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THE POWER OF PROSECUTORS

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One of the predominant themes in the criminal justice literature is that prosecutors dominate the justice system. Over seventy-five years ago, Attorney General Robert Jackson famously proclaimed that the “prosecutor has more control over life, liberty, and reputation than any other person in America.” In one of the most cited law review articles of all time, Bill Stuntz added that prosecutors—not legislators, judges, or police—“are the criminal justice system’s real lawmakers.” And an unchallenged modern consensus holds that prosecutors “rule the criminal justice system.”

This Article applies a critical lens to longstanding claims of prosecutorial preeminence. It reveals a curious echo chamber enabled by a puzzling lack of dissent. With few voices challenging ever-more-strident prosecutor-dominance rhetoric, academic claims became uncritical, imprecise, and ultimately incorrect.

An unchallenged consensus that “prosecutors are the criminal justice system” and that the “institution of the prosecutor has more power than any other in the criminal justice system” has real consequences for criminal justice discourse. Portraying prosecutors as the system’s iron-fisted rulers obscures the complex interplay that actually determines criminal justice outcomes. The overheated rhetoric of prosecutorial preeminence fosters a superficial understanding of the criminal justice system, overlooks the powerful forces that can and do constrain prosecutors, and diverts attention from the most promising sources of reform (legislators, judges, and police) to the least (prosecutors).

INTRODUCTION	172
I. “PROSECUTORS HAVE LOTS OF POWER”	176
II. FEDERAL PROSECUTORIAL POWER: A CASE STUDY IN CASE SELECTION.....	182
III. “PROSECUTORS ARE PREEMINENT”	187

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A. <i>Prosecutors Versus Police Officers</i>	191
B. <i>Prosecutors Versus Judges</i>	194
C. <i>Prosecutors Versus Legislators</i>	198
IV. THE REFLECTIVE NATURE OF PROSECUTORIAL POWER.....	203
A. <i>Prosecutors' Reflective Power</i>	203
B. <i>What About Lobbying?</i>	206
C. <i>How Should We Talk About Prosecutorial Power?</i> .	208
CONCLUSION	212

INTRODUCTION

*“For all intents and purposes,
prosecutors are the criminal justice system.”*

—Erik Luna & Marianne Wade, 2010¹

Compelling assertions about prosecutorial dominance leap off the pages of the criminal justice literature.² These statements position prosecutors as the most prominent stars in the criminal justice universe, bending all others to their will. The ubiquitous sentiment appears in a variety of contexts. Most broadly, rhetorical allusions to prosecutors' vast power illustrate the uneven contest between the government and a criminal defendant.³ More pointed claims of prosecutorial *preeminence* single out prosecutors—not judges, legislatures, or police, and not facts, laws, or crime—as the key explanatory variable for criminal justice outcomes.⁴ These claims typically serve as the foundation for empirical assertions that prosecutors bear primary responsibility for everything from wrongful convictions⁵ to mass incar-

¹ Erik Luna & Marianne Wade, *Introduction to Prosecutorial Power: A Transnational Symposium*, 67 WASH. & LEE L. REV. 1285, 1285 (2010).

² See, e.g., Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 MICH. L. REV. 835, 837 (2018) (“Prosecutors are the Darth Vader of academic writing: mysterious, powerful and, for the most part, bad.”); David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 480 (2016) (“The starting point for virtually every discussion of prosecutors in the United States is their tremendous clout.”); see also *infra* Part I (delineating various overbroad prosecutorial-power claims).

³ See, e.g., Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2132 (1998) (identifying “[t]he frequent disparity of power between the prosecutor and the defendant” as particularly important).

⁴ See *infra* Part III (assessing claims of prosecutorial power framed through a comparison to other criminal justice actors).

⁵ See Steven Weinberg, *Harmful Error: How Prosecutors Cause Wrongful Convictions*, 7 J. INST. JUST. & INT’L STUD. 28, 29 (2007) (“[P]rosecutors are the linchpin of the criminal justice system and certainly the linchpin when it comes to wrongful prosecutions and wrongful convictions.”); cf. DANIEL S. MEDWED, *PROSECUTION COMPLEX: AMERICA’S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT* 5 (2012) (“The goal of this book is not to portray prosecutors as rogue officials indifferent to the conviction of the

ceration,⁶ and for normative contentions that the road to criminal justice reform runs through prosecutor offices.⁷

Prosecutor-power claims have a venerable pedigree. Perhaps the most famous iteration comes from then-Attorney General Robert Jackson who stated over seventy-five years ago: “The prosecutor has more control over life, liberty, and reputation than any other person in America.”⁸ Among academic commentators, the iconic Bill Stuntz probably deserves the most credit. Stuntz famously posited that it is not legislators and judges, but “prosecutors, who are the criminal justice system’s real lawmakers.”⁹ Over the decades, the rest of academia fell into line.¹⁰ Nowadays, the only noteworthy variance arises from authors’ willingness to embrace ever-increasing hyperbole. No one bats an eye at scholarly pronouncements like, “prosecutors *are* the criminal justice system,”¹¹ “Prosecutors [r]ule the [c]riminal [j]ustice [s]ystem,”¹² or “[p]rosecutors are the ‘Leviathan’ in our criminal justice system.”¹³ Many commentators emphasize that it is “difficult to

innocent. . . . [M]ost prosecutors aim to do justice, but only some hit that target consistently.”).

⁶ See JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM* 206 (2017) (“Prosecutors have been and remain the engines driving mass incarceration.”).

⁷ See, e.g., *id.* at 146–60 (articulating the need for limiting prosecutorial power and identifying specific reforms that have been proposed toward this end).

⁸ Robert H. Jackson, *The Federal Prosecutor*, 31 J. AM. INST. CRIM. L. & CRIMINOLOGY 3, 3 (1940).

⁹ William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 506 (2001) [hereinafter Stuntz, *Pathological Politics*] (discussing the restricted function of legislators and judges, as compared to prosecutors, by arguing that “[t]he definition of crimes and defenses plays a . . . much smaller role in the allocation of criminal punishment than we usually suppose. In general, the role it plays is to empower prosecutors . . .”); see also William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 HARV. L. REV. 2548, 2549 (2004) [hereinafter Stuntz, *Plea Bargaining*] (“[T]he law that determines who goes to prison and for how long—is chiefly written by prosecutors, not by legislators or judges.”); cf. Miriam H. Baer, *Choosing Punishment*, 92 B.U. L. REV. 577, 632 (2012) (describing William Stuntz’s article on overcriminalization, *Pathological Politics*, as “seminal”); Todd Haugh, *Overcriminalization’s New Harm Paradigm*, 68 VAND. L. REV. 1191, 1201 (2015) (explaining the strong influence of Stuntz’s analysis and noting that “almost every scholar working in the area draws on Stuntz” (footnote omitted)).

¹⁰ See Haugh, *supra* note 9, at 1201 n.54 (noting that Stuntz’s article has been cited more than 600 times and providing prominent examples of leading scholars drawing on his work).

¹¹ Luna & Wade, *supra* note 1, at 1285.

¹² Erik Luna & Marianne L. Wade, *Preface to THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE*, at xi (Erik Luna & Marianne L. Wade eds., 2012); see also Jed S. Rakoff, *Why Prosecutors Rule the Criminal Justice System—and What Can Be Done About It*, 111 NW. U. L. REV. 1429, 1436 (2017) (“[F]or the immediate future at least, prosecutors . . . will be the real rulers of the American criminal justice system.”).

¹³ Josh Gupta-Kagan, *Rethinking Family-Court Prosecutors: Elected and Agency*

overstate the power conferred on prosecutors,”¹⁴ but it is not for lack of trying.

This Article applies a critical lens to the longstanding and increasingly frenetic claims about prosecutorial preeminence. It reveals a flawed academic consensus enabled by a puzzling lack of dissent. Without anyone challenging the ever-more-strident rhetoric, scholars’ claims became casual and imprecise. Bold, often-hyperbolic assertions morphed through sheer repetition into an unshakeable empirical consensus. As a result, today’s prosecutorial-power rhetoric is, upon close examination, frustratingly incoherent. This is a striking state of affairs for these are, at base, empirical claims resting comfortably unchallenged in a prominent scholarly literature. Anyone who digs into the claims finds citations only to similar prosecutor-power claims made by others. Many roads lead to Stuntz’s “real lawmakers” claim, which includes no citation at all. When it comes to assertions of prosecutorial dominance over American criminal justice, it is rhetoric all the way down.

The academic chorus about prosecutorial preeminence has led, in recent years, to real-world action. Inspired by the sweeping claims, criminal justice reformers divert energy and resources from traditional targets (legislators and judges) to local district attorney elections.¹⁵ This resource allocation makes sense if “the prosecutor *is* the criminal justice system.”¹⁶ It is hard to change a system, but easy to elect a local prosecutor. And, once a progressive icon like Philadelphia

Prosecutors and Prosecutorial Discretion in Juvenile Delinquency and Child Protection Cases, 85 U. CHI. L. REV. 743, 757 (2018) (citing Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 874 (2009) (using “The Prosecutor as Leviathan” as the title for a section discussing federal prosecutorial powers)).

¹⁴ David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1341 (2013); see also John F. Pfaff, *Criminal Punishment and the Politics of Place*, 45 FORDHAM URB. L.J. 571, 575 (2018) (“It is hard to [over]state the power of prosecutors. Granted nearly-unfettered and nearly-unreviewable discretion, prosecutors determine almost every aspect of a defendant’s case . . .”).

¹⁵ Cf. Scott Bland, *George Soros’ Quiet Overhaul of the U.S. Justice System*, POLITICO (Aug. 30, 2016, 5:25 AM), <https://www.politico.com/story/2016/08/george-soros-criminal-justice-reform-227519> (reporting on the recent influx of money being funnelled into local DA elections, and noting that this is a shift from traditional efforts aimed at “advocating criminal justice policies and legislation that would reduce incarceration rates”); Henry Gass, *Meet a New Breed of Prosecutor*, CHRISTIAN SCI. MONITOR (July 17, 2017), <https://www.csmonitor.com/USA/Justice/2017/0717/Meet-a-new-breed-of-prosecutor> (noting that while reform-minded prosecutors are currently a small contingent, “those numbers could climb as liberal activists such as billionaire George Soros increasingly target DA elections”).

¹⁶ Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413, 1415 (2010).

District Attorney Larry Krasner is the criminal justice system, the system's injustices should melt away.¹⁷ Most poignantly, this progressive prosecutor movement leverages the very thing it seeks to reform—unchecked power. Reformers assign prosecutors the awesome task of unilaterally reversing the actions of other criminal justice actors.¹⁸

Putting aside the unflattering optics of scholarly imprecision, the core substantive problem with this state of affairs is that claims about prosecutorial power are oversimplified and overstated. As reformers are finding, the criminal justice system is not a prosecutorial fiefdom.¹⁹ And while the country could use more thoughtful criminal justice practitioners of every stripe, prosecutors remain just one piece of a complex puzzle.

Under traditional definitions, a prosecutor's influence is not even accurately characterized as “power” at all. Using sociologist Max Weber's widely-embraced definition of power as a baseline,²⁰ “‘Power’ . . . is the probability that one actor within a social relationship will be in a position to carry out his own will despite resistance”²¹ The key insight provided by Weber's definition is that a prosecutor's ability to steer a case to a preferred outcome (e.g., a long prison term) does not demonstrate prosecutorial power. Power is the

¹⁷ See Maura Ewing, *A “Completely Unelectable” Progressive Will Probably Win Philadelphia's DA Race*, ATLANTIC (Nov. 6, 2017), <https://www.theatlantic.com/politics/archive/2017/11/larry-krasner-philadelphia-da/544937> (describing Krasner as the “most progressive” of the recent wave of reform-minded prosecutors).

¹⁸ Cf. Jeffrey Bellin, *Theories of Prosecution* 13 (Nov. 2, 2018) (unpublished manuscript) (on file with New York University Law Review) (discussing challenges posed by the progressive prosecution movement to traditional theories of the prosecutorial role).

¹⁹ See Jeffrey Bellin, *The Limits of Prosecutorial Power*, MARSHALL PROJECT (May 2, 2017, 10:00 PM), <https://www.themarshallproject.org/2017/05/02/the-limits-of-prosecutorial-power> (explaining that after Orlando's elected chief prosecutor announced she would no longer seek the death penalty, Florida Governor Rick Scott transferred twenty-two of her cases to another District Attorney); Samantha Melamed, *Philly Judges Block DA Krasner's Deals for Juvenile Lifers*, PHILA. INQUIRER (Apr. 6, 2018), <http://www.philly.com/philly/news/crime/krasner-juvenile-lifer-judge-rejecting-deals-20180406.html> (describing judicial rejection of lenient plea offers that Krasner has made to juveniles).

²⁰ See Louise Marie Roth, *The Right to Privacy Is Political: Power, the Boundary Between Public and Private, and Sexual Harassment*, 24 LAW & SOC. INQUIRY 45, 47 (1999) (calling Weber's definition of power the “classic sociological definition” and noting that other scholars have used it as a foundation for their own definitions of power); Norman Uphoff, *Distinguishing Power, Authority & Legitimacy: Taking Max Weber at His Word by Using Resources-Exchange Analysis*, 22 POLITY 295, 299 (1989) (“No definition of power has been more frequently cited than Weber's”); cf. Daryl J. Levinson, *Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 39 (2016) (“[P]ower’ in public law should be understood to refer to the ability of political actors to control the outcomes of contested decisionmaking processes and secure their preferred policies.”).

²¹ MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 53 (Guenther Roth & Claus Wittich eds., Univ. of Cal. Press 1968) (1956).

ability to achieve that goal when other actors (legislators, judges, police) resist. Prosecutors rarely exhibit that kind of power. Commentators seem to envision prosecutorial “power” as the far less impressive ability to achieve a result that other equally, or more, powerful actors enable and endorse. It is the difference between making a group of people do what you want (power), and facilitating that same group’s ability to achieve a shared goal (not power). Commentators’ failure to appreciate this distinction muddles our understanding of the criminal justice system, reducing the likelihood of accurately diagnosing problems and decreasing the prospects for meaningful reform.

This Article proceeds in four Parts. Part I introduces the most vacuous prosecutorial-power claims: those that simply assert that prosecutors have “immense” power. These claims typically fail to specify the nature of the referenced power (i.e., the power to do what?) and the degree to which the power can be frustrated by other actors. Thus, the claims impart little information. Part II discusses the flaws in failing to particularize prosecutorial-power claims, and emphasizes the distinctions between federal and state prosecutors to illustrate this point. The substantial differences between the type of “power” these actors wield further illustrates the vacuous nature of prosecutorial-power claims. Part III critiques the most significant prosecutorial-power claims—sweeping assertions of prosecutorial preeminence. As the discussion reveals, preeminence claims are quite meaningful, but descriptively false. Part IV builds on the previous analysis to construct a clearer picture of the “reflective power” of America’s prosecutors and suggests more constructive ways to think and talk about these influential actors. Representative quotes from the vast prosecutor-power literature illustrate the analysis throughout.

I

“PROSECUTORS HAVE LOTS OF POWER”

“[P]rosecutors in the American system wield an immense amount of power.”

—Eric S. Fish, 2018²²

This Part discusses the emptiness of the most common genre of prosecutor power claims: claims that prosecutors have lots of power. Conclusory statements about unchecked prosecutorial power and discretion are ubiquitous and uncontroversial. Even prosecutors agree.²³ Yet the claims impart virtually no information. The introduction of

²² Eric S. Fish, *Against Adversary Prosecution*, 103 IOWA L. REV. 1419, 1424 (2018).

²³ See, e.g., James P. Fox, *We Need to Educate the Media*, PROSECUTOR: J. NAT’L DISTRICT ATT’YS ASS’N, Nov.–Dec. 2007, at 5, 5 (“I believe that America’s prosecutors do

any precision causes these claims to become either readily refutable or painfully pedestrian.

At the outset, it is helpful to unpack the claims to understand the meaning they intend to convey. As explained below, implicit in generic prosecutor-power claims is the notion that prosecutors possess free choice (discretion) to impose meaningful consequences over resistance (power).

To get us started, here is a taste of the genre:

“Prosecutors have enormous power”²⁴

“It would be difficult to overstate the power conferred on prosecutors”²⁵

“[P]rosecutors in the American system wield an immense amount of power.”²⁶

“[P]rosecutors wield tremendous power”²⁷

“[P]rosecutors have awesome powers”²⁸

“[P]rosecutors wield so much power”²⁹

The power is often described as growing:

“[P]rosecutors wield vastly more power than ever before.”³⁰

A common adjunct to assertions about prosecutor power is that the power is unchecked:

“[P]rosecutors enjoy vast unfettered power”³¹

“[P]rosecutors[] [have] virtually unchecked powers.”³²

“[Prosecutors] really hold all the effective power, reporting to no one save God”³³

The contention that prosecutorial power is unchecked follows neatly from the common understanding of power as the ability to achieve a

have a great deal of power.”); Janet Reno, *The Importance of Prosecution Training in Law School*, 74 MISS. L.J. xii, xiii (2005) (referring to “the enormous power of a prosecutor”).

²⁴ Carrie Leonetti, *When the Emperor Has No Clothes III: Personnel Policies and Conflicts of Interest in Prosecutors’ Offices*, 22 CORNELL J.L. & PUB. POL’Y 53, 54 (2012).

²⁵ Uhlmann, *supra* note 14, at 1341.

²⁶ Fish, *supra* note 22, at 1424.

²⁷ Charles E. MacLean et al., *Stop Blaming the Prosecutors: The Real Causes of Wrongful Convictions and Rightful Exonerations*, 44 HOFSTRA L. REV. 151, 157 (2015).

²⁸ H. Mitchell Caldwell, *The Prosecutor Prince: Misconduct, Accountability, and a Modest Proposal*, 63 CATH. U. L. REV. 51, 54 (2013).

²⁹ Steven Alan Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. PA. L. REV. 1365, 1477 (1987).

³⁰ Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 393 (1992).

³¹ Dwight L. Greene, *Abusive Prosecutors: Gender, Race & Class Discretion and the Prosecution of Drug-Addicted Mothers*, 39 BUFF. L. REV. 737, 738 (1991).

³² Kenneth Rosenthal, *Prosecutor Misconduct, Convictions, and Double Jeopardy: Case Studies in an Emerging Jurisprudence*, 71 TEMP. L. REV. 887, 887 (1998).

³³ Adam Gopnik, *How We Misunderstand Mass Incarceration*, NEW YORKER (Apr. 10, 2017), <https://www.newyorker.com/magazine/2017/04/10/how-we-misunderstand-mass-incarceration>.

goal against resistance.³⁴ It would be silly to proclaim that prosecutors have vast power if other actors could routinely check that power. We would not say, for example, that doctors have enormous power to harvest peoples' organs and then footnote that claim by saying patients can veto the procedure. To the extent other actors can override doctors' wishes, doctors have little power worth remarking upon in this (hypothetical) context. Thus, inherent in the notion of power is the ability to overcome others' disagreements with its exercise.³⁵

It is also important to recognize the critical distinction between prosecutorial power and discretion.³⁶ Claims about prosecutors' discretion typically mirror those about prosecutorial power suggesting substantial overlap in this context:

"American prosecutors exercise almost limitless discretion"³⁷

"Technically prosecutors have almost unlimited discretion."³⁸

"[P]rosecutors have essentially unfettered discretion"³⁹

"[The prosecutor's] discretion is tremendous."⁴⁰

Those who say prosecutors have a lot of power mean that prosecutors have the ability to freely choose between different options (i.e., discretion). Thus, the already-quoted statements should be understood as shorthand expressions of longer sentiments like this:

"No government official in America has as much unreviewable power and discretion as the prosecutor."⁴¹

The notion of choosing from a vast array of options (discretion) distinguishes prosecutors from other officials who are not traditionally thought to possess remarkable power. The executioner, for example, could be characterized as wielding awesome power: the power to take life. But those opposed to capital punishment don't lobby executioners because the public servant who physically takes a condemned prisoner's life has no discretion. The executioner can kill a few preselected people, and must do so in a predetermined place, time,

³⁴ See *supra* notes 20–21 and accompanying text (providing Max Weber's foundational definition of power and noting its broad acceptance).

³⁵ See WEBER, *supra* note 21, at 53.

³⁶ See, e.g., Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1422 (2008) ("I use the term 'power' to refer to lawful authority to take action against an individual. 'Discretion,' on the other hand, is the authority not to exercise power.").

³⁷ Luna & Wade, *supra* note 16, at 1414–15.

³⁸ Nora V. Demleitner, *Revisiting the Role of Federal Prosecutors in Times of Mass Imprisonment*, 30 FED. SENT'G REP. 165, 169 (2018).

³⁹ Mitchell Stephens, *Ignoring Justice: Prosecutorial Discretion and the Ethics of Charging*, 35 N. KY. L. REV. 53, 65 (2008).

⁴⁰ Jackson, *supra* note 8, at 3.

⁴¹ Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 960 (2009).

and manner. A similar analysis can be done for jailors, who have the power to lock people away, but no discretion to select the targets of that power.

Discretion is not the same as power. For discretion to matter, the choices available to an actor must have a substantial impact. This distinction can be illustrated by reference to still other criminal justice actors who have great discretion but little power. For example, the courtroom clerk has vast discretion in selecting the order of cases to call on the day's calendar. But since the exercise of this unchecked discretion has a relatively minor impact on individuals' lives, it is comfortably left unregulated. In criminal justice parlance, all of these actors—the executioner, the jailor, the court clerk—have little power. Prosecutors are different.

Notice, then, that most shorthand statements about prosecutorial power encompass the longer form statements about unchecked power and discretion. All of these statements are saying the same thing. Claims that prosecutors have great power imply that they have broad discretion to make consequential decisions that other actors cannot override.

Armed with this broad understanding of the nature of the most common species of prosecutor power claims, we can begin our critique. The first point highlights these claims' imprecision. All of the above-quoted claims trade on a critical ambiguity for their rhetorical effectiveness. They do not tell us what the prosecutor has the power to do. Assertions of the breadth of prosecutorial power can only be evaluated if they specify a contemplated action. The chef's power to select the soup of the day is not the same thing as the President's power to start a war. Further, power claims should connect the contemplated action to a real-world consequence. Both the Prince of Liechtenstein and the President of the United States can start a war—but *starting* a war is less meaningful than successfully waging one. That means that only one of these world leaders wields enormous power.

Statements about prosecutorial power superficially benefit from obscuring the form of power they address. It is easy to say prosecutors have lots of power. So do police officers, judges, and legislators. Restaurant inspectors,⁴² school teachers,⁴³ social media influencers,⁴⁴ and

⁴² See Priya Krishna, *The Life of a Restaurant Inspector: Rising Grades, Fainting Owners*, N.Y. TIMES (June 5, 2018), <https://www.nytimes.com/2018/06/05/dining/restaurant-health-inspector.html> (“The most feared and loathed character in the city's restaurant business is not the critic, or the landlord. It's the health inspector.”).

news anchors⁴⁵ have great power. Jailors do too, if we think about the power to determine conditions of imprisonment. That is why claims about power only communicate valuable information when they are connected to a specific function. To assess these claims requires some precision about the contemplated action and its consequences. And, as we will see, the introduction of this kind of specificity immediately complicates descriptive claims about “immense” prosecutorial power.

Take two common claims:

“Prosecutors possess extraordinary power to charge defendants.”⁴⁶

“[P]rosecutors have ended up with almost unfettered, unreviewable power to determine who gets sent to prison and for how long.”⁴⁷

The first claim is narrow and defensible. It limits the universe of possible prosecutorial targets to “defendants,” recognizing that prosecutors typically cannot select targets at will from the population at large. The core prosecutorial function is deciding how to process the large number, but small percentage, of the overall population brought to their attention by police. We could still quibble about the role of the grand jury in charging felony cases,⁴⁸ or indirect constraints on

⁴³ See Jenny Edwards, *Teachers: The Most Powerful People in the World!*, NAT'L EDUC. ASS'N, <http://www.nea.org/grants/62734.htm> (last visited Nov. 4, 2018) (“[Teachers] are the most powerful people in the world! In your hands, you hold the future of society.”).

⁴⁴ See Jelle Fastenau, *Under the Influence: The Power of Social Media Influencers*, MEDIUM (Mar. 6, 2018), <https://medium.com/crobox/under-the-influence-the-power-of-social-media-influencers-5192571083c3> (using consumer psychology to explain why social media influencers are in an authoritative position and have the ability to shape their followers' opinions).

⁴⁵ See Mike Conway, *The Origins of the All-Powerful News Anchor*, CONVERSATION (Feb. 25, 2015, 5:56 AM), <http://theconversation.com/the-origins-of-the-all-powerful-news-anchor-37874> (“An anchor's perceived ability to bring viewers to the newscast trumped even the authority of the network news presidents, so the main anchor not only controlled the newscast, but also had heavy influence over the network news operation.”).

⁴⁶ Wesley MacNeil Oliver & Rishi Batra, *Standards of Legitimacy in Criminal Negotiations*, 20 HARV. NEGOT. L. REV. 61, 67 (2015) (citing WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 257–61 (2011)); see also Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43, 43 (1988) (“Prosecutors have unlimited discretion not to charge, and when they do proceed, they have largely unlimited power to determine which charges to file.”). For an example of a carefully limited claim, see Daniel Epps, *Adversarial Asymmetry in the Criminal Process*, 91 N.Y.U. L. REV. 762, 778 (2016), writing that “it is hard to dispute that prosecutors generally have broad power to decline to bring charges and that they use that power sometimes.”

⁴⁷ PFAFF, *supra* note 6, at 70.

⁴⁸ See U.S. CONST. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . .”); see also Roger A. Fairfax, Jr., *Grand Jury Discretion and Constitutional Design*, 93 CORNELL L. REV. 703, 707 n.5 (2008) (“[A]bout half of the fifty states have some form of grand jury requirement.” (citing SARA SUN BEALE ET AL., *GRAND JURY LAW AND PRACTICE* § 8.2 (2d ed. 2005))).

charging decisions like judicial dismissals.⁴⁹ And, of course, prosecutors can only charge someone with recognized, typically statutory, offenses.⁵⁰ But basically, the first claim set out above is descriptively correct. A prosecutor has discretion to choose whether to charge a defendant with a crime and what crime to select. And within broad boundaries, the charging decision typically cannot be overruled by the courts or other actors, such as victims or police.

Yet if we are assessing prosecutorial power, the second claim set out above is the one that matters. There is a reason observers label the most significant criminal justice crisis of modern times “mass incarceration” and not “mass charging.”⁵¹ Those who rightly worry about the criminal justice system’s severity are primarily thinking about convictions and sentences (as well as pretrial incarceration).⁵² Assertions of prosecutorial power to control these phenomena are more meaningful but also readily rebutted. As I have explained elsewhere, “it takes a village” to send someone to prison.⁵³ The track is laid by legislators and passes through critical gateways controlled by police, judges, and other actors.⁵⁴ A journey on that track begins when the police arrest a person and deliver the case to the prosecutor for a charging decision. But no punishment may be imposed until a jury convicts or the defen-

⁴⁹ See Anna Roberts, *Dismissals as Justice*, 69 ALA. L. REV. 327, 330 (2017) (“Nineteen states have given trial courts the power to dismiss prosecutions for the sake of justice.”).

⁵⁰ See Carissa Byrne Hessick, *The Myth of Common Law Crimes*, 105 VA. L. REV. (forthcoming 2019) (manuscript at 13) (on file with author) (highlighting the enduring legacy of judicial common law crime creation and noting that “[j]udicial crime creation is still explicitly permitted in several states”); see also Stith, *supra* note 36, at 1430 (“[E]videntiary and resource constraints necessarily limit the charges that a prosecutor can bring in any given case.”).

⁵¹ See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 12–13 (2011) (identifying “mass incarceration” as the New Jim Crow); JEREMY TRAVIS ET AL., NAT’L RESEARCH COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 1 (2014) (reporting on a comprehensive study designed to explain why “the rate of incarceration in the United States more than quadrupled in the past four decades”).

⁵² See, e.g., Zina Makar, *Displacing Due Process*, 67 DEPAUL L. REV. 425, 430 (2018) (focusing on contribution of pretrial incarceration to mass incarceration). Even pretrial incarceration depends on a judicial determination pursuant to legislative authorization. See, e.g., SHIMA BARADARAN BAUGHMAN, *THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S SYSTEM* 40–41 (2018) (describing various practices across jurisdictions by which a judge will determine whether to set bail or to deny release altogether).

⁵³ Bellin, *supra* note 2, at 837.

⁵⁴ See *id.*; see also Philadelphia DA Wants to Dismantle Mass Incarceration from the Inside out, WBUR: HERE & NOW (Apr. 18, 2018, 2:55 PM), <http://www.wbur.org/hereandnow/2018/04/18/philadelphia-da-larry-krasner-incarceration> (“We have a 700 percent increase in incarceration in Pennsylvania, and it is because a bunch of legislators—many of whom had never been lawyers, nor had they ever been in criminal justice—were getting votes by preying off of fear and demanding high sentences.” (quoting Philadelphia District Attorney Larry Krasner)).

dant agrees, with judicial approval, to plead guilty. And even then, a judge (or legislature) selects the punishment. Of course, we can debate the nuances of all of this, but that is the point. Once we connect prosecutor power to a meaningful consequence, the ubiquitous, unchallenged empirical claims about prosecutor's "enormous"⁵⁵ power become vulnerable.⁵⁶ Proponents of these claims avoid the contest altogether by alluding to power generally and adding jaw-dropping adjectives ("awesome")⁵⁷ to assure skeptical readers of the certainty of the observation.

Sending someone to prison is a consequential impact, and *if* prosecutors have the ability to do that without constraint, then prosecutors *are* the criminal justice system. But that is a big "if." The claim depends on an assessment of the power of other criminal justice actors, and particularly the ability of prosecutors to place people in prison *against resistance*. After a constructive detour to highlight important distinctions between different types of prosecutors, this critical interplay between criminal justice actors takes center stage in Part III.

II

FEDERAL PROSECUTORIAL POWER: A CASE STUDY IN CASE SELECTION

"Federal prosecutors wield enormous power."

—Rachel E. Barkow, 2009⁵⁸

Prosecutorial powers vary by jurisdiction. For example, many claims about prosecutorial power highlight the prosecutorial screening function, but in some jurisdictions, police file cases directly with the courts.⁵⁹ Another place that commentators find great prosecutorial power is in plea bargaining. Yet in some jurisdictions, judges compete

⁵⁵ Leonetti, *supra* note 24, at 54 (arguing that because of their unchallenged discretion in choosing whom to charge, prosecutors have "enormous power in determining who is subjected to criminal punishment").

⁵⁶ Cf. Don Stemen & Gipsy Escobar, *Whither the Prosecutor? Prosecutor and County Effects on Guilty Plea Outcomes in Wisconsin*, 35 JUST. Q. 1166 (2019) ("Overall, the analyses find little effect of prosecutor-level variables on guilty plea outcomes.").

⁵⁷ Caldwell, *supra* note 28, at 54 (positing as one of "[t]wo truths" that "prosecutors have awesome powers").

⁵⁸ Barkow, *supra* note 13, at 869.

⁵⁹ In some jurisdictions "police automatically file all felony arrests with the lower court before the prosecutor has an opportunity to screen." BARBARA BOLAND, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, *THE PROSECUTION OF FELONY ARRESTS 1988*, at 7 (1992). In those jurisdictions, "nearly all arrests result in initial charges being filed with the court." *Id.* at 5; see also Alexandra Natapoff, *When the Police Become Prosecutors*, N.Y. TIMES (Dec. 26, 2018), <https://www.nytimes.com/2018/12/26/opinion/police-prosecutors-misdemeanors.html> ("In

with prosecutors to offer plea deals.⁶⁰ To be fair, generalizing about prosecutors is necessary to have a coherent conversation. But as this Part highlights, any claim about “American prosecutors”⁶¹ obscures important distinctions, and these distinctions reveal the elusive nature of prosecutor power claims.

Sophisticated takes on prosecutors identify specific types of prosecutors:

“All sides agree that for good or ill, federal prosecutors exercise vast discretion. . . .”⁶²

“It is hard to overstate the power of federal prosecutors.”⁶³

“Like criminal prosecutors, family-court prosecutors have immense power.”⁶⁴

“District attorneys in California have tremendous power”⁶⁵

The most salient distinction between types of American prosecutors are between federal and state prosecutors. If pushed on the question, most commentators would assert that federal prosecutors are more powerful than state prosecutors.⁶⁶ But, again, such claims are riddled with imprecision. Conclusory references to the “awesome power” of federal prosecutors overlook important limitations. The most obvious limit is jurisdictional. A federal prosecutor can only

hundreds of misdemeanor courts in at least 14 states, police officers can file criminal charges and handle court cases, acting as prosecutor as well as witness and negotiator.”),

⁶⁰ Cf. Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325, 326 (2016) (describing robust judicial involvement in plea negotiations in ten states); Justin Fenton, *In Baltimore’s Reception Court, a Behind-the-Scenes Look at How Plea Deals Happen*, BALT. SUN (NOV. 3, 2017), <https://www.baltimoresun.com/news/maryland/crime/bs-md-ci-baltimore-plea-bargains-peters-20171023-htmlstory.html> (profiling active judicial involvement in plea negotiations in Baltimore).

⁶¹ See, e.g., Epps, *supra* note 46, at 782 (emphasizing the broad discretion of “American prosecutors”); Fish, *supra* note 22, at 1424 (stating that “prosecutors in the American system wield an immense amount of power”).

⁶² Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 856 (2007).

⁶³ Barkow, *supra* note 13, at 870.

⁶⁴ Gupta-Kagan, *supra* note 13, at 743.

⁶⁵ ACLU Founds. of Cal., *What Makes a DA So Powerful?*, MEET YOUR DA, <https://meetyourda.org/> (last visited Dec. 27, 2018).

⁶⁶ See Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 278 (2011) (documenting enormous state prosecutor caseloads and explaining that “federal prosecutors have vastly greater resources than their state counterparts”); Daniel C. Richman & William J. Stuntz, *Al Capone’s Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 611 (2005) (contrasting federal with state prosecutors and concluding that “[l]ittle responsibility and vast jurisdiction mean that federal law enforcers must exercise an extraordinary degree of investigative and prosecutorial discretion in deciding when, and against whom, to invoke that jurisdiction”).

prosecute individuals for federal crimes.⁶⁷ Absent an applicable section of the United States Code, a federal prosecutor cannot prosecute even serious offenses like murder.⁶⁸ This limit reflects a general restriction on all prosecutors' power—their powers depend on an enforceable statute enacted by the legislature. This gives legislatures a preemptive veto on prosecutorial power, which is part of the subject matter of Part III.⁶⁹

Federal caseloads reflect the statutory limits on federal jurisdiction. Federal prosecutions target mostly immigration (50%) and drug (17%) offenses.⁷⁰ This means that federal prosecutors have little power over the vast bulk of criminal defendants. For example, federal prosecutors wield little power over a person who robs a restaurant in Los Angeles, except if that person was previously deported⁷¹ or is carrying drugs (or committed some other federal offense).⁷² The consensus about federal prosecutorial power overlooks this critical limitation. It focuses instead only on prosecutors' power within a narrow jurisdictional sphere. This makes the federal prosecutor appear quite powerful. Think of the federal prosecutor as a spider exercising enormous power over those caught in its web, and little power over anything else.

⁶⁷ See 28 U.S.C. § 516 (2012) (reserving authority to prosecute violations of federal law to the Department of Justice); *Heath v. Alabama*, 474 U.S. 82, 89 (1985) (explaining that the states' "powers to undertake criminal prosecutions derive from separate and independent sources of power and authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment"); *Abbate v. United States*, 359 U.S. 187, 195 (1959) ("The States under our federal system have the principal responsibility for defining and prosecuting crimes."). Federal statutes sometimes expressly incorporate state offenses. See, e.g., *Lewis v. United States*, 523 U.S. 155, 158 (1998) (interpreting the Assimilative Crimes Act which incorporates state offenses into federal law to allow federal prosecutions of certain state crimes on "federal enclaves such as Army bases").

⁶⁸ This limitation recently arose in Virginia, when a state prosecutor accidentally dismissed a murder case, and federal prosecutors declined to prosecute the case to correct the error, stating that the case "did not meet the criteria to try it in federal court." See Jane Harper, *Virginia Beach Prosecutor Says Office Botched Murder Case, Setting a Man Free*, VIRGINIAN-PILOT (Mar. 5, 2018), https://pilotonline.com/news/local/crime/article_78260d84-1859-544e-a5d3-5d5f09157f09.html.

⁶⁹ See *infra* Part III (discussing the interplay between prosecutors and other powerful criminal justice actors).

⁷⁰ MARK MOTIVANS, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, FEDERAL JUSTICE STATISTICS, 2014—STATISTICAL TABLES 9 fig.2.1 (2014), <https://www.bjs.gov/content/pub/pdf/fjs14st.pdf> (showing "Suspects in matters received by U.S. attorneys, by offense, October 1, 2013–September 30, 2014").

⁷¹ See 8 U.S.C. § 1326 (2012) (setting forth a criminal offense for reentry of removed aliens).

⁷² See 21 U.S.C. § 844 (2012) (prohibiting possession of controlled substances). Federal prosecutions of violent crimes (three percent of federal prosecutions) are rare. See MOTIVANS, *supra* note 70, at tbl.2.1.

The spider metaphor illustrates another key aspect of the aura of prosecutorial power: target selection. Observers view prosecutors as powerful because they typically succeed in the cases they prosecute.⁷³ But that success is inflated by the prosecution's ability to choose its cases.⁷⁴ The spider wins most of the fights it gets into too, but only by carefully choosing its opponents. When a deer (as opposed to a butterfly) stumbles into the spider's web, the spider takes a hard pass and makes a new web somewhere else.

The ability to win most contests by unilaterally choosing when to play is particularly exaggerated among federal prosecutors. Most federal prosecutions are easy to "win" because they are police-initiated, meaning federal officers are typically the key witnesses and, in concert with federal prosecutors, generate the kind of evidence that will hold up in court. (If they can't generate sufficient evidence through the aid of law enforcement, prosecutors typically do not proceed with the case.) The cases are also typically straightforward, without the twists and turns that populate civilian-initiated cases (e.g., property and violent crimes). It is easy to prove common federal crimes such as that a previously deported person was "found in . . . the United States,"⁷⁵ possessed a firearm despite a previous felony conviction,⁷⁶ or possessed a large quantity of drugs.⁷⁷ It is hard to prove that the same person robbed a restaurant, or sexually assaulted an acquaintance (state crimes). Federal prosecutors also have free reign to defer difficult, but important cases to state prosecutors.⁷⁸ In short, by weeding out the cases in which they foresee an inability to overcome resis-

⁷³ Even excluding guilty pleas, conviction rates at trial are high. See Jeffrey Bellin, *The Silence Penalty*, 103 IOWA L. REV. 395, 411 (2018) ("For example, in California the rate of conviction at trial in felony cases is reportedly higher than 80%; in Florida it is around 73%.").

⁷⁴ See *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) ("In our system, 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.").

⁷⁵ 8 U.S.C. § 1326(a)(2) (2012).

⁷⁶ See 18 U.S.C. § 922(g)(1) (2012).

⁷⁷ See, e.g., MONA LYNCH, *HARD BARGAINS: THE COERCIVE POWER OF DRUG LAWS IN FEDERAL COURT* 114 (2016) (describing how the structure of federal drug charges makes them easy to prove).

⁷⁸ See, e.g., *id.* at 113 (arguing that "federal prosecutors are not generally in the business of bringing weaker cases," but instead bring "'the pick of the litter' cases"); Eric Holder, U.S. Attorney Gen., Remarks at the Annual Meeting of the American Bar Association's House of Delegates (Aug. 12, 2013), <https://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-annual-meeting-american-bar-associations> ("This means that federal prosecutors cannot—and should not—bring every case or charge every defendant who stands accused of violating federal law. Some issues are best handled at the state or local level.").

tance, federal prosecutors maintain an inflated air of invulnerability. If a case is destined to fail, prosecutors don't apply their awesome power to obtain a conviction. They drop the case like it's hot and search for an easier target.

The fragile nature of federal prosecutorial power can be illustrated by the effect of placing federal prosecutors in state court—the prosecutorial equivalent of kryptonite. Federal prosecutors handle all non-traffic criminal offenses in one of the nation's largest cities, the District of Columbia.⁷⁹ These federal prosecutors resemble state prosecutors. They get to charge the whole panoply of criminal offenses, like robbery and murder. And, like other state prosecutors, they routinely lose cases they pursue. In 2016, for example, only 42% of the 12,537 defendants in the D.C. United States Attorney's Office's cases pled guilty, while 53% had their cases dismissed post-filing.⁸⁰ Across the river in the Eastern District of Virginia, their fully federalized colleagues convicted nearly all of the 961 people they prosecuted (primarily via guilty pleas), with only a 4% post-filing dismissal rate.⁸¹

Thus, the perception that federal prosecutors wield great power depends on a spectacular home court advantage in a small jurisdictional sphere, where resistance is most easily overcome. State prosecutors look very different, presiding over a broader scope of cases,⁸² but struggling to overcome more frequent resistance. State prosecutors have greater flexibility to choose from a broader menu of charges. This gives state prosecutors more discretion in selecting a charge, and thus (presumably) more power. Yet, as prosecutors of last resort, state prosecutors possess less discretion to decline charges altogether.⁸³

⁷⁹ *About Us*, U.S. DEP'T JUST.: U.S. ATT'Y'S OFF., D.C., <https://www.justice.gov/usao-dc/about-us> (last visited Dec. 23, 2018) (“We are responsible not only for the prosecution of all federal crimes, but also for the prosecution of all serious local crime committed by adults in the District of Columbia.”).

⁸⁰ U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT 65 tbl.17 (2016), <https://www.justice.gov/usao/page/file/988896/download> (reporting 5273 guilty pleas, 139 jury convictions, 527 court trial convictions, and 6598 dismissals out of 12,537 total case “dispositions” in 2016; 7044 arrests “declined” are listed separately).

⁸¹ *Id.* at 7 tbl.2A. The table does not break down the exact percentage of convictions obtained by guilty plea as opposed to a trial verdict, but it reports that 919 defendants were found guilty and only 69 cases tried. *Id.* This means the minimum percentage of defendants found guilty via a guilty plea (even assuming every trial resulted in a conviction) is 92.5% (850 out of 919). *Id.*

⁸² *See, e.g.*, LYNCH, *supra* note 77, at 112–14 (describing the different jurisdictional scope and bargaining power of state and federal prosecutors).

⁸³ *Compare Justice Manual* § 9-27.200, U.S. DEP'T JUST., <https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution#9-27.200> (last updated Feb. 2018) (describing the broad discretion a federal prosecutor has to decline cases), *with* Bennett L. Gershman, *Prosecutorial Decisionmaking and Discretion in the Charging Function*, 62 HASTINGS L.J.

And state prosecutors' power to convict defendants is tempered by the difficulty of securing convictions for many state crimes.⁸⁴ As a result, state prosecutors encounter more robust resistance from judges, juries, and defendants, and struggle to overcome this resistance.⁸⁵

And when resistance from any corner becomes (or is likely to be) sufficiently substantial, prosecutors of all stripes drop the case, suffer a dismissal, or bargain around it.⁸⁶ Since state prosecutors have to do this more frequently (and more publicly), they look less powerful than their federal counterparts, but that is largely a result of case selection. So what is the answer: Are federal prosecutors more powerful than state prosecutors? It depends. Do either possess "awesome" power? Go back to Part I. (And then meet me at Part III.)

III

"PROSECUTORS ARE PREEMINENT"

"The institution of the prosecutor has more power than any other in the criminal justice system."

—Jason Kreag, 2017⁸⁷

Because power is the ability to achieve one's goals against resistance, assessing prosecutorial power claims requires a comparison of prosecutors to other criminal justice actors. This is why the most meaningful claims about prosecutorial power involve implicit or explicit claims of prosecutorial preeminence. The most famous example is the already-quoted statement by Attorney General Jackson: "The prosecutor has more control over life, liberty, and reputation than any other person in America."⁸⁸ Jackson's quote is unusual in extending its scope to all other persons (e.g., even the President). More typically, these claims limit their scope to the criminal justice universe:

1259, 1263–64 (2011) (describing the more extensive guidelines set forth in the ABA Criminal Justice Standards).

⁸⁴ See LYNCH, *supra* note 77, at 112–13 (highlighting caseload pressures, variable "case quality," and sentencing leniency in state as opposed to federal court that result in defendants obtaining favorable plea offers).

⁸⁵ See, e.g., *id.* (describing how prosecutors may face pressure from judges); Gershman, *supra* note 83, at 1277–79 (describing the sorts of pressure prosecutors may face from the community and potential jury pool).

⁸⁶ See Bellin, *supra* note 2, at 846 (chronicling studies of prosecutorial screening behavior that found that prosecutors proceeded on about half and, in some cases, substantially less than half of felony arrests); cf. LYNCH, *supra* note 77, at 112–13 (describing challenges state prosecutors face in the plea negotiation process).

⁸⁷ Jason Kreag, *Prosecutorial Analytics*, 94 WASH. U. L. REV. 771, 771 (2017).

⁸⁸ Jackson, *supra* note 8.

“As every lawyer knows, the prosecutor is the most powerful figure in the American criminal justice system.”⁸⁹

“There is little doubt that prosecutors are the most powerful and influential actors in the American criminal justice system.”⁹⁰

“Prosecutors are usually conceded to be the most powerful actors in the criminal justice drama”⁹¹

“[C]riminal law scholars frequently view prosecutors as the most powerful actors in the system.”⁹²

“No serious observer disputes that prosecutors . . . hold most of the power in the United States criminal justice system.”⁹³

“[Prosecutors] are the most powerful actors in the criminal justice system.”⁹⁴

These assertions pack a rhetorical punch. Again, however, they trade on ambiguity.

Claims of prosecutorial primacy build on the lack of specificity about “power” already highlighted in Part I. Even if we provide some precision, by assuming, for example, that the claims refer to prosecutors’ ability to obtain their desired criminal justice outcomes, uncertainty remains. Prosecutorial preeminence claims typically leverage uncertainty about the unit of comparison and the universe of comparators. Many assessments of prosecutorial primacy quietly omit legislatures and police, two of the most powerful criminal justice actors. Others fail to specify the level of comparison. As we will see, these are critical omissions. Once all players are included, and the unit of comparison fixed, prosecutorial primacy becomes hazy at best.

The most basic complications of claims of prosecutorial preeminence center on the comparators. The complexity operates on two different axes: (1) what is the unit of comparison; and (2) who is included in the competition. Let’s start with the first. Statements about

⁸⁹ Bennett L. Gershman, *The Most Fundamental Change in the Criminal Justice System: The Role of the Prosecutor in Sentence Reduction*, CRIM. JUST., Fall 1990, at 2, 3.

⁹⁰ Bidish Sarma, *Using Deterrence Theory to Promote Prosecutorial Accountability*, 21 LEWIS & CLARK L. REV. 573, 579 (2017).

⁹¹ Jon’a Meyer & Paul Jesilow, *Research on Bias in Judicial Sentencing*, 26 N.M. L. REV. 107, 113 (1996).

⁹² Eisha Jain, *Proportionality and Other Misdemeanor Myths*, 98 B.U. L. REV. 953, 960 (2018).

⁹³ Adam M. Gershowitz, *Consolidating Local Criminal Justice: Should Prosecutors Control the Jails?*, 51 WAKE FOREST L. REV. 677, 678 (2016).

⁹⁴ Fish, *supra* note 22, at 1444; *see also* MEDWED, *supra* note 5, at 2 (“Prosecutors are the most powerful players in the criminal justice system”); PFAFF, *supra* note 6, at 133 (“[P]rosecutors [are] the most powerful actors in the entire criminal justice system.”); K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 GEO. J. LEGAL ETHICS 285, 288 (2014) (“[T]he prosecutor [is] the most powerful actor in the criminal justice system”); Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 718 (1996) (“[T]he prosecutor [is] the preeminent actor in the system”).

prosecutorial power can leverage the ambiguity in comparators by suggesting that all prosecutors have more power than, for example, individual legislators or judges. That is not a fair comparison. If a claim of prosecutorial power depends on the actions of all prosecutors in a given jurisdiction, the equivalent comparison is to all of that jurisdiction's police, judges, or legislators. Thus, a more precise claim would be something along these lines:

“The prosecutor’s office has become the most powerful office in the criminal justice system.”⁹⁵

Another approach is to look not at prosecutors or their offices, but at the prosecutorial role:

“The institution of the prosecutor has more power than any other in the criminal justice system.”⁹⁶

Here, we would compare the institution or role of the prosecutor in the abstract to other analogues.

More commonly, commentators use words like “officials” or “actors.” These terms typically speak to individual prosecutors acting as a collective:

“[P]rosecutors are the most powerful officials in the criminal justice system, bar none.”⁹⁷

“U.S. prosecutors are arguably the most powerful officials in the U.S. criminal justice system”⁹⁸

“[P]rosecutors are the most powerful actors in the criminal justice system.”⁹⁹

“[T]he most powerful party in the criminal justice system [is] the prosecutor.”¹⁰⁰

“No government official in America has as much unreviewable power and discretion as the prosecutor.”¹⁰¹

⁹⁵ Shelby A. Dickerson Moore, *Questioning the Autonomy of Prosecutorial Charging Decisions: Recognizing the Need to Exercise Discretion—Knowing There Will Be Consequences for Crossing the Line*, 60 LA. L. REV. 371, 403 (2000).

⁹⁶ Kreag, *supra* note 87, at 771.

⁹⁷ Angela J. Davis, *The Prosecution of Black Men*, in POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT 178 (Angela J. Davis ed., 2017); *see also* Angela J. Davis, *In Search of Racial Justice: The Role of the Prosecutor*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 821, 832 (2013) (“Prosecutors are the most powerful officials in the criminal justice system.”).

⁹⁸ Marie Gottschalk, *Bring It on: The Future of Penal Reform, the Carceral State, and American Politics*, 12 OHIO ST. J. CRIM. L. 559, 574 (2015) (referring to federal and state prosecutors).

⁹⁹ Erik Luna, *Prosecutorial Decriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 785, 795 (2012).

¹⁰⁰ Lissa Griffin & Ellen Yaroshefsky, *Ministers of Justice and Mass Incarceration*, 30 GEO. J. LEGAL ETHICS 301, 304 (2017).

¹⁰¹ Bibas, *supra* note 41.

“[P]rosecutors are considered to be the most influential players in the criminal justice process.”¹⁰²

Even when a prosecutorial-power claim addresses an individual prosecutor, it is still important to identify the contemplated level. Are we talking about the chief prosecutor, such as an elected District Attorney, or a line prosecutor? Each unit should be compared to its analogue. Commentators should compare, for example, District Attorneys to Chiefs of Police, and line attorneys to individual police officers. A line prosecutor’s power is, obviously, limited by hierarchies within the office and the vagaries of case assignment.¹⁰³ To the extent office policies dictate the most meaningful decisions, or require approval for deviations from fixed policies, line prosecutors end up with severely limited power. A chief prosecutor can overcome these limits, but is restricted by geographic jurisdiction, as well as the challenges of making line prosecutors conform to office policies.¹⁰⁴

A second, more important ambiguity arises when we try to determine who is included in the competition. The broadest pool of contenders includes legislators, judges, police, defense attorneys, and prosecutors. We might also include governors, parole boards, mayors, and probation officers. Indeed, some prosecutorial-power claims seem intended to capture every possibility:

“American criminal justice is a largely administrative system run by prosecutors.”¹⁰⁵

“For all intents and purposes, prosecutors *are* the criminal justice system”¹⁰⁶

Other comparisons reach out to include even non-human actors:

“[P]rosecutors [are] the most powerful entity in the criminal justice system”¹⁰⁷

Sometimes the competition appears to be limited to only courtroom actors—judges, juries, prosecutors, and defense attorneys:

¹⁰² Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187, 1197 (2018).

¹⁰³ See, e.g., Bibas, *supra* note 41, at 1000–02 (describing the effect of prosecutorial office structures on outcomes).

¹⁰⁴ See Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1352 n.97 (2008) (recognizing the “classic principal-agent problem that is internal to the prosecutor’s office”).

¹⁰⁵ Russell M. Gold, “Clientless” Prosecutors, 51 GA. L. REV. 693, 709 n.62 (2017).

¹⁰⁶ Luna & Wade, *supra* note 1, at 1285.

¹⁰⁷ Michael Pinard, *A Reentry-Centered Vision of Criminal Justice*, 20 FED. SENT’G REP. 103, 104 (2007).

“Prosecutors have replaced jurors and judges as the most powerful players in the criminal trial”¹⁰⁸

“[P]rosecutors are the most powerful players in the judicial system.”¹⁰⁹

“[T]he most powerful repeat players in the criminal system [are prosecutors]”¹¹⁰

“[P]rosecutors, rather than judges, now effectively determine the sentences to be imposed in most cases.”¹¹¹

Other comparisons only include prosecutors and other attorneys:

“Prosecutors are the most powerful lawyers”¹¹²

“[P]rosecutors wield extraordinary power in comparison to private lawyers”¹¹³

Artificial limitations of the field of competitors make huge differences in the significance of the claims. Consequently, commentators should note whom their comparisons exclude, especially if the claims exclude police and legislators, two of the most powerful criminal justice actors.¹¹⁴ Clarity is critical because once burdened with precision, prosecutorial preeminence claims become difficult to maintain. The problem becomes clear once we dispatch with prosecutors versus the ambiguous field comparisons and explore head-to-head matchups.

A. Prosecutors Versus Police Officers

If I wanted to influence criminal justice outcomes and could control either police or prosecutors, I would choose police. Police officers have an enormous advantage by virtue of their status as first movers. Police (not prosecutors) conduct stings, make traffic stops, and respond to 911 calls.¹¹⁵ Prosecutors, by contrast, have little ability to detect crime. It is true that a prosecutor can decline to pursue a

¹⁰⁸ Taja-Nia Y. Henderson, *Teaching the Carceral Crisis: An Ethical and Pedagogical Imperative*, 13 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 104, 120 (2013).

¹⁰⁹ Ellen S. Podgor, *Overcriminalization: New Approaches to a Growing Problem*, 102 J. CRIM. L. & CRIMINOLOGY 529, 535 (2012).

¹¹⁰ Brandon L. Garrett, *Aggregation in Criminal Law*, 95 CALIF. L. REV. 383, 440 (2007).

¹¹¹ Rakoff, *supra* note 12, at 1432.

¹¹² Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 FORDHAM URB. L.J. 607, 626 (1999).

¹¹³ Arnold I. Burns et al., *Curbing Prosecutorial Excess: A Job for the Courts & Congress*, CHAMPION, July 1998, <https://www.nacdl.org/champion/articles/98jul01.htm>.

¹¹⁴ See generally Bellin, *supra* note 19 (explaining the crucial roles of the police in decisions about enforcement and the legislature in changing the criminal justice system).

¹¹⁵ *Officer Expectations and Duties*, UNC POLICE, <https://police.unc.edu/recruitment/officer-expectations-duties> (last visited Oct. 29, 2018); cf. Alice Ristroph, *The Thin Blue Line from Crime to Punishment*, 108 J. CRIM. L. & CRIMINOLOGY 305, 306 (2018) (“Policing is central to the operation of the modern criminal law, and yet, it has long been almost entirely ignored by criminal law theorists.”).

matter, but a police officer can do that too by letting a suspect off with a warning (or a nod) with much less of a paper trail.¹¹⁶

Police dominate cases before they get to court, well before other officials get involved.¹¹⁷ This gives them great freedom to operate outside the justice system—something prosecutors generally lack. Police can choose whom to investigate, how to investigate, how many resources to commit, and whether to bring the fruits of any investigation to a court (via a prosecutor). Since most crimes go unsolved (barely half of *homicides* result in an arrest),¹¹⁸ the decision of whether and to what degree to deploy police resources to detect and investigate an offense may be the most significant criminal justice decision of all. Police control the initial record of the case by choosing what to document, who to question, and what to ask. Police officers lay their hands on people, and interrogate them for hours in back rooms, isolated and without access to the outside world.¹¹⁹

Police-civilian interactions are unconstrained in the moment by judges or prosecutors. Rather, judicial actors review these interactions, if at all, long after the fact.¹²⁰ Police influence continues throughout the proceedings. Police are often the primary witnesses in criminal trials, and also play a critical role in urging (and compelling) civilian witnesses to testify.¹²¹ If a defendant or witness fails to appear at court, judges and prosecutors rely on law enforcement to compel attendance.¹²²

¹¹⁶ See 4 WAYNE R. LAFAYE ET AL., *CRIMINAL PROCEDURE* § 13.2(b) (4th ed. 2017) (“[I]t is clear beyond question that discretion is regularly exercised by the police in deciding when to arrest and that such decisions have a profound effect upon prosecution policy.”).

¹¹⁷ See generally *What Are Some Common Steps of a Criminal Investigation and Prosecution?*, LEWIS & CLARK L. SCH. NAT’L CRIME VICTIM L. INST. (Apr. 15, 2010), https://law.lclark.edu/centers/national_crime_victim_law_institute/details/story.php?id=5498 (explaining the stages of an investigation/prosecution and where the prosecuting attorney may get involved).

¹¹⁸ *Unsolved Homicide Database*, WASH. POST, <https://www.washingtonpost.com/graphics/2018/investigations/unsolved-homicide-database> (last updated July 24, 2018) (noting that nationally only fifty percent of homicides result in an arrest).

¹¹⁹ See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 445 (1966) (summarizing interrogation practices).

¹²⁰ See, e.g., *United States v. Wise*, 877 F.3d 209, 212–14 (5th Cir. 2017) (reviewing legality of a search a year and a half after incident in question); *United States v. Rivera*, 152 F. Supp. 2d 61, 63 (D. Mass. 2001) (reviewing interaction in a suppression hearing nearly a year after arrest).

¹²¹ *Officer Expectations and Duties*, *supra* note 115; see also David Kocieniewski, *Keeping Witnesses off Stand to Keep Them Safe*, N.Y. TIMES (Nov. 19, 2007), <https://www.nytimes.com/2007/11/19/nyregion/19witness.html> (explaining a shift in policy of some police forces regarding pressuring witnesses to testify).

¹²² See Howard M. Livingston, *Criminal Law and Procedure; Service of Subpoenas for the Attendance of Witnesses*; G.S. § 15A-801; G.S. § 1A-1, Rule 45, N.C. DEP’T JUST. (Mar.

Perhaps the most notorious recent example of independent police power comes from New York City. For years, the New York City Police Department (NYPD) stopped and arrested hundreds of thousands of New Yorkers on suspicion of minor crimes in an effort (they said) to deter and detect public gun carrying.¹²³ As most of these stops did not uncover guns, the policing surge sent a wave of minor cases (subway fare evasion, trespassing, marijuana possession) to the courts. From the outset, prosecutors dismissed almost all of these cases, many of which would not stand up in court.¹²⁴ The NYPD did not blink. It continued its gun-detering program of mass stops and arrests for minor offenses year after year, until a judge and newly-elected progressive mayor ordered the NYPD to desist.¹²⁵ To people living in New York City from 2003 to 2013, it sure looked like police, not prosecutors, ran the show.¹²⁶

Another distinction that highlights the power of police is the power to take life.¹²⁷ In a jurisdiction with the death penalty, a prosecutor can bring a capital case against a defendant accused of a quali-

22, 1978), <https://www.ncdoj.gov/About-DOJ/Legal-Services/Legal-Opinions/Opinions/Criminal-Law-and-Procedure;-Service-of-Subpoenas-f.aspx> (explaining role of law enforcement agencies in subpoena process). See generally FED. R. CRIM. P. 17 (enumerating the subpoena process and requirements).

¹²³ See *Floyd v. City of New York*, 959 F. Supp. 2d 540, 556 (S.D.N.Y. 2013) (describing New York Police Department (NYPD) “Stop and Frisk” practices in ruling them unconstitutional); Jeffrey Bellin, *The Inverse Relationship Between the Constitutionality and Effectiveness of New York City “Stop and Frisk,”* 94 B.U. L. REV. 1495, 1500–20 (2014) (chronicling the history of “Stop and Frisk”).

¹²⁴ See ISSA KOHLER-HAUSMANN, *MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS* 173–74 (2018) (explaining that the “common experience” for those caught up in NYPD’s policing surge was to “experience a series of arrests” but no convictions); Bellin, *supra* note 123, at 1532 (“As arrests increased, the rate at which prosecutors declined to pursue these cases rose dramatically.”).

¹²⁵ *Floyd*, 959 F. Supp. 2d at 667 (ordering NYPD to change their policing practices); see also Bellin, *supra* note 123 (chronicling NYPD’s prior tactics over the period).

¹²⁶ In a careful study of the chaotic workings of New York City misdemeanor courts, Issa Kohler-Hausmann interprets the mass dismissal of these cases as prosecutors “marking” defendants for closer scrutiny should they eventually accumulate a substantial number of arrests. KOHLER-HAUSMANN, *supra* note 124, at 144–45. As “[m]arks are an unavoidable part of case processing,” *id.* at 175, another way to look at these events is that since the NYPD did not care if the cases were prosecuted, prosecutor decisionmaking had no impact on a “stop and frisk” phenomenon exclusively generated and maintained by the NYPD. See Bellin, *supra* note 123, at 1531–32 (explaining that while the number of stops skyrocketed, a small percentage led to arrests, convictions, or sentencings).

¹²⁷ See Jillian K. Swencionis & Phillip Atiba Goff, *The Psychological Science of Racial Bias and Policing*, 23 PSYCHOL. PUB. POL’Y & L. 398, 405 (2017) (“When has there been enough training, ‘practice,’ or expertise developed to trust someone with the power to take away someone’s life or liberty—and to do so equitably?”).

fying murder.¹²⁸ If the jury convicts and imposes a death sentence, the courts (federal and state) do not reverse the sentence on appeal, and the governor concurs, the state may eventually execute the defendant.¹²⁹ In 2017, there were 23 executions in the United States.¹³⁰ A police officer can unilaterally decide to shoot someone dead on the street;¹³¹ police killed 987 people in 2017.¹³²

B. Prosecutors Versus Judges

Again, if seeking to make an impact on the criminal justice system, and forced to pick between prosecutors and judges, I would go with judges every day of the week (except weekends when the courts are closed). Individual judges dominate courtroom proceedings. Once a case is filed, a judge decides whether and how that case progresses. Judges set pretrial release conditions,¹³³ approve (or reject) plea bargains,¹³⁴ empanel and instruct juries,¹³⁵ rule on evidence,¹³⁶ control the flow of cases,¹³⁷ and much more.¹³⁸ A particularly crafty judge could undermine a prosecution simply by declining to call a case in a predictable fashion. Even if a defendant obtains favorable treatment from a prosecutor and receives a sentence of probation or is diverted

¹²⁸ See Stephen McAllister, *Federal Constitutional Requirements Governing Trial, Sentencing and Direct Review in Capital Cases*, 64 J. KAN. B. ASS'N 20, 21 (1995) (explaining the Kansas statute that limits the class of defendants eligible for the death penalty by creating specific requirements for the offense of capital murder).

¹²⁹ See *Death Penalty Appeals Process*, CAP. PUNISHMENT CONTEXT, <https://capitalpunishmentincontext.org/resources/dpappealsprocess> (last visited Oct. 30, 2018) (explaining the process of appealing a death penalty).

¹³⁰ *Execution List 2017*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/execution-list-2017> (last visited Oct. 27, 2018).

¹³¹ See, e.g., Associated Press, *When Are Police Justified in Using Deadly Force?*, L.A. TIMES (July 13, 2016, 1:49 PM), <http://www.latimes.com/nation/nationnow/la-na-police-deadly-force-20160711-snap-story.html> (describing when police are justified in using deadly force).

¹³² *Fatal Force*, WASH. POST, <https://www.washingtonpost.com/graphics/national/police-shootings-2017> (last visited Oct. 27, 2018).

¹³³ See BARADARAN BAUGHMAN, *supra* note 52, at 40–41 (discussing process for setting bail conditions).

¹³⁴ See, e.g., Melamed, *supra* note 19 (explaining how judge rejected some deals offered by prosecutor); Lacie Pierson, *Federal Judge Rejects Third Plea Deal in a Year in WV*, CHARLESTON GAZETTE-MAIL (Apr. 12, 2018), https://www.wvgazette.com/news/cops_and_courts/federal-judge-rejects-third-plea-deal-in-a-year-in/article_4970f4b3-2282-51f8-ac0e-fa8e27a73d8e.html (same).

¹³⁵ *The Judge and the Jury*, JUD. LEARNING CTR., <https://judiciallearningcenter.org/the-judge-and-the-jury> (last visited Oct. 30, 2018).

¹³⁶ *Role of the Judge and Other Courtroom Participants*, U.S. DISTRICT CT. N. DISTRICT FLA., <http://www.flnd.uscourts.gov/role-judge-and-other-courtroom-participants> (last visited Dec. 23, 2018).

¹³⁷ *Id.*

¹³⁸ *Id.*

to a drug court, it is a judge who assesses the defendant's compliance and, if unsatisfied, sends the defendant to jail.¹³⁹ Judges decide whether to issue warrants for defendants who fail to appear at court and can hold witnesses, attorneys, and anyone else who violates their commands in contempt.¹⁴⁰

True, litigants can appeal judges' decisions. But only to other judges. Assessing the power of judges, then, requires widening the lens to include all judges with authority in a given jurisdiction—a lineup that includes magistrates, trial judges, appellate judges, on up to the United States Supreme Court. Judges consciously act as a collective. They magnify their individual powers by accepting an established hierarchy that binds lower court judges to decisions of higher courts. This hierarchy gives judges, collectively, substantial control over the criminal justice system. Individually elected at the local level, state prosecutors (the large bulk of this country's prosecutors)¹⁴¹ lack a similar hierarchy, decreasing prosecutorial power in the aggregate. The power-magnification effects of coordination (and their absence) are illustrated by the relative powerlessness of the one actor who is notoriously crippled by an inability to coordinate: defense attorneys. Even within the same office, defense attorneys' obligation to individual client interests undermines their ability to engage in coordinated actions (e.g., refusing all plea deals), diluting their influence over the criminal justice system below that of other actors.¹⁴²

Commentators (including judges) sometimes suggest that judges are neutral observers of the severity (or leniency) of the criminal jus-

¹³⁹ See, e.g., *United States v. Vixamar*, 679 F.3d 22, 25 (1st Cir. 2012); *State v. Hancock*, 727 P.2d 1263, 1264 (Idaho Ct. App. 1986).

¹⁴⁰ See generally *Int'l Longshoremen's Ass'n, Local 1291 v. Phila. Marine Trade Ass'n*, 389 U.S. 64, 76 (1967) ("The judicial contempt power is a potent weapon.").

¹⁴¹ See John C. Jeffries, Jr. & Hon. John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 *HASTINGS L.J.* 1095, 1099 (1995) ("[T]he number of federal prosecutors is small compared to their state and local counterparts, comprising roughly ten percent of the national total."). The most recent statistical survey of state prosecutors counted approximately 25,000 in 2007. STEVEN W. PERRY & DUREN BANKS, U.S. DEP'T OF JUST., OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, PROSECUTORS IN STATE COURTS 4 tbl.2 (2007), <https://www.bjs.gov/content/pub/pdf/psc07st.pdf>. There were fewer than 6000 Assistant United States Attorneys in that year. U.S. DEP'T OF JUST., UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT 3 (2007), <https://www.justice.gov/sites/default/files/usao/legacy/2008/06/17/07statrpt.pdf>.

¹⁴² See John H. Blume, *How the "Shackles" of Individual Ethics Prevent Structural Reform in the American Criminal Justice System*, 42 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 23, 38 (2016) ("If [defense] lawyers had the ability to act collectively and to take actions, something approaching structural reform of the criminal justice system would likely be achieved.").

tice system.¹⁴³ This sentiment is highlighted when individual judges deplore restrictions on their discretion.¹⁴⁴ It is certainly true that judges run into constraints. The problem is not a lack of judicial power, however. The problem is usually that the judges at the top of the hierarchy decide to exercise their power in ways that lower court judges disagree with and the judges lower in the hierarchy feel obligated to acquiesce.¹⁴⁵ It is, perhaps, the greatest testament to the power of the prosecutorial preeminence narrative that the judges who craft and preside over the criminal justice system can be portrayed as hapless bystanders to prosecutorial might.¹⁴⁶

Judicial power is easy to miss because judges are conditioned to act (and speak) as if they have none. Even in the most controversial and free-wheeling cases, judges cloak the exercise of their power in the guise of implementing the will of other actors, such as legislators or the framers of the Constitution.¹⁴⁷ John Roberts famously informed senators at his confirmation hearing that, even as Chief Justice of the Supreme Court, his job would be merely to “call balls and strikes.”¹⁴⁸

¹⁴³ Philip K. Howard, *Judges: The Problem and Solution to America's Judiciary Mess*, ATLANTIC (June 6, 2012), <https://www.theatlantic.com/national/archive/2012/06/judges-the-problem-and-solution-to-americas-judiciary-mess/258131>; see also Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), <http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty> (“[I]t is the prosecutor, not the judge, who effectively exercises the sentencing power, albeit cloaked as a charging decision.”).

¹⁴⁴ See, e.g., Shira A. Scheindlin, *I Sentenced Criminals to Hundreds More Years Than I Wanted To. I Had No Choice.*, WASH. POST (Feb. 17, 2017), <https://www.washingtonpost.com/posteverything/wp/2017/02/17/i-sentenced-criminals-to-hundreds-more-years-than-i-wanted-to-i-had-no-choice/> (“I would never have imposed that sentence if I hadn't been forced to.”).

¹⁴⁵ See generally Wesley M. Oliver, *Charles Lindbergh, Caryl Chessman, and the Exception Proving the (Potentially Waning) Rule of Broad Prosecutorial Discretion*, 20 BERKELEY J. CRIM. L. 1, 2 (2015) (“Historically, courts have accepted—and indeed been a part of—the transfer of power from judges to prosecutors.”).

¹⁴⁶ See, e.g., Gold, *supra* note 105 (“American criminal justice is a largely administrative system run by prosecutors.”); cf. Gottschalk, *supra* note 98, at 575 (“Several landmark court cases challenging prosecutors' wide prerogatives were decided in their favor and further enhanced their powers.”).

¹⁴⁷ See, e.g., *Coker v. Georgia*, 433 U.S. 584, 604 (1977) (Berger, C.J., dissenting) (“[T]he Cruel and Unusual Punishments Clause does not give the Members of this Court license to engraft their conceptions of proper public policy onto the considered legislative judgments of the States.”); *Twining v. New Jersey*, 211 U.S. 78, 106–07 (1908) (“[W]e must take care that we do not import into the discussion our own personal views of what would be wise, just and fitting rules . . . and confound them with constitutional limitations.”), *overruled by Malloy v. Hogan*, 378 U.S. 1, 9 (1964).

¹⁴⁸ Charles Fried, *Balls and Strikes*, 61 EMORY L.J. 641, 641 (2012). The broad parameters of constitutional criminal procedure illustrate the widely-recognized problem with Roberts's analogy. Roberts would have to envision, for example, strikes as pitches that are “due” a batter (Fifth and Fourteenth Amendments) and balls as pitches that are “unreasonable” (Fourth Amendment). But that's not how umpiring works in baseball: The strike zone is concretely delineated by reference to home plate and the batter's shoulders

The degree to which judges themselves believe in these constraints or simply genuflect to them to maintain their legitimacy (and ease confirmation) is beyond the scope of this Article. But even if we accept that judges must work within the rough boundaries set forth by legislative actors, those boundaries, particularly in the criminal justice sphere, are exceedingly malleable.¹⁴⁹ The Eighth Amendment forbids “cruel and unusual” punishments, the Fourth Amendment prohibits “unreasonable” searches and seizures, and the Fifth and Fourteenth Amendments dictate that all criminal defendants receive “due process.” That’s why judges often disagree. In criminal cases, they possess vast discretion to carve out new formations in the criminal justice landscape.

As a result of the broad legal spaces within which judges work, virtually every criminal injustice that crosses the news wire resonates with an important ruling by a judicial body. The Supreme Court, for example, has ruled that lengthy terms of imprisonment for minor crimes do not constitute “cruel and unusual” punishment,¹⁵⁰ coercive plea bargaining is consistent with “due process”¹⁵¹ (both 5-4 decisions), and that pretextual stops do not violate the Fourth Amendment (9-0).¹⁵² State courts generate analogues of these decisions interpreting State constitutional and legislative commands.¹⁵³ The very existence of these cases implies that the courts could have ruled another way. Some have.¹⁵⁴ And when they do, those decisions

and knees. *The Strike Zone: A Historical Timeline*, MLB, http://mlb.mlb.com/mlb/official_info/umpires/strike_zone.jsp (last visited Oct. 28, 2018).

¹⁴⁹ See Saul Levmore, *Ambiguous Statutes*, 77 U. CHI. L. REV. 1073, 1079 n.18 (2010) (explaining that legislatures anticipate or intend ambiguity in statutory language).

¹⁵⁰ *Ewing v. California*, 538 U.S. 11, 30–31 (2003) (upholding life sentence for a defendant, with two prior felony convictions, convicted of stealing three golf clubs).

¹⁵¹ *Bordenkircher v. Hayes*, 434 U.S. 357, 358–59 (1978) (rejecting challenge to conviction that resulted in life sentence after prosecutor threatened to add recidivism enhancement if defendant did not accept plea offer involving five-year sentence).

¹⁵² *Whren v. United States*, 517 U.S. 806, 819 (1996).

¹⁵³ See, e.g., *State v. Short*, 851 N.W.2d 474, 478 (Iowa 2014); *The Chair King, Inc. v. GTE Mobilnet of Hous., Inc.*, 184 S.W.3d 707, 716 (Tex. 2006).

¹⁵⁴ See, e.g., *Hayes v. Cowan*, 547 F.2d 42, 45 (6th Cir. 1976) (“[W]e hold that due process has been offended by placing petitioner in fear of retaliatory action for insisting upon his constitutional right to stand trial.”), *rev’d sub nom. Bordenkircher*, 434 U.S. 357; see also Jon’a Meyer & Paul Jesilow, *The Formation of Judicial Bias in Sentencing: Preliminary Findings on “Doing Justice,”* 22 W. ST. U. L. REV. 271, 279 (1995) (reporting on California judges’ avoidance of mandatory sentencing regimes); cf. *State v. Kumukau*, 787 P.2d 682, 684, 688 (Haw. 1990) (reversing an effective-life sentence for defendant convicted of several counts of armed robbery, kidnapping, and attempted murder of a police officer).

bind lower courts.¹⁵⁵ In the case of the Supreme Court interpreting constitutional principles, the rulings must be enforced by every state and federal court across the country.¹⁵⁶ A fifty-year-old Supreme Court decision requires the country's almost one million police officers¹⁵⁷ to read a set of warnings about the perils of cooperation to suspects they wish to question.¹⁵⁸ That is power. Judges effectively abolished the death penalty¹⁵⁹ and then blessed its return.¹⁶⁰ The Supreme Court required states to open their coffers to provide attorneys to indigent defendants.¹⁶¹ Judicial decisions set the boundaries for other criminal justice actors, including prosecutors and the judges themselves.¹⁶² Even when granting great freedom to these other actors, these rulings reflect the exercise of power, not its absence.

C. *Prosecutors Versus Legislators*

Legislators are clearly more powerful than prosecutors. No one would pay to watch this lopsided contest. Take any criminal justice example and the legislature has greater power. Yes, prosecutors can dismiss marijuana cases. But legislators can legalize marijuana. Congress could make the marijuana leaf the national symbol, emblazon it on the American flag, and introduce “Puff the Magic Dragon” as the new national anthem. Legislators could create government marijuana-distribution centers and issue free daily doses to every man, woman, and child. (You get the idea.) Prosecutors cannot do anything like that.

Even at the extreme bounds of their power—declining all cases of a certain type in an effort to nullify a law—prosecutors are less powerful than legislators. Prosecutors could issue a public promise, for

¹⁵⁵ *Legal Research: An Overview: Mandatory v. Persuasive Authority*, UCLA SCH. L., <http://libguides.law.ucla.edu/c.php?g=686105&p=5160745> (last updated July 19, 2018, 9:55 AM).

¹⁵⁶ See, e.g., *State v. Coleman*, 214 A.2d 393, 402 (N.J. 1965) (“We, of course, recognize that the United States Supreme Court is the final arbiter on all questions of federal constitutional law.”).

¹⁵⁷ *Law Enforcement Facts*, NAT’L L. ENFORCEMENT OFFICERS MEMORIAL FUND, <http://www.nleomf.org/facts/enforcement/> (last visited Oct. 28, 2018) (“There are more than 900,000 sworn law enforcement officers now serving in the United States . . .”).

¹⁵⁸ *Miranda v. Arizona*, 384 U.S. 436, 469 (1966).

¹⁵⁹ *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972).

¹⁶⁰ *Gregg v. Georgia*, 428 U.S. 153, 207 (1976); see also Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1, 7–8 (2007) (describing history).

¹⁶¹ See *Gideon v. Wainwright*, 372 U.S. 335, 342–44 (1963) (holding the right to have assistance of counsel is a fundamental right under the Sixth Amendment).

¹⁶² See, e.g., *United States v. Angelos*, 433 F.3d 738, 753 (10th Cir. 2006) (explaining that Supreme Court case law required affirmance of life sentence that the district court criticized and adding that “[a]lthough the district court concluded that Angelos’s sentence was disproportionate to his crimes, we disagree”).

example, not to prosecute marijuana possession or petty theft in their jurisdiction. But police officers could continue to arrest people for those crimes, regardless of whether prosecution ultimately resulted.¹⁶³ And if defendants sit in jail while awaiting a court-ordered dismissal, many defendants' punishment would approximate the lawful sanctions for minor crimes. Further, legislators could punish prosecutors for recalcitrance in creative ways. They could cut prosecutor office budgets.¹⁶⁴ Or, legislators might institute alternative mechanisms to punish offenders and place those mechanisms outside of prosecutors' hands. They might grant police more flexibility in determining where to file their cases, allowing officers to shop around for like-minded prosecutors. Or, legislatures could permit police to litigate cases themselves, already a common occurrence in a number of jurisdictions.¹⁶⁵

Prosecutors do not often push the boundaries set by the legislature, but when they do, there is a predictable backlash. For example, when a prosecutor in Orlando announced she would no longer seek the death penalty, Florida's governor invoked a statute allowing him to reassign cases for "good and sufficient reason," and sent Orlando's death-eligible cases to a hand-picked prosecutor in another jurisdiction.¹⁶⁶ The Florida courts upheld the action, citing a similar ruling in New York.¹⁶⁷

Confronted on this difficult terrain, many commentators would likely acknowledge legislative primacy. The truth behind the rhetoric, they would explain, is that legislators have used their primacy to create a system in which prosecutors are the most powerful actor. In the world that legislators created, prosecutors "run[] the show."¹⁶⁸ Here is a vivid description along these lines:

¹⁶³ Cf. *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) ("If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.").

¹⁶⁴ See William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 786 (2006) (explaining that legislators "write budgets for the agencies that enforce those laws: police forces, prosecutors' offices, public defenders' offices, courts, and prisons").

¹⁶⁵ See Natapoff, *supra* note 59 ("In hundreds of misdemeanor courts in at least 14 states, police officers can file criminal charges and handle court cases, acting as prosecutor as well as witness and negotiator.").

¹⁶⁶ *Ayala v. Scott*, 224 So. 3d 755, 758 (Fla. 2017).

¹⁶⁷ *Id.*; see also *Johnson v. Pataki*, 691 N.E.2d 1002, 1003 (N.Y. 1997) (upholding Governor's reassignment of a single case in similar circumstances).

¹⁶⁸ Gershman, *supra* note 30, at 405 n.74 (1992); see also ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 5 (2007) (asserting that prosecutors are the "most powerful officials in the criminal justice system"); MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* 268 (2015) (claiming that prosecutors are the "preeminent players in this game").

“Criminal law scholars are in near complete agreement that prosecutorial discretion now dominates the path that a particular case follows in the criminal system”¹⁶⁹

This species of prosecutorial-power quote epitomizes the genre. It removes the legislature from the equation by framing the criminal justice system as a discrete, unchangeable set of pathways. It overlooks the role of police by spontaneously placing the defendant on the track awaiting the decision of the powerful prosecutor. And it discounts the influence of judges, parole and probation officers, and governors. If we assume the pathways are set in stone, and that no one else is interested or able to intervene, the prosecutor finally does look like the most powerful actor. One can't help but think of the joke about the economist stranded on a desert island with a can of food but no way to open it; the economist's solution is to assume the existence of a can opener. That's how prosecutorial-power rhetoric works too. If we assume everyone else is powerless or paralyzed, prosecutors have great power. Weber would not approve.

Prosecutors are not achieving goals over the resistance of other criminal justice actors. They are facilitating the goals approved by those other actors. Legislators, judges, police, governors, voters, etc., are not “shocked, shocked”¹⁷⁰ at the outputs of the American criminal justice system. They make and remake the system every day. Prosecutors, for the most part, dutifully implement their commands.

Take, for example, one of the most compelling examples cited to support prosecutorial-dominance rhetoric, the case of Weldon Angelos. In 2002, Angelos conducted three separate sales of marijuana to a government informant, carrying a gun to two of the exchanges.¹⁷¹ A jury convicted Angelos of those offenses.¹⁷² District court Judge Paul Cassell sentenced him to fifty-five years in prison, while issuing a fiery opinion denouncing the statutorily-mandated sentence as “cruel, unjust, and even irrational.”¹⁷³ Cassell wrote:

[T]he court . . . calls on the President—in whom our Constitution reposes the power to correct unduly harsh sentences—to commute Mr. Angelos's sentence to something that is more in accord with just and rational punishment. In particular, the court recommends that the President commute Mr. Angelos's sentence to no more

¹⁶⁹ Samuel W. Buell, *Is the White Collar Offender Privileged?*, 63 DUKE L.J. 823, 882 (2014).

¹⁷⁰ CASABLANCA (Warner Bros./First National Pictures 1942).

¹⁷¹ United States v. Angelos, 345 F. Supp. 2d 1227, 1230–32 (D. Utah 2004).

¹⁷² *Id.* at 1232.

¹⁷³ *Id.* at 1230.

than 18 years in prison, the average sentence that the jurors in this case recommended.¹⁷⁴

The Angelos case reflects three hallmarks of prosecutorial power: (1) It was a federal prosecution; (2) the offense was covered by multiple, severe mandatory sentences; and (3) the evidence against Angelos was “overwhelming.”¹⁷⁵ And indeed the prosecutor could have changed the outcome in two ways. First, the prosecutor could have offered a more generous plea deal.¹⁷⁶ In fact, the prosecutor offered to recommend a sentence of fifteen years in prison if Angelos pleaded guilty (just under Cassell’s post-trial recommendation).¹⁷⁷ Angelos declined the offer.¹⁷⁸ Second, the prosecutor could have declined to charge some or all of the offenses.

The prosecutor obviously influenced the outcome in the Angelos case. But so did every other criminal justice actor implicated, including Angelos. Angelos never receives a fifty-five year sentence unless: (1) The legislature passes a statute that dictates severe mandatory minimum sentences for distributing drugs while armed, and requires that such sentences run consecutively for each occurrence;¹⁷⁹ (2) the courts decline to deem the statute unconstitutional or limit its reach;¹⁸⁰ (3) the police wait until Angelos conducts three separate sales before arresting him;¹⁸¹ (4) the police deliver the case to prosecutors, and specifically to federal—not state—prosecutors; (5) the defendant refuses a plea deal that appears to closely track the judge’s preferred sentence (“the shadow of trial”); (6) the jury convicts on the counts that require mandatory sentences; (7) the trial judge, following Supreme Court precedent, refuses to declare this particular sentence unconstitutional (“cruel and unusual”) instead

¹⁷⁴ *Id.* at 1230–31.

¹⁷⁵ *United States v. Angelos*, 433 F.3d 738, 749 (10th Cir. 2006).

¹⁷⁶ *See Bellin*, *supra* note 2, at 844–45, 848 (noting that “prosecutor’s power is at its apex in deciding *not* to bring charges” and highlighting the “prosecutor’s broad discretion to offer concessions in exchange for guilty pleas”).

¹⁷⁷ *Angelos*, 345 F. Supp. 2d at 1231.

¹⁷⁸ *Id.* at 1232.

¹⁷⁹ *See id.* at 1230 (“While the sentence appears to be cruel, unjust, and irrational, in our system of separated powers Congress makes the final decisions as to appropriate criminal penalties.”).

¹⁸⁰ In fact, the Supreme Court did try to limit the language in 1995, *see Bailey v. United States*, 516 U.S. 137, 146 (1995), only to have Congress respond by amending the statute so that it clearly applied in cases like Angelos’s. *United States v. Ceballos-Torres*, 218 F.3d 409, 413 (5th Cir. 2000).

¹⁸¹ *See John F. Stinneford, Dividing Crime, Multiplying Punishments*, 48 U.C. DAVIS L. REV. 1955, 1971–73 (2015) (“As the Angelos case demonstrates, if the individual drug transaction is the unit of prosecution, prosecutors and police will have the power to procure virtually any prison sentence they wish simply by manipulating the number of controlled buys.”).

labeling it “cruel, unjust, and irrational”—a decision upheld by the appellate court, which went on to express disagreement with the trial court’s characterization of the sentence as disproportionate;¹⁸² (8) the President declines to issue a pardon or commutation; (9) Congress abolishes parole.¹⁸³ Assuming all of these things remain constant, the prosecutor wields tremendous power and *is* the criminal justice system. But it is misleading to hold every other variable constant and then point to the prosecutor as holding all the power. We could similarly hold the prosecutor’s behavior constant and say the jury holds all the power, or the judge does, or the President, and on and on—any one of whom could change the outcome, regardless of the prosecutor’s objections.

These logical holes widen once we circle back to the elements that make this case unusual.¹⁸⁴ In a typical case, the prosecutor’s charging options are less impactful, the government’s case is less airtight, the sentencing rules are more discretionary and less draconian, and looming over everything is the parole system.¹⁸⁵ Typical state prosecutors are overburdened with cases,¹⁸⁶ are unable to dictate defendants’ sentences, and are worried about embarrassing trial losses.¹⁸⁷ This gives defendants leverage to extract more favorable plea deals. The *Angelos* case is an outlier when it comes to prosecutorial power, and even this case illustrates the prosecutors’ dependence on other criminal justice actors. The prosecutor in the

¹⁸² *Angelos*, 345 F. Supp. 2d at 1230; *United States v. Angelos*, 433 F.3d 738, 753 (10th Cir. 2006).

¹⁸³ See *Graham v. Florida*, 560 U.S. 48, 109–10 (2010) (Thomas, J., dissenting) (noting that through the Sentencing Reform Act of 1984, “Congress abolished parole for federal offenders,” and also that “several States have followed suit”).

¹⁸⁴ See *Luna & Wade*, *supra* note 16, at 1416 (“To some extent, [the *Angelos*] case is exceptional.”).

¹⁸⁵ See W. David Ball, *Heinous, Atrocious, and Cruel: Apprendi, Indeterminate Sentencing, and the Meaning of Punishment*, 109 COLUM. L. REV. 893, 900 (2009) (“While it is difficult to characterize the variety of sentencing systems in the fifty states and the District of Columbia, the majority of states still impose sentences terminating in discretionary parole release, and the ‘vast majority . . . have retained some form of discretionary parole release and postrelease supervision.’” (quoting U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE ASSISTANCE, 1996 NATIONAL SURVEY OF STATE SENTENCING STRUCTURES, at xi (1998), <http://www.ncjrs.gov/pdffiles/169270.pdf>)).

¹⁸⁶ See *Gershowitz & Killinger*, *supra* note 66, at 270 (reporting on astronomical state prosecutor caseloads across the country, including Houston, Texas “where some prosecutors are handling upwards of 1500 felonies per year and over 500 felonies at any one time”).

¹⁸⁷ See 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, 292–93 (2001) (explaining that fear of losing can be so extreme as to lead to misconduct).

Angelos case did not put the defendant in prison over resistance. He did it with the support and assistance of every other criminal justice institution implicated, including the police, the judiciary, and the legislature.

As the next Part explores, the underlying assumption that every other actor remains in an artificial stasis is the key to understanding the only claims about prosecutorial power that matter—and their toxicity to candid criminal justice conversations.

IV

THE REFLECTIVE NATURE OF PROSECUTORIAL POWER

As the previous Parts show, a rigorous assessment of prosecutorial power belies the prosecutorial-preeminence echo chamber that has grown up in the scholarly literature. Commentators use the term “power” as if it says something simple, but these claims paper over vast complexity. Distilled to their core, claims about prosecutorial power are actually claims about the inaction of other powerful actors—legislators, police, and judges. And, in fact, prosecutors typically appear powerful in these accounts only after other powerful criminal justice actors empower and work in tandem with them to implement severe outcomes. This is not “power” in any conventional sense. Rather, it can more accurately be described as a reflection of the power of others. And this distinction is critical to understanding how the criminal justice system works, diagnosing its problems, and proposing reforms.

A. *Prosecutors’ Reflective Power*

There is great power in the criminal justice system. But because the system consists of a complex interplay of independent actors, the sources of this power can be difficult to detect. Academic claims of prosecutorial power obscure these sources by holding everything constant and then asserting that prosecutors dictate outcomes. If criminal statutes are broad and severe, police bring prosecutors all the cases they solve, judges go along with prosecutors’ recommendations (or seek to impose even harsher sentences), parole boards keep people locked away, governors issue pardons sparingly, etc., *then* prosecutors possess great power. But this is not “power.” It is an illusion created by rhetorically stripping all the other actors of their power, and then pointing to a reflection of that power in prosecutors.¹⁸⁸ Power is the

¹⁸⁸ Cf. Levinson, *supra* note 20, at 141 (“Power is often located elsewhere than the site of action and camouflaged by inaction.”).

ability to accomplish goals over resistance.¹⁸⁹ Everyone becomes powerful when all the other players stand still. Indeed, if we switch our perspective to holding the prosecutor's role constant, the same sweeping claims of preeminence could be applied to police or judges or legislators.

Take the war on drugs as an example. It could be halted to varying degrees by any of the major criminal justice actors. Legislators could decriminalize narcotics. Police could stop making arrests for possession of drugs.¹⁹⁰ Prosecutors could stop charging drug cases.¹⁹¹ Judges could dismiss them,¹⁹² regularly suppress drug evidence, sentence drug crimes lightly, or deem drug crimes unconstitutional.¹⁹³ What makes prosecutors special in this equation? Perhaps commentators seize on prosecutorial power because that power seems relatively easy to activate. Legislators hew to political winds and need to find consensus to act. Judges bow to hierarchy, and claim to be severely restricted by formal sources of authority such as statutes and constitutions. Police, purportedly, act with little discretion, mechanically delivering suspected law breakers to prosecutors for decisions about how to proceed. By contrast, prosecutors' decisions to drop cases, or even stop charging certain categories of cases, can (commentators perceive) be made unilaterally and without immediate check.¹⁹⁴ But notice that even if we credit the multitude of assumptions baked into the preceding statements, being more likely to act is a curious form of power.

And it is not even clear that prosecutors have more flexibility than other actors. Let's start with charging. Prosecutors can only

¹⁸⁹ See *supra* note 21 and accompanying text (defining and explaining "power").

¹⁹⁰ See, e.g., Jonathan Wolfe, *Marijuana in New York: Here's How the Laws Are Changing*, N.Y. TIMES (June 20, 2018), <https://www.nytimes.com/2018/06/20/nyregion/marijuana-laws-new-york.html> ("[T]he New York Police Department will begin issuing tickets for people who smoke weed in public instead of arresting them.").

¹⁹¹ See, e.g., Brian X. McCrone, *Marijuana Criminal Cases Dropped En Masse by Philadelphia District Attorney*, NBC PHILA. (Feb. 15, 2018), <https://www.nbcphiladelphia.com/news/local/Marijuana-Criminal-Cases-Dropped-En-Masse-by-Philadelphia-District-Attorney-Larry-Krasner-474228023.html> (reporting on Philadelphia District Attorney's new policy to dismiss marijuana possession cases).

¹⁹² See, e.g., *People v. Edwin C.*, 369 N.Y.S.2d 311, 316–17 (App. Div. 1975) (dismissing the defendant's drug charges *sua sponte* in the interest of justice).

¹⁹³ Compare *Robinson v. California*, 370 U.S. 660, 660, 667 (1962) (striking down a state law that made it a criminal offense to be "addicted to the use of narcotics"), with *Gonzales v. Raich*, 545 U.S. 1, 33 (2005) (rejecting challenge to federal authority to prohibit illegal drugs), and *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 564 (6th Cir. 2011) (Sutton, J., concurring in part) ("Go to any federal prison in the country to see how a broad conception of the commerce power has affected individual liberty through the passage of federal gun-possession and drug-possession laws and sentencing mandates.").

¹⁹⁴ This flexibility may be primarily a function of the lack of attention to prosecutors' actions.

charge crimes they are aware of, and police are the primary mechanism by which prosecutors become aware of crimes. This means that prosecutors' charging decisions, especially at the state level, are largely dependent on police. Prosecutors are also limited, particularly at the federal level, by legislative crime definitions. If the facts established through police investigation do not fit a statutory crime, prosecutors lose the ability to charge an offense. Further, judges can take certain charges off the table through procedural rulings, and by narrowly interpreting statutes and rigorously assessing their constitutionality.¹⁹⁵ This latter power is particularly impactful, as judges can wait until well after trial to invoke it, undoing years of prosecutorial effort.¹⁹⁶ If prosecutors charge beyond the safety net provided by the legislature and judges, they increase the chances of trial and an embarrassing loss. If they charge substantially under what the facts and law suggest, they risk political backlash.

Even assuming that all of the obstacles prosecutors must navigate are more or less mechanical and predictable, the case for prosecutorial flexibility still needs fleshing out. With respect to cases that judges, legislators, and the public care a great deal about, prosecutors don't seem to have much freedom. For many serious crimes, prosecutors have little choice but to file charges that parallel the facts of the offense. Richman and Stuntz describe these offenses as "politically mandatory."¹⁹⁷ Prosecutors can dismiss minor cases with little consequence, but that is only because judges and legislators (and voters) do not care as much about punishing those offenses and because of this, the punishments avoided are less substantial.

Prosecutors also have great flexibility to recommend lower (or higher) bail amounts and less (or more) severe sentences.¹⁹⁸ But the final decision falls to the judge (or for mandatory sentences, the legislature) who may or may not follow the prosecutor's suggestion. When sentences involve probation or parole, as they often do,¹⁹⁹ prosecutors fall further out of the picture, as judges and parole boards monitor

¹⁹⁵ See, e.g., *McDonnell v. United States*, 136 S. Ct. 2355, 2361, 2375 (2016) (vacating the federal bribery convictions of a former Virginia Governor that prosecutors had obtained two years previously by narrowly interpreting the term "official act").

¹⁹⁶ See, e.g., *id.*

¹⁹⁷ Richman & Stuntz, *supra* note 66, at 600.

¹⁹⁸ See, e.g., Fed. R. Crim. P. 11 (c)(1)(a) (explaining that prosecutor can "recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate" but emphasizing that "such a recommendation or request does not bind the court"); Bellin, *supra* note 2, at 849 & n.78 (highlighting requirement for judicial approval of plea deals in all fifty states). For a discussion of bail rules, see BARADARAN BAUGHMAN, *supra* note 52, at 40–41.

¹⁹⁹ See Bellin, *supra* note 2, at 844 (estimating that forty-five percent of prison inmates are incarcerated for parole and probation violations).

and adjust initial sentences based on subsequent developments.²⁰⁰ Again, what looks like prosecutorial power is merely a reflection of a power lodged in other actors.

Cutting through the hyperbole, then, claims of prosecutorial power turn out to be little more than vaguely articulated, undeveloped contentions about prosecutorial freedom to manipulate the power held by others. Commentators allege that prosecutors have space to operate where judges, police, and even legislators seem constrained. The evidence for this proposition is unclear, since it is more likely that these other actors have no desire to act differently than that they are prevented from implementing their desires. And since this point is rarely made explicit, there is a great deal of work to be done in supporting it. It may simply be that prosecutors' lack of transparency and unwillingness to go against the political grain create an inflated perception of maneuverability. But even if it were proven that prosecutors are more flexible than other actors, that doesn't mean they are more powerful. It just means that they have an untapped ability to reflect and (perhaps) redirect other actors' power. And that difference has profound implications for modern criminal justice debates and prescriptions for reform.

B. *What About Lobbying?*

When all else fails, the last line of prosecutorial-power rhetoric turns to lobbying. In this iteration, prosecutors are powerful because they advocate for the laws that grant them power and block changes to those laws.

“No other group comes close to prosecutorial lobbying efforts on crime issues.”²⁰¹

“[P]rosecutors are especially effective lobbyists for criminal law expansion”²⁰²

“[T]he powerful state prosecutor lobby . . . has scuttled criminal justice reform efforts across the country”²⁰³

²⁰⁰ See JEREMY TRAVIS, *BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY* 47 (Jeffrey Butts et al. eds., 2005) (explaining that “typically,” parole revocation “hearings are held before an administrative law judge employed by the parole board or the parole board itself”).

²⁰¹ Rachel E. Barkow, *Administering Crime*, 52 *UCLA L. REV.* 715, 728 (2005); cf. Aziz Z. Huq, *The Constitutional Law of Agenda Control*, 104 *CALIF. L. REV.* 1401, 1445–46 (2016) (“[A]lthough formally the first mover in the definition of federal criminal law, in practice, Congress is better viewed as responsive to executive branch needs. Congress is heavily and asymmetrically lobbied by the Department of Justice.”).

²⁰² Darryl K. Brown, *Democracy and Decriminalization*, 86 *TEX. L. REV.* 223, 232 (2007).

²⁰³ Radley Balko, *Behind the Scenes, Prosecutor Lobbies Wield Immense Power*, *WASH. POST: THE WATCH* (Apr. 23, 2018), <https://www.washingtonpost.com/news/the-watch/wp/>

The most obvious response to this argument is that it directly situates prosecutorial power as an ability to influence legislators. That makes legislators more powerful. (No one has more influence over legislators than legislators.) And even if we examine the claim on its own terms, there is still much work to be done to show that prosecutors are powerful lobbyists and, if so, why.

The mechanism by which prosecutorial lobbying influences criminal law is unclear. Prosecutors' associations do not possess the traditional means to influence legislators. They possess neither large voting memberships nor vast sums of money. There are about 25,000 prosecutors scattered across the country,²⁰⁴ and their interests vary. Prosecutors cannot deliver a large number of voters like the AARP (thirty-eight million members),²⁰⁵ the NRA (four million members),²⁰⁶ or MoveOn.org (seven million members).²⁰⁷ Also, unlike those groups, prosecutors' organizations lack storehouses of cash that they can use to take down disfavored legislators. In fact, the modern political landscape more readily produces illustrations of the opposite—well-funded groups funneling cash and resources to vote disfavored prosecutors out of office.²⁰⁸ Even within the criminal justice system, police look like a much stronger lobby than prosecutors.²⁰⁹ And when law enforcement takes on traditional lobbying groups, such as the gun lobby, they often lose. The spread of so-called “stand your ground”

2018/04/23/behind-the-scenes-prosecutor-lobbies-wield-immense-power/; *see also* Josie Duffy Rice, *Prosecutors Aren't Just Enforcing the Law—They're Making It*, APPEAL (Apr. 20, 2018), <https://theappeal.org/prosecutors-arent-just-enforcing-the-law-they-re-making-it-d83e6e59f97a/> (arguing that while prosecutors do not get a vote in state legislatures, “in many—if not all—state legislatures, they have leverage over those that do”).

²⁰⁴ *See supra* note 141.

²⁰⁵ Laura Johannes, *AARP Faces Competition from Conservative-Leaning Groups*, WALL ST. J. (Mar. 30, 2014, 5:05 PM), <https://www.wsj.com/articles/aarp-faces-competition-from-conservative-leaning-groups-1394667995>.

²⁰⁶ Glenn Kessler, *Does the NRA Really Have More than 4.5 Million Members?*, WASH. POST (Feb. 8, 2013), https://www.washingtonpost.com/blogs/fact-checker/post/does-the-nra-really-have-more-than-45-million-members/2013/02/07/06047c10-7164-11e2-ac36-3d8d9dcaa2e2_blog.html.

²⁰⁷ Amanda Terkel & Ryan Grim, *MoveOn Moving On: Progressive Powerhouse Launches Radical Strategic Overhaul*, HUFF. POST (Dec. 4, 2012, 8:49 PM), https://www.huffingtonpost.com/2012/12/04/moveon-changes_n_2240238.html.

²⁰⁸ *See, e.g.*, Bland, *supra* note 15 (“Progressives have zeroed in on electing prosecutors as an avenue for criminal justice reform, and the billionaire financier is providing the cash to make it happen.”).

²⁰⁹ *See, e.g.*, *About the Fraternal Order of Police*, FRATERNAL ORD. POLICE, <https://www.fop.net/CmsPage.aspx?id=223> (last visited Nov. 2, 2018) (boasting more than 330,000 members); *Steve Young Law Enforcement Legislative Advocacy Center*, FRATERNAL ORD. POLICE, <https://www.fop.net/CmsPage.aspx?id=34> (last visited Nov. 2, 2018) (“The FOP maintains an office in Washington, D.C. on Capitol Hill, where a full-time professional staff actively lobbies Congress and the Administration on the issues most important to rank-and-file law enforcement officers.”).

laws across the country, for example, hints at the fragile nature of prosecutor lobbying power when that power is tested by a true political juggernaut, like the NRA.²¹⁰

The best evidence of prosecutors' lobbying power comes in the form of the correspondence between legislation that passes (or is defeated) and position statements of individual prosecutors, or groups.²¹¹ There has been no systematic study of this effect, but even if the correlation is sound, it can easily be framed as something other than lobbying power. What commentators think of as effective prosecutor lobbying may, in fact, be a shared interest among prosecutors and lawmakers.²¹² Again, Stuntz provides guidance: "Advancing police and prosecutors' goals usually means advancing legislators' goals as well. Thus, legislators have good reason to listen when prosecutors urge some statutory change."²¹³ Notice, though, that contrary to the characterization of modern commentary, this does not make prosecutors "a very powerful lobby on criminal law issues"²¹⁴ in any normal sense. Instead, it suggests that prosecutors have little need to lobby. Given a choice, legislators (and their voters) often favor the ("tough-on-crime") positions that prosecutors traditionally take. A similar story could be spun about public parks. Legislators don't support parks because the parks department and park ranger associations are a powerful lobbying force. Legislators support parks because voters do too. These are bland stories of legislative power in a democracy, not conspiratorial tales of prosecutorial (or park ranger) power.

C. *How Should We Talk About Prosecutorial Power?*

Generic prosecutorial-power claims may have once been valuable to highlight the overlooked influence of prosecutors. Prosecutors no longer escape notice. Criminal justice commentators are focused on prosecutors, and have been for some time. The next step is zeroing in on precisely what prosecutors do and, to the extent those practices are objectionable, exploring how they can be changed. Vague claims of immense prosecutorial power and false assertions of preeminence only detract from this discussion.

²¹⁰ See Adam Liptak, *15 States Expand Right to Shoot in Self-Defense*, N.Y. TIMES (Aug. 7, 2006), <https://www.nytimes.com/2006/08/07/us/07shoot.html> ("Many prosecutors oppose the laws, saying they are unnecessary at best and pernicious at worst.").

²¹¹ See *supra* note 203.

²¹² Cf. Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 587–88 (2002) ("The only area in which we heard that paid lobbyists had a limited role was standard criminal law issues, where there is no real lobby but where the Department of Justice is a regular player.").

²¹³ Stuntz, *Pathological Politics*, *supra* note 9, at 534.

²¹⁴ *Id.*

Speaking precisely enables policymakers and reformers to evaluate the prosecutorial function, its impacts, and the need for reform in particular jurisdictions.²¹⁵ Often this precision will expose the reflective nature of prosecutorial power—revealing that the perceived problem lies elsewhere, usually in judicial or legislative actions, but also sometimes in unexpected corners like parole boards and probation officers. For example, rather than claiming that prosecutors wield enormous power, a precise claim about charging powers could be rendered as:

In jurisdiction X, a prosecutor has the discretion to charge a repeat felony offender with a recidivism enhancement that mandates an additional fifteen-year sentence.²¹⁶

Assessing the significance of this power, advocates, scholars, and policymakers would reflect on how likely the occurrence is and whether it represents a normatively desirable state of affairs. Those inclined toward reform may recognize that the best solutions target the enhancement itself, and particularly its severity—not prosecutorial discretion. The prosecutorial power highlighted in the blurb above is a tool of leniency.²¹⁷ Removing the prosecutor’s discretion while retaining the enhancement would increase, not decrease, sentencing severity. Of course, the discretion to charge or forego the enhancement gives prosecutors plea bargaining leverage. But taking away that discretion (while retaining the enhancement) would incentivize the parties to seek other avenues for manipulating the enhancement’s application (or cause its imposition to become automatic). Finally, even if reformers convince some prosecutors to unilaterally forgo the enhancement, legislators—convinced of its worth—could respond by bypassing prosecutors and directing judges to inquire into and assess the recidivist penalty.²¹⁸ Or, as Washington State does, dictate that prosecutors must allege prior convictions when applicable.²¹⁹

²¹⁵ For an example of speaking precisely about prosecutorial power, see Melanie D. Wilson, *Prosecutors “Doing Justice” Through Osmosis—Reminders to Encourage a Culture of Cooperation*, 45 AM. CRIM. L. REV. 67, 92 (2008) (“[T]he [federal] prosecutor’s power to award or deny a substantial-assistance sentence reduction is virtually unlimited.”).

²¹⁶ Cf. Michael A. Simons, *Prosecutors as Punishment Theorists: Seeking Sentencing Justice*, 16 GEO. MASON L. REV. 303, 354 (2009) (“Sentencing enhancements and mandatory minimum sentences give prosecutors undeniable power.”).

²¹⁷ See DAVIS, *supra* note 46, at 170 (“[T]he power to be lenient is the power to discriminate.”).

²¹⁸ See, e.g., *Arrendondo v. Neven*, 763 F.3d 1122, 1135 (9th Cir. 2014) (explaining that “recidivist enhancements” are “not require[d] to be charged before trial and tried to a jury”).

²¹⁹ See WASH. REV. CODE ANN. § 9.94A.421(6) (West 2010) (explaining that “in no instance may the prosecutor agree not to allege prior convictions” as part of a plea agreement).

Here is another example with sufficient specificity to allow a critique:

“[P]rosecutors’ ability to threaten inflated sentences, combined with their power to trade those sentences away for pleas of guilt, allows them to control ‘who goes to prison and for how long.’”²²⁰

Plea bargaining is a common focus of prosecutor power claims,²²¹ but it is misleading to characterize plea bargaining as a source of prosecutorial power. Instead, plea bargaining is a reflection of the power of other actors. That is why it has proven almost impossible to control.²²² At its core, plea bargaining is a cooperative effort between the system’s assumed adversaries (prosecutors and defendants) to avoid legislatively and judicially directed outcomes.²²³ Cooperation is required because, while prosecutors can offer deals, defendants can veto them. The defendant’s ability to demand a trial becomes more difficult, of course, the greater the spread between the prosecutor’s offer and the likely outcome after trial (“the trial penalty”). A broad spread can be a result of a particularly generous plea offer, or an (expected) draconian post-trial sentence. But that doesn’t mean that prosecutors control the outcome. Defendants’ absolute veto means that they will only agree to a prosecutor’s offer if the legislature’s “offer” (a mandatory sentence) or the judge’s “offer” (an expected discretionary sentence) is worse.²²⁴ This means that prosecutors’ plea-bargaining power is derivative of judicial and legislative power. Judges and legislatures indirectly dictate the terms of prosecutors’ plea offers by setting the backdrop against which defendants assess those offers. In a jurisdiction where juries acquit regularly and judges sentence modestly, defendants will reject severe plea offers.²²⁵ In another jurisdiction where juries readily convict and judges sentence severely,

²²⁰ Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1304 (2018) (quoting Stuntz, *Plea Bargaining*, *supra* note 9).

²²¹ See, e.g., Sklansky, *supra* note 2, at 487 (“[T]he core of prosecutorial power in the United States today, as it is generally described, is the ability to coerce guilty pleas.”).

²²² See, e.g., GEORGE FISHER, *PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* (2003) (tracing the evolution of plea bargaining and exploring how it has come to dominate the American criminal justice system over the last 150 years).

²²³ Cf. Gifford, *supra* note 176, at 41, 79 n.232 (explaining that plea bargaining has the capacity to frustrate both judicial and legislative intent); Stemen & Escobar, *supra* note 56, at 6 (summarizing research that suggests prosecutors “have a ‘downstream orientation’ that leads them to anticipate and consider how other actors not yet involved in the process, such as judges and juries, will respond to a case”).

²²⁴ See Bellin, *supra* note 2, at 849–52 (describing this dynamic).

²²⁵ See Kyle Graham, *Crimes, Widgets, and Plea Bargaining: An Analysis of Charge Content, Pleas, and Trials*, 100 CALIF. L. REV. 1573, 1580 (2012) (explaining that in making plea decisions, defendants will take into account the sentences they expect to receive upon conviction and the likelihood of conviction).

defendants will accept them.²²⁶ The prosecutors in the latter jurisdiction are not more powerful than their counterparts in the former; they are simply reflecting the power of other actors.

Greater precision will also reveal areas where prosecutor power claims are technically accurate, but not particularly worrisome, as in:

The prosecutor has the power to decline to pursue even readily-provable, serious crimes.

While legally accurate, this is a practically difficult power for a prosecutor to exercise without substantial backlash from victims, the media, and, ultimately, voters.²²⁷ Thus, it is unlikely that prosecutors will systematically drop serious, readily-provable cases.²²⁸

Another claim might be:

Prosecutors recommend bail amounts to judges who go along with those requests seventy-five percent of the time.²²⁹

Here, precision highlights that if bail is a problem in the particular jurisdiction, the judges imposing bail are the logical target, alongside the legislative framework that authorizes judges to do so. Any lasting solution to flawed bail systems will go through legislatures and judges, not prosecutors.

As these examples illustrate, precise phrasing of prosecutorial powers will often reveal the complexity of the underlying issues. Often what looks like a problematic choice by a prosecutor is a reflection of decisions made by other, more powerful criminal justice actors: a draconian recidivism enhancement, a judicial bail determination, or a judicially-imposed or legislatively-mandated trial penalty. Reforms that myopically focus on prosecutors who “rule the system”²³⁰ overlook that dynamic, jeopardizing their long-term efficacy.

²²⁶ *Id.*

²²⁷ See, e.g., CAL. PENAL CODE § 1192.7(a)(2) (West 2015) (prohibiting “[p]lea bargaining in any case in which the indictment or information charges any serious felony,” with limited exceptions, including “insufficient evidence to prove the people’s case”).

²²⁸ See Richard S. Frase & Thomas Weigend, *German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?*, 18 B.C. INT’L & COMP. L. REV. 317, 338–39 (1995) (“Although legally free to do so, American prosecutors decline prosecution of relatively few serious felonies for which the evidence is sufficient to convict.”). *But see* Timothy Williams, *Higher Crime, Fewer Charges on Indian Land*, N.Y. TIMES (Feb. 20, 2012), <https://www.nytimes.com/2012/02/21/us/on-indian-reservations-higher-crime-and-fewer-prosecutions.html> (highlighting criticism of the Department of Justice for failing to prosecute serious cases that arise on American Indian reservations).

²²⁹ Cf. Casey Tolan, *Making Freedom Free*, SLATE (Mar. 29, 2017, 10:15 AM), http://www.slate.com/articles/news_and_politics/trials_and_error/2017/03/poor_defendants_get_locked_up_because_they_cant_afford_cash_bail_here_s.html (“Bail is set by judges, but prosecutors have huge influence on the process.”).

²³⁰ See *supra* note 12 (providing examples of scholarly pronouncements that prosecutors “rule the system”).

CONCLUSION

Prosecutors are not powerless. Indeed, virtually every criminal justice outcome can be traced to a prosecutor's decision. But this exercise—"six degrees of prosecution"—can be conducted with many other criminal justice actors. For every prosecutor who asks for a high bail or severe sentence, there is a legislature that authorized the result and a judge who imposed it. Every story about a reform bill that died in the legislature after opposition from prosecutors is a story about a prior legislature's severity and a present legislature's failure to enact reform. Every critique of a prosecutor's refusal to charge a police officer for an illegal shooting rests against a backdrop of a police officer who pulled the trigger, and a longstanding pattern of judges and juries reluctant to convict in police violence cases.²³¹ Even the most sophisticated critique—that prosecutors control outcomes through plea bargaining—ignores that defendants must agree to any plea deal and that their agreement depends on the background decisions of judges, juries, and legislators.

Prosecutors are one of the many important actors who populate the criminal justice ecosystem. Police, legislators, judges, governors, and parole boards are important too. The cacophonous rhetoric of prosecutorial dominance, however, ignores the agency of these other actors, fostering a rhetorically pleasing, but hopelessly flawed understanding of the criminal justice system. This blinkered approach overlooks the powerful forces that can and do constrain prosecutors and diverts attention from the most promising sources of lasting reform, like legislators, judges, and police, to the least.

²³¹ See Daniel Arkin & Ron Allen, *It's Very Difficult to Convict Officers in Police Shootings, Experts Say*, NBC NEWS (June 27, 2017, 5:15 AM), <https://www.nbcnews.com/news/us-news/it-s-very-difficult-convict-officers-police-shootings-experts-say-n776901> ("[P]ersuading jurors that the police have committed a crime, and not just made a mistake, goes against [the dominant] narrative. It's a very steep hill for prosecutors to climb."); Madison Park, *Police Shootings: Trials, Convictions Are Rare for Officers*, CNN (last updated Oct. 3, 2018, 4:41 PM), <https://www.cnn.com/2017/05/18/us/police-involved-shooting-cases/index.html> (chronicling recent acquittals in judge and jury trials of police officers).