as “something more than a litigant who operates ‘in the shadow of the law’”).

rules of professional conduct as less restrictively applied to prosecutors than to other lawyers.”<sup>161</sup> Another consequence—more to the present point—is that prosecutors “soften the distinction” between adversarial and inquisitorial forms of justice<sup>162</sup>; the more prominent a role the prosecutor plays in a system of criminal adjudication, the more difficult it is to categorize that system as clearly adversarial or clearly inquisitorial. Prosecutors therefore complicate the self-conception of legal systems on both sides of the Atlantic.

In adversarial systems, the prosecutor often appears as an anomaly: “an inquisitorial figure in adversarial proceedings.”<sup>163</sup> This is notably true in the United States, where prosecutors, at least in the pretrial stage, are often described as performing an “essentially . . . inquisitorial” role<sup>164</sup>—and frequently faulted for performing it with a mindset that is too adversarial.<sup>165</sup>

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<sup>161</sup> Bruce A. Green, *Prosecutors and Professional Regulation*, 25 GEO. J. LEGAL ETHICS 873, 873–74 (2012); see also, e.g., DAVIS, *supra* note 8, at 143–54. The only provision of the Model Rules of Professional Conduct directly addressing prosecutors, Rule 3.8, says nothing about the proper exercise of charging discretion, aside from suggesting that charges should satisfy the undemanding standard of “probable cause.” Nor does the rule discuss prosecutors’ “conduct before the grand jury, relations with the police and other law enforcement officers, [or] relations with victims and government witnesses.” DAVIS, *supra* note 8, at 147. Some of these latter matters are addressed in separate standards the ABA has issued for prosecutors, see PROSECUTION FUNCTION, *supra* note 13, and in guidelines developed by the National District Attorneys Association, see NATIONAL PROSECUTION STANDARDS, *supra* note 13, but both sets of standards are non-binding and largely anodyne. On the critical question of charging discretion, for example, the ABA standards prohibit filing charges that are based on “partisan political pressure or professional ambition or improper personal considerations,” or that cannot “reasonably . . . be substantiated by admissible evidence at trial.” Other than that, pretty much anything is fair game. See CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION, *supra* note 13, at standard 3-4.4. The NDAA’s standards are more or less similar, see NATIONAL PROSECUTION STANDARDS, *supra* note 13, at §§ 4-1.3 & 4-1.4, as are the “Principles of Federal Prosecution” promulgated by the United States Department of Justice, see UNITED STATES ATTORNEYS’ MANUAL § 9-27.200–.760 (U.S. DEP’T OF JUSTICE 1997). The Principles of Federal Prosecution do take up the controversial and hugely important question of whether and in what way prosecutors should take potential penalties into account in selecting charges, but what they on that subject is so convoluted and contradictory it offers little genuine guidance. See *id.* § 9-27.300; David A. Sklansky, *Starr, Singleton, and the Prosecutor’s Role*, 26 FORDHAM URB. L.J. 509, 533–36 (1999).

<sup>162</sup> Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 83 FORDHAM L. REV. 1673, 1674 (2015).

<sup>163</sup> Caianiello, *supra* note 113, at 251 (describing Italian prosecutors); see also, e.g., Bibas, *supra* note 37, at 994 (describing American prosecutors as “not mere partisan advocates, but officers of the court”).

<sup>164</sup> Lynch, *supra* note 162, at 1674; see also, e.g., *McNeil v. Wisconsin*, 501 U.S. 171, 181 n.2 (1991); Laurin, *supra* note 145, at 811.

<sup>165</sup> See, e.g., DAVIS, *supra* note 8; Tonry, *supra* note 2. Increasingly, American

But at other times, American prosecutors are criticized for being *insufficiently* adversarial in their handling of investigations: this was the gravamen of many of the complaints in 2014 after prosecutors in Missouri and New York failed to secure indictments of white police officers who had killed unarmed black men.<sup>166</sup> In systems within the inquisitorial tradition, meanwhile, prosecutors are often understood as advocates, at least at the trial stage. How else to make sense of the longstanding European commitment to “equality of arms” in criminal procedure,<sup>167</sup> or the repeated insistence by the European Court of Human Rights on a sharp “separation of the duties of accusation and adjudication,”<sup>168</sup> prohibiting an official from acting both as prosecutor and judge in the same case?<sup>169</sup> The European prosecutor is often described as, in theory, “a detached ‘guardian of the law’”<sup>170</sup>—a “judicial” officer “operating under the same professional obligations of balance and fairness . . . that apply to judges.”<sup>171</sup> The reality, though—repeatedly acknowledged by European scholars—is that once an accusation is filed, the European prosecutor, like his or her American counterpart, “is cast in the role of the accuser, seeking to persuade the court of the defendant’s guilt rather than to neutrally present evidence in a detached fashion.”<sup>172</sup> The fairness of adjudicatory proceedings, a leading scholar of continental criminal proceeding has stressed, “is not as such endangered by a partial prosecutor. One might be tempted to argue to the contrary.”<sup>173</sup>

## B. POLICE AND COURTS

One reason it is plausible to see prosecutors either as adversarial or

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prosecutors are also taking on an inquisitorial role at the back end of the adjudicatory process, forming “conviction integrity units” to assess claims of innocence from convicted defendants. See, e.g., Dana Carver Boehm, *The New Prosecutor’s Dilemma: Prosecutorial Ethics and the Evaluation of Actual Innocence*, 2014 UTAH L. REV. 613, 627–45; Laurie L. Levenson, *The Problem With Cynical Prosecutor’s Syndrome: Rethinking a Prosecutor’s Role in Post-Conviction Cases*, 20 BERKELEY J. CRIM. L. 335, 369–70, 385 (2015).

<sup>166</sup> See *supra* the discussion accompanying note 9.

<sup>167</sup> See JOHN D. JACKSON & SARAH J. SUMMERS, *THE INTERNATIONALISATION OF CRIMINAL EVIDENCE: BEYOND THE COMMON LAW AND CIVIL LAW TRADITIONS* 83 (2012); WĄSEK-WIADEREK, *supra* note 155, at 23, 48, 50; Jiri Toman, *The Role of the Public Prosecution Office in the Criminal Field*, in *THE ROLE OF THE PUBLIC PROSECUTION OFFICE IN A DEMOCRATIC SOCIETY* 123, 128, 132–33 (1997).

<sup>168</sup> STEFAN TRECHSEL, *HUMAN RIGHTS IN CRIMINAL PROCEEDINGS* 67 (2005).

<sup>169</sup> See *id.* at 100–02.

<sup>170</sup> Weigend, *supra* note 102, at 382.

<sup>171</sup> Pizzi, *supra* note 17, at 1352.

<sup>172</sup> Weigend, *supra* note 102, at 382.

<sup>173</sup> TRECHSEL, *supra* note 168, at 175.

inquisitorial figures is that they “provide the link between police investigation and courtroom adjudication”<sup>174</sup>—between “zealous officers . . . engaged in the often competitive enterprise of ferreting out crime”<sup>175</sup> and “neutral and detached”<sup>176</sup> judicial personnel. Prosecutors are the “gatekeepers”<sup>177</sup> of the criminal justice system; they oversee “the transition from the investigative phase to adjudication in court,”<sup>178</sup> playing “a quasi-magisterial role, somewhere between police officer and judge.”<sup>179</sup> They have a foot in each camp. On the one hand, they work closely with law enforcement officers and often see themselves as investigators and crime fighters,<sup>180</sup> on the other hand, like judges they are trained in the law and are “officers of the court”<sup>181</sup>; in some civil law systems, they share the same occupational status as judges.<sup>182</sup>

Because they pass back and forth between these two worlds, prosecutors are relied upon both to bring the police within the rule of law and to make the rule of law compatible with the realities of policing. Prosecutors present and defend the work of the police in court, but they also explain and legitimize the law to the police, and—in varying degrees—supervise the police to ensure they comply with the law.<sup>183</sup> They are envoys—“culture-brokers”<sup>184</sup>—between the realm of the judges and the

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<sup>174</sup> Erik Luna and Marianne L. Wade, *Introduction to The Prosecutor as Policy Maker, Case Manager, and Investigator*, in *THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE* 1, 1 (Erik Luna & Marianne L. Wade eds., 2012).

<sup>175</sup> *Johnson v. United States*, 333 U.S. 10, 13–14 (1948).

<sup>176</sup> *Id.* at 14.

<sup>177</sup> *E.g.*, Caianiello, *supra* note 113, at 256; Richman, *supra* note 54, at 758.

<sup>178</sup> Weigend, *supra* note 113, at 377.

<sup>179</sup> SKOLNICK, *supra* note 147, at 193; *see also* JACOBY, *supra* note 17, at xv, xxii; Caianiello, *supra* note 113, at 256; Weigend, *supra* note 102, at 377.

<sup>180</sup> *See, e.g.*, JACOBY, *supra* note 17, at xxii.

<sup>181</sup> *E.g.*, Bibas, *supra* note 37, at 994.

<sup>182</sup> *See, e.g.*, David Nelken, *Can Prosecutors Be Too Independent? An Italian Case Study*, in *EUROPEAN PENOLOGY* 249, 250 (Tom Daems et al. eds., 2013); Tonry, *supra* note 2, at 14.

<sup>183</sup> *See* SKOLNICK, *supra* note 147, at 196, 228; Russell M. Gold, *Beyond the Judicial Fourth Amendment: The Prosecutor’s Role*, 47 U.C. DAVIS L. REV. 1591, 1596, 1641 (2014); Laurin, *supra* note 145, at 818; Richman, *supra* note 54, at 806–13; *cf.* JOHNSON, *supra* note 101, at 58–61, 119, 140 (noting the gatekeeping function of Japanese prosecutors); Brown, *supra* note 23 (quoting the argument of Steve Zeidman, director of the Criminal Defense Clinic at CUNY School of Law, that “[p]rosecutors are supposed to be the gatekeepers to the criminal-justice system” and “should maintain a healthy distance from the police so they can evaluate the constitutionality and appropriateness of what the police are doing”); Jehle, *supra* note 103, at 20 (arguing that European prosecutors should supervise criminal investigations more closely in order to ensure compliance with the rule of law).

<sup>184</sup> *See* Rasmussen, *supra* note 152 and accompanying text.

domain of law enforcement, between the courtroom and the squad room.

Prosecutors thus mediate between courts and police in at least two different ways. First, the prosecutor's duties contain elements both of law enforcement and adjudication: on the one hand the prosecutor helps to direct police operations and works to secure criminal convictions; on the other hand the prosecutor decides which cases to move forward and which cases to drop, and—more and more, in an era of global plea bargaining—the prosecutor “has become a ‘judge before the judge,’” determining “whether a sanction will be imposed and how severe or lenient that sanction will be.”<sup>185</sup> Second, because their work requires them to travel back and forth between the world of the policing and the world of the courtroom, talking on a daily basis with officers and with judges, they serve to explain the occupants of each world to those of the other, bridging a cultural divide and “negotiat[ing] different social interests.”<sup>186</sup> They are translators and organizational intermediaries.

### C. LAW AND DISCRETION

In addition to blurring the distinction between adversarial and inquisitorial forms of justice, and bridging the gap between the police and the courts, prosecutors straddle the divide between law and discretion. Here is former Attorney General Eric Holder, explaining in 2009 how the United States Department of Justice would make the politically explosive decision whether to prosecute officials of the previous Administration who had authorized or carried out torture: “We are going to follow the evidence, follow the law and take that where it leads. No one is above the law.”<sup>187</sup> That could have been virtually any prosecutor discussing almost any case; prosecutors routinely wrap themselves in the mantle of the law. But the American criminal justice system also relies heavily and explicitly on the prosecutor's leeway to forego enforcement: “[t]he rigors of the penal system are . . . mitigated by the responsible exercise of prosecutorial discretion.”<sup>188</sup> “Although we expect prosecutors to follow the law, nobody believes that prosecutors in the United States *only* follow the law—discretionary application of criminal law is central to the prosecutor's role.”<sup>189</sup> Civil law countries that follow the “legality” principle *do* expect

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<sup>185</sup> Weigend, *supra* note 102, at 378; *see also* Jehle, *supra* note 103, at 6; Luna & Wade, *supra* note 19, at 1427.

<sup>186</sup> Rasmussen, *supra* note 150, at 147.

<sup>187</sup> Terry Frieden, ‘No One is Above the Law,’ *Holder Says of Torture Inquiry*, CNN (Apr. 22, 2009, 06:46 PM), <http://www.cnn.com/2009/POLITICS/04/22/torture.prosecution>.

<sup>188</sup> 542 U.S. 367, 386 (2004); *see also, e.g.*, Pizzi, *supra* note 17, at 1340.

<sup>189</sup> Wright & Levine, *supra* note 37, at 1071.



prosecutors to “only follow the law,” at least in theory, but there are fewer of those countries today.<sup>190</sup> And even the holdouts, it is widely acknowledged, riddle the legality principle with exceptions, some official and others unwritten.<sup>191</sup>

Every government functionary in every criminal justice system navigates between law and discretion, of course. But police work involves vastly more discretion than law, and pretty much the opposite is true of judging. Police discretion is hemmed in only at the margins by legal constraints<sup>192</sup>; judicial discretion, by and large, operates in the interstices of the law. Prosecutors, midway between the world of law enforcement and the world of the courts, move more fluidly between law and discretion than either police officers or judges. No police officer today could ever claim simply to be following the law and expect to be taken seriously, and few judges would assert the authority, let alone the responsibility, to decline to enforce a criminal law simply because it seems, in the circumstances, inappropriate.

Prosecutors, in contrast, constantly mediate between law and discretion; they are expected to “be accountable both to the people and to their laws.”<sup>193</sup> Mixing law and discretion is a deep and longstanding feature of their job, especially in the United States. Prosecutors became salaried workers in the nineteenth century, Nicholas Parrillo has shown, precisely “so that they would have the financial independence to exercise prosecutorial discretion”; legislators wanted prosecutors to ““sand off” the hard edges of modern positivist legislation (which was inevitably broad and rigid) and thereby vest it with legitimacy.”<sup>194</sup> By mediating between law and discretion, prosecutors thus also blurred the boundary between the lawful and the prohibited.

In Parrillo’s account, prosecutorial discretion was critical in securing acceptance of “alien imposition”: directives running contrary to “shared social expectations,” issued by a “sovereign external to the community.”<sup>195</sup> He takes laws of this kind to be “largely synonymous with modernity,” and

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<sup>190</sup> See, e.g., Weigend, *supra* note 102, at 383.

<sup>191</sup> See generally *supra* notes 112–115 and accompanying text.

<sup>192</sup> See, e.g., Egon Bittner, *The Police on Skid-Row: A Study of Peace Keeping*, 5 AM. SOC. REV. 699 (1967); Ryken Grattet & Valerie Jenness, *The Reconstitution of Law in Local Settings: Agency Discretion, Ambiguity, and a Surplus of Law in the Policing of Hate Crime*, 39 LAW & SOC’Y REV. 893, 899–900 (2005); David A. Sklansky, *Killer Seatbelts and Criminal Procedure*, 119 HARV. L. REV. F. 56, 58–59 (2006).

<sup>193</sup> Miller & Wright, *supra* note 120, at 392.

<sup>194</sup> NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940*, at 258 (2013).

<sup>195</sup> *Id.* at 24–25.

he contrasts them with “familiar imposition,” an older form of governance in which “the enforcer, the enforcee, and the norm being imposed all had reference to a single face-to-face community.”<sup>196</sup> This makes prosecutors intermediaries in still another sense as well: they served—and continue to serve—to reconcile the populace with a distant sovereign. They do that in part by tempering law with discretion and softening the edges between the lawful and the prohibited. They can accomplish *those* tasks because they bridge the world of the police and the world of the courts—which also helps them blur the boundary between adversarial and inquisitorial forms of justice.

#### D. FLEXIBILITY AND COMPLEXITY.

Why would officials who are first and foremost mediating figures come to dominate criminal justice, first in the United States and more recently in Europe? Perhaps because modern criminal justice systems have come to rely, more and more, on intermediation. The boundary-blurring performed by prosecutors provides the legal order with three different kinds of flexibility: ideological, institutional, and operational.

By *ideological flexibility*, I mean the ability of a system to fudge on its commitments. The story that Parrillo tells, about prosecutors legitimating alien imposition by blunting the edges of positivist prohibitions, is a story of prosecutors letting the legal system equivocate: letting it prohibit conduct without actually penalizing it, letting it insist on a “government of law not of men” without requiring rigid enforcement of the laws.<sup>197</sup> More recently, prosecutorial discretion has allowed legislators to act “tough on crime” without worrying much about the consequences: prosecutors have been trusted to ensure that draconian penalties are imposed only on those who truly deserve them.<sup>198</sup> Blurring the boundary between adversarial and inquisitorial forms of justice facilitates a different kind of ideological

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<sup>196</sup> *Id.*

<sup>197</sup> See generally PARRILLO, *supra* note 194.

<sup>198</sup> See, e.g., Stephanos Bibas, *The Real-World Shift in Criminal Procedure*, 93 J. CRIM. L. & CRIMINOLOGY 789, 809–10 (2003) (book review); Harold Edgar & Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929, 940–41 (1973); Judith Ianelli, *Lessening the Mens Rea Requirement for Hazardous Waste Violations*, 16 VT. L. REV. 419, 423 (1991); Lydia Pallas Loren, *Digitization, Commodification, Criminalization: The Evolution of Criminal Copyright Infringement and the Importance of the Willfulness Requirement*, 77 WASH. U. L.Q. 835, 870 (1999); Barkow, *supra* note 2, at 73–81; Pizzi, *supra* note 17, at 1340–41; cf. Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1101–02 (1952) (observing that prosecutorial discretion ameliorates “harsh or anarchical penalty provisions” on “a large though incalculable scale”).

flexibility: it allows a system to declare itself proudly “adversarial” or “inquisitorial” without living with all the consequences.

Prosecutors provide *institutional flexibility* by bridging courts and police, allowing the two organizations to function separately but in a coordinated manner. The separation of functions between the police and the courts is itself, in part, a strategy for reconciling antagonistic allegiances—specifically, the dueling commitments to what Herbert Packard called the “crime control model” and “due process model” of criminal justice.<sup>199</sup> We want to be safe from crime, but we also want criminal suspects and criminal defendants to be treated fairly—the way we ourselves would wish to be treated were we suspected or accused of breaking the law. We deal with this tension in part by division of responsibility: the police are charged with controlling crime, and the courts with ensuring due process. Each agency pursues its separate mission, so that neither set of values gets lost.<sup>200</sup>

That is the theory. In practice, judges often care a great deal about crime control, and there are police officers who think a lot about fairness. More to the point, the mounting complexity of criminal justice work makes it progressively harder to maintain this separation of functions and still have a system that works. Judges know less and less about what the police work is like, and the police have a more and more attenuated sense of the intellectual and professional world of judges.<sup>201</sup> Mutual incomprehension makes it increasingly hard for judges to oversee police work unilaterally, and for the police, on their own, to ensure that their cases will hold up in court, or even enter the system. Each side relies on envoys to the other, and the envoys are prosecutors. Prosecutors make it possible for the courts and the police to remain separate agencies with divergent missions, and they therefore make it possible for the system to maintain its concurrent commitments to crime control and to due process. The organizational flexibility provided by prosecutors thus itself facilitates a certain kind of ideological flexibility.

By blurring boundaries, prosecutors also provide the criminal justice system with *operational flexibility*: the ability to change practices on the fly in response to new challenges. Because prosecutors stand at the gateway to the criminal justice system, mediating between the police and courts, and because they are both agents of the law and vested with wide discretion, they are able to redirect the energies of the criminal justice system, to

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<sup>199</sup> Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 5–6 (1964).

<sup>200</sup> See, e.g., SKLANSKY, *supra* note 34, at 44–48.

<sup>201</sup> See, e.g., SKOLNICK, *supra* note 147.

recalibrate its severity, and to change its tactics. They can make these changes rapidly, in individual cases and at the wholesale level. Prosecutors can tailor charges, plea offers, and sentencing recommendations to particular defendants. They can go further and offer to defer criminal prosecution altogether if an individual or an organization agrees to . . . well, pretty much to whatever terms the prosecutor thinks appropriate. By aggregating many such decisions, or by adopting explicit policies to guide their discretion, prosecutors can steer the entire criminal justice system in new directions. There is evidence, for example, that the bulk of the sharp increase in levels of incarceration in the United States over the past several decades has been caused by prosecutors exercising their discretion to file more charges.<sup>202</sup> Similarly, prosecutors have been responsible for the decision to suspend enforcement, for all practical purposes, of federal marijuana laws in states that repealed their own prohibitions of marijuana use.<sup>203</sup> The nationwide ramp-up in charging appears to have been the result of many retail-level decisions, whereas the change in federal marijuana enforcement policy took the form of explicit guidelines adopted by the Department of Justice. In each case, though, prosecutors were able to redirect the operations of the criminal justice system through the exercise of their discretion.

When prosecutors are lauded for taking a “data-driven,”<sup>204</sup> “Moneyball approach”<sup>205</sup> to crime—in large part through the calculated use of what used to be called pretextual prosecutions—they are being praised for, among other things, using their flexibility. They are being applauded for breaking free from ideological constraints, rigid institutional boundaries, and operational inertia. The very substitution of terms like “intelligence-led prosecution” for the older, more pejorative label of “pretextual prosecution” is a sign of the broad changes in legal culture that have made the boundary-blurring carried out by prosecutors increasingly valuable, or at least increasingly valued. Another sign is the growing tendency for prosecutors, with all their intermediating abilities, to be held up as the models for new, more flexible approaches to governance outside the criminal context. Thus, for example, the Obama Administration broke the logjam over immigration reform through a series of bureaucratic changes it defended as exercises of “prosecutorial discretion” in immigration enforcement.<sup>206</sup> Critics

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<sup>202</sup> See Pfaff, *supra* note 1, at 267.

<sup>203</sup> See Memorandum from James M. Cole, Deputy Attorney Gen., U.S. Dep’t of Justice, to United States Attorneys (Aug. 29, 2013).

<sup>204</sup> Mac Donald, *supra* note 24.

<sup>205</sup> Brown, *supra* note 23.

<sup>206</sup> See Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*

complained that the new immigration rules departed from how prosecutors actually operated, but—tellingly—almost no one in this debate suggested that prosecutorial discretion was itself a bad thing, something to be avoided rather than emulated.<sup>207</sup>

It is difficult to pinpoint the social changes that have put a growing premium on boundary-blurring in the criminal process and in the legal system more broadly, but the explanation may well have to do with rising legal complexity, and it almost certainly has to do with an increasing preference for flexibility over institutional rigidity and hard-and-fast commitments. As the sheer volume of legal rules and legal institutions has grown, as legal rules have become progressively easier to access, and as mechanisms have proliferated for invoking and enforcing legal rules, the play in the joints previously provided by gaps in information and severe limitations on the opportunities for appeal has likely diminished; rigid formalism is harder to live with the more seriously and thoroughly it is implemented.<sup>208</sup> That may be why the new enthusiasm for pretextual prosecutions is part of a broader shift toward a preference for ad hoc instrumentalism in the exercise of government power. Regardless of underlying cause, though, the broader shift seems clear.<sup>209</sup> And prosecutors are ad hoc instrumentalists par excellence.

Similarly, Anne O’Connell has pointed out the regulatory flexibility provided by “boundary organizations”—government agencies straddling the divides between public and private; between the federal government and states, foreign nations, and Indian tribes; and between the legislative, judicial, and executive branches.<sup>210</sup> Her account strongly suggests (although she does not explicitly claim) that the organizations she describes have proliferated over the past century. Prosecutors’ offices muddy the separation of executive from judicial power, so they fit snugly within O’Connell’s definition of boundary organizations—maybe the only category within which they fit snugly. But prosecutors also muddy other

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*Redux*, 125 YALE L.J. 104, 104 (2015); Janet Napolitano, *The Truth About Dreamers*, N.Y. TIMES, Nov. 30, 2016, at A23.

<sup>207</sup> See Cox & Rodriguez, *supra* note 206.

<sup>208</sup> See, e.g., David Alan Sklansky, *Hearsay’s Last Hurrah*, 2009 SUP. CT. REV. 1, 5–6 (2009).

<sup>209</sup> See Sklansky, *supra* note 59, at 163–208; cf. David Thacher, *Perils of Value Neutrality*, 44 RES. SOC. ORGS. 317 (2015) (describing increasing scholarly “reticence about the moral limits of the order maintenance function” of the police). Thacher observes that “[y]ears ago academic students of the police . . . tried to clarify the nature of the order maintenance authority, but today police are increasingly left to wing it.” *Id.* at 317–18.

<sup>210</sup> Anne Joseph O’Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841, 852–74 (2014).

important divides, as I have tried to show. O’Connell focuses on agencies that have “migrated” toward a boundary or were placed by Congress at a boundary so that they could carry out their mission more effectively.<sup>211</sup> For prosecutors, though, we might say that boundary-crossing *is* the mission.

Ad hoc instrumentalism and boundary organizations, in turn, are parts of a still larger movement toward greater flexibility and fluidity in governance, a movement that includes the broad categories of negotiated rulemaking,<sup>212</sup> “unorthodox lawmaking,”<sup>213</sup> and—most capacious of all—“new governance.”<sup>214</sup> Each of these developments has been celebrated as a way to respond to greater legal complexity, and each does so in part by evading or transcending traditional jurisprudential taxonomies. The “blurring of boundaries pervades new governance,” for example, and has been plausibly called one of its “signature strengths.”<sup>215</sup> Again, however, prosecutors go one better. New governance is increasingly faulted for leaving no space for “adversarial legalism,”<sup>216</sup> whereas the binaries bridged by prosecutors, as we have seen, include the divide between adversarialism and rival approaches to criminal justice.

### III. REFORM

One reason why scholarship on prosecutors, at least in the United States, has tended to be pragmatic and reformist is that American prosecutorial agencies have long seemed, to most scholars, in urgent need of reform. Since the mid-twentieth century if not earlier, “[t]he American prosecutor has been under nearly constant attack in the criminal procedure literature.”<sup>217</sup> The core concern is that prosecutors have too much power and too much discretion, that they are anomalies in a scheme of limited

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<sup>211</sup> See *id.* at 871–73, 875–88.

<sup>212</sup> See, e.g., Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997).

<sup>213</sup> See generally BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS (3d ed. 1997); Abbe R. Gluck et al., *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789 (2015).

<sup>214</sup> See, e.g., Orly Lobel, *New Governance as Regulatory Governance*, in THE OXFORD HANDBOOK OF GOVERNANCE 65 (David Levi-Four ed., 2012); Douglas NeJaime, *When New Governance Fails*, 70 OHIO ST. L.J. 323 (2009); Jason M. Solomon, *Law and Governance in the 21st Century Regulatory State*, 86 TEX. L. REV. 819 (2008) (book review).

<sup>215</sup> Jason M. Solomon, *New Governance, Preemptive Self-Regulation, and the Blurring of Boundaries in Regulatory Theory and Practice*, 2010 WIS. L. REV. 591, 593–94 (2010).

<sup>216</sup> NeJaime, *supra* note 214, at 338; see also, e.g., Lisa T. Alexander, *Part III: Reflections on Success and Failure in New Governance and the Role of the Lawyer*, 2010 WIS. L. REV. 737, 743 (2010).

<sup>217</sup> Pizzi, *supra* note 17, at 1329.

government, separation of powers, and rule of law. If prosecutors are first and foremost mediating figures, though, if they have accumulated power precisely because of their unrivalled ability to blur boundaries within criminal justice, then reforming prosecutors' offices is trickier business than is often suggested, or at least a different kind of business. Many, if not most, of the proposals for taming prosecutorial power aim to bring prosecutors' offices in line with other, more traditional government agencies by clarifying and narrowing the prosecutor's job: limiting the prosecutor's discretion,<sup>218</sup> or making the prosecutor more clearly adversarial<sup>219</sup> or more explicitly inquisitorial,<sup>220</sup> or having judges oversee prosecutors the way judges oversee police officers,<sup>221</sup> or making prosecutors more like judges,<sup>222</sup> or separating functions within a prosecutors' office.<sup>223</sup> These are all efforts to stop prosecutors from blurring boundaries so much. They may be sensible proposals, but they push against a strong current. Prosecutors blur boundaries not because they have grabbed power,<sup>224</sup> and not because the ambiguity of their role has escaped notice, but because boundary blurring has been what we have wanted prosecutors to do—and, increasingly, what we want other officials to do as well.

Whether we *should* want prosecutors to intermediate as much as they do is a different question. Boundary blurring and the flexibility that it facilitates have serious costs, and they can take a particular toll on transparency and accountability. This is true of “unorthodox lawmaking” and its analogs in the rulemaking context (including negotiated rulemaking), which “bypass the hurdles of transparency” imposed by traditional legislative and regulatory processes and can “obfuscate accountability.”<sup>225</sup> It is true of new governance: that is why discussions of new governance spend so much time designing and assessing new forms of accountability.<sup>226</sup> It is plainly true of prosecutors, as well. Many if not most

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<sup>218</sup> See, e.g., Luna, *supra* note 37; Pizzi, *supra* note 41; Vorenberg, *supra* note 41.

<sup>219</sup> See, e.g., Melanie D. Wilson, *Anti-Justice*, 81 TENN. L. REV. 699, 709–10 (2014).

<sup>220</sup> See, e.g., Laurin, *supra* note 145.

<sup>221</sup> See, e.g., Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii (2015).

<sup>222</sup> See, e.g., Tonry, *supra* note 2.

<sup>223</sup> See, e.g., H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695, 1713–18 (2000); Barkow, *supra* note 2; Boehm, *supra* note 165.

<sup>224</sup> Cf., e.g., Barkow, *supra* note 2, at 871, 887.

<sup>225</sup> Gluck et al., *supra* note 213, at 1796, 1841.

<sup>226</sup> See, e.g., Wendy A. Bach, *Governance, Accountability, and the New Poverty Agenda*, 2010 WIS. L. REV. 239, 262–64 (2010); Laura A. Dickinson, *Privatization and*

of the concerns raised about prosecutors pertain to the “accountability deficit” under which they operate,<sup>227</sup> and that deficit comes, in significant part, from the mediating nature of the prosecutor’s role. But the connection between accountability concerns and prosecutorial boundary-blurring has not always been recognized.

In theory, American prosecutors operate under two separate forms of oversight: as elected officials, they answer to the public, and as legal officers, they are accountable to the law.<sup>228</sup> Because prosecutors “straddle a line that separates courts from politics,”<sup>229</sup> they are subject to “a complex set of constraints.”<sup>230</sup> In practice, though, neither half of this set of constraints seems to operate effectively. Prosecutors seem accountable neither to the electorate nor to the legal system, in part exactly because of the hybrid nature of their authority. The “locally elected status” of American prosecutors gives legitimacy to their broad, virtually unreviewable discretion,<sup>231</sup> while the technical nature of their work helps to make public assessments of their performance superficial and often perfunctory: prosecutors who seek reelection are rarely unsuccessful.<sup>232</sup> In a similar way, prosecutors escape serious regulation through rules of professional discipline, because prosecutors seem “fundamentally different from . . . lawyers who represent clients,”<sup>233</sup> and they escape close supervision by the judiciary in part because they are advocates, not judges, and “amenab[le] to professional discipline” by the bar.<sup>234</sup>

The American legal tradition has often sought to constrain power not through “accountability,” either to the public or to the law, but instead

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*Accountability*, 7 ANN. REV. L. & SOC. SCI. 101, 106 (2011); Imelda Maher, *Economic Governance: Hybridity, Accountability and Control*, 13 COLUM. J. EUR. L. 679, 680–81 (2007); Joanne Scott & Susan Sturm, *Courts as Catalysts: Re-thinking the Judicial Role in New Governance*, 13 COLUM. J. EUR. L. 565, 587–92 (2006).

<sup>227</sup> Ronald F. Wright & Marc L. Miller, *The Worldwide Accountability Deficit for Prosecutors*, 67 WASH. & LEE L. REV. 1587, 1587 (2010); see also, e.g., Mortimer R. Kadish & Sanford H. Kadish, *On Justified Rule Departures by Officials*, 59 CALIF. L. REV. 905, 942 (1971); DAVIS, *supra* note 8, at 163–77; Bibas, *supra* note 37, at 960–63; Luna, *supra* note 37, at 80–86; Pizzi, *supra* note 17, at 1329; Vorenberg, *supra* note 41, at 1522, 1562.

<sup>228</sup> See Miller & Wright, *supra* note 120, at 392.

<sup>229</sup> Worrall, *supra* note 18, at 4.

<sup>230</sup> JACOBY, *supra* note 17, at xx.

<sup>231</sup> *Id.* at xxi; see also, e.g., Wright, *supra* note 99, at 593.

<sup>232</sup> See, e.g., Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 582–83 (2009); Wright & Miller, *supra* note 227, at 1606; Wright, *supra* note 99, at 600–05. There are signs this may be changing, but so far only in exceptional cases. See Sklansky, *supra* note 138.

<sup>233</sup> DAVIS, *supra* note 8, at 145; see also *supra* note 161 and accompanying text.

<sup>234</sup> *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976).



through checks and balances, relying on “[a]mbition . . . to counteract ambition.”<sup>235</sup> But prosecutorial boundary-blurring seems to confound the separation of powers, as well. Prosecutors exercise “both executive and judicial power—posing the very danger the Framers tried to prevent.”<sup>236</sup> Indeed, prosecutors do not just have authority both to “execute the law” and to “adjudicate matters”; they also may be said to “legislate criminal law, setting the penal code’s effective scope” through their collective exercise of discretion.<sup>237</sup>

Faced with the difficulty of reconciling the realities of prosecutorial power with the aspirations of a constitutional democracy, reformers generally have pursued one of two paths—or, most often, some combination of them. The first is to make prosecutors more responsive to the public. The typical strategy for achieving this is either increased transparency<sup>238</sup> or, less commonly, some combination of decentralization and community outreach.<sup>239</sup> The second path is to make prosecutors more accountable to law, either through outside oversight (to courts, bar associations, or special disciplinary boards)<sup>240</sup> or by strengthening of rule-of-law norms inside prosecutors’ offices.<sup>241</sup> The first path tries to enhance democratic control of prosecutors; the second is often (but not always) motivated in part by a desire to insulate prosecutors from politics.

The two paths actually do not diverge very far. In fact, the three most striking things about the reform programs that have been put forward over the past half-century for addressing prosecutorial power are how similar they have been to each other, how relatively modest they have been in their ambitions, and how unsuccessful they have been in achieving even their limited goals.

There has been a strong amount of consensus among scholars,

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<sup>235</sup> THE FEDERALIST NO. 51 (James Madison); *see also, e.g.*, Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 517 (2015) (describing “a deep and enduring commitment to separating, checking, and balancing state power in whatever form that power happens to take”).

<sup>236</sup> Barkow, *supra* note 36, at 1048.

<sup>237</sup> Luna, *supra* note 37, at 57.

<sup>238</sup> *See, e.g.*, Gold, *supra* note 8; Wright & Miller, *supra* note 227, at 1619–20.

<sup>239</sup> This is often what is meant by “community prosecution.” *See* Wright, *supra* note 232, at 609–10.

<sup>240</sup> *See, e.g.*, William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 508 (2001); DAVIS, *supra* note 8, at 180–83, 184–86 (2007); Kozinski, *supra* note 221, at xxii–xxxvi.

<sup>241</sup> *See, e.g.*, Michael Tonry, *Prosecutors and Politics in Comparative Perspective*, in PROSECUTORS AND POLITICS: A COMPARATIVE PERSPECTIVE 1 (Michael Tonry ed., 2012); Barkow, *supra* note 2; Bibas, *supra* note 37, at 997–1000; Fish, *supra* note 159; Wright & Levine, *supra* note 37, at 1067.

stretching back to the 1970s, that prosecutors' offices should be reformed in the following ways: discretion should be constrained by internally promulgated guidelines. Prosecutors should provide reasons for their decisions. Defendants should have opportunities to be heard before those decisions are made. And there should be meaningful mechanisms of internal oversight and review. Four or five decades ago, the scholars making these proposals generally hoped they would be adopted through some combination of professionalism among prosecutors and prodding from courts and legislatures<sup>242</sup>; today, scholars tend to place their hopes in some combination of professionalism among prosecutors and prodding from the community.<sup>243</sup> That aside, the package of reform proposals has stayed largely constant.<sup>244</sup>

It is a relatively mild package. Despite the fact that prosecutors' offices as we now know them are relatively new institutions, dating back at most to the late nineteenth century, there are no calls to abolish the institution or to alter its core characteristics. Reformers uniformly stress that they seek to impose only "decent" limitations on prosecutors<sup>245</sup>; they have no quarrel with prosecutorial discretion, only with its "idiosyncratic" use<sup>246</sup>; they do not want or expect rigid adherence to guidelines, just "tolerable consistency."<sup>247</sup> Prosecutors' offices will by and large be left with all of their powers. They will just have to exercise those powers a little more thoughtfully, a little less haphazardly, and with a little more accountability.

Nonetheless, even this consensus package of minimal, prosecutor-friendly reforms has proven unattainable. One reason why the current generation of scholars has soured on judicial oversight as a tool of prosecutorial reform is that it never seemed to go anywhere. Controls over

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<sup>242</sup> See, e.g., Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1 (1971); Leland E. Beck, *The Administrative Law of Criminal Prosecution: The Development of Prosecutorial Policy*, 27 AM. U. L. REV. 310 (1978); DAVIS, *supra* note 108; Vorenberg, *supra* note 41.

<sup>243</sup> See, e.g., Bibas, *supra* note 37; Fish, *supra* note 159; Gold, *supra* note 8; Miller & Wright, *supra* note 91.

<sup>244</sup> See, e.g., Barkow, *supra* note 2, at 914; Vorenberg, *supra* note 41, at 1545 (showing that this program seeks in part to centralize and rationalize the exercise of prosecutorial discretion). It runs contrary in some ways to "community prosecution," which decentralizes decision-making and downplays concerns about consistency. But community prosecution has remained a marginal phenomenon, far more significant in campaign rhetoric than in operations on the ground.

<sup>245</sup> Vorenberg, *supra* note 41, at 1521.

<sup>246</sup> Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 TEMP. POL. & CIV. RTS. L. REV. 369, 371 (2010).

<sup>247</sup> Abrams, *supra* note 242, at 7 (quotations in original).

prosecutors have not strengthened; “what has changed, if anything, is that prosecutors now have even more power.”<sup>248</sup> The use of guidelines is “sporadic,” and “[m]ost prosecutor offices do not ask their attorneys to record any reasons for their decisions.”<sup>249</sup> Judicial review of charging decisions and plea bargains remains virtually nonexistent. At the close of the 1960s, Kenneth Culp Davis noted with bewilderment the

universally accepted assumptions . . . that the prosecuting power must of course be discretionary, that statutory provisions as to what enforcement officers “shall” do may be freely violated without disapproval from the public or from other officials, that determinations to prosecute or not to prosecute may be made secretly without any statement of findings or reasons, that such decisions by a top prosecutor of a city or county or state usually need not be reviewable by any other administrative authority, and that decisions to prosecute or not to prosecute are not judicially reviewable for abuse of discretion.<sup>250</sup>

He could not see any reason for these assumptions other than “unplanned evolution” and a lack of critical reflection,<sup>251</sup> but half a century on they seem hardly shaken, at least among legislators and judges.

Hence the turn among scholars toward the possibility of democratic oversight. The thought has been that although the United States lacks the strong civil service tradition of Europe, maybe our own, distinctive political traditions offer homegrown answers to the problem of prosecutorial power. For us, perhaps, local election of prosecutors is a feature, not a bug. The trick is simply to unleash the power of elections to prod prosecutors to self-regulate.<sup>252</sup>

It has long seemed apparent, though, that the “political check is not working.”<sup>253</sup> It seemed apparent to Kenneth Davis and others fifty years ago—that is why they turned to courts and legislators.<sup>254</sup> It has seemed apparent to the scholars who have written more recently about prosecutors, as well. Voters rarely turn prosecutors out of office, and campaign rhetoric when prosecutors seek election or reelection tends to focus on personalities rather than on policies.<sup>255</sup> Part of the problem has seemed to be that the public has little information about how well prosecutorial offices function,

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<sup>248</sup> Barkow, *supra* note 2, at 921; see Bibas, *supra* note 37, at 978; Gold, *supra* note 8, at 99; Wright, *supra* note 99, at 595.

<sup>249</sup> Wright & Miller, *supra* note 227, at 1608.

<sup>250</sup> DAVIS, *supra* note 108, at 188–89.

<sup>251</sup> *Id.* at 189.

<sup>252</sup> See, e.g., Bibas, *supra* note 37; Gold, *supra* note 8; Wright & Miller, *supra* note 91.

<sup>253</sup> Bibas, *supra* note 37, at 984.

<sup>254</sup> See, e.g., DAVIS, *supra* note 108, at 207–08.

<sup>255</sup> See, e.g., Wright, *supra* note 232. Once again, though, there are scattered indications that this may be changing. See Sklansky, *supra* note 138.

and the information it does have—such as conviction rates and crime rates—provides a poor basis for assessing prosecutors’ performance. So scholars, along with some reformers, have suggested that “transparency is the key mechanism” for reining in prosecutors.<sup>256</sup> With better information, it is hoped, voters will pressure prosecutors’ offices to adopt guidelines and procedures to ensure the principled and responsible exercise of discretion.<sup>257</sup>

This idea has not gone anywhere, either. “Prosecutors on the whole earn low grades for any kind of transparency,”<sup>258</sup> and that appears to be changing slowly if at all. Part of the reason may be the glaring difficulty that scholars have had deciding what kind of information voters need about prosecutors. The suggestions have ranged from crime and recidivism rates,<sup>259</sup> to the percentage of defendants who are convicted as charged,<sup>260</sup> to “regular performance evaluations of head prosecutors” by “[f]ellow prosecutors, judges, defense counsel, defendants, victims, and jurors,”<sup>261</sup> to “the percent of defendants sentenced to incarceration, compared to last year” (the lower, the better),<sup>262</sup> to the “percent of violent (and serious) crime cases on docket, compared to last year” (the higher, the better),<sup>263</sup> to the “costs the public bears for each case that was or could have been prosecuted,” including “expenditures on prosecution, public defense, and incarceration,”<sup>264</sup> to measures of transparency itself, such as whether the office publishes statistics on the cases it declines to prosecute.<sup>265</sup> Unless they are co-authors, no two scholars ever propose the same metric for prosecutorial effectiveness. There is nothing remotely approaching a consensus. And even if scholars could agree about what information prosecutors’ offices should be disclosing, it is not clear the public would care about it. The one statistic about prosecutors’ offices that generally is

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<sup>256</sup> Wright & Miller, *supra* note 91, at 196; *see also, e.g.*, Bibas, *supra* note 246, at 273; Gold, *supra* note 8, at 108; *cf.* LAUREN BROOKE-EISEN ET AL., BRENNAN CTR. FOR JUSTICE, FEDERAL PROSECUTION FOR THE 21ST CENTURY 44 (2014) (recommending the adoption of “success measures” for federal prosecutors to “transparently show progress or lack of progress toward priorities”).

<sup>257</sup> *See* Bibas, *supra* note 37, at 1003.

<sup>258</sup> Wright & Miller, *supra* note 91, at 194.

<sup>259</sup> *See* BROOKE-EISEN ET AL., *supra* note 256, at 4.

<sup>260</sup> *See* Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 33 (2002).

<sup>261</sup> Bibas, *supra* note 37, at 989.

<sup>262</sup> LAUREN BROOKE-EISEN ET AL., *supra* note 256, at 4.

<sup>263</sup> *Id.*

<sup>264</sup> Gold, *supra* note 8, at 73.

<sup>265</sup> *See* Wright, *supra* note 99, at 612–13.

available to the public, conviction rates, is rarely emphasized in campaign rhetoric<sup>266</sup> and does not appear to influence a prosecutor's chance of being reelected.<sup>267</sup> (Not that we should want it to.) Democratic oversight of prosecutors has been stymied not just by a lack of transparency but, more importantly, by uncertainty regarding what we should want prosecutors to be transparent *about*.

One sign of how little has been accomplished through greater transparency of prosecutorial decision-making is the difficulty that scholars have had identifying success stories. The two scholars who have given the most thought to transparency as a tool for reforming prosecutors' offices, Marc Miller and Ronald Wright, point to the models provided by Harry Connick, the New Orleans District Attorney for the last quarter of the twentieth century, and Russell Hauge, until recently the Prosecuting Attorney for Kitsap County, Washington. Miller and Wright praise Connick for his use of case processing data to manage the attorneys in his office, and they praise Hauge's office for publishing its policies and a range of annual performance statistics, including the number of cases referred to the office, the number of cases in which charges were reduced after the initial filing, the number of diversions allowed, and the number of positions eliminated for budgetary reasons.<sup>268</sup> Miller and Wright wrote shortly before a series of scandals, culminating in two decisions by the United States Supreme Court, turned Connick's office into "a national whipping boy for violating defendants' rights."<sup>269</sup> In *Connick v. Thompson*,<sup>270</sup> the Court narrowly overturned a \$14 million award against Connick's office for failing to turn over exculpatory evidence<sup>271</sup>; four dissenters charged that "[f]rom the top down . . . members of the District Attorney's Office, including the District Attorney himself . . . inadequately attended to their disclosure obligations" and "slighted [their] responsibility to the profession

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<sup>266</sup> See Wright, *supra* note 232, at 603.

<sup>267</sup> See Bibas, *supra* note 37, at 987.

<sup>268</sup> See Wright & Miller, *supra* note 227, at 1615–20.

<sup>269</sup> John Simerman, *Former DA Harry Connick Defends His Leadership, Reputation*, TIMES-PICAYUNE (Apr. 1, 2012), [http://www.nola.com/crime/index.ssf/2012/04/former\\_da\\_harry\\_connick\\_defend.html](http://www.nola.com/crime/index.ssf/2012/04/former_da_harry_connick_defend.html); see also Editorial, *How to Force Prosecutors to Play Fair*, N.Y. TIMES, Feb. 16, 2015, at A16 (calling the New Orleans District Attorney's Office "among the worst . . . in violating defendants' rights to exculpatory evidence"); Editorial, *Justice Gone Wrong in New Orleans*, N.Y. TIMES, Oct. 20, 2015, at A24 (noting "the culture of negligence and outright dishonesty that has pervaded [the office] for decades . . . largely under [Connick's] command").

<sup>270</sup> 131 S. Ct. 1350 (2011).

<sup>271</sup> *Id.* at 1355.

and to the State's system of justice."<sup>272</sup> The following year a nearly unanimous Court took only three pages to find that discovery violations required reversal of a murder conviction obtained by Connick's office<sup>273</sup>; "[d]uring oral argument, several justices verbally slapped" Connick's successor "for even bothering to defend" the verdict.<sup>274</sup> Connick has become, at best, an awkward model for prosecutorial accountability.

Hauge, for his part, was narrowly voted out of office in 2014.<sup>275</sup> His defeat did not reflect any Connick-style scandals, nor did it suggest that Hauge's efforts at transparency had backfired. His successor has said she plans to continue Hauge's practice of publishing reports of the office's "goal, policies, direction and performance."<sup>276</sup> The practice is surely laudable. But there is little indication that it has triggered any significant changes in the office's operations or deepened its engagement with the public. The issues that led to Hauge's defeat appear to have had little or nothing to do with the data he disclosed; instead, they seemed to have centered on his support for gun control, his disputes with a local gun club, his handling of a civil case involving a contract dispute between the county and its deputy sheriffs—and the possibility that after twenty years of his leadership, it simply was time for a change.<sup>277</sup>

Transparency has disappointed so far as a vehicle for reforming prosecutors' offices not just because it is difficult to decide on performance metrics for public servants who blur so many boundaries, but also for two other reasons, related as well to the intermediating nature of the prosecutor's job.

First, there is a constituency for keeping prosecutorial decision-making in the shadows, and the constituency is not limited to prosecutors. Part of the reason there has not been more pressure on prosecutors to document and to disclose their exercises of discretion is that candor might make it harder for prosecutors to carry out some of their work as intermediaries. There has long been concern, for example, that if prosecutors made their charging

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<sup>272</sup> *Id.* at 1370, 1387 (Ginsburg, J., dissenting) (concluding that Connick had "created a tinderbox in Orleans Parish in which *Brady* violations were nigh inevitable").

<sup>273</sup> *See* *Smith v. Cain*, 132 S. Ct. 627, 631 (2012).

<sup>274</sup> Simerman, *supra* note 269.

<sup>275</sup> *2014 Election Results for Washington State*, SEATTLE TIMES (Nov. 21, 2014), <http://projects.seattletimes.com/2014/election/#Local>.

<sup>276</sup> TINA R. ROBINSON, ANNUAL REPORT 2014 I (2015).

<sup>277</sup> *See* Andrew Binion, *Prosecutor Race: Longtime Incumbent vs. Fresh Perspective*, KITSAP SUN (Oct. 7, 2014), <http://www.kitsapsun.com/news/local/prosecutor-race-longtime-incumbent-vs-fresh-perspective-ep-681773264-355212901.html>; Kevan Moore, *Kitsap Deputies Won't Endorse Russ Hauge*, BREMERTON PATRIOT (July 31, 2014), <http://www.bremertonpatriot.com/news/269410801.html>.

criteria public, they would no longer be able to soften the edges of the law without significantly undermining deterrence.<sup>278</sup> There has also been concern that if prosecutors had to disclose the reasons for decisions, they could not be honest without antagonizing the courts,<sup>279</sup> and they could not be merciful without antagonizing the electorate.<sup>280</sup> Similarly, there have been persistent worries about publicly-announced charging criteria being turned into “litigation weapons” or otherwise being used to force prosecutors to defend departures from rigid uniformity,<sup>281</sup> at bottom, these are worries that prosecutors would be less free to blur the line between law and discretion.

Second, and more fundamentally, much of what we want from prosecutors is fairness, and that is a hard issue to debate in a political campaign. This is why judicial elections are such a bad idea: judicial virtues do not lend themselves to reinforcement through the ballot box.<sup>282</sup> By the same token, because judicial virtues are some of what we want from prosecutors, electoral oversight, even if greatly strengthened by improved transparency, is an unpromising strategy for assessing and rewarding one important aspect of a prosecutor’s performance.

Of course, other aspects of the prosecutor’s job *do* seem amenable to electoral review.<sup>283</sup> That is why electing prosecutors is easier to defend than electing judges, and it is part of the reason judges are so reluctant to review discretionary decisions by prosecutors. We want prosecutors “to strike the appropriate balance between independence and accountability . . . to their constituents”<sup>284</sup>; in other words, we want them to mediate between democratic responsiveness and detached objectivity. This particular mediating role of prosecutors is related to and helps facilitate some others, such as the boundary-blurring function that Nicholas Parrillo describes prosecutors performing in the nineteenth century: softening the edges of “alien imposition” by mediating between positivist legislation and community norms.<sup>285</sup> It is partly prosecutors’ ambiguous relationship to

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<sup>278</sup> See, e.g., Robert L. Rabin, *Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion*, 24 STAN. L. REV. 1036, 1076 (1972); Pizzi, *supra* note 17.

<sup>279</sup> See Rabin, *supra* note 278, at 1077.

<sup>280</sup> See Pizzi, *supra* note 17, at 1365.

<sup>281</sup> See *id.* at 1365–66.

<sup>282</sup> See, e.g., Gregory A. Huber & Sanford C. Gordon, *Authority and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247 (2004).

<sup>283</sup> On the possibility of strengthening democratic oversight of elected prosecutors through a ranking or rating system, see Sklansky, *supra* note 16; Sklansky, *supra* note 138.

<sup>284</sup> DAVIS, *supra* note 8, at 165.

<sup>285</sup> See *supra* notes 194–196 and accompanying text.

local, democratic accountability that allows them to carry out the job that Parrillo identifies. And that may help to explain why, as legal authority in Europe gradually becomes more centralized and “alien imposition” from Brussels becomes more pronounced,<sup>286</sup> there are moves across the continent to make prosecutors somewhat more responsive to local, popular preferences.<sup>287</sup> Increasingly, European prosecutors—like their American counterparts—provide “a kind of suspension bridge between politics and the judiciary.”<sup>288</sup>

#### CONCLUSION

It is precisely the bridges that prosecutors supply—between law and politics, rules and discretion, courts and police, advocacy and objectivity—that have made curtailing prosecutorial power and taming prosecutorial discretion so much more difficult than reformers have often expected. The intermediation performed by prosecutors makes them difficult to regulate. As I have tried to demonstrate, though, the intermediation is not incidental or accidental; it is what we have asked prosecutors to do. Therefore, if we are serious about reforming the modern prosecutor’s office, or replacing it with a different kind of institution, either we will need to find other ways to blur the lines that prosecutors cross, or we will need to rethink our commitment to making those boundaries so indistinct. And if we are unconvinced that prosecutors need significant reform, if we are comfortable with or even enthusiastic about the various forms of flexibility they provide, it is worth understanding the sources of that flexibility, and reflecting on its possible costs.

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<sup>286</sup> See, e.g., Erik Luna & Marianne L. Wade, *Looking Back and at the Challenges Ahead*, in *THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE* 424, 442–43 (2012).

<sup>287</sup> See Wright & Miller, *supra* note 227, at 1609–13.

<sup>288</sup> Roger Perrot, *Role of the Public Prosecution Office in Criminal, Civil and Commercial Fields*, in *THE ROLE OF THE PUBLIC PROSECUTION OFFICE IN A DEMOCRATIC SOCIETY* 165, 166 (1997).



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