Article

Fixing Disparate Prosecution

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America's system of public prosecution is broken. Prosecutors who charge harshly or disparately are shielded from any consequences or recourse, and defendants are left with few options. This asymmetry in power results in prosecutors singlehandedly maintaining mass incarceration in the United States and leads to some states incarcerating more people per year than entire countries. Prosecutors in the United States are permitted to charge with little supervision or guidance other than to follow the law and "seek justice." Many choose to charge the highest number of crimes possible, while others choose to exercise restraint and label themselves as "progressives." But there is no solicitude for individuals who are subject to the whims of an individual prosecutor who might decide to throw the book at an individual rather than exercise mercy and drop charges for a minor first-time

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offense. Both normative and structural changes are needed. But proposed normative changes—such as progressive prosecution or evidence-driven prosecution—rely on prosecutors themselves to change and lack any enforcement mechanism. Likewise, proposed structural reforms are often too unrealistic to seriously contemplate. While we support these reforms rhetorically, this Article proposes a much simpler, potentially more pragmatic reform. Each defendant should be legislatively provided with a private right of action against disparate prosecution. In other words, a defendant believing she has been charged or sentenced unfairly or out of step with others in a particular jurisdiction could challenge the prosecutorial action and shift the burden to the prosecutor to justify charges. This straightforward proposal could shift the balance of power and create the right incentives to force prosecutors to check their decisions, and in turn result in less draconian charging throughout the United States.

INTRODUCTION

Prosecutors can determine whether a person maintains liberty or is punished through incarceration; they can singlehandedly transform the American criminal legal system, and, if desired, end mass incarceration.[1] Prosecutors have vast power over criminal cases—prosecutors determine whether to charge a case, what charges to file, whether to accept a plea, often what sentence to seek, and frequently whether to permit expungement of criminal records[2]—and their exercise of that power at any given stage is often discretionary.[3] Thus, scholars have recognized that prosecutors are among the most powerful actors in the U.S. criminal justice system.[4] Commentators and activists have therefore devoted volumes to understanding how prosecutors make decisions, how prosecutors should make decisions, and solutions to the problems in U.S. prosecution.

The current normative paradigm requires simply that prosecutors "seek justice" in any individual case with little guidance or checks in place if justice does not appear to be met.[5] The problem is that "justice" is a notoriously flexible term, which can mean different things to different prosecutors. Thus, a recent national study found significant variations in how individual prosecutors handle a given set of facts.[6] While the study found some

1. *See generally* Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 993 (2006) (explaining that prosecutors are criminal justice actors with immense discretion and very few checks through the executive branch or other branches of government); Jeffrey Bellin, *Theories of Prosecution*, 108 CALIF. L. REV. 1203, 1211 (2020) (discussing the prosecutor's role of ending mass incarceration); W. Kerrel Murray, *Populist Prosecutorial Nullification*, 96 N.Y.U. L. REV. 173, 177 (2021) (examining the concept of prosecutorial nullification, where prosecutors "de facto decriminalize" by refusing to prosecute certain crimes).

2. *See infra* Part I.B (explaining the general duties of prosecutors).

3. *See infra* Part I.B (explaining the discretionary nature of prosecutors' power and the limitations on that power).

4. *See infra* note 50 (illustrating the debate over the relative power of prosecutors in the criminal justice system).

5. *See infra* Part II (describing how the Supreme Court in *Berger v. United States* created the standard that prosecutors' actions should be governed by a goal to "seek justice" and that normative guidance from courts and professional organizations do not extend far beyond this ambiguous standard).

6. Megan S. Wright et al., *Inside the Black Box of Prosecutor Discretion*, 55 UC DAVIS L. REV. 2133, 2162–68 (2022) [hereinafter Wright et al., *Inside the Black Box*] (discussing the results of a national prosecutor study); *see also*

correlation in charging and sentencing decisions by region, "[m]ost of this variation was inexplicable."[7] In other words, the data and qualitative responses showed that each prosecutor was seeking justice according to their individual perspective on what they viewed as "right" based on the facts given. And for many prosecutors, "justice" has always involved charging the highest or greatest number of charges possible.[8]

While, arguably, society wants prosecutors (and public officials more generally) to be guided by some sense of right and wrong, it is also clear from the data that this approach can lead to varying results for similarly situated individuals. Further, as a normative matter, individual notions of justice should not continue to burden the system to the point where we continue to lock up more people in some individual states than entire countries incarcerate in a given year.[9] This kind of variability and severity is problematic. On the one hand, prosecutors must have discretion to charge cases with a material difference differently. But on the other hand, it is an abuse of discretion for similarly situated individuals subject to the same set of laws to receive different treatment by the law and its officers. If the U.S. criminal justice system can claim to be "just," at the very least it must be sufficiently uniform such that like individuals are treated alike, while different individuals are treated differently. Yet, currently, neither the federal government nor any state has a mechanism through which to seriously enforce uniform treatment or to counteract draconian charging by individual prosecutors.

The dual problem of an immensely powerful official with wide discretion and almost infinitely flexible normative guidance has provoked a number of proposed solutions. The leading arguments for fixing prosecution center on what has been called

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Shima Baradaran Baughman & Megan S. Wright, *Prosecutors and Mass Incarceration*, 94 S. CAL. L. REV. 1123, 1158–64 (2021) [hereinafter Baughman & Wright, *Prosecutors and Mass Incarceration*] (considering the data from the national prosecutor study).

7. Wright et al., *Inside the Black Box*, *supra* note 6, at 2202.

8. *See infra* Part II.A (explaining the conviction-focused model of prosecution).

9. Emily Widra & Tiana Herring, *States of Incarceration: The Global Context 2021*, PRISON POL'Y INITIATIVE (Sept. 2021), https://www.prisonpolicy.org/global/2021.html [https://perma.cc/XAR9-UXCV] ("Not only does the U.S. have the highest incarceration rate in the world; every single U.S. state incarcerates more people per capita than virtually any independent democracy on earth.").

"progressive prosecution."[10] Prosecutors are arguably in a unique position to address mass incarceration by setting specific decarceration goals.[11] There are public examples of prosecutors committing to progressive goals like decarceration on their own accord.[12] Dallas District Attorney John Creuzot "promised to reduce state jail and prison admissions by 15 to 20 percent within four years" during his 2018 campaign.[13] Progressive prosecutors gained traction in several urban areas, including Philadelphia,[14]

10. *See infra* Part II.B (explaining the progressive-prosecutor model of prosecution).

11. *See infra* notes 193–210 (detailing how a core tenet of the progressive-prosecution movement is that prosecutors should use their power and discretion to reduce mass incarceration); Nicole Zayas Fortier, *Unfettered, Unchecked, Unopposed: The Need for Accountability and Limits*, *in* CAN THEY DO THAT?: UNDERSTANDING PROSECUTORIAL DISCRETION 25, 37 (Melba V. Pearson ed., 2020) ("[Prosecutors] should assess their office's contributions toward mass incarceration, and publicly commit to specific decarceration goals.").

12. Daniel Nichanian, *The Politics of Prosecutors*, THE APPEAL (2021), https://theappeal.org/political-report/the-politics-of-prosecutors [https://perma.cc/23ET-F5AQ] (citing examples of prosecutors taking progressive action throughout the country). For instance, in Baltimore, State's Attorney Marilyn Mosby announced that her office would not prosecute a list of low-level offenses, including drug possession, prostitution, and open container violations. *Id.* District Attorneys (DAs) in Manhattan and Brooklyn announced that their offices would no longer prosecute sex workers. *Id.* Los Angeles DA George Gascón announced that his office would stop seeking cash bail, stop charging children as adults, stop seeking sentencing enhancements, stop seeking the death penalty, and decline to prosecute offenses associated with homelessness. *Id.*

13. Shawn Shinneman, *The Era of Dallas County District Attorney John Creuzot Is Almost Here*, D MAG. (Nov. 26, 2018), https://www.dmagazine.com/frontburner/2018/11/the-era-of-dallas-county-district-attorney-john-creuzot-is-almost-here [https://perma.cc/8UCK-7HJ8].

14. *See* Note, *The Paradox of 'Progressive Prosecution*,*'* 132 HARV. L. REV. 748, 751–52 (2018) ("Fundamentally, progressive prosecutors seek to rebalance the use of prosecutorial discretion."). For example, Philadelphia DA Larry Krasner advocated ending mass incarceration and promised never to pursue the death penalty, and several district attorneys have instructed line prosecutors not to prosecute or severely limit prosecution of marijuana offenses. *Id.* at 750–52.

St. Louis,[15] San Francisco,[16] and Suffolk County, Massachusetts.[17] Several scholars have documented a movement of "progressive prosecutors" changing the role from one who seeks "punitive outcomes" to one "defaulting to leniency."[18] A few scholars have theorized that the COVID-19 pandemic gave momentum to policies progressive prosecutors were "endeavoring to advance already."[19] Some jurisdictions implemented policies seemingly

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15. Allan Smith, *Progressive DAs Are Shaking Up the Criminal Justice System. Pro-Police Groups Aren't Happy.*, NBC NEWS (Aug. 19, 2019), https://www.nbcnews.com/politics/justice-department/these-reform-prosecutors-are-shaking-system-pro-police-groups-aren-n1033286 [https://perma.cc/3859-SG9F] (quoting Wesley Bell, a progressive prosecutor elected in 2018 in St. Louis, Missouri).

16. Allison Young, *The Facts on Progressive Prosecutors: How and Why Prosecutors Should Help End Mass Incarceration*, CTR. FOR AM. PROGRESS (Apr. 23, 2020), https://www.americanprogress.org/issues/criminal-justice/reports/2020/03/19/481939/progressive-prosecutors-reforming-criminal-justice [https://perma.cc/3MK7-US69] (describing San Francisco DA Chesa Boudin as an example of a progressive prosecutor). *See generally* KAMALA D. HARRIS, SMART ON CRIME: A CAREER PROSECUTOR'S PLAN TO MAKE US SAFER (2009) (advocating for the smart on crime movement and discussing key opportunities for reform, such as diversionary programs for nonviolent offenders).

17. Smith, *supra* note 15 (discussing Suffolk County DA Rachael Rollins, a progressive prosecutor).

18. *See* Jeffrey Bellin, *Expanding the Reach of Progressive Prosecution*, 110 J. CRIM. L. & CRIMINOLOGY 707, 715–16 (2020) (describing prosecutors who are more concerned with "fairness and legitimacy" rather than a desire for convictions); Daniel Fryer, *Race, Reform, & Progressive Prosecution*, 110 J. CRIM. L. & CRIMINOLOGY 769, 801–02 (2020) ("Even when endorsing progressive prosecutors, we should recognize the complexities of their power, the shortcomings of their proposed solutions, and their ability to obstruct our advancements in racial justice."); Bruce A. Green & Rebecca Roiphe, *When Prosecutors Politick: Progressive Law Enforcers Then and Now*, 110 J. CRIM. L. & CRIMINOLOGY 719, 722–36 (2020) (chronicling the legacy of the Progressive Era on criminal justice reform, including the work of prosecutor William Travers Jerome, who "implement[ed] policies to treat defendants equally regardless of their wealth and status and personally advocat[ed] leniency for less fortunate criminals whose bad acts may have been influenced by their circumstances"); Ronald F. Wright, *Prosecutors and Their State and Local Polities*, 110 J. CRIM. L. & CRIMINOLOGY 823, 824 (2020) (describing the shift in prosecutors in some jurisdictions from quietly declining charges to publicly announcing the decision to decline to file charges in certain types of cases, such as marijuana possession, or cases involving a group of defendants, such as juveniles or people experiencing homelessness, who face certain charges).

19. Chad Flanders & Stephen Galoob, *Progressive Prosecution in a Pandemic*, 110 J. CRIM. L. & CRIMINOLOGY 685, 696 (2020).

overnight.[20] For instance, jurisdictions made great strides to end cash bail,[21] deprioritize drug crime prosecutions,[22] adopt early release for inmates from jails and prisons,[23] and increase use of supervised release.[24] Professor David Sklansky even authored *The Progressive Prosecutor's Handbook*, recommending best practices for prosecutors, including evaluating and rewarding attorneys properly.[25] The problem with this model, as acknowledged by Sklansky himself, is that for this model to work, prosecutors have to be evaluated and rewarded based on alternative measures other than guilty verdicts and "decades of imprisonment," and there has been very little national change in this regard.[26] At the end of the day, progressive prosecution relies on the desire and determination of individual prosecutors to charge less often and less punitively while ensuring that other prosecutors in their office do the same. Further, this must be done without any internal or external check or pressure, and sometimes in spite of public pressure to be tough on crime.[27]

Aside from progressive prosecution, scholars have argued for new normative models of prosecution.[28] Some argue that increased regulation of prosecutors might help.[29] And at the extreme, some argue that prosecutors should be divested of their authority entirely and we should return to a system of private

20. *Id.* ("The movement to end cash bail, already popular among progressive prosecutors prior to the pandemic, was effectively put into place overnight in many places and for many offenses." (footnotes omitted)).

21. *Id.*

22. *Id.* at 697.

23. *Id.*

24. *Id.* However, "jurisdictions where progressive prosecution never obtained a foothold or was rejected" did not always follow suit and, in some instances, increased use of punitive measures. *Id.* at 697–98.

25. David Alan Sklansky, *The Progressive Prosecutor's Handbook*, 50 UC DAVIS L. REV. ONLINE 25, 27–29 (2017) (suggesting that evaluating and rewarding attorneys is one way prosecutors' offices can do a better job pursuing justice).

26. *Id.* at 29.

27. *See infra* notes 193–210 (exploring progressive prosecution in depth).

28. *See, e.g.*, Bellin, *supra* note 1, at 1211–15 (arguing for a new normative model and outlining its basic tenants).

29. *See infra* Part IV.A.2 (describing prosecutorial reform proposals such as the development of internal office policies, controls imposed by sentencing judges, legislative amendments limiting prosecutorial discretion, plea bargaining guidelines, and centralized review councils that would investigate prosecutorial misconduct).

prosecution,[30] or that at least certain powers should be delegated to community groups or social workers.[31]

This Article explores the current state of U.S. prosecution, including its guiding structures and normative mandates. It argues that solutions proposed to address the problems in U.S. prosecution are either too limited or too unrealistic. Instead, we propose that legislatures develop a private defense to disparate prosecution. In other words, if a prosecutor's office treats similarly situated defendants differently, in charging, sentencing, or expungement, the disadvantaged defendant should be able to challenge the prosecutor's decision and seek uniformity. As opposed to other solutions, this would impose only minimal administrative burdens on already overloaded prosecutor's offices and could alter the balance between the defense and prosecutors in plea bargaining. Additionally, this proposal addresses the underlying issues of unchecked power and discretion without fundamentally changing the structure of U.S. prosecution.

American prosecution is broken. This Article sets out to fix it. Part I describes the current landscape of U.S. prosecution, both in federal and state systems, as well as the general duties, power, and discretion of prosecutors. Part II describes the normative models of prosecutor decision-making, including conviction-focused prosecution, progressive prosecution, and evidence-based prosecution. Part III provides original empirical research that outlines insights derived from the largest national field experiment ever conducted on prosecutors, and addresses how these insights affect normative and theoretical approaches to prosecutorial decision-making. Part IV reviews the current proposals for reforming prosecutors and provides a novel proposal, allowing a private defense to disparate prosecution, where charges are not in line with office practices or are excessive in number and kind.

30. *See infra* Part IV.A.5 (considering Bennett Capers' argument that "problems inherent in prosecution would be better addressed by reverting back to private prosecution or by giving victims greater input into the prosecutorial process").

31. *See infra* Part I.A.4 (detailing how Cynthia Godsoe argues for "prosecutors to cede expertise and power to communities" and to "divest from prosecutorial and other law enforcement funding while supporting investment in truly independent community supports").

I. U.S. PROSECUTION

Every state, as well as the federal government—historically and today—has its own system of prosecution.[32] Thus, the general trends discussed in this Part may not apply to particular locales.[33] First, this Part will provide a brief overview of U.S. prosecution, including its public dimension; and second, it will describe the general duties, power, and discretion of U.S. prosecutors and organizational structures of most offices, and will outline the lack of any meaningful check on prosecutorial discretion.

A. AN OVERVIEW OF U.S. PROSECUTION

Any general overview of the current state of prosecution in the United States must recognize that there is great heterogeneity and little that is universal to all states.[34] In most states, chief prosecutors are locally elected officials who are responsible for their own mini-bureaucracy.[35] In other words, the United States has a system of decentralized prosecution, in which each office operates independently, even within the same state.[36] As of 2007—the most recent data available from the Bureau of Justice Statistics—there were 2,330 state prosecutors' offices in the United States.[37] These housed 2,157 state chief prosecutors, and

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32. *See* Jason Twede, Going Public: How the Government Assumed the Authority to Prosecute in the Southern United States 20 (Jan. 2016) (Ph.D. dissertation, University of North Dakota), https://commons.und.edu/cgi/viewcontent.cgi?article=2976&context=theses [https://perma.cc/RH9Q-T8EQ] (explaining that prosecutorial evolution differs in each of the fifty states and federally).

33. *See* Leonard R. Mellon et al., *The Prosecutor Constrained by His Environment: A New Look at Discretionary Justice in the United States*, 72 J. CRIM. L. & CRIMINOLOGY 52, 53 (1981) ("The study concludes that prosecutors in America cannot be discussed in universal terms."); *see also* Ronald F. Wright et al., *The Many Faces of Prosecution*, 1 STAN. J. CRIM. L. & POL'Y 27, 27 (2014) (cautioning against viewing prosecutors as homogenous).

34. *See* Mellon et al., *supra* note 33, at 53.

35. Carissa Byrne Hessick, *The Prosecutors and Politics Project: National Study of Prosecutor Elections*, UNIV. OF N.C. SCH. OF L. 4 (Feb. 2020), https://law.unc.edu/wp-content/uploads/2020/01/National-Study-Prosecutor-Elections-2020.pdf [https://perma.cc/F5NX-8YA6] (noting that forty-five states elect chief prosecutors at the local level).

36. *See* Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 589 (2009) ("The local District Attorney does not report up to any statewide hierarchy . . . when setting priorities and practices of the office.").

37. Steven W. Perry & Duren Banks, *Prosecutors in State Courts, 2007 - Statistical Tables*, U.S. DEP'T OF JUST. 1 (Dec. 2011), https://bjs.ojp.gov/content/pub/pdf/psc07st.pdf [https://perma.cc/6BLH-RU4K].

24,937 assistant prosecutors.[38] In the federal system, there are ninety-three U.S. Attorneys in the United States[39]—one for each judicial district[40]—who are appointed for four-year terms.[41] There is wide heterogeneity in both federal and state prosecution offices throughout the country.

U.S. prosecution has changed dramatically over time. While public prosecution existed at common law, it was comparatively rare.[42] Generally, until at least the mid-nineteenth century, jurisdictions in the United States relied predominantly upon private prosecution.[43] In the private prosecution system, a citizen would act as a prosecutor and would hire an attorney to file a complaint and conduct the prosecution.[44] While theories on the historical reasons for the shift differ,[45] it is accepted that today,

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38. *Id.* at 4.

39. Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 876 (2009).

40. Guam and the Northern Mariana Islands are the exception as they share a U.S. Attorney. *Offices of the United States Attorneys*, U.S. DEP'T OF JUST., https://www.justice.gov/usao [https://perma.cc/Q2K8-UVTC].

41. 28 U.S.C. § 541.

42. *See* Allen Steinberg, *From Private Prosecution to Plea Bargaining: Criminal Prosecution, the District Attorney, and American Legal History*, 30 CRIME & DELINQ. 568, 569–70, 583–84 (1984) (explaining that the early American criminal justice system was dominated by private, as opposed to public, prosecution); Robert M. Ireland, *Privately Funded Prosecution of Crime in the Nineteenth-Century United States*, 39 AM. J. LEGAL HIST. 43, 43 (1995) (stating that private prosecution remained a significant part of the criminal justice system throughout the nineteenth century); Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 450–51 (2001) (noting that public prosecution emerged in the Colonial era and that elected prosecutors proliferated following the Jacksonian era); I. Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561, 1573–78 (2020) (explaining the shift from private to public prosecution). *See generally* John H. Langbein, *The Origins of Public Prosecution at Common Law*, 17 AM. J. LEGAL HIST. 313 (1973) (tracing the public prosecutor to English justices of the peace, and noting the predominance of private prosecution).

43. *See* Steinberg, *supra* note 42, at 569–70, 583–84; Ireland, *supra* note 42, at 43; Davis, *supra* note 42, at 450–51.

44. Steinberg, *supra* note 42, at 571. It is important to distinguish between truly private prosecution and merely prosecution by a private attorney with whom the government contracts. *See* Twede, *supra* note 32, at 16–17 (discussing the difference between "victim-initiated private prosecution" and "outsourced prosecution").

45. *Compare* Steinberg, *supra* note 42, at 581 (explaining the shift as being caused by internal contradictions and flaws of the private prosecution system),

public prosecution is dominant.[46] Indeed, the federal government and each state have largely adopted a system of public prosecution of crimes.[47] Nevertheless, private prosecutions still exist as some states permit private prosecution for minor offenses or contempt cases.[48] Similarly, some states also allow private individuals to challenge a public prosecutor's declination decision.[49]

B. DUTIES, POWER, AND DISCRETION OF AMERICAN PROSECUTORS

There is wide agreement that prosecutors are among the most powerful, if not the most powerful actors in the criminal justice system.[50] Generally, prosecutors perform several duties:

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with Twede, *supra* note 32, at 54–57 (explaining that the increase in urban crime that stemmed from industrialization may have contributed to the shift), *and* Capers, *supra* note 42, at 1579–80 ("[C]ontributing factors include the rise in urbanization that accompanied the industrial revolution, together with the growing complexity of the law.").

46. *See* Capers, *supra* note 42, at 1578–79 (stating that public prosecutors wield "hegemonic power" today).

47. *See* 28 U.S.C. §§ 541, 542, 547 (detailing the federal system). Many states have constitutional provisions restricting prosecution to public officials. *See, e.g.*, UTAH CONST. art. VIII, § 16; WASH. CONST. art. IV, § 27. Today, only a handful of states permit private prosecution in certain contexts. *See* Jed Handelsman Shugerman, *Professionals, Politicos, and Crony Attorneys General: A Historical Sketch of the U.S. Attorney General as a Case for Structural Independence*, 87 FORDHAM L. REV. 1965, 1987 (2019) ("Even today, New Hampshire, New Jersey, Pennsylvania, Rhode Island, Virginia, and Texas allow private citizens to serve a role in criminal prosecutions.").

48. *See* Twede, *supra* note 32, at 30–31 ("There are some state courts that allow private parties to prosecute criminal contempt cases . . . though there are numerous caveats.").

49. *See* Stuart P. Green, *Private Challenges to Prosecutorial Inaction: A Model Declaratory Judgement Statute*, 97 YALE L.J. 488, 488 (1988) ("Although federal law lacks such a statute, at least nine states have, or recently had, statutory schemes that potentially enable private persons to challenge prosecutorial inaction.").

50. *See, e.g.*, Capers, *supra* note 42, at 1570–71 (making the claim that the powers of other criminal justice actors pale in comparison to that of prosecutors); Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415, 1419 n.16 (2021) (citing over ten articles that consider the power of prosecutors); Wright et al., *Inside the Black Box*, *supra* note 6, at 2138 ("The prosecutor may be the government official with the most unreviewable power and discretion."); Bellin, *supra* note 18, at 709–10 (arguing that prosecutors are the fourth most powerful criminal justice actors, behind legislatures, police, and judges). *But cf.* Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171

assisting and initiating criminal investigations; choosing whether to bring charges, and if so, which charges to bring; holding a powerful position in plea bargaining negotiations; presenting the government's case in court; making sentencing recommendations to courts in some jurisdictions; and, likewise, playing a significant role in expungement proceedings in some jurisdictions.[51] These powers are in part bolstered by the relative power dynamics at play in many criminal cases; prosecutors represent the sovereign, which has comparatively greater resources and authority than most criminal defendants.[52] As the Attorney General for President Franklin Roosevelt (and future Supreme Court Justice) Robert H. Jackson wrote in 1940: "The prosecutor has more control over life, liberty, and reputation than any other person in America."[53]

(2019) (arguing for a critical re-examination of the claim that prosecutors are the most powerful actor in the criminal justice system).

51. *See* THE PRESIDENT'S COMM'N ON L. ENF'T & ADMIN. OF JUST., U.S. DEP'T OF JUST., NO. 147397, TASK FORCE REPORT: THE COURTS 11, 72–73 (1967) [hereinafter TASK FORCE REPORT], https://www.ojp.gov/pdffiles1/Digitization/147397NCJRS.pdf [https://perma.cc/2QUA-SBET] (discussing the role of prosecutors); THE PRESIDENT'S COMM'N ON L. ENF'T & ADMIN. OF JUST., U.S. DEP'T OF JUST., NO. 00042, THE CHALLENGE OF CRIME IN A FREE SOCIETY 135 (1967), https://www.ojp.gov/pdffiles1/Digitization/42NCJRS.pdf [https://perma.cc/DM3F-2HL7] (addressing the different responsibilities of prosecutors); Wright et al., *Inside the Black Box*, *supra* note 6, at 2137–38 ("Prosecutors play a key role in the administration of criminal justice. Prosecutors decide whether to initiate criminal proceedings, what charges to bring, what penalties to seek, whether to agree to a plea bargain, and what sentencing recommendations to advise." (footnotes omitted)); Brian M. Murray, *Insider Expungement*, 2023 UTAH L. REV. 337, 352–55 (discussing prosecutors' role in expungement proceedings). In a line of cases dealing with prosecutorial immunity, the Supreme Court has outlined many of the tasks prosecutors undertake. *See* Imbler v. Pachtman, 424 U.S. 409, 424, 430 (1976) (initiating cases and "conducting them in court," and acting as an advocate for the State); Burns v. Reed, 500 U.S. 478, 491, 496 (1991) (including "presenting evidence in support of a motion for a search warrant" and "giving legal advice to the police"); Buckley v. Fitzsimmons, 509 U.S. 259, 278 (1993) (making statements to the press); Kalina v. Fletcher, 522 U.S. 118, 130 (1997) (finding that serving as a witness on a certification for a warrant was not a prosecutorial function); Van de Kamp v. Goldstein, 555 U.S. 335, 344 (2009) (supervising and training deputy district attorneys).

52. Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 626–28 (1999) (explaining the unequal power dynamic between prosecutors and criminal defendants).

53. Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 3 (1940).

While the authority granted to prosecutors itself vests prosecutors with significant power, prosecutors' true power lies in their virtually unlimited discretion. Indeed, scholars have devoted thousands, if not tens of thousands, of pages to the issue of prosecutorial power and discretion.[54] Many scholars point out that a wholly discretionary power to bring or decline charges can be based on a number of factors, including potentially improper ones.[55] Wayne LaFave, for instance, notes that a prosecutor may decline to charge a case because of: legislative overcriminalization, resource constraints, a need to do individualized justice, victim input, or other reasons.[56] Nonetheless, he points out the flip-side of discretionary leniency is discretionary, and potentially discriminatory, harshness.[57] Further, scholars point out

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54. *E.g.*, Wright et al., *Inside the Black Box*, *supra* note 6, at 2139–41 (noting scholars' arguments about prosecutorial discretion); Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 127–28 (2008) ("[S]cholars have magnified . . . concerns about prosecutorial discretion. Many scholars have expressed particular concerns about racial, gender, and other nefarious grounds for prosecution . . . . Another group of scholars has worried about 'overcriminalization' . . . . A third group has noted how changes in sentencing law, such as the use of sentencing guidelines and 'three strikes' laws, have increased the size and certainty of the consequences that flow from a prosecutor's charging choices."); Wayne R. LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMPAR. L. 532 (1970) (discussing prosecutorial discretion to decline to prosecute and to accept plea deals); Davis, *supra* note 42, at 408–15 (detailing the power and discretion of state and federal prosecutors); Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 TEMP. POL. & CIV. RTS. L. REV. 369 (2010) (arguing for prosecutorial discretion); Bruce A. Green, *Prosecutorial Discretion: The Difficulty and Necessity of Public Inquiry*, 123 DICKINSON L. REV. 589, 595–601 (2019) (arguing for publicity of prosecutorial decisions to discourage abuse); Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. REV. 669, 672, 674 (describing prosecutorial discretion from a former prosecutor's point of view).

55. *See, e.g.*, Davis, *supra* note 42, at 408–10 (noting that prosecutors' charging decisions may be based on practical considerations, justice, or bias towards a defendant); LaFave, *supra* note 54, at 535–36 (noting the potential for injustice); Wright et al., *Inside the Black Box*, *supra* note 6, at 2139 (noting the possibility for racial or gender bias).

56. LaFave, *supra* note 54, at 533–35.

57. *Id.* at 535–36 ("A fundamental fact about the discretionary power to be lenient is extremely simple and entirely clear and yet is usually overlooked: *The discretionary power to be lenient is an impossibility without a concomitant discretionary power not to be lenient, and injustice from the discretionary power not to be lenient is especially frequent; the power to be lenient is the power to discriminate*." (quoting KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 170 (1969))).

that overly discretionary charging authority allows prosecutors to over-charge cases in order to incentivize a defendant to plead down to what might have been the correct charge to begin with.[58]

Prosecutor power and discretion in any given case is not wholly without limits; yet, the limits that do exist do not limit discretion per se, but rather, provide a general set of very loose guardrails within which prosecutors make decisions.[59] The remainder of this Section reviews the major limitations that exist to the power of prosecutors, including charging limits, constitutional bounds, internal office checks, prosecutorial elections, and community prosecution and external review.

1. Charging Limitations

Prosecutors are plainly limited by what crimes are available to charge, though they have a wide panoply of charging options under today's criminal landscape. In the federal system and in most states, only legislatures may define crimes,[60] and as executive officials, prosecutors cannot charge what is not defined as a crime.[61] Yet, legislatures have generally acted to enhance

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58. *See, e.g.*, Davis, *supra* note 42, at 413.

59. *See, e.g.*, Wright, *supra* note 36, at 581 ("There are several methods for holding prosecutors accountable in this country. Judges enforce a few legal boundaries on the work of prosecutors, and legislatures sometimes have their say about criminal law enforcement. Prosecutors with positions lower in the officer or department hierarchy must answer to those at the top. As licensed attorneys, prosecutors must answer to the bar authorities in their states. But none of these controls binds a prosecutor too tightly.").

60. *See* 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 2.1(c), Westlaw (database updated October 2023) ("[Today] a great many states have enacted comprehensive new criminal codes, and in the process they have usually but not always abolished common law crimes. It has long been settled that there are no federal common law crimes; if Congress has not by statute made certain conduct criminal, it is not a federal crime." (footnotes omitted)).

61. Baughman & Wright, *Prosecutors and Mass Incarceration*, *supra* note 6, at 1135 ("Prosecutors can 'freely choose' between charging options . . . . [But] [p]rosecutors' discretionary power is not unlimited, as the scope depends on statutes passed by legislatures."); Bellin, *supra* note 50, at 184 ("Absent an applicable section of the United States Code, a federal prosecutor cannot prosecute even serious offenses like murder."); Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010, 1011 (2005) ("[Prosecutors] draw[] on the large collection of crimes available under the criminal code . . . .").

prosecutors' power by providing a wide range of statutes to choose from.[62] One news article described the problem this way:

> The most recent attempt at an official estimate from the Justice Department [on the total criminal offenses in the United States], completed more than 35 years ago, found that the federal government had defined more than 3,000 crimes in statute, a number that may well have doubled since then. . . . Moreover, states and localities maintain so many criminal laws on the book that nobody even ventures a comprehensive count.[63]

The power of legislatures to criminalize most conduct is largely unconstrained.[64] In general, so long as legislatures avoid vague or overbroad statutes,[65] or statutes that violate individuals' fundamental rights,[66] a legislature can criminalize nearly anything.[67]

Expansive criminal codes also enlarge prosecutorial discretion in that prosecutors are able to overcharge in order to obtain a plea.[68] For instance, in *Bordenkircher v. Hayes*, the defendant

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62. *See* Shima Baradaran Baughman, *Subconstitutional Checks*, 92 NOTRE DAME L. REV. 1071, 1105–06 (2017) ("[A]ggressive federal criminal statutes and state tough-on-crime legislation expand prosecutorial power. It is a well-known phenomenon among criminal experts that state criminal codes continually expand—imposing more harsh sentences for the same crimes and enacting new laws, which essentially punish already punishable offenses. Prosecutors often have options of several felonies and misdemeanors to charge for any single infraction or crime." (footnote omitted)); *see also* Miller & Wright, *supra* note 54, at 142 ("[Criminal codes] contain the seeds of their own irrelevance. When a prosecutor faces difficulty proving one crime, the code is likely to offer some other charging option that authorizes a similar range of sentences.").

63. Eli Lehrer, *America Has Too Many Criminal Laws*, THE HILL (Dec. 9, 2019), https://thehill.com/opinion/criminal-justice/473659-america-has-too-many-criminal-laws [https://perma.cc/RQ2V-QC5K].

64. *See* Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 703–06 (2005) (describing governments' continual expansion of what is considered criminal conduct).

65. *See, e.g.*, Johnson v. United States, 576 U.S. 591, 595–96 (2015) (explaining the legal standard for finding a law unconstitutionally vague, standardless, or arbitrary).

66. *See, e.g.*, Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) (applying strict scrutiny to content-based restrictions on speech).

67. *See, e.g.*, Luna, *supra* note 64, at 704 ("Delaware punishes by up to six months imprisonment the sale of perfume or lotion as a beverage.").

68. *See generally* Jeff Palmer, *Abolishing Plea Bargaining: An End to the Same Old Song and Dance*, 26 AM. J. CRIM. L. 505, 519 (1999) (discussing how prosecutors have overcharged during the plea-bargaining stage); Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 863 (1995)

was indicted for forging a check in the amount of $88.30, which could have been punished by up to ten years in prison under Kentucky law at the time.[69] The prosecutor sought to force the defendant to plead guilty by threatening charges under Kentucky's habitual criminal statute, which would trigger a mandatory life sentence.[70] When the defendant refused to plead guilty and was convicted under the habitual offender statute, the Supreme Court upheld the prosecutor's conduct as not violating due process.[71]

As long as a charge is sufficiently supported, a prosecutor can bring any charges they wish,[72] and in many cases, prosecutors have a wide variety of charges to choose from given the expansive nature of most criminal codes.[73] Defendants facing a situation like the one in *Bordenkircher* may plead guilty simply to avoid more serious charges, contributing to the high rates of plea bargains in criminal cases.[74] And, in a system like the United States', which is primarily driven by plea bargaining, charging authority becomes an even more powerful prosecutorial tool.[75]

Related to the problem of expanding criminal codes, is the problem of "'dead crimes'—crimes that are openly violated, have long gone unenforced, and no longer reflect majoritarian views."[76] As Joel Johnson details, these sorts of crimes can lead to sudden and unexpected prosecution of conduct that is widely

(emphasizing that a prosecutor may bring a charge so long as there is probable cause and that such prosecutorial charging discretion can influence a defendant's decision to take a plea bargain).

69. 434 U.S. 357, 358 (1978).

70. *Id.* at 358–59 (explaining that due to two prior felony convictions, Hayes would be subject to life imprisonment if charged under Kentucky's habitual offender statute).

71. *Id.* at 364–65.

72. Meares, *supra* note 68, at 862–63 ("So long as the prosecutor has probable cause to believe that the accused committed an offense, the prosecutor is entitled to bring the charge.").

73. *See* Sean Rosenmerkel et al., *Felony Sentences in State Courts, 2006 – Statistical Tables*, U.S. DEP'T OF JUST. (Dec. 2009), https://bjs.ojp.gov/content/pub/pdf/fssc06st.pdf [https://perma.cc/WFB8-YWPB] (detailing the vast array of felony offenses prosecuted in state courts).

74. *See* Baughman & Wright, *Prosecutors and Mass Incarceration*, *supra* note 6, at 1128 (noting that 94% of criminal case are resolved by plea bargain).

75. *Id.* ("[S]ince 94% of criminal cases are resolved by plea bargain, prosecutors—not judges—determine a defendant's fate the vast majority of the time.").

76. Joel S. Johnson, *Dealing with Dead Crimes*, 111 GEO. L.J. 95, 96 (2022).

practiced—for instance, pre-marital sex.[77] The combination of virtually unlimited criminal codes and dead crimes does little to operate as a meaningful check on executive power.

2. Constitutional Limitations

Prosecutors are limited by various constitutional provisions, but examined closely, none of these constitutional provisions limit prosecutorial discretion in key determinations, like charging or sentencing. The rights contained in the Fourth,[78] Fifth,[79] Sixth,[80] Eighth,[81] and Fourteenth Amendments[82] define the general rights of criminal defendants, and as such, limit governmental power somewhat.[83] The Fourth Amendment forbids "unreasonable searches and seizures."[84] Generally, this means that searches and seizures "require[] a warrant supported by probable cause,"[85] and evidence resulting from illegal searches or seizures must be excluded from criminal proceedings.[86] Each of these requirements, however, is riddled with exceptions.[87]

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77. *Id.* at 118–20.

78. U.S. CONST. amend. IV (providing the right to be free against unreasonable search and seizure).

79. U.S. CONST. amend. V (prohibiting double jeopardy, self-incrimination, and the deprivation of life, liberty, or property without due process).

80. U.S. CONST. amend. VI (providing the right to a speedy trial, the right of the defendant to confront witnesses, and the right to the assistance of counsel).

81. U.S. CONST. amend. VIII (prohibiting excessive bail and cruel and unusual punishment).

82. U.S. CONST. amend. XIV (extending due process to the states).

83. *See generally* Baughman, *supra* note 62, at 1078–82, 1108–21 (arguing that constitutional checks do not adequately limit executive criminal power, using prosecutors as an example).

84. U.S. CONST. amend. IV.

85. Carpenter v. United States, 585 U.S. 296, 304 (2018).

86. *See* Weeks v. United States, 232 U.S. 383, 393 (1914) (describing defendant's argument to exclude evidence found in violation of his Fourth Amendment rights); Mapp v. Ohio, 367 U.S. 643, 655 (1961) (extending the exclusionary rule to the states); Wong Sun v. United States, 371 U.S. 471, 479–88 (1963) (establishing the fruit of the poisonous tree doctrine).

87. *See* Kentucky v. King, 563 U.S. 452, 460 (2011) (describing an exigent circumstances exception to the warrant requirement); New York v. Class, 475 U.S. 106, 114, 119 (1986) (describing a plain view exception to the warrant requirement); California v. Acevedo, 500 U.S. 565, 567 n.1, 569–72 (1991) (finding an automobile exception to the warrant requirement); Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001) (finding an arrest exception to the warrant

Fourth Amendment requirements almost certainly influence disposition in some cases prosecutors are presented with.[88] But once the Fourth Amendment is satisfied, it does almost nothing to limit the power and discretion of prosecutors at the charging, plea bargaining, and sentencing stages of a criminal case. As noted by the Supreme Court, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."[89]

Likewise, due process, the prohibition on double jeopardy, and the privilege against self-incrimination,[90] certainly limit some prosecutorial conduct but do nothing to seriously constrain prosecutorial discretion and power. Perhaps most importantly, the due process clause requires "proof beyond a reasonable doubt of every fact necessary to constitute the crime . . . charged."[91] This requirement likely prevents prosecutors from charging offenses they cannot prove at trial. Similarly, in *Brady v. Maryland*, the Supreme Court held that due process prohibits prosecutors from suppressing material evidence favorable to the

requirement); Chimel v. California, 395 U.S. 752, 762–63 (1969) (establishing the search incident to arrest exception for both the warrant and probable cause requirements); Terry v. Ohio, 392 U.S. 1, 20–22 (1968) (establishing the *Terry* rule, which permits limited search and seizure subject only to a reasonableness requirement).

88. *See* Miller & Wright, *supra* note 54, at 131, 138 (noting, in the context of an empirical survey of declinations, that prosecutors decline cases when there appears to be a Fourth Amendment violation); *see also id.* at 141 ("[M]any declination choices are shaped by *legal* norms that control criminal investigations . . . . Judges announce Fourth Amendment rules and enforce them through pretrial motions to exclude evidence. Police departments contribute their own part to the enforcement of these legal norms . . . . Finally, prosecutors also shape the enforcement of search-and-seizure rules."). *But see* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting) ("[T]here is no empirical evidence to support the claim that the rule actually deters illegal conduct of law enforcement officials."); California v. Minjares, 443 U.S. 916, 926–27 (1979) (Rehnquist, J., dissenting) ("[I]t is an open question whether the exclusionary rule deters the police from violating Fourth Amendment protections of individuals. Whether or not this be the case, the exclusionary rule certainly deters the police and prosecuting authorities from convicting many guilty defendants.").

89. United States v. Armstrong, 517 U.S. 456, 464 (1996) (quoting Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978)).

90. *See* U.S. CONST. amend. V; U.S. CONST. amend. XIV.

91. *In re* Winship, 397 U.S. 358, 364 (1970).

defendant.[92] Due process also requires some expeditiousness in prosecutorial investigation prior to charging.[93] As noted above, due process, however, imposes no real limitations on conduct during plea bargaining.[94] However, the Double Jeopardy Clause forbids the same sovereign from prosecuting the same offense in successive prosecutions,[95] thus preventing harassing prosecution. Finally, the rights articulated by *Miranda v. Arizona* and its progeny limit the admissibility of statements by a defendant during custodial interrogation.[96] Thus, these rights impose some procedural guardrails.[97]

The Sixth Amendment, similarly, checks only certain forms of government power. It guarantees a right to a speedy trial, the right to a jury trial, the right to confront witnesses, and the right to counsel.[98] The right to a speedy trial is the only one of these rights that directly checks prosecutorial power—by preventing prosecutors from bringing charges and indefinitely delaying resolution of these charges at trial[99]—and it is a fairly weak check at that.[100]

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92. 373 U.S. 83, 87 (1963).

93. *See* United States v. Lovasco, 431 U.S. 783, 795–96 (1977) (describing the prosecutorial goal of "orderly expedition").

94. *See Bordenkircher*, 434 U.S. at 364–65 (holding that a threat to bring charges supported by probable cause to induce a plea did not violate due process).

95. *See* Currier v. Virginia, 138 S. Ct. 2144, 2149–50 (2018) (describing double jeopardy protections); *see also* Gamble v. United States, 587 U.S. 678, 688–89 (2019) (describing the implications of the dual sovereignty doctrine).

96. 384 U.S. 436, 444 (1966) ("[T]he prosecution may not use statements . . . stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.").

97. *Id.* at 444–45 (summarizing *Miranda*'s procedural safeguards).

98. U.S. CONST. amend. VI.

99. *See* Betterman v. Montana, 578 U.S. 437, 442–45 (2016) (expanding on the protections afforded by the right to a speedy trial and how legislatures have implemented this guarantee).

100. *See* Barker v. Wingo, 407 U.S. 514, 521–22, 529–33 (1972) (discussing how the right to a speedy trial is "amorphous" and "vague," and establishing a multi-factor balancing test to determine whether the right has been violated). *But see Betterman*, 578 U.S. at 445 (noting that both federal and state governments have implemented speedy trial acts that impose more concrete limits on how quickly the government must act with respect to indictment and trial).

The Eighth Amendment prevents courts from imposing grossly disproportionate sentences for an offense.[101] Thus, by the same token, it limits prosecutors' ability to seek extreme punishment. Yet, the requirement that a sentence be "grossly" disproportionate to the offense is a fairly low bar for the prosecution and courts to clear.[102]

Lastly, the Fourteenth Amendment contains the Equal Protection Clause,[103] which protects against "intentional and arbitrary discrimination."[104] This clause limits prosecutors at the charging and sentencing stages of a case, but not by much. For starters, the Equal Protection Clause primarily protects suspect classes, such as race,[105] national origin,[106] non-citizenship,[107] parentage,[108] and gender.[109] Thus, prosecution initiated because of a non-suspect class would only be checked by rational basis review.[110] Next, prosecutors enjoy a presumption of regularity,

101. U.S. CONST. amend. VIII; *see* Graham v. Florida, 560 U.S. 48, 59–61 (2010) ("Embodied in the Constitution's ban on cruel and unusual punishment is the 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'" (alteration in original) (quoting Weems v. United States, 217 U.S. 349, 367 (1910))).

102. *See, e.g.*, Ewing v. California, 538 U.S. 11, 11 (2003) (upholding a twenty-five-year sentence for stealing golf clubs); Hutto v. Davis, 454 U.S. 370, 370 (1982) (upholding a forty-year sentence for possession of marijuana with the intent to distribute).

103. U.S. CONST. amend. XIV.

104. Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (per curiam) (quoting Sioux City Bridge Co. v. Dakota County, 260 U.S. 441, 445 (1923)).

105. *See*, *e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 222, 235 (1995) (subjecting all racial classifications to strict scrutiny).

106. *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 218 (1944) (subjecting classifications based on "Japanese ancestry" to strict scrutiny).

107. *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 371–72 (1971) (subjecting all classifications based on alienage to strict scrutiny).

108. *See, e.g.*, Clark v. Jeter, 486 U.S. 456, 461–64 (1988) (subjecting equal protection claims in a paternity suit to heightened judicial scrutiny).

109. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 531–33 (1996) (subjecting gender-based classifications to heightened judicial scrutiny).

110. *See, e.g.*, Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) (per curiam) (applying rational basis review to age-based classifications). Rational basis review simply requires that a non-suspect classification be "rationally related to furthering a legitimate state interest." *Id.* at 312. *But see* People v. Kail, 501 N.E.2d 979, 981–82 (Ill. App. Ct. 1986) (holding that selective enforcement of a statute requiring bells on bicycles pursuant to an official police policy of strict enforcement against suspected prostitutes violated Equal Protection, even under a rational basis test).

and a defendant claiming that a prosecutor violated equal protection either by initiating prosecution or at sentencing must show, with clear and convincing evidence,[111] a discriminatory effect motivated by a discriminatory purpose.[112] To show a discriminatory effect, however, "the claimant must show that similarly situated individuals of a [suspect class] were not prosecuted."[113] Only if the claimant can show a discriminatory effect motivated by a discriminatory purpose does the burden shift to the government to justify the prosecution under either strict or intermediate scrutiny.[114] Only in the most extreme cases of invidious discrimination would equal protection impose any meaningful check on prosecutorial conduct. As it stands, constitutional provisions do not limit prosecutors from over charging or treating similar defendants differently for the same crime, unless it is proven that they discriminated on account of a protected status. In sum, prosecutors have nearly unlimited charging discretion so long as they stay within these relatively loose constitutional boundaries.

3. Internal Office Checks

Prosecutorial conduct is arguably constrained by office culture and internal regulations; however, research in this area demonstrates that supervision is not common and prosecutors are largely left to make their own decisions.[115] Chief prosecutors often set office policies and strategies.[116] As such, internal controls within an office can influence prosecutors' exercise of power and discretion, though recent empirical work demonstrates that

111. *See* United States v. Armstrong, 517 U.S. 456, 465 (1996) ("[T]o dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present 'clear evidence to the contrary.'" (quoting United States v. Chem. Found., Inc., 272 U.S. 1, 14–15 (1926))).

112. *See* McCleskey v. Kemp, 481 U.S. 279, 292–93 (1987) ("[T]o prevail under the Equal Protection Clause, [the defendant] must prove that the decisionmakers in *his* case acted with discriminatory purpose.").

113. *Armstrong*, 517 U.S. at 465.

114. *See, e.g.*, *McCleskey*, 481 U.S. at 293 (finding the defendant failed to demonstrate that the legislature either enacted the capital punishment statute with discriminatory intent or disparate racial impact).

115. Wright et al., *Inside the Black Box*, *supra* note 6, at 2203 (discussing a study which found "that nearly three-quarters of prosecutors" made charging decisions alone and that "their supervisors provided no direction into the initial charging decisions").

116. *Id.* at 2152.

many prosecutors act as solo players and have surprisingly little oversight internally within their office or through any formal guidelines.[117]

Miller and Wright discuss internal office regulations and present evidence that these guidelines and social norms operate as a kind of positive law that can constrain abuse of discretion within an office.[118] In their study, Miller and Wright reviewed office practices surrounding declinations in New Orleans (and other major cities).[119] They found that chief prosecutors can affect policies regarding plea bargaining.[120] In another discussion of prosecution in New Orleans, they describe how New Orleans attempted a change in office policy regarding non-declination of domestic assault cases.[121] There, they found that while there was some evidence that attorneys attempted to implement it, external factors (such as victim non-cooperation) prevented any meaningful change.[122]

Likewise, a study conducted by Professor Don Stemen and Bruce Frederick in two counties with just under 1,000,000 people each and offices of around 75 and 125 prosecutors respectively found that internal office controls impacted decision-making.[123] Specifically, they found that because the offices surveyed were large and dispersed, the chief prosecutor's "guiding philosophy" did little to cabin an individual prosecutor's power or discretion.[124] They also found that units within offices developed rules and procedures to enforce consistency to some degree. Namely,

117. *See id.* at 2188–89 (finding that among surveyed prosecutors, only about half of prosecutor offices had any internal guidelines and, of these, only a small percent were mandatory guidelines); *see also* Kay L. Levine & Ronald F. Wright, *Prosecution in 3-D*, 102 J. CRIM. L. & CRIMINOLOGY 1119, 1174 (2012) (finding no charging or sentencing guidelines in any of the three prosecutor offices studied).

118. Miller & Wright, *supra* note 54, at 175–96.

119. *Id.* at 129.

120. *Id.* at 149; *see also* Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 34, 58–84 (2002) ("Among the many virtues we see in the screening/bargaining tradeoff described in this paper is the authority of a chief prosecutor, acting alone, to set this change in motion.").

121. Miller & Wright, *supra* note 54, at 149–53.

122. *Id.* at 150–51.

123. *See* Don Stemen & Bruce Frederick, *Rules, Resources, and Relationships: Contextual Constraints on Prosecutorial Decision Making*, 31 QUINNIPIAC L. REV. 1, 10–13, 17–39 (2013).

124. *Id.* at 18–21.

in one county, units prosecuting similar offenses would "roundtable" their cases regularly "to determine the charges to file and the appropriate plea offer."[125] Similarly, while these offices lacked office-wide rules that were consistently interpreted and enforced, units developed rules that "were clearly seen as binding on prosecutors" due to "prosecutors' desires to ensure their decisions are consistent with their colleagues and to maintain good working relationships with their colleagues."[126]

Thus, there is some empirical evidence for the proposition that internal policies within prosecutors' offices can effectively guide prosecutors' use of power and discretion. Worth noting, however, is that the two studies described took place in large offices; the effectiveness of internal mechanisms, or even the feasibility of internal mechanisms, looks quite different for small or mid-sized offices. Most prosecutors in the national study described in Part III commented that office policies and supervision were both minimal.[127] More investigation is necessary to determine how much internal supervision actually affects prosecutorial decision-making overall, though the largest national study in this area indicates that that it is limited, at least for many mid-sized and smaller prosecutor offices.[128]

4. Prosecutor Election or Appointment

Prosecutor elections or appointments arguably act as a check on prosecutorial power and discretion, though in practical terms they do not typically impact prosecutorial decision-making. Unlike every other country in the world, many prosecutors in the United States are elected.[129] Indeed, most states provide for the local election of chief prosecutors.[130] A prosecutor,

125. *Id.* at 21–22.

126. *Id.* at 27–30.

127. *See infra* notes 249–50 and accompanying text (noting that most prosecutors work alone, and most offices either did not have guidelines or have guidelines that are not mandatory).

128. Wright et al., *Inside the Black Box*, *supra* note 6, at 2152, 2159–60 (noting that the national survey of prosecutor offices leaned more heavily in the direction of middle- to smaller-sized prosecutor offices). It could be the case that larger offices have more supervision than smaller offices, but more research is necessary on this issue.

129. John F. Pfaff, *Criminal Punishment and the Politics of Place*, 45 FORDHAM URB. L.J. 571, 578 (2018).

130. Ronald F. Wright, *Community Prosecution, Comparative Prosecution*, 47 WAKE FOREST L. REV. 361, 363 (2012).

particularly if elected, might be concerned about their public image with an eye towards reelection; thus, accountability to the constituency one represents may influence prosecutorial charging decisions.[131] As Ronald Wright observes, local, democratic control is supposedly the most powerful form of holding officials accountable; this "connection between the criminal prosecutor and the local voters grew out of the Jacksonian period, with its emphasis on placing the daily work of governance into the hands of citizens."[132]

Yet, empirical studies suggest elections are not a meaningful check. For instance, Wright has argued that elections are often ineffectual.[133] He points out that challenges to incumbents are rare, and even when an election has more than one candidate, "[i]ncumbents and challengers have little to say about the overall pattern of outcomes that attorneys in the office produce or the priorities of the office."[134] Similarly, he argues that elections do not communicate sufficient information to chief prosecutors so that they can shift their actions to conform to the public's will.[135] In a more recent study, Professors Carissa Hessick and Michael Morse have confirmed not only that incumbents often lack challengers, but also that local races are often uncontested.[136] They point out, however, that more populous

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131. *See* Wright, *supra* note 18, at 834 ("Instead of formal review mechanisms within the legal system, local prosecutors in the United States face political accountability for their declinations. . . . Chief prosecutors also face scrutiny from other prosecutors and attorneys throughout the state and beyond." (footnotes omitted)).

132. Wright, *supra* note 36, at 589.

133. *See id.*; *see also* Ronald F. Wright, *Beyond Prosecutor Elections*, 67 SMU L. REV. 593 (2014) (discussing methods to improve prosecutor elections).

134. Wright, *supra* note 36, at 582–83.

135. Wright, *supra* note 133, at 593 ("[W]e hold high expectations for elections, treating them as a crucial device to legitimize the work of prosecutors. And these high expectations create a problem since any observer of prosecutor elections would have to conclude that they do a poor job. Elections do not give chief prosecutors enough guidance about the priorities and policies they should pursue to achieve public safety at an appropriate fiscal and human cost. Elections tell prosecutors very little about how to organize their offices, how to choose their priority cases, or—most important of all—how to select their least important cases, the ones the prosecutors will dismiss or decline to charge at all.").

136. Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 IOWA L. REV. 1537, 1544–45 (2020).

jurisdictions have an increased chance of seeing a contested election.[137] As such, elections may produce more of a check on prosecutors in urban areas.

It would be a mistake, however, to discount elections as influencing prosecutors' decision-making entirely. John Pfaff, for instance, has argued that the fact that prosecutors are elected at a county level, while crime typically takes place within larger urban centers, helps explain prosecutors' treatment of crime trends over several decades.[138] In other words, because prosecutors' electorates are skewed towards voters who are not necessarily influenced by the decisions they make, as these voters began to fear crime more, prosecutors tended towards increased punitiveness.[139]

In addition, the recent "progressive" prosecutor movement suggests that the electorate (at least in some jurisdictions) will consider the policies of a local prosecutor's office when making their decision. Campaigns have directed rhetoric expressly towards reform of the prosecutor's position itself.[140] Yet, as the progressive prosecutor movement illustrates, the electorate may want and expect strong executive officials who will use their power and discretion to its fullest extent, so long as it generally conforms to the electorate's expectations of what those ends are.[141]

137. *Id.* at 1545.

138. Pfaff, *supra* note 129, at 574–85. For other arguments about the influence of local politics on chief prosecutors, see, for example, Mellon et al., *supra* note 33, at 65–66, noting the influence of local politics on the Boulder DA. *See also* Wright et al., *supra* note 33, at 36–37 (describing a study of nine different jurisdictions aimed at determining what motivated chief prosecutors in their prosecutorial decision-making and finding that "chief prosecutors take on certain roles during elections and then implement certain policies—consistent with those roles—once they take office").

139. Pfaff, *supra* note 129, at 582.

140. *See* Levin, *supra* note 50, at 1422–25 (discussing the progressive prosecutor movement and prosecutor campaigns that have "adopted a critical posture, promising systemic change").

141. *Cf.* Hessick & Morse, *supra* note 136, at 1541 ("[T]he progressive prosecutor movement does not seek to reform prosecutorial power, at least immediately, so much as to capitalize on it."); Darcy Covert, *The False Hope of the Progressive-Prosecutor Movement*, ATLANTIC (June 14, 2021), https://www.theatlantic.com/ideas/archive/2021/06/myth-progressive-prosecutor-justice-reform/619141 [https://perma.cc/WRF6-4JC7] ("The progressive-prosecutor movement acknowledges . . . that prosecutors' 'breathtaking' power is a major

In the federal system, however, chief prosecutors—U.S. Attorneys—are appointed by the President and confirmed by the Senate.[142] Assistant U.S. Attorneys—the line prosecutors of the federal system—are appointed by the U.S. Attorney General, without any political confirmation process.[143] The field of administrative law has dedicated significant attention to whether the political processes governing appointment and removal of federal officers and non-officers acts as a check on administrative power,[144] and the critique of a "headless fourth branch" of the U.S. government rings true for U.S. Attorneys and Assistant U.S. Attorneys. Federal prosecutors act without much of a check from the top of the executive branch, arguably in some ways even more haphazardly than other administrative offices.[145]

5. Community Prosecution and External Review

Similar to elections, many prosecutors' offices have sought other methods of enhancing community feedback or monitoring.

source of America's criminal-justice problems. It asks its adherents to use that power for good, and trusts them to do so. But true reform won't come from using that power for good; instead, prosecutors will need to have less of it in the first place.").

142. U.S. CONST. art. II, § 2, cl. 2; 28 U.S.C. § 541; *see* Barkow, *supra* note 41, at 876 ("There are ninety-three United States Attorneys, who are appointed by the President with confirmation by the Senate . . . .").

143. 28 U.S.C. § 542.

144. *See, e.g.*, David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095, 1121–37 (2008) (discussing the problem of increasingly politicized agencies facilitated through the appointment and removal process); Christine Kexel Chabot, *Interring the Unitary Executive*, 98 NOTRE DAME L. REV. 129 (2022) (discussing the unitary executive theory of presidential accountability for unelected officials); Blake Emerson, *The Departmental Structure of Executive Power: Subordinate Checks from Madison to Mueller*, 38 YALE J. ON REGUL. 90 (2021) (discussing the executive branch and its departmental structure).

145. *See* Baughman, *supra* note 62, at 1084–92 (detailing the lack of executive checks on federal prosecutors); Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 312–15 (2013) (noting the lack of political power for those opposing prosecutorial practices); Barkow, *supra* note 41, at 871 ("In a national government whose hallmark is supposed to be the separation of powers, federal prosecutors are a glaring and dangerous exception."); Barkow, *supra* note 1, at 993 ("[U]nlike the administrative law context, where agencies must adhere to the structural and process protections of the APA and their decisions are subject to judicial review, the government faces almost no institutional checks when it proceeds in criminal matters.").

This is generally known as "community prosecution" and its aims include proactively addressing crime through problem solving and a focus on partnerships between prosecutors, law enforcement, and communities.[146] There is no single model for community programs. Some locate offices in targeted communities for visibility, others help direct police activity in certain communities, while still others solicit public feedback directly or even allow outside review of a prosecutor's decision to charge a case.[147]

In essence, community prosecution is an attempt to further decentralize prosecution to better involve communities. By that token, many smaller jurisdictions do not attempt to implement these kinds of efforts.[148] Further, it is unclear to what extent community prosecution truly checks prosecutorial power. As Bruce Green and Alafair Burke note, "a diversely constituted community [must be] fully participatory in prosecution efforts, and [must be] sufficiently informed and empowered to meaningfully express its will."[149] It also bears pointing out that if community prosecution is a check, it is essentially a voluntary check; if an office wanted to end community prosecution, it could at any time.

Similarly, a minority of states allow outside review of a prosecutor's decision to charge a case. Eleven states provide for public review of a prosecutor's decision to decline charges.[150] They allow for either judicial, attorney general, or victim or

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146. *See* Wright, *supra* note 130, at 362 ("[A]ll community prosecution programs aim to decentralize and democratize the work of criminal prosecutors."); M. Elaine Nugent, *What Does It Mean to Practice Community Prosecution?: Organizational, Functional, and Philosophical Changes*, AM. PROSECUTORS RSCH. INST. 3 (Feb. 2004), https://prosecutingattorneys.org/wp-content/uploads/What-Does-it-Mean-to-Practice-Community-Prosecution.pdf [https://perma.cc/K4SE-2HRG] (defining and explaining community prosecution); *see also* Thomas J. Miles, *Does the "Community Prosecution" Strategy Reduce Crime? A Test of Chicago's Experience*, 16 AM. L. & ECON. REV. 117, 120–24 (2014) (describing what the community prosecution model encompasses).

147. *See* Wright, *supra* note 130, at 369 (discussing the different forms that community prosecution initiatives take).

148. *Id.* at 370.

149. Bruce A. Green & Alafair S. Burke, *The Community Prosecutor: Questions of Professional Discretion*, 47 WAKE FOREST L. REV. 285, 313 (2012).

150. These states are Colorado, Michigan, Nebraska, North Dakota, Pennsylvania, Wisconsin, Kentucky, Oklahoma, Connecticut, New York, and South Carolina. *See infra* notes 152–56.

community review.[151] The most common form of oversight is judicial review of a decision not to prosecute.[152] Some states require prosecutors who decide not to prosecute to present a written statement detailing their reasoning for declining to prosecute.[153] Others require the prosecutor to appear before a judge and give their reasons for some public accountability.[154] Similarly, two states allow for the attorney general to review a prosecutor's decision and initiate proceedings if they deem necessary.[155] Finally, four states allow victims, their families, or the community to challenge or otherwise be involved in a prosecutor's decision to decline charges.[156] Connecticut has the strongest of these statutes, being the only state to explicitly provide that the family of a deceased victim may complain in the event a prosecutor declines to bring charges.[157]

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151. *See, e.g.*, Jessica A. Roth, *Prosecutorial Declination Statements*, 110 J. CRIM. L. & CRIMINOLOGY 447, 529–30 (2020) (noting that certain states require public declination statements, in particular for cases dealing with police use of force).

152. Six states provide for a judicial review process. COLO. REV. STAT. § 16-5-209 (2023); MICH. COMP. LAWS § 767.41 (2023); NEB. REV. STAT. § 29-1606 (2023); N.D. CENT. CODE § 11-16-06 (2023); 16 PA. CONS. STAT. § 1409 (2023); WIS. STAT. § 968.02(3) (2023); WIS. STAT. § 968.26 (2023).

153. MICH. COMP. LAWS § 767.41 (2023); NEB. REV. STAT. § 29-1606 (2023); WIS. STAT. § 968.26 (2023).

154. 16 PA. CONS. STAT. § 1409 (2023); WIS. STAT. § 968.02(3) (2023).

155. KY. REV. STAT. ANN. § 15.715 (West 2023); OKLA. STAT. tit. 21, § 1328 (2023).

156. CONN. GEN. STAT. § 51-277d (2023) (stating that, in the case of an investigation into the cause of a person's death, if a "prosecutorial official . . . declines to criminally prosecute . . . , a member of [the victim's] immediate family may file a written complaint . . . ." and that the Chief State Attorney or the Criminal Justice Commission must respond to the complainant no later than thirty days after the filing of the complaint and must state any action that has or will be taken on the matter); N.Y. CRIM. PROC. LAW § 170.40 (McKinney 2023) (allowing a prosecutor to dismiss "[a]n information, a simplified traffic information, a prosecutor's information or a misdemeanor complaint . . . in the interest of justice" as long as the prosecutor considers a number of factors including, where the court deems it appropriate, the "attitude of the complainant or victim"); S.C. CODE ANN. § 16-3-1545 (2023) (providing that, in juvenile cases, the prosecuting attorney must "discuss a case with the victim" including diversion of the case); WIS. STAT. § 968.26(2) (2023) (describing how individuals who are not district attorneys may contact a judge if they have "reason to believe that a crime has been committed," have their complaint referred by that judge to the district attorney and, if the DA refuses to bring charges, have the judge consider taking action to compel charges).

157. CONN. GEN. STAT. § 51-277d (2023).

To briefly recap: U.S. prosecutors are vested with significant power at each stage of a criminal case, from charging to sentencing, and even expungement. While the current state of law constrains prosecutors in some ways, it leaves their power and discretion untouched in others. For instance, prosecutors cannot invent crimes, punish conduct without sufficient cause and evidence, or engage in invidious discrimination. But there is generally nothing to prevent a prosecutor from overcharging in an effort to obtain a plea, declining charges in any given case,[158] or otherwise handling similar cases in vastly different ways.

It is worth recognizing that some aspects of prosecutorial power and discretion are desirable. Judge Stephanos Bibas, for instance, points out that discretion per se—the ability of prosecutors to treat unlike cases unlike and to use discretion to avoid charging acts the law plainly was not meant to cover—is "neither bad nor antithetical to the rule of law."[159] Instead, it is idiosyncratic prosecutorial discretion—wide variance from prosecutor to prosecutor "with each one a law unto himself and his own whims, biases, and shirking"—that is problematic.[160] In other words, were prosecutors to have no discretion and to apply the law mechanically, it would produce absurd results.[161]

This argument is certainly valid. Yet, there is some evidence that a lack of checks on individual prosecutors *has* led to idiosyncratic prosecutorial discretion. One study, for instance, found that length of time as a prosecutor impacted decision-making, and that generally the longer the prosecutor practiced the less harsh they were in charging.[162] Pamela Utz found that some differences in prosecutorial discretion and decision-making may be a result of geographic location.[163] Likewise, another study found

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158. *But see supra* text accompanying notes 152–57 (noting that some states permit private citizens to push for review of prosecutors' declination decisions).

159. Bibas, *supra* note 54, at 370.

160. *Id.* at 371.

161. *Id.* at 372.

162. Ronald F. Wright & Kay L. Levine, *The Cure for Young Prosecutors' Syndrome*, 56 ARIZ. L. REV. 1065, 1068–69 (2014).

163. Levine & Wright, *supra* note 117, at 1129 (finding a higher rate of negotiated pleas among prosecutors in Alameda County due to factors such as a "relatively strong public defense bar," "the active role of the Alameda County judiciary in twisting arms to secure pleas," "a long history of high crime rates," and a politically liberal population as well as leadership styles recommending plea bargaining (citing PAMELA J. UTZ, SETTLING THE FACTS: DISCRETION AND NEGOTIATION IN CRIMINAL COURT (1978))).

significant variability between different prosecutors in how they would handle the same set of facts, with correlations by region.[164]

It is fair to say that the debate is not over *whether* there should be prosecutorial discretion at all; it is over *how much* discretion and power society is willing to give to one official.[165] Indeed, many take issue primarily with the fact that decisions of prosecutors are often not public.[166] In other words, it is *unreviewable* and *unconstrained* discretion that can create the issue, especially when prosecutors use their discretion in disparate ways or employ excessive charging.

II. NORMATIVE MODELS FOR PROSECUTOR DECISION-MAKING

Given the wide discretion prosecutors have in handling any particular case, one may expect a robust set of normative guidelines from courts and professional organizations providing a roadmap for how prosecutors ideally *should* act. This, however, is not the case. According to the American Bar Association (ABA) and the National District Attorneys Association (NDAA), prosecutors should primarily "seek justice."[167] This standard can be traced to *Berger v. United States*:

> [The prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest,

164. Wright et al., *Inside the Black Box*, *supra* note 6, at 2141–42.

165. *See, e.g.*, Melilli, *supra* note 54, at 674 ("Whatever disagreement exists about the appropriate extent of prosecutorial discretion, there is a consensus that some degree of discretion is inevitable.").

166. *See* Miller & Wright, *supra* note 54, at 129 (terming the inner workings of prosecutors' offices "the black box" due to the ability of "prosecutors to do their daily work without explaining their choices to the public"); Wright et al., *Inside the Black Box*, *supra* note 6, at 2136 ("[P]rosecutor decision making . . . has been referred to as the 'black box.' This is protected information that is not discoverable by defendants and has been difficult to examine empirically." (footnotes omitted)).

167. NAT'L DIST. ATT'YS ASS'N, 3 NATIONAL PROSECUTION STANDARDS 2 (2009) (ebook); *see also* MODEL RULES OF PRO. CONDUCT r. 3.8 cmt. (AM. BAR ASS'N 1983); CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION (AM. BAR ASS'N 2017); Baughman & Wright, *Prosecutors and Mass Incarceration*, *supra* note 6, at 1166–67 (noting that the ABA and NDAA encourage prosecutors to "seek justice").

> therefore, in a criminal prosecution *is not that it shall win a case, but that justice shall be done*.[168]

There is little additional insight on what "justice" means for prosecutor decision-making, including charging.

Importantly, this guidance stands in stark contrast to the role of most attorneys as advocates for their client,[169] and, as Green notes, this obligation "places prosecutors somewhere between judges, on the one hand, and lawyers advocating on behalf of private clients, on the other."[170] While this guidance certainly recognizes that prosecutors are quasi-executive, quasi-judicial officials, it is also extraordinarily malleable; what "justice" means in terms of prosecutorial decision-making is anyone's guess. Green has argued that the obligation should be understood in its historical context as a duty that prosecutors act on behalf of a sovereign, whose interest includes both "punishing lawbreakers" and "avoiding the punishment of innocent people and ensuring that people are treated fairly."[171] Jeffrey Bellin, however, persuasively argues that justice "is an analytical dead end[;] [i]t offers neither a meaningful standard to govern prosecutors, nor a useful guideline for generating specific rules."[172] In other words, official ethical guidance offers little in the way of a yardstick by which to measure prosecutors' conduct. Prosecutors could charge identical cases vastly differently, and each could be seeking justice according to their own moral compass that differs dramatically.[173]

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168. Berger v. United States, 295 U.S. 78, 88 (1935) (emphasis added); *see also* Green, *supra* note 52, at 612–18 (detailing the history of the "seek justice" concept and tracing it back to theorists and court decisions from the mid-nineteenth century).

169. *Cf.* MODEL RULES OF PRO. CONDUCT r. 3.8 cmt. (AM. BAR ASS'N 1983) (noting the additional responsibility of a prosecutor as a minister of justice); MODEL RULES OF PRO. CONDUCT r. 1.3 cmt. (AM. BAR ASS'N 1983) (describing the diligence a lawyer should demonstrate on behalf of a client); MODEL RULES OF PRO. CONDUCT: PREAMBLE & SCOPE (AM. BAR ASS'N 1983) (asserting a lawyer's responsibility to clients, the legal system, and justice).

170. Green, *supra* note 52, at 615.

171. *Id.* at 642.

172. Bellin, *supra* note 1, at 1210; *see also* Green, *supra* note 52, at 616 ("The disciplinary rules, however, do not fully consider how prosecutors' duty to seek justice may translate into different or more demanding professional obligations: Indeed, the rules barely scratch the surface.").

173. *See* Bellin, *supra* note 1, at 1210 (noting the common problem of inconsistent approaches among prosecutors).

The following Sections outline what this Article identifies as three normative models that have either been adopted by some prosecutors or that have been suggested by scholars. These include: (A) conviction-focused prosecution, (B) progressive prosecution, and (C) evidence-driven prosecution.

A. CONVICTION-FOCUSED PROSECUTION

While the official guidance of professional organizations and the Supreme Court may be that the prosecutor's duty is to seek justice, many prosecutors interpret "justice" to mean convictions.[174] This motivation underlying prosecutor decision-making has been termed "conviction psychology."[175] Scholars who have studied the phenomenon have argued that conviction psychology stems from the length of time one spends as a prosecutor;[176] an

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174. *See* George T. Felkenes, *The Prosecutor: A Look at Realty*, 7 SW. U. L. REV. 98, 109 (1975) (describing the results of a study into the demographics and attitudes of prosecutors which found a conviction psychology among prosecutors where one-third of prosecutors surveyed expressed that their "major function is to secure convictions"); Green, *supra* note 54, at 604 (noting that prosecutors may make decisions that the community disagrees with due to their ultimate goal of "winning" the most cases); Melilli, *supra* note 54, at 690 (discussing "conviction psychology" that encourages prosecutors to secure convictions); Stephanos Bibas, *Rewarding Prosecutors for Performance*, 6 OHIO ST. J. CRIM. L. 441, 444 (2009) ("Prosecutors are public officials sworn to do justice, not just convict, so we hold them to high ethical standards. Fighting hard is part of zealous advocacy, but partisanship tempts them to go further and hit below the belt. For example, the conviction mindset temps some prosecutors to overlook or withhold exculpatory or impeachment evidence. They may block DNA testing or obstinately defend convictions even after DNA tests confirm innocence. They may threaten excessive charges, lie, or misrepresent facts to pressure or bluff defendants into plea bargains or cooperation deals. Prosecutors' powers to subpoena, bring or dismiss charges, and strike deals are vast yet not constrained." (footnotes omitted)); Kenneth Bresler, *"I Never Lost a Trial": When Prosecutors Keep Score of Criminal Convictions*, 9 GEO. J. LEGAL ETHICS 537, 541–44 (1996) (critiquing prosecutors who track their conviction records as not following the ethical imperative to seek justice and as an unprofessional incentive to seek convictions at all costs).

175. Felkenes, *supra* note 174, at 111 ("When emphasis, in any form, is placed on convictions, 'conviction psychology' exists.").

176. Melilli, *supra* note 54, at 690 ("Because the adoption of a conviction psychology frequently results from the institutional influences brought to bear upon prosecutors, veteran prosecutors are more likely than their less experienced colleagues to manifest conviction psychology.").

intrinsic belief in the guilt of all defendants;[177] the social and political rewards obtained by securing convictions;[178] and that, of the two roles assigned to a prosecutor,[179] many prosecutors tend to adopt the role of a law enforcement advocate.[180] In other words, at least for some, the prosecutor's role has been defined as one that is tied to seeking convictions.[181] Indeed, some have reported that prosecutors are even given merit pay and bonuses based on conviction rates.[182] Another possibility is that prosecutors bring charges in order to increase governmental supervision over the defendant.[183] The adversarial role of the prosecutor and their first priority of upholding and obtaining convictions is an

177. Felkenes, *supra* note 174, at 112 ("[M]ore than one-half of the district attorneys surveyed do not presume that a man is innocent until proven guilty."); Melilli, *supra* note 54, at 680–82, 689–90 (discussing how the probable cause standard is low and noting that a "prosecutor's institutional posture and orientation make him or her less likely to perceive doubts concerning the guilt of defendants").

178. *See* Felkenes, *supra* note 174, at 114–17 (noting the social and political factors in conviction psychology).

179. Melilli, *supra* note 54, at 697 (noting the dual role of the prosecutor as both "an advocate for the government and as an administrator of justice"); *see also* Barbara O'Brien, *A Recipe for Bias: An Empirical Look at the Interplay Between Institutional Incentives and Bounded Rationality in Prosecutorial Decision Making*, 74 MO. L. REV. 999, 1010–15 (2009) (explaining the reasons prosecutors struggle to reconcile their conflicting roles as both an advocate and minister of justice).

180. Melilli, *supra* note 54, at 698 (describing how, when faced with the dilemma between being an advocate and a minister of justice, prosecutors identify more with their role as a law enforcement advocate); Felkenes, *supra* note 174, at 119 (explaining the reasons a prosecutor will favor their advocate role).

181. *See, e.g.*, TASK FORCE REPORT, *supra* note 51, at 72 (naming the various responsibilities of a prosecutor).

182. Peter A. Joy & Kevin C. McMunigal, *Contingent Rewards for Prosecutors?*, CRIM. JUST., Fall 2011, at 55, 55 ("[A] district attorney in Colorado recently paid prosecutors bonuses averaging $1,100 for achieving at least 70 percent convictions in five or more felony trials during the year. In Texas, another district attorney announced trial competitions for prosecutors in the office's misdemeanor division. The 'Trial Dawg Award' promised the first assistant prosecutor to take 12 cases to jury trials and achieve a conviction rate above 50 percent the prize of sitting second chair on a murder case.").

183. *See infra* text accompanying notes 265–66 (describing a prosecutor who, when making a charging and sentencing decision, decided that "[t]he State and this defendant likely would benefit more from supervised treatment rather than incarceration").

insurmountable impediment to change in American prosecution.[184]

Conviction-based prosecution may also be simply another cognitive bias. Alafair Burke argues that when prosecutors act in ways that suggest "they must value obtaining and maintaining convictions over 'doing justice,'" they really are acting irrationally but without any ulterior motive.[185] Specifically, Burke details four types of cognitive biases that affect decision-making: (1) confirmation bias, (2) selective information processing, (3) belief perseverance, and (4) the avoidance of cognitive dissonance.[186] For instance, in the context of the initial investigation and charging decision, "[c]onfirmation bias will reduce the likelihood that the investigation will be directed in a manner that would yield evidence of innocence."[187] This confirmation bias may get worse still more once a prosecutor has made the decision to charge.[188] Thus, Burke argues, the prosecutor lacks the ability to be a neutral decision-maker in charging, because their decisions are compromised by cognitive bias.[189]

Barbara O'Brien agrees that prosecutorial cognitive bias results from prosecutors being forced to justify and prove why they think an individual defendant is guilty of a crime, which

184. *See* Eric S. Fish, *Against Adversary Prosecution*, 103 IOWA L. REV. 1419, 1432 (2018) (noting the conflict between the prosecutors' adversary role and their responsibility to seek justice); Catherine Ferguson-Gilbert, Comment, *It Is Not Whether You Win or Lose, It Is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors?*, 38 CAL. W. L. REV. 283, 289–309 (2001) (discussing prosecutors' tally-keeping mentality, motivations for maintaining a winning percentage, misconduct as a result of this mentality, the lack of discipline for misconduct, and suggesting an alternative way to measure success).

185. Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1590 (2006).

186. *Id.* at 1593.

187. *Id.* at 1604.

188. *Id.* at 1605 (discussing how prosecutors get "tunnel vision" focused on getting a conviction, which leads to innocent people wrongly convicted).

189. *Id.* at 1612 ("In short, compared to a neutral decision maker, the prosecutor will overestimate the strength of the government's case against the defendant and underestimate the potential exculpatory value of the evidence whose disclosure is at issue. As a consequence, the prosecutor will fail to see materiality where it might in fact exist.").

undermines objectivity and breeds conviction-based prosecution.[190] O'Brien presents two empirical studies that demonstrate that "people who expect to persuade others of the correctness of their position will be more prone to defensive bolstering at the expense of an evenhanded review of the evidence."[191] O'Brien argues that to limit conviction psychology, it would be best to hold prosecutors accountable not for the result of a case but the process by which they make decisions.[192] However, none of this changes the bottom line for a defendant. A defendant prosecuted by an individual focused on convictions may not be receiving the same type of "justice" as an individual charged by a prosecutor focused on achieving the best result in a given case for the defendant, victim, and society. At the very least, conviction is a motivation for some prosecutors in their decisions and must be taken into account in any potential reform in this area.

B. Progressive Prosecution

Several scholars have voiced support for the "progressive prosecutor" model that has emerged in some jurisdictions as a new normative model of prosecution. Since the mid-2010s, several chief prosecutors who have styled themselves as progressive reformers have been elected across the United States.[193] While the term "progressive prosecutor" has no strictly accepted

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190. O'Brien, *supra* note 179, at 1022 ("Accountability for the ability to persuade another that a decision is the right one is precisely the sort that research suggests induces defensive bolstering and undermines objectivity.").

191. *Id.* at 1028. O'Brien's first study assigned four different levels of accountability to participants (process, outcome, persuasion, and none). *Id.* at 1027. Participants then acted the part of prosecutors in reviewing evidence and role-playing an argument of who committed a crime and how it happened. *Id.* at 1024–28. The results confirmed that those who were expected to persuade a jury interpreted evidence in ways that confirmed the guilt of the initial suspect. *Id.* at 1028–29. The second study assigned the same four levels of accountability to participants. *Id.* at 1029. It then raised the level of perceived accountability by promising a reward to those who came closest to fulfilling the objectives. *Id.* at 1030. The results again showed that those in the persuasion group tended to focus on the guilt of their initial suspect. *Id.* at 1031–32.

192. *Id.* at 1046–47.

193. *See* Tyler Yeargain, *Prosecutorial Disassociation*, 47 AM. J. CRIM. L. 85, 114–19 (2020) (recounting the advent and evolution of progressive prosecutors); Green & Roiphe, *supra* note 18, at 738–46 (describing the rise of the progressive-prosecution movement). For a recent list of jurisdictions in which progressive prosecutors have won, see Darcy Covert, *Transforming the Progressive Prosecutor Movement*, 2021 WIS. L. REV. 187, 197–99.

definition, it broadly refers to prosecutors who seek structural reform by reducing mass incarceration and increasing fairness for defendants.[194] Some progressive prosecutors have noted their willingness to categorically decline charges of a certain type,[195] which has elicited praise by some and criticism by others.[196] Worth noting as well is *who* has been styled as a progressive prosecutor. In contrast to "tough-on-crime" candidates of years past, progressive prosecutors often have been previously criminal defense or civil rights lawyers.[197] Likely due to political reasons, progressive prosecutors have largely only been successful in getting elected in urban areas.[198]

Proponents suggest that progressive prosecution is an "updated normative model" for U.S. prosecution.[199] As opposed to overtly punitive normative models, which contribute to mass incarceration, progressive prosecution purportedly seeks to address an overloaded criminal justice system and exercises leniency when appropriate.[200] Proponents argue that this shift in

194. *See* Levin, *supra* note 50, at 1425–28 (discussing the uncertainty of what it means to be a "progressive prosecutor"); *id.* at 1418 (tracing four types of progressive prosecutors); Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 2 (2019) (describing progressive prosecutors as prosecutors who use "their power and discretion with the goals of not only enforcing the law, but also reducing mass incarceration, eliminating racial disparities, and seeking justice for all, including the accused").

195. *See, e.g.*, J. David Goodman & Jack Healy, *In States Banning Abortion, a Growing Rift over Enforcement*, N.Y. TIMES (June 29, 2022), https://www.nytimes.com/2022/06/29/us/abortion-enforcement-prosecutors.html [https://perma.cc/9A46-XKG5] (reporting on some district attorneys' reluctance to charge abortion providers).

196. *See id.* (considering the different reactions to prosecutors refusing to prosecute people who seek abortions or those who provide abortion services).

197. Green & Roiphe, *supra* note 18, at 742 ("Today's progressive prosecutors are also distinguished from mainstream prosecutors by their identity, which adds to their outsider status."); Yeargain, *supra* note 193, at 118 (noting that many progressive prosecutor candidates were more likely to be public defenders than prosecutors and more likely to campaign on ending mass incarceration rather than on being "tough on crime").

198. Maybell Romero, *Rural Spaces, Communities of Color, and the Progressive Prosecutor*, 110 J. CRIM. L. & CRIMINOLOGY 803, 804–06 (2020) (attributing the urban concentration of progressive prosecutors to the "political divide" between urban and rural communities).

199. Bellin, *supra* note 18, at 712.

200. *Id.* at 716; *see also* Davis, *supra* note 194, at 27 (supporting any progressive prosecutor practice that reduces incarceration rates and racial

prosecutorial priorities is much needed to address the issues of the criminal justice system.[201] Likewise, they argue that it is more expedient to act through prosecutorial elections rather than legislative change.[202] This idea has some appeal. Given that prosecutors have so much power and discretion in the U.S. criminal justice system, it arguably makes sense for those seeking reform to elect prosecutors who share these priorities.

The movement is not without critics, however. Some argue that progressive prosecution is an abuse of discretion, in that it allows criminals to remain free.[203] Other critics argue that the movement cannot and has not thus far offered any meaningful change, given that it relies entirely on what many see as the problem: prosecutors with too much power and too much discretion.[204] As Covert points out: "It is unrealistic to expect that even reform-minded prosecutors (or anyone, for that matter) can and will dispense justice when they have virtually boundless power and almost unlimited discretion to use it against criminal defendants."[205] Indeed, some commentators argue that while the goals of the progressive prosecutor movement are laudable, the movement is unlikely to achieve those goals in any lasting fashion.[206] Covert, for instance, argues that to achieve more

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disparity); Angela J. Davis, *The Progressive Prosecutor: An Imperative for Criminal Justice Reform*, 87 FORDHAM L. REV. ONLINE 1, 3 (2018) ("These chief prosecutors are implementing a new model of prosecution that focuses on alternatives to incarceration and second chances, and they are making a difference.").

201. *See, e.g.*, Davis, *supra* note 200, at 5.

202. EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION, at xxviii (2019) (noting the significant electoral power citizens have over prosecutors).

203. *Cf.* Covert, *supra* note 193, at 191 (citing several examples of critiques on progressive prosecution).

204. *See* Covert, *supra* note 141 (arguing that the progressive-prosecutor movement cannot bring about "meaningful change" because instead of supporting a reduction in the power given to prosecutors, the movement advocates for the unrealistic goal of prosecutors using their vast discretionary powers solely for good).

205. *Id.*

206. *See* Covert, *supra* note 193, at 193, 240–49 (pointing out flaws in the use of elections to achieve change); Hana Yamahiro & Luna Garzón-Montano, *A Mirage Not a Movement: The Misguided Enterprise of Progressive Prosecution*, 46 N.Y.U. REV. L. & SOC. CHANGE: HARBINGER 130, 132–34 (2022), https://socialchangenyu.com/wp-content/uploads/2022/06/Yamahiro_Garzon-Montano_RLSC-The-Harbinger_46.130-1.pdf [https://perma.cc/LZ8V-X4BH] (appreciating progressive prosecutors but refusing to believe they will save the

significant change, progressive prosecutors must change the way they think about violent crime,[207] must change how treatment relates to the criminal justice system,[208] should support defunding efforts and legislative and judicial limits,[209] and should support efforts to expand defendants' constitutional rights.[210] All of these changes must occur at the whim of individual prosecutors, which makes it difficult for lasting national change by prosecutors who are susceptible to public opinion and can change the course of their decisions at any time with little accountability.

C. EVIDENCE-DRIVEN PROSECUTION

Some argue that prosecutors make charging decisions based on whether the defendant could be convicted as a matter of law.[211] This framework envisions prosecutors making charging decisions based on whether the burden of proof has been met and whether there is sufficient evidence to convince a jury that the defendant is guilty.[212]

Using an evidence-based theory, Bellin argues that his "servant-of-the-law" model would better address criticisms of

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criminal legal system); Seema Gajwani & Max G. Lesser, *The Hard Truths of Progressive Prosecution and a Path to Realizing the Movement's Promise*, 64 N.Y. L. SCH. L. REV. 69, 71–72 (2020) (questioning whether better prosecutors will solve anything).

207. *See* Covert, *supra* note 193, at 207–14 (arguing that progressive prosecutors fail to appreciate that those incarcerated for drug offenses make up only about 20% of the prison population and that unless prosecutors rethink violent crime, they will have only a minimal impact on mass incarceration).

208. *See id.* at 215–24 (arguing that pre-trial diversionary programs often just open the door to criminal justice interactions and they are ultimately ineffective at reducing incarceration).

209. *Id.* at 230–33 (arguing for legislative and judicial change due to internal policies lacking effectiveness).

210. *See id.* at 233–39 (noting that progressive prosecution has done little to combat, for instance, racial disparities).

211. *See* Bellin, *supra* note 1, at 1213 ("[A] prosecutor who embraces the servant-of-the-law model would not robotically enforce every criminal statute in every case. Most obviously, the prosecutor would decline to prosecute cases with insufficient evidence to prove the defendant's guilt."). *See generally* Miller & Wright, *supra* note 54, at 137–45 (arguing that substantive criminal law and procedure impose meaningful limits on prosecutor discretion).

212. ANNA OFFIT, THE IMAGINED JUROR: HOW HYPOTHETICAL JURIES INFLUENCE FEDERAL PROSECUTORS 33–37, 42–46 (2022) (noting that federal prosecutors frequently imagine how jurors will react to the evidence they have assembled).

modern prosecution.[213] This model has four components. First, servant-of-the law prosecutors would pursue only cases that they should win—as an evidentiary matter—if the case were to go to trial.[214] Second, and relatedly, this model encourages prosecutors to bring charges only for offenses "for which a jury should (legally speaking) convict."[215] Third, servant-of-the-law prosecutors should prioritize serious offenses and standardize plea bargaining to limit overcharging in order to gain an edge.[216] And finally, servant-of-the-law prosecutors should be less adversarial and should avoid lobbying efforts.[217] He further explains that prosecutors under this model would not "robotically enforce every criminal statute in every case."[218] Likewise, he envisions that prosecutors would "freely dismiss minor cases in response to resource constraints."[219]

While Bellin's normative model would provide meaningful change if adopted, it essentially relies on prosecutors to decide to change their view of justice and limit their own overcharging. Furthermore, it does not address the fact that the default to resolving a case is a charge and a prosecutor's decision to maintain charges is "a safe choice because no one can question or scrutinize a prosecutor's decision to pursue a charge."[220] Prosecutors do not have the responsibility to justify decisions to pursue charges.[221] Dismissing charges, in contrast, may require a prosecutor to justify their decision either because of the attention that comes from dropping charges or because of internal

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213. Bellin, *supra* note 1, at 1211–12.

214. *Id.* at 1220–23.

215. *Id.* at 1224.

216. *Id.* at 1228–31.

217. *Id.* at 1231–36.

218. *Id.* at 1213 ("Most obviously, the prosecutor would decline to prosecute cases with insufficient evidence to prove the defendant's guilt. This would include cases that depend on police officers with credibility problems, jailhouse informants, coerced confessions, flawed identification procedures, or questionable forensic science. The servant-of-the-law prosecutor would also preference defendant-protective state and federal constitutional provisions over the mechanical enforcement of criminal statutes." (footnotes omitted)).

219. *Id.* at 1214.

220. Fan Li, *Youthful Indiscretion: The Structural Challenge of Inexperienced Prosecutors*, *in* CAN THEY DO THAT?: UNDERSTANDING PROSECUTORIAL DISCRETION 97, 108–09 (Melba V. Pearson ed., 2020).

221. *Id.* at 109.

policies.[222] New prosecutors in particular may be susceptible to pressure to pursue all possible cases as they try "to build a reputation for being tough-but-fair."[223] When a case is dismissed for lack of evidence, the prosecutor does not incur the same negative repercussions because the lack of evidence "would merely be a reflection of the police efforts," rather than of the prosecutor's decision-making ability.[224] While the outcome when viewed from the prosecutor's perspective is identical ("one charge was filed and a little later one charge was dropped"), the accused may suffer extreme negative consequences by waiting until a trial date for the charges to be dropped.[225] In addition, the cost to the public is considerable,[226] and the safe choice for prosecutors remains charging a crime.[227] Any reform relying on prosecutors to limit themselves without an external check lacks the appropriate teeth to be effective.[228]

III. EMPIRICAL INSIGHTS ON PROSECUTORIAL DECISION-MAKING

Few empirical studies expressly examine how prosecutors make decisions.[229] This Part reviews the existing data and argues that it largely confirms that prosecutorial power and discretion in any given case is unchecked, that prosecutors appear to rely primarily on the justice-based model for decision-making, and that the justice-based normative model produces variable results.

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222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.* at 108.

228. *See* Baughman, *supra* note 62, at 1076–77, 1108–12 ("Without functioning checks, prosecutors have used harsh legislation without accompanying limits to increase charging and individual sentences and have retained immunity from accountability or, in large part, from the responsibility of fulfilling individual constitutional rights with a lack of judicial intervention, all while contradicting the articulated executive agenda without any recourse.").

229. *See* Baughman & Wright, *Prosecutors and Mass Incarceration*, *supra* note 6, at 1147 (noting that some prior work is based solely on anecdotes, some studies use lay persons rather than prosecutors as subjects, and some studies rely on modeling to predict decision-making).

A. PRIOR STUDIES

A few studies have examined how office structure and guidance affect prosecutorial decision-making. In one study, Miller and Wright examined data on office practices surrounding declinations in New Orleans, Milwaukee, Charlotte, and San Diego.[230] In New Orleans, the chief prosecutor had required line prosecutors to keep records of their decisions and reasons for their decisions.[231] Miller and Wright show that declination decisions "most often derive from legitimate (and primarily legal) sources," which range from procedural requirements to substantive doctrines to enforcement priorities of the office.[232] For example, the most common reason for declination listed was that the prosecutor was pressing other charges, while the second and third most common have to do with evidentiary issues.[233] The fourth most cited reason for declination was that the case was "[n]ot suitable for prosecution,"[234] however, and the authors argue that to some extent, internal office guidelines and social norms operate as a kind of positive law that can constrain abuse of discretion.[235]

Other studies have examined which factors go into prosecutors' charging decisions.[236] For instance, in a study by Beichner and Spohn, which examined factors that predict whether prosecutors would charge in a sexual assault case based on data from Kansas City and Miami, the authors found that evidentiary concerns, offense seriousness, victim credibility, and victim risk-taking behavior were factors.[237]

B. THE PRESENT STUDY

In a more recent study, one of the Authors of this piece, Professor Baughman, along with Professors Wright and Robertson

230. Miller & Wright, *supra* note 54, at 129.

231. *Id.* at 129.

232. *Id.* at 135.

233. *Id.* at 136.

234. *Id.*

235. *Id.* at 131–33, 148–54, 172–96 (detailing the theory behind internal regulations and arguing for their desirability).

236. *See* Dawn Beichner & Cassia Spohn, *Prosecutorial Charging Decisions in Sexual Assault Cases: Examining the Impact of a Specialized Prosecution Unit*, 16 CRIM. JUST. POL'Y REV. 461, 464–67 (2005) (summarizing prior research on prosecutor charging decisions).

237. *Id.* at 490–91.

examine how state and local prosecutors from across the country would prosecute the same relatively minor case.[238] This study is discussed at length because it relies on an experiment charging an identical set of facts and survey responses rather than data from real case dispositions. The authors presented the same fictitious case to 500 prosecutors from across the country involving a man at a train station who was distraught after breaking up with his girlfriend and needed money for the train.[239] The man was yelling obscenities, asking for money, brandishing a knife, and went as far as to grab a woman's arm, but did not harm her or anyone else.[240] The man submitted to arrest without incident, and he had no prior criminal record.[241] The researchers asked prosecutors open-ended questions regarding which charges and penalties they would recommend, if any, and their reasoning behind their recommendations.[242] The survey also asked a series of close-ended questions about how the prosecutors make charging and plea-bargaining decisions in their individual offices.[243]

This study revealed tremendous variation in prosecutorial decision-making based on an identical set of facts. Only 3% of respondents declined to charge, while 80% brought multiple charges for this scenario.[244] Yet, strikingly, despite the majority of respondents seeking charges, the majority that sought charges did not recommend a monetary penalty or any confinement.[245] Of the minority that sought to impose a monetary penalty or confinement, there was significant variation in the degrees of punishment sought.[246] For instance, the recommended monetary penalty ranged from $100 to between $1,000 and $5,000, while the recommended confinement ranged from ten days or less to over one year.[247]

When asked an optional follow-up question about the reasoning for their charging and penalty recommendations,

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238. Wright et al., *Inside the Black Box*, *supra* note 6, at 2134.

239. *Id.* at 2158–59, 2161.

240. *Id.* at 2161.

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.* at 2162 (noting that only eighteen respondents decided to decline charges out of a total of 542).

245. *Id.* at 2164–66.

246. *Id.* at 2165–67.

247. *Id.*

responses varied. The five most common themes were necessity of punishment despite a minor crime, the financial state of the offender, the mental state of the offender, the benefit of jail time for the offender, and plea bargaining considerations.[248]

The survey also explored the decision-making process in the different offices. The responses revealed that the majority of prosecutors work alone, with 72% making charging and plea bargaining decisions alone, and 57% prosecuting cases without input from other prosecutors.[249] Regarding internal guidelines, the study found that most offices either did not have guidelines or had guidelines that were not mandatory.[250] Finally, when asked about what kinds of information were important to have before making a charging decision, the respondents selected "severity of personal injuries, use of weapons, severity of property damage, . . . suspect's prior convictions, age of victims, presence of illegal drugs, and use of illegal drugs."[251] They noted that victim and witness input was also important.[252]

The variability shown in the survey responses "demonstrates that prosecutorial discretion is indeed broad, largely unsupervised, and highly variable and inconsistent."[253] Further, "[m]ost of this variation was inexplicable."[254] Though, there are correlations in decision-making by region.[255] The responses and data demonstrate that prosecutors rely on several factors when reaching a decision on how they will handle a case, but that these factors are not necessarily uniform between prosecutors, even within the same office. A closer look at this data suggests that prosecutors invoke justice in decision-making but with little uniformity.

For instance, some respondents expressly used moral-sounding justice language to describe their decision-making when selecting a charge and a sentence.[256] On the extreme end,

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248. *Id.* at 2168.
249. *Id.* at 2186–87.
250. *Id.* at 2189.
251. *Id.* at 2198.
252. *Id.* at 2199.
253. *Id.* at 2202.
254. *Id.*
255. *Id.*
256. Megan S. Wright, Shima Baradaran Baughman & Christopher Robertson, National Prosecutor Study (2015–2016) (unpublished study) (on file with author) (results available in Wright et al., *Inside the Black Box*, *supra* note 6).

one respondent who recommended a longer sentence and higher fine than others stated: "60 days and $2,500 seemed sufficient to emphasize the *wrongness* of his thinking and behavior, taking into account the fact that multiple victims were affected by this, while recognizing the lack of intent to do harm, and the level of cooperation with law enforcement when they arrived."[257] Another who recommended a suspended sentence with a $500 fine emphasized that while there was no victim, the defendant "must realize that his behavior is *unacceptable*."[258] Yet another prosecutor, who recommended 180 days in jail with a $1,000 fine, emphasized that it was "an egregious break from social norms" to brandish a knife in such a manner.[259] Finally, on the other side of the punitive spectrum, one prosecutor stated that a "proverbial 'slap on the wrist' was appropriate" given that the conduct was "pretty minor."[260] That prosecutor viewed charging the defendant, but seeking only a probationary sentence, as "just."[261] Yet, these kinds of expressly moral judgments were in an extreme minority of comments.

More often, respondents couched their decision-making in some of the factors identified above, namely the presence of a weapon, the risk to potential victims, the lack of the defendant's intent to do real harm, the defendant's lack of criminal history, risk that jail or fines would harm the defendant, the potential need for mental health or substance abuse counseling, and victim input.[262] Thus, as one would expect, prosecutors frequently, if implicitly, sought to balance public safety concerns with the overall culpability of the defendant and the risk that jail or fines would harm the defendant and cause further run-ins with law enforcement. As one respondent summarized: "The State and this defendant likely would benefit more from supervised treatment rather than incarceration."[263]

Further, many of the factors respondents noted were important to their decision-making when deciding whether to charge were not present in this case. Namely, there were no

257. *Id.*
258. *Id.*
259. *Id.*
260. *Id.*
261. *Id.*
262. *Id.*
263. *Id.*

injuries or property damage, the suspect had no prior convictions, and drugs were not present. The only factor identified by prosecutors as being important to their charging decision that was present in this case was the presence of a weapon, although several respondents observed that it was not clear from the facts whether the suspect was using the knife as a weapon or threatening anyone with it.[264] Thus, the fact that a majority of respondents decided to charge given the presence of only one important factor suggests that at the charging stage, prosecutors do not conduct any meaningful balancing test. It appears that while these factors influence recommended sentencing, most respondents still did not seek to impose a fine or confinement. Given the wide divergence in recommended sentences the data clearly suggests that prosecutors balance the various factors quite differently.

Aside from the wide variation in outcomes, another striking feature of this study was the split in respondents who would bring charges but would not seek any fine or sentence. While around 97% of respondents would bring charges, 60% of those would not seek a monetary penalty and 70% of those would not seek confinement.[265] This, along with respondents' comments, suggests that respondents sought to build a criminal record for the suspect in case of another incident, and to encourage the suspect to get treatment. A criminal record alone, however, creates immeasurable harm for a first-time offender.[266]

To summarize, the fact that consideration of similar factors can be used to reach such wide a divergence in outcomes

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264. *Id.*

265. Wright et al., *Inside the Black Box*, *supra* note 6, at 2162–66.

266. *See generally* Paul Nieuwbeerta et al., *Assessing the Impact of First-Time Imprisonment on Offenders' Subsequent Criminal Career Development: A Matched Samples Comparison*, 25 J. QUANTITATIVE CRIMINOLOGY 227 (2009) (discussing the effects of conviction and imprisonment on first-time offenders in the Netherlands and how the risk of reoffending is significantly higher than the non-imprisoned group); Megan C. Kurlychek et al., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 CRIMINOLOGY & PUB. POL'Y 483 (2006) (discussing the effects of imprisonment and conviction on a person's ability to retain employment and social connections, which eventually leads to re-offense); Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction*, 30 N.Y.U. REV. L. & SOC. CHANGE 585 (2005) (discussing the severe collateral consequences of a criminal conviction and how it can influence an individual's future behavior).

suggests that prosecutors rely on intuitive judgments about what is "just" in any given case, and that depending on one's notions of justice, prosecutors may balance similar factors differently. Further, some of the variation in part appeared to be based on strategic considerations meant to give the prosecutor greater leverage in potential future encounters, like plea negotiations. Indeed, some prosecutors actually mentioned this explicitly.

IV. A PROPOSAL TO ADDRESS DISPARATE PROSECUTION

As the preceding Parts have shown, prosecutors are public officials who are vested with significant power and discretion and who have little oversight. Scholars have devoted significant attention to how prosecutors should act and how they do act. Our view is that, in part, prosecutors generally seek to do what they think is best in each individual case—in terms of both charging and sentencing. While arguably it is admirable for public officials to follow their conscience, it also presents several problems. First, different prosecutors may choose to handle cases with identical facts differently, leading to divergent outcomes for similarly situated defendants (and victims).[267] Second, when prosecutors' consciences tilt towards increased punishment, given the conviction psychology at play, there is a greater potential for mass incarceration, which has both personal costs to defendant and fiscal costs to society.[268]

267. *See* Jon B. Gould et al., *Predicting Erroneous Convictions*, 99 IOWA L. REV. 471, 498 (2014) (discussing prosecutorial bias in deciding to prosecute defendants with similar facts and how this results in different outcomes); Lisa Stolzenberg et al., *Race and Cumulative Discrimination in the Prosecution of Criminal Defendants*, 3 RACE & JUST. 275, 277–80 (2013) (noting how race and discrimination play a role in a prosecutor's decision in moving forward with a case); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2470–76 (2004) (discussing the biases present within prosecutorial discretion).

268. *See* Brady Heiner, *The Procedural Entrapment of Mass Incarceration: Prosecution, Race, and the Unfinished Project of American Abolition*, 42 PHIL. & SOC. CRITICISM 594 (2016) (discussing how procedural entrapment leads to mass incarceration in the United States); Mark Osler & Mark W. Bennett, *A "Holocaust in Slow Motion?" America's Mass Incarceration and the Role of Discretion*, 7 DEPAUL J. FOR SOC. JUST. 117, 145–52 (2014) (noting how prosecutorial discretion plays a role in the mass incarceration issue in the United States); Barkow, *supra* note 145 (discussing the relationship between prosecutorial bias and mass incarceration).

The dual issues of discretion and power, mixed with a lack of external checks and an almost infinitely flexible normative standard, suggests that solutions should address both aspects of the problem. Yet, if normative shifts are needed, how are they to be implemented? Even if the ABA, the NDAA, and state bar associations adopt new guidance on how prosecutors should conduct themselves, unless the new model is readily enforceable, it will likely lead to little meaningful change. As the progressive prosecutor movement has shown, at least to some extent, the electorate can influence normative models for prosecutorial decision-making.[269] But this on its own is insufficient, and ironically, leads to potentially even wider variation in how the law is applied within a given jurisdiction. Similarly, proposed external checks on prosecutors, like decriminalization, are unlikely to be implemented. And internal checks such as supervisors and even personal or office progressive ideals have little impact on the bottom line—prosecutor charging, as confirmed by empirical studies. We also must recognize that encouraging prosecutors to focus on evidence is also unlikely to impact their charging as empirical research shows that even when the balance of factors weighs against charging, prosecutors still choose to charge.[270] Thus, we propose a solution that would require little change on behalf of prosecutors themselves.

A. Existing Proposals to Fix Prosecution

In response to growing critiques of prosecutors, scholars have proposed a number of solutions, including increased regulation, abolition, and private prosecution. The following overview is not exhaustive but is merely meant to be illustrative of the types of proposals commentators offer for reforming the current broken system of prosecution.

1. Decriminalization

As noted above, legislatures could act to limit prosecutorial power and discretion by limiting the availability of crimes in any

269. *See supra* notes 199–202 and accompanying text (describing how members of the public can influence prosecutorial decision-making by electing prosecutors who share their same priorities in criminal justice).

270. *See supra* notes 220–27 and accompanying text (highlighting that the "safe choice" for prosecutors when making charging decisions is to pursue a charge because there are no negative repercussions).

given jurisdiction.[271] This is an unrealistic solution. While some jurisdictions have been willing to decriminalize certain drug-related offenses,[272] it is unrealistic that legislatures will move ahead with reform through a wholesale repeal of many crimes. Quite simply, in many states, there is a lack of political interest or feasibility in such broadscale legislative change.[273] So, while this would be a meaningful and impactful reform, it is unlikely to happen quickly and would require years of concerted legislative action towards this goal.

2. Centralized Regulation and Increased Judicial Review

Traditional solutions to prosecutorial power and discretion have been to regulate prosecutors more strictly, to change incentives or processes, or to change ethical rules for prosecutors. These include development of internal office policies that would be subject to judicial review, controls imposed by sentencing judges, and legislative amendments to limit discretion.[274] More recently, others have argued for better plea bargaining guidelines, which would "restrict the threats prosecutors could exert during the plea process."[275] Others have argued for centralized review councils to investigate prosecutorial misconduct.[276] None

271. *See supra* Part I.B.1; *see also, e.g.*, Fortier, *supra* note 11, at 41 (suggesting legislatures should reconsider which behaviors and activities call for criminal law investigation and interference).

272. *See, e.g.*, Lauren M. Johnson, *Oregon's Law Decriminalizing Small Amounts of Heroin and Other Street Drugs Officially Goes into Effect*, CNN (Feb. 1, 2021), https://www.cnn.com/2021/02/01/us/oregon-decriminalize-drugs-is-law-trnd/index.html [https://perma.cc/6M23-NZEM] (discussing Oregon's decriminalization of the possession of heroin, cocaine, and methamphetamine); Claire Hansen et al., *Where Is Marijuana Legal? A Guide to Marijuana Legalization*, U.S. NEWS & WORLD REP. (Nov. 8, 2023), https://www.usnews.com/news/best-states/articles/where-is-marijuana-legal-a-guide-to-marijuana-legalization [https://perma.cc/BFD6-US47] (reporting that twenty-four states along with the District of Columbia and Guam have acted to legalize recreational marijuana).

273. *See, e.g.*, Hansen, *supra* note 272, at 2 ("State legislatures are grappling with if and how to legalize [marijuana].").

274. Wright & Miller, *supra* note 120, at 51–53.

275. JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 210 (2017); *see also* Fortier, *supra* note 11, at 41–42 ("[L]egislatures could enact laws that require prosecutors to adopt a standard record of the plea-bargaining process, turn evidence over to the defense early in a case, and explain the reasoning behind their discretionary decisions and recommendations in court.").

276. Walter W. Steele, Jr., *Unethical Prosecutors and Inadequate Discipline*, 38 SW. L.J. 965, 983–87 (1984).

of these proposals are likely to create any meaningful change in the nature of U.S. prosecution, or in meaningful reforms like reducing mass incarceration or improving justice or fairness in prosecution. They would require prosecutors and national and state prosecutor organizations to decide to regulate themselves to reduce their own power, which is an unlikely ask.

3. Data Collection and Transparency

A common call for reform of prosecutors' offices—similar to other aspects of government—is for greater transparency and data collection. For instance, Barkow suggests that greater access to prosecutors files by defense attorneys would operate as a check on prosecutorial power.[277] Likewise, Pfaff argues that increased access to data and better data collection methods are needed to better assess what "justice" even is.[278] Indeed, Fortier argues that increasing access to data about how prosecutors use their discretion can assist the public in holding prosecutors accountable for their actions.[279]

Increased data would be incredibly helpful in many areas of prosecution and should be pursued in tandem with other reforms. Transparency mechanisms are certainly an important check on governmental overreach. But they alone are insufficient. In an information-saturated world, few will pay much attention to efforts at transparency from each of the over 2,000 prosecutor's offices in the United States, and it would be a reach to suggest that information transparency alone would make a difference in most prosecutor elections.[280] The solution that we present below builds on calls for greater transparency and data access by providing a legal right through which to use that information.

4. Divestment and Abolition

Some have proposed to divest prosecutors of their power and reallocate it to other community organizations or the public. In

277. Rachel E. Barkow, *Can Prosecutors End Mass Incarceration?*, 119 MICH. L. REV. 1365, 1390 (2021).

278. PFAFF, *supra* note 275, at 210 ("What we count, and how we count it, will strongly shape what prosecutors do.").

279. Fortier, *supra* note 11, at 41.

280. *Cf. supra* Part I.B.4 (noting that prosecutorial elections are rarely contested).

recent years, calls to "defund" the police and reduce the size and capabilities of the criminal justice system have grown louder,[281] and have been deployed as solutions to U.S. prosecution. There are several national organizations working to empower communities to transform prosecution from the ground up.[282]

Cynthia Godsoe, for instance, argues that progressive prosecution does not go far enough in addressing the harms of the criminal justice system.[283] Instead, she argues that systemic change "requires prosecutors to cede expertise and power to communities" and to "divest from prosecutorial and other law enforcement funding while supporting investment in truly independent community supports."[284] As opposed to the victim-centered approaches discussed below, Godsoe argues for

281. *See* Jennifer E. Cobbina-Dungy & Delores Jones-Brown, *Too Much Policing: Why Calls Are Made to Defund the Police*, 25 PUNISHMENT & SOC. 3, 3 (2023) ("[C]alls to abolish, transform, or reform policing have reemerged with a primary focus on the elimination of structural racism."); Jennifer Cobbina-Dungy et al., *"Defund the Police:" Perceptions Among Protestors in the 2020 March on Washington*, 21 CRIMINOLOGY & PUB. POL'Y 147, 148 (2022) (discussing how in 2020 "[d]emands to *defund the police* echoed throughout the United States" and that many Americans began to "reassess the role of police in the United States" (footnote omitted)); Jessica M. Eaglin, *To "Defund" the Police*, 73 STAN. L. REV. ONLINE 120, 123 (2021) ("[T]he demand to defund the police has emerged as a political lightning-rod . . . .").

282. *See Community Justice Platform*, ACLU OF CAL., https://meetyourda.org/community-justice-platform [https://perma.cc/KW4R-N9ZK] (providing a policy builder tool to create a personal community justice platform to advocate for, among other things, ending mass incarceration and explaining how to bring the platform to town halls or the district attorney); *Our Work and Vision*, FAIR & JUST PROSECUTION, https://fairandjustprosecution.org/about-fjp/our-work-and-vision [https://perma.cc/32YW-V996] (enabling local prosecutors to move beyond incarceration-driven approaches by helping build a network of connections, creating learning opportunities, supporting newly elected leaders in implementing change, highlighting their successes, and connecting prosecutors to organizations and experts); *Our Mission*, INST. FOR INNOVATION IN PROSECUTION, https://www.prosecution.org/mission [https://perma.cc/8TPR-VZ3E] (providing a "collaborative national platform that brings together prosecutors, policy experts, and the communities they serve to promote data-driven strategies, cutting-edge scholarship, and innovative thinking"); *Reshaping Prosecution Initiative*, VERA INST. OF JUST., https://www.vera.org/ending-mass-incarceration/criminalization-racial-disparities/prosecution-reform/reshaping-prosecution-initiative [https://perma.cc/NY93-9EE5] (working directly with prosecutor offices through implementation support, analysis, and communications assistance to reduce incarceration by declining and diverting cases).

283. Cynthia Godsoe, *The Place of the Prosecutor in Abolitionist Praxis*, 69 UCLA L. REV. 164, 168–69, 171 (2022).

284. *Id.* at 173.

community opinion writ large to guide prosecution of each class of crime.[285] To accomplish this broad goal, she suggests that prosecutors cede some decision-making power to community organizations and otherwise engage their communities, and that prosecutors engage in restorative and transformative justice programs.[286] Finally, Godsoe argues for divestment from prosecutors' offices and investment in other societal programs—such as housing, childcare, and treatment.[287]

The divestment approach has parallels to victim-centered approaches. Divestment of prosecutor power is an innovative solution, but like other more radical proposals, it is likely politically infeasible.[288] Prosecutors (and the legislators that back them) are unlikely to agree to a wholesale power shift from government to communities, unless more pressure is applied by the public. At this point, this type of solution is still politically unlikely.

5. Private Prosecution

One commentator, I. Bennett Capers, argues that the problems inherent in prosecution would be better addressed by reverting back to private prosecution or by giving victims greater input into the prosecutorial process.[289] Capers suggests that victims of crimes should have a range of options, including: prosecuting the case themselves, ceding the right to prosecute to a public prosecutor, seeking assistance from a state-provided prosecutor, seeking assistance from a non-profit-provided prosecutor, or to simply not prosecute at all.[290] Capers does not suggest that all cases should be handed entirely to victims, only that "the

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285. *Id.* at 217.

286. *Id.* at 218–28.

287. *Id.* at 229–37 ("Public funding currently spent on prosecution should instead be invested in societal supports, such as housing, childcare, and mental health and substance abuse treatment care, that address the root causes of crime, including violent crime.").

288. *See infra* notes 297–99 and accompanying text (describing the merits of using a restorative justice model that involves victims in prosecutorial decision-making and providing an example of how, in 2013, the United Kingdom adopted a system where victims could request a review of a prosecutor's decision not to prosecute); *cf. supra* note 62 and accompanying text (noting that legislatures have typically acted to enhance prosecutorial power).

289. *See* Capers, *supra* note 42, 1586–604 (considering the implications of shifting some amount of prosecutorial power to private actors, such as victims).

290. *Id.* at 1588–89.

state's usurpations of the victim's role should not be automatic."[291] The benefits of this limited private prosecution are: (1) it would restore power to laypeople; (2) it would highlight that victimless crimes may not deserve to be prosecuted; (3) it could limit the amount of deference courts give to prosecutors; (4) it could lead to a reconceptualization of the adversarial process; (5) it could lead to a better understanding that order can be achieved without criminal interventions; and (6) it could lead to more mercy and forgiveness in the criminal justice system, which in turn could help to address racial disparities.[292] This proposal has historical and theoretical merit. Though politically unlikely, if the call for a return to private prosecution gains traction, there is significant potential to increase the prevalence of restorative justice as compared to our current system of conviction-based prosecution.

6. Victim Input

Instead of a wholesale shift from public to private prosecution, Green and Ruben argue that prosecutors should consider victims' views when making charging decisions, especially in misdemeanor cases.[293] Green and Ruben point out that even in jurisdictions with laws that give victims certain rights, such laws are merely procedural, and "do not guarantee [victims'] influence in punishment."[294] As such, they argue that while prosecutors should disregard victims' views in certain felony cases where "prosecution serves the paramount public interest in incapacitating the dangerous offender to ensure public safety . . . and in retribution."[295] The same cannot be said for misdemeanors.[296] Like Capers, Green and Ruben point to a number of benefits that could follow from giving greater weight to victims' input: namely, that following victims' preferences could lead to use of less expensive and less punitive alternatives, which would

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291. *Id.* at 1589.

292. *Id.* at 1590–604.

293. Bruce A. Green & Brandon P. Ruben, *Should Victims' Views Influence Prosecutors' Decisions*?, 87 BROOK. L. REV. 1127, 1129–30 (2022) ("[P]rosecutors, particularly in misdemeanor cases with identifiable victims, should take account of what victims want, including what victims regard as the just result.").

294. *Id.* at 1131.

295. *Id.* at 1147.

296. *Id.* at 1147–48.

have little impact on deterrence, and victim well-being and willingness to cooperate with officials may increase.[297] Unlike Capers, however, Green and Ruben make a largely normative argument, rather than a policy-based argument. In other words, they argue for normative change from individual prosecutors rather than for a specific law to be adopted by any given jurisdiction.

Aspects of calls for victim input have been adopted by some states and other countries. Four states permit victims, victims' families, or community members to challenge or otherwise be involved in a prosecutor's declination decision.[298] In 2013, the United Kingdom adopted a system in which victims may request review of a declination decision.[299] Finally, Seema Gajwani and Max Lesser argue for a restorative justice model as a method of involving victims when defendants are willing to accept responsibility and defendants are open to it.[300]

In sum, scholars and activists have sought criminal justice reform through prosecutorial reforms. Current proposals include everything from increased regulation to outright abolition to a return to private prosecution. A significant barrier to reform has been that prosecutor offices have largely resisted external reform efforts. For instance, the NDAA and the National Association of Assistant United States Attorneys "are two of the most vocal opponents of criminal justice reform."[301] Likewise, state prosecutor associations are fairly powerful organizations that typically lobby for expanded criminal codes, stricter punishments, and increased prosecutorial power.[302] As such, proposals that seek a wholesale power shift away from prosecutors or that

297. *Id.* at 1149–51.

298. *See* statutes cited *supra* note 156.

299. *Victims' Right to Review - Policy and Guidance*, CROWN PROSECUTION SERV. 9 (2020), https://www.cps.gov.uk/sites/default/files/documents/publications/Victims-Right-to-Review-Policy-and-Guidance-2020.pdf [https://perma.cc/49JN-UJNF] ("Victims will be notified of the prosecution decision not to bring proceedings/bring proceedings to an end. Where an investigator is responsible for notifying a victim of a decision not to bring proceedings, the investigator will advise the victim of their right to review on behalf of the CPS.").

300. Gajwani & Lesser, *supra* note 206, at 70–72, 78–83, 86–88.

301. Molly Gill, *Removing the White Hats: Reducing the Power of Prosecutors in the Courthouse and the Statehouse*, *in* CAN THEY DO THAT?: UNDERSTANDING PROSECUTORIAL DISCRETION 63, 68 (Melba V. Pearson ed., 2020).

302. *See* Yeargain, *supra* note 193, at 90–104 (detailing the activities of state prosecutors' associations and noting the distinctions by state).

would fundamentally change the nature of U.S. prosecution are unlikely. Other proposals require dedicated long-term legislative coordination to cut criminal codes down to a fraction of what currently exists, which is also an unrealistic expectation.

B. Our Proposal: A Defense to Prosecutorial Discretion

The proposed solutions identified above would certainly fix aspects of prosecution. Some, however, rely on prosecutors themselves to change behavior, which does not truly solve the issues of unchecked prosecutorial discretion and power. Simply put, legislative action is needed. Other solutions have either proved unrealistic or ineffectual when implemented, or require political will that is unlikely to be garnered. That being said, our proposal is not meant to be exclusive; we would welcome the implementation of many of the proposals discussed above, recognizing that more pragmatic solutions are needed in this space.

Our proposal is to give defendants a defense to charging, sentencing, and expungement decisions based on prior prosecutorial decisions, which would shift the burden to prosecutors to justify their charging decision. For instance, imagine John shoplifts some electronics worth about $50 and is arrested and charged with theft. Imagine that the local prosecutor had declined charges in an identical case in which Jane had shoplifted an equivalent value of electronics. It would seem unfair for the same prosecutor to charge one but not the other, without a good reason for doing so—like lack of evidence. If our proposal were implemented, John would have the opportunity to challenge the prosecutor's charging decision and force the prosecutor to justify it. The opponent of the prosecution would first have to prove that they are similarly situated to the earlier case based on enumerated factors—such as conduct that led to the charge, actual harm suffered by victims, risk of harm to victims, etc. If they prove by a preponderance of the evidence that their case was sufficiently similar to an earlier case, the government must justify their decision through a heightened burden—that is, the government must have a compelling governmental reason for differential treatment and that treatment must be narrowly tailored to the differential treatment. If there is an insufficient justification, then the prosecutor must align their decision with the earlier instance. The same would go for sentencing decisions. If the prosecutor sought thirty days in jail for Jane, but sought six months in jail for John, John would have a defense.

This would also protect against a common issue of individuals being charged disparately by prosecutors in the same office, or jurisdiction. An individual would be able to challenge prosecution against them as harsh, and a prosecutor would have to justify her decision based on similarly decided cases or would have to plead to a lower charge. This proposal has the potential to increase the defense's hand in any plea bargain. Defense attorneys collectively have a lot of information about prosecutor charging and will know when a charge appears harsh. They can use the threat of bringing this defense in bargaining with prosecutors in given cases. This also means that this proposal might not increase litigation or workload for prosecutors or defense, given that this defense can in most cases act as a threat to encourage prosecutors to reevaluate their proposed charge rather than increase litigation. This proposal has the potential to meaningfully adjust the balance of powers between prosecutors and defense attorneys.

Our proposal also aims to avoid the heavy thumb of regulation, while at the same time avoiding reliance on prosecutors themselves to willingly relinquish power. In many ways, it is simply the inverse of some victim-centered approaches. This approach would simply enable the enforcement of uniformity among decisions, and thereby limit discretion and exercise of power somewhat tangentially. A primary benefit of such an approach would be that, over time, it may constrain over-charging in order to secure plea bargains. Likewise, it would generally only prevent prosecutors from being unfairly harsh on defendants (given that no defendant is likely to challenge a decision for being too lenient), and therefore, it could slowly address issues of mass incarceration. Another advantage is that it does not require a fundamental change in how the criminal justice system operates. While such a fundamental change may be desirable to some, it may not garner sufficient consensus to put into action. Our proposal acts as a safety valve rather than a wholesale restructuring.

Of course, this proposal is not without challenges. First, it would require legislative action to implement, which may or may not be forthcoming. It would likely be opposed by prosecutor offices as burdensome and limiting. On the other hand, prosecutors would not have to defend each charging decision until trial if, after a cursory review, they realize that their charge was out of the norm for their office.

Second, it would require some public disclosures from prosecutors' offices about their charging decisions and sentencing recommendations. Not only would that require developing administrative processes to ensure adequate recordkeeping and some source of funding, but some offices may oppose such disclosures for financial or political reasons. Administrative burdens could be lessened by limiting the precedential effect of each decision to a specified number of years—for instance, three years—after which, the disposition would be removed from the database automatically.

Third, and relatedly, prosecutors may simply choose to charge more harshly to avoid looking soft on crime. Our proposal might lead to prosecutors banding together and establishing stricter or harsher sentencing guidelines in their office. Or it may cause a push towards limiting discretion in charging less in any given case for worry that this would create bad precedent in future cases. This may or may not present as much of an issue as it appears. The progressive prosecutor movement has shown that at least some jurisdictions are willing to elect candidates who do not purport to be overly punitive; the public may be unwilling to accept candidates who impose uniformly harsh punishments. And more importantly, it seems, based on empirical data, that prosecutors—even progressive ones—are uniformly charging as many charges as they see fit, and not providing much leniency as it is, so this proposal is at least worth consideration.

If implemented such that only each prosecutors' office must make uniform decisions, at the very least, it would ensure equal treatment by district. The benefit to this is that it may be politically more palatable and would be slightly easier to administer. However, this solution would not address the larger issue of different prosecutor offices handling cases differently. In other words, simply crossing a county line may cause a de facto change in the law, despite the legislative definition of crimes remaining constant. Thus, a more ambitious proposal would be to require uniform treatment across a given region or state. This, of course, would address the issue of a lack of state-wide uniformity, but may be less politically palatable and more complex administratively. A middle ground solution would be to permit a private defense when the office had handled a single sufficiently similar case differently, while permitting a private defense when there is a sufficient state-wide trend. For instance, if a majority or

super-majority of districts handled a sufficiently similar case one way, the defense would become available.

CONCLUSION

The current prosecutorial model is flawed and has wide-ranging negative impacts on the larger system of U.S. criminal justice. It permits too great an investment of power in one official and provides no meaningful avenue for that official's decisions to be reviewed. Empirical evidence has shown that individual prosecutors often dispose of an identical case differently; this is antithetical to the rule of law in the United States. This is not to say that prosecutors are "bad" people, or that they are not dedicated public servants; it is simply to say that the current framework in which prosecutors operate permits too much discretion and allows prosecutors to rely on intuitive judgments of what is "right" or "just" in any given case, which may differ dramatically for each prosecutor. There should be some checks on prosecutors which do not come from prosecutors' offices themselves. One such check is a private defense to dissimilar or harsh treatment. This proposal may be more legislatively feasible than other suggested reforms and could alter the balance of power between prosecution and defense, allowing room for more alternatives to punishment and progress towards broader goals like ending mass incarceration. Given the lack of existing checks on prosecutors, providing defendants their own check could create the better balance of power and force prosecutors to exercise restraint where necessary.