



Fall 9-1-2010

Prosecutors as Judges

Erik Luna

Washington and Lee University School of Law, lunae@wlu.edu

Marianne Wade

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Recommended Citation

Erik Luna and Marianne Wade, *Prosecutors as Judges*, 67 Wash. & Lee L. Rev. 1413 (2010).

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Prosecutors as Judges

Erik Luna*
Marianne Wade**

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* Professor of Law and Law Alumni Faculty Fellow, Washington and Lee University School of Law.

** Senior Researcher, Max Plank Institute for Foreign and International Criminal Law, Freiburg, Germany. We are grateful to Antoni Bojańczyk, Amos Guiora, Máximo Langer, Russell Miller, and George Thomas for their comments and suggestions. Thanks also to Katherine Brings for excellent research assistance, and to the editors of the *Washington & Lee Law Review* for their assistance in the prosecution workshop and their efforts on this symposium.

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I. Introduction

As demonstrated by some recent high-profile cases and suggested by a seemingly endless litany of misconduct,¹ American prosecutors exercise

1. See, e.g., KATHLEEN M. RIDOLFI & MAURICE POSSLEY, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA, 1997–2009, 18–41 (2010), available at http://law.scu.edu/ncip/file/ProsecutorialMisconduct_BookEntire_online%20version.pdf (studying the extent to which prosecutorial misconduct was a factor in the conviction of innocent people in California); STUART TAYLOR & K.C. JOHNSON, UNTIL PROVEN INNOCENT: POLITICAL CORRECTNESS AND THE SHAMEFUL INJUSTICES OF THE DUKE LACROSSE RAPE CASE 84–89 (2007) (discussing the misconduct of prosecutor Michael Nifong during the Duke lacrosse rape case, including never interviewing the alleged victim); EMILY M. WEST, COURT FINDINGS OF PROSECUTORIAL MISCONDUCT CLAIMS IN POST-CONVICTION APPEALS AND CIVIL SUITS AMONG THE FIRST 255 DNA EXONERATION CASES, INNOCENCE PROJECT (2010), available at http://www.innocenceproject.org/docs/Innocence_Project_Pros_Misconduct.pdf (using DNA exoneration cases to offer proof of prosecutorial misconduct); Jeffrey L. Kirchmeyer, Stephen R. Greenwald, Harold Reynolds & Jonathan Sussman, *Vigilante Justice: Prosecutor Misconduct in Capital Cases*, 55 WAYNE L. REV. 1327, 1381–85 (2009) (examining categories of prosecutor misconduct that occur in capital cases and discussing suggestions to help prevent and remedy such misconduct); Tony Mauro, *Justices Appear Ready to Hold New Orleans Prosecutors Liable for Misconduct*, NAT'L L.J., Oct. 7, 2010 (discussing the Supreme Court deciding whether to allow "a New Orleans man to win compensation for prosecutorial misconduct that put him behind bars for more than two decades for a murder he did not commit"); *DA Kratz Quits After 'Sexting' Revelations*, WISC. STATE J., Oct. 4, 2010, available at http://host.madison.com/wsj/news/local/govt-and-politics/article_43e8e8cfd7-11df-b5bb-001cc4c002e0.html (noting misconduct by prosecutor who, *inter alia*, propositioned a 26-year-old domestic abuse victim while prosecuting her ex-boyfriend); Darryl Fears, *Black Teens' Case Intensifies Racial Issues*, WASH. POST, Aug. 4, 2007, at A3 (detailing racially tinged prosecution); Brad Heath & Kevin McCoy, *Prosecutors' Conduct Can Tip the Scales*, USA TODAY, Sept. 23, 2010, at 1A (describing prosecutorial abuses including federal prosecutors who hid facts and covered up evidence); Peter J. Henning, *Another Claim of Prosecutorial Misconduct*, *DealBook*, N.Y. TIMES, Jan. 11, 2010, <http://dealbook.blogs.nytimes.com/2010/01/11/another-claim-of-prosecutorial-misconduct/> (last visited Nov. 17, 2010) (explaining how the defense attorney in the case against the former chief executive of KB Homes, Bruce Karatz, was filing a motion to dismiss the case claiming that the U.S. Attorney threatened a witness) (on file with the Washington and Lee Law Review); Eric Lichtblau, *Criticism of Ex-Official in Hiring at Justice Dept.*, N.Y. TIMES, Jan. 14, 2009, at A16 (commenting on a former Justice Department official who allegedly made hiring decisions based on political affiliations); Adam Liptak, *Justices Will Decide Whether Ashcroft May Be Sued in Detention Case*, N.Y. TIMES, Oct. 19, 2010, at A17 (discussing a Supreme Court case where the defendant alleges that former Attorney General John Ashcroft misused "material witness" detention law); Steve Mills, *Prosecutor DNA at Odds*, CHI.

almost limitless discretion in a series of decisions affecting individuals embroiled in the criminal justice system. They decide whether to accept or decline a case, and on occasion, whether an individual should be arrested in the first place; they select what crimes should be charged and the number of counts; they choose whether to engage in plea negotiations and the terms of an acceptable agreement; they determine all aspects of pretrial and trial strategy; and in many cases, they essentially decide the punishment that will be imposed upon conviction. These and other discretionary judgments are often made without meaningful internal and external review or any effective opposition. In many (if not most) American jurisdictions, the prosecutor *is* the criminal justice system. For all intents and purposes, he makes the law, enforces it against particular individuals, and adjudicates their guilt and resulting sentences.

Consider the case of Weldon Angelos, who at the age of twenty-three was arrested for dealing marijuana and possessing firearms in his hometown of Salt Lake City, Utah.² A first-time offender with no adult criminal record, Angelos started selling relatively small amounts of marijuana to help pay the bills after the birth of his second son. The fact-pattern that led to his conviction and punishment was as follows:

[O]n two occasions while selling [eight ounces] of marijuana, Mr. Angelos possessed a handgun under his clothing, but he never brandished or used the handgun. The third relevant crime occurred

TRIB., Dec. 15, 2008, at C4 (detailing three cases in which one prosecutor continued to pursue suspects excluded by DNA evidence); Nedra Pickler, *Justice Dept. Lawyers in Contempt for Withholding Stevens Documents*, WASH. POST, Feb. 14, 2009, at A7 (reporting on federal prosecutors who were held in contempt of court for failing to produce documents relating to the Senator Ted Stevens investigation); Henry R. Chalmers, *Prosecutorial Misconduct Leads to Dismissal of Broadcom Criminal Charges*, ABANET (Feb. 11, 2010), http://www.abanet.org/litigation/litigationnews/top_stories/ruehle-broadcom-prosecutorial-misconduct.html (last visited Nov. 17, 2010) (describing a courts finding of prosecutorial misconduct where the prosecutors violated the defendants' Sixth Amendment rights by intimidating and improperly influencing key witnesses) (on file with the Washington and Lee Law Review); Mary Jacoby, *Judge Cites Prosecutorial Misconduct in Blackwater Dismissal*, MAIN JUSTICE, Jan. 1, 2010, <http://www.mainjustice.com/2010/01/01/judge-cites-prosecutorial-misconduct-in-black-water-dismissal/> (last visited Nov. 17, 2010) (describing the dismissal of an indictment against five Blackwater Worldwide security guards for a shooting incident in Iraq due to prosecutors' unconstitutional use of tainted, compelled testimony) (on file with the Washington and Lee Law Reivew). See generally AMNESTY INTERNATIONAL, USA: MODEL CRIMINAL JUSTICE? DEATH BY PROSECUTORIAL MISCONDUCT AND A "STACKED" JURY (May 11, 2010), available at www.amnestyusa.org/abolish/i/ClemonsReport.pdf (describing the prosecutorial misconduct in the case of Reginald Clemons).

2. As a matter of disclosure, one of the present authors (Luna) represented Angelos before the U.S. Court of Appeals for the Tenth Circuit and in his petition for a writ of certiorari before the U.S. Supreme Court.

when the police searched his home and found handguns in his residence Mr. Angelos did not engage in force or violence, or threats of force or violence, in furtherance of or in connection with the offenses for which he has been convicted. No offense involved injury to any person or the threat of injury to any person.³

Instead of bringing state charges, officials decided to prosecute the case in federal court employing an infamously harsh law that carries mandatory minimum punishment. That statute, 18 U.S.C. § 924(c),⁴ provides an obligatory five-year sentence for possessing a firearm during a drug transaction⁵ and a twenty-five-year sentence for each subsequent transaction.⁶ Multiple charges can be brought under § 924(c) in one case, and the mandatory sentences must be served consecutively, that is, one after the other rather than simultaneously.⁷ As a result, the prosecution can slice a drug dealer's actions into as many transactions as it likes (or wishes to corroborate) and bring them in a single case, where the mandatory sentences can be stacked on top of each other in twenty-five-year increments. A defendant does not need a criminal record to trigger § 924(c). What is more, the firearm does not even have to be brandished or used, nor does the law require that any violence or injury be caused or threatened.⁸ When Angelos was convicted of three § 924(c) counts in December of 2003, the punishment was predetermined: a mandatory sentence of fifty-five years. As a result, this low-level marijuana dealer will not be eligible for parole until the middle of the twenty-first century, when he will be over seventy years old. In all likelihood, he will die in prison.

To some extent, this case is exceptional. Few drug dealers receive (effective) life sentences, particularly where the underlying drug is marijuana and the defendant has no prior convictions. As a more general issue, however, it is not uncommon for defendants to be threatened with or actually face charges and punishment out of proportion to their moral blameworthiness. Nor is it unique for offenders of similar culpability to receive disparate sentences (or worse yet, for the less culpable to receive the stiffer punishment). The prosecution of Weldon Angelos thus throws into stark relief a basic issue of the American criminal justice system, one

3. *United States v. Angelos*, 345 F. Supp. 2d 1227, 1258 (D. Utah 2003).

4. 18 U.S.C. § 924(c)(1) (2006).

5. *Id.* § 924(c)(1)(A)(i).

6. *Id.* § 924(c)(1)(C)(i).

7. *Id.* § 924(c)(1)(D)(ii).

8. *See, e.g., Angelos*, 345 F. Supp. 2d at 1234–35 (noting that exchanging a gun for drugs constitutes "use" of a firearm for purposes of § 924(c)).

barely understood by the public and rarely admitted by law enforcement. The enormous power provided to prosecutors to decide the fate of people's lives—from the lucky draw of nonprosecution or case dismissal, to minor inconveniences and invasions of privacy through pleas in abeyance and probation, to deprivations of liberty by incarceration or even the taking of life itself—is subject to the proclivities and peculiarities of a given state's attorney.

Parts of this phenomenon have been recognized for quite some time,⁹ although the problem of discretion in criminal justice was not officially "discovered" until the late 1950s.¹⁰ In the ensuing decades, some of the best scholars in the nation examined and critiqued the criminal process and the discretionary judgments of various legal actors. Much light and heat was placed on the street-level decisions of police officers and the sentencing discretion of judges,¹¹ but prosecutors were also prime targets for critical analysis.¹² In general, academic solutions to the problems of prosecutorial discretion came in two forms: the promulgation of internal office guidelines to control prosecutorial decision-making and the development of external limitations through restrictive legislation or heightened judicial review.¹³ The literature was rich and engaging, calling

9. See, e.g., NAT'L COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, NO. 4. REPORT ON PROSECUTION 19 (1931) (noting the broad discretion given to prosecutors in dismissing cases and the lack of required explanations for most dismissals).

10. See SAMUEL WALKER, *TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE* 6–11 (1993) (describing the 1956 American Bar Foundation Survey of the Administration of Criminal Justice, which recognized the major roles of decision-making and discretion throughout the criminal justice system).

11. See, e.g., MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 5–11, 69–85 (1973) (describing the wide discretion given to judges in sentencing and suggesting possible solutions); JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY* 91–109 (1966) (examining the behavior and decision-making of policemen in situations such as traffic citations and prostitution investigations).

12. See, e.g., KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 188–195 (1969) (describing the wide discretion given to American prosecutors and comparing it to the absence of discretion given to German prosecutors); Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 *UCLA L. REV.* 1, 7–11 (1971) (discussing the discretion of prosecutors and advocating for the promulgation of guidelines to restrict such discretion).

13. See Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 *STAN. L. REV.* 29, 51–53 (2003) [hereinafter Wright & Miller, *Screening/Bargaining*] (discussing various approaches).

on prosecutors to control themselves or face limitations by the other branches of government.¹⁴

Unfortunately, real-world implementation has been far less inspiring, with limitations on prosecutorial discretion being infrequent and of dubious value. Absent a showing of invidious discrimination based on race or religion, for instance, courts will not question the prosecution's decision to charge a given person;¹⁵ conversely, the judiciary will not demand that a criminal case be brought against any individual.¹⁶ Nor are the courts likely to impede plea negotiations and the resulting agreements.¹⁷ The main legal checks are the burdens of proof—probable cause that a crime has been committed in order to charge a suspect and proof beyond a reasonable doubt in order to convict a defendant—coupled with procedural requirements during the pretrial and trial process. In practice, these hurdles impede only a fraction of cases brought in earnest by the prosecution.¹⁸

14. See, e.g., *id.* (proposing various solutions).

15. See, e.g., *Wade v. United States*, 504 U.S. 181, 186 (1992) ("Thus, a defendant would be entitled to relief if a prosecutor refused to file a substantial-assistance motion, say, because of the defendant's race or religion."); *Wayte v. United States*, 470 U.S. 598, 607 (1985) ("[S]o 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." (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978))); *United States v. Batchelder*, 442 U.S. 114, 123–24 (1979) ("This Court has long recognized that when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants."); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) ("[T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation' so long as 'the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.'" (citing *Oyler v. Boles*, 368 U.S. 448, 456 (1962))); see also *United States v. Armstrong*, 517 U.S. 456, 464 (1996) ("[A] presumption of regularity supports' their prosecutorial decisions and, 'in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.'" (citing *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14–15 (1926))).

16. See, e.g., *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 381 (2d Cir. 1973) (stating that the decision of whether to prosecute various state officers for possible civil rights violations was within the discretion of the United States Attorney).

17. See, e.g., *Jenia Iontcheva Turner, Judicial Participation in Plea Negotiations*, 54 AM. J. COMP. L. 199, 199–200, 202–14 (2006) [hereinafter *Turner, Judicial Participation*] (discussing the lack of judicial participation in America and the problems it produces). *But cf. Santobello v. New York*, 404 U.S. 257, 262–63 (1971) (remanding a case in which the prosecutor failed to abide by the terms of the plea agreement).

18. See, e.g., RONALD JAY ALLEN, ET AL., *COMPREHENSIVE CRIMINAL PROCEDURE* 1095 (2d ed. 2005) (noting studies finding dismissal rate of 3–8% for preliminary hearings); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE* tbl.5.57.2006 (2010) [hereinafter *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS*], available at <http://www.albany.edu/sourcebook/pdf/t5572006.pdf> (noting that

Lawmakers also have been wary to hamper prosecutors and instead have facilitated the prosecutorial function through the passage of more crimes and harsher punishments.¹⁹ As for internal guidelines, some prosecution offices have adopted policies on charging, plea bargaining, and other crucial decisions.²⁰ These constraints are far from universal, however, and may be confidential, often employing hortatory language or pitched at a level of generality that confines little.²¹ Most importantly, they are not legally binding in court, and the lack of vigorous internal oversight and discipline has rendered such guidelines largely ineffective.²²

of the felony defendants arrested in the seventy-five largest counties in 2006, 68% were convicted, 31% were diverted or had their cases dismissed by the prosecution, and only 1% were acquitted at trial); *id.* at tbl.5.24.2009 (finding that of the defendants disposed of in U.S. District Court in 2009, 91% were convicted while only 0.5% were acquitted by jury); *id.* at tbl.5.7.2009 (2010) (finding similar results); Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 274–78 (1995) (providing indictment statistics); Sam Skolnik, *Grand Juries: Power Shift?*, LEGAL TIMES, Apr. 12, 1999, at 1 (reporting federal indictment rate of 99.9%); *see also* U.S. DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS 2004 59–62 (2004) [hereinafter COMPENDIUM OF FEDERAL JUSTICE STATISTICS] (finding that 90% of all federal defendants are convicted, and 79% of defendants who exercise their right to trial are convicted).

19. *See, e.g.*, Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 703–12 (2005) [hereinafter Luna, *Overcriminalization*] (discussing the proliferation of crimes in state, federal, and administrative law).

20. *See, e.g.*, Alan Vinegrad, *Justice Department's New Charging, Plea Bargaining and Sentencing Policy*, N.Y. L.J., June 10, 2010, at 3 (reporting on new charging, sentencing, and plea bargaining policy guidelines at the Justice Department under Attorney General Eric Holder).

21. *See* ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 85–86 (2001) (“[P]rosecutors receive little formal training in sentencing theory; often they decide the fates of defendants rapidly and intuitively, without obligatory coordinating guidelines and without any institutionalized requirement to explain and compare their decisions in a reviewable manner.”); David T. Johnson, *The Organization of Prosecution and the Possibility of Order*, 32 LAW & SOC’Y REV. 247, 268 (1998) (“In other large American prosecution offices, one usually finds an office manual or handbook of some sort, but ‘in most instances it is difficult to say that these materials set forth prosecutorial policy.’”); *see also* DAVID BURNHAM, *ABOVE THE LAW: SECRET DEALS, POLITICAL FIXES, AND OTHER MISADVENTURES OF THE U.S. DEPARTMENT OF JUSTICE* 46 (1996) (“Many of the broad policy determinations and specific determinations of the Justice Department . . . are permeated with profound contradictions and politics in a way that is only barely understood by the public.”).

22. *See, e.g.*, Ellen S. Podgor, *Department of Justice Guidelines: Balancing “Discretionary Justice,”* 13 CORNELL J.L. & PUB. POL’Y 167, 177–85 (2004) (discussing federal prosecution guidelines and the failure to enforce them). Indeed, discipline against American prosecutors for any kind of misconduct is an infrequent occurrence. *See, e.g.*, ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 123–41 (2007) (discussing a study of over eleven thousand cases involving possible prosecutorial misconduct and finding that in just over two thousand of those cases courts reversed

In most cases, prosecutors can charge at will and preordain the ultimate resolution.²³

The prosecution of Weldon Angelos highlights many of these concerns. It epitomizes the danger of expansive or poorly delineated crimes and ruthless punishments, often enacted in spurts of political opportunism or during periods of moral panic. With little legislative debate, Congress proposed and passed 18 U.S.C. § 924(c) in a single day in 1968, reacting in part to the assassinations of Martin Luther King, Jr. and Robert F. Kennedy and, more generally, the mounting public fear of lawlessness on the streets.²⁴ The statute's language was ambiguous and its goal idealistic—"to persuade a man who is tempted to commit a federal felony to leave his gun at home"²⁵—all portending broad applicability and thus enhanced prosecutorial authority, with subsequent enactments and judicial interpretations only increasing this power. As such, statutes like § 924(c) hold great potential for injustice, checked only by the conscience of a single actor, the prosecutor. In very discrete situations, crimes with low predicates (e.g., any drug and a firearm) and high penalties (e.g., a twenty-five-year mandatory, consecutive sentence per count) might be justifiably employed against, say, a brutal drug lord or the occasional dictator who turns his country into a narco-state. But when applied to the vast majority of

convictions, dismissed charges, or reduced sentences, and that most of the prosecutors suffered no consequences); CENTER FOR PUBLIC INTEGRITY, HARMFUL ERROR: INVESTIGATING AMERICA'S LOCAL PROSECUTORS i-iii (2003), available at <http://projects.publicintegrity.org/pm/> (same); Daniel Medwed, *Brady's Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533 (2010) (discussing widespread failure of prosecutors to disclose exculpatory evidence to defendants); Michael S. Ross, *Thinking Outside the Box: How the Enforcement of Ethical Rules Can Minimize the Dangers of Prosecutorial Leniency and Immunity Deals*, 23 CARDOZO L. REV. 875, 890 (2002) (stating that the Department of Justice's Office of Professional Responsibility has been known to overlook acts of misconduct by prosecutors, even when such misconduct has been publicly noted by judges); see also Ronald F. Wright & Marc L. Miller, *The Worldwide Accountability Deficit for Prosecutors*, 67 WASH. & LEE L. REV. 1587 (2010) (describing the "accountability deficit" of American prosecutors across a range of decisions).

23. See, e.g., Hans P. Sinha, *Prosecutorial Ethics: The Charging Decision*, 41 PROSECUTOR 32, 33 (2007) (discussing a former deputy district attorney acknowledging "that if a prosecutor wants to bring charges against someone, the prosecutor will be able to do so," and "[a] prosecutor can . . . sit down at the onset of a typical case and fairly accurately plan and predict the outcome of the case").

24. See *United States v. Angelos*, 345 F. Supp. 2d 1227, 1233 (D. Utah 2003) (describing the history of 18 U.S.C. § 924(c)).

25. 114 CONG. REC. 22, 231 (1968) (statement of Rep. Poff, sponsor of the amendment that became § 924(c)).

offenders, low-level drug dealers who neither threaten violence nor cause injury, the results can be grotesque.

Angelos's case also reveals the rough play of American adversarialism and the extent of prosecutorial power in plea bargaining. The prosecution initially said that if Angelos pled guilty to a charge of drug distribution and one count of § 924(c), it would recommend a prison term of fifteen years—a steep sentence given the nature of the offense and the background of the offender.²⁶ If the offer was not accepted, however, the prosecution threatened to obtain a new indictment that carried more than 100 years of mandatory imprisonment via multiple § 924(c) counts.²⁷ When the plea bargain was declined, the prosecution followed through on its promise, charging crimes with the potential for 105 years of mandatory incarceration. And when Angelos was convicted on three § 924(c) counts, the prosecution *only* obtained an obligatory sentence of fifty-five years.²⁸

Of course, some might say that Angelos should have taken the deal, with any disproportionality between crime and punishment the result of his own intransigence rather than the government's vindictiveness. He is the author of his own demise, or so it might be argued. The counterargument seems just as strong, however. If this defendant is so extremely dangerous or the public interest is so important as to merit a 105-year mandatory sentence, how could the prosecution put the citizenry at risk by permitting Angelos to serve a fraction (1/7) of that amount? Surely, prosecutors would not offer a serial rapist, mass murderer, or violent terrorist a fifteen-year deal when justice demands a century of incarceration. Angelos was not one of these predators, but instead a local marijuana dealer who got caught in a sting operation. Nonetheless, he was treated like the marijuana equivalent of Al Capone or Manuel Noriega—brutal contraband kingpins who, ironically enough, received lower sentences than Angelos.²⁹

In theory, any excesses in this case could have been stemmed by office policies, supervision, and discipline, supported by more general norms and expectations of government attorneys. Unfortunately, both the threatened

26. *Angelos*, 345 F. Supp. 2d at 1254.

27. *Id.* "In short," the trial court summarized, "Mr. Angelos faced the choice of accepting fifteen years in prison or insisting on a trial by jury at the risk of a life sentence." *Id.*

28. *Id.* at 1239.

29. See *United States v. Noriega*, 40 F. Supp. 2d 1378, 1381 (S.D. Fla. 1999) (reducing Noriega's sentence from forty to thirty years); Joseph Loss, *Al Capone Bio Concentrates On Fed Tax Case*, ST. LOUIS POST-DISPATCH, May 9, 2010, at D9 (stating that Capone was found guilty of income tax fraud and sentenced to eleven years in prison).

and actual punishment demonstrates the impotence of existing guidelines and the failure of professional culture to control prosecutorial discretion in America. Under the so-called "Ashcroft Memorandum," prosecutors in cases involving three or more § 924(c) violations should only pursue the first *two* violations and only where the predicate offenses involve *crimes of violence*.³⁰ Here, the prosecution charged Angelos with *five* violations and obtained convictions on *three*, and his predicate offenses were *drug crimes*, not crimes of violence.³¹ In the end, however, there were no internal or external repercussions for failing to abide by this prosecutorial guideline.

Finally, this case exemplifies the remarkable level of prosecutorial deference, by which the American judiciary largely acquiesces to charging decisions and the prosecution sets punishment through determinate sentencing regimes. For Angelos, it did not matter that few U.S. Attorneys would have prosecuted the case in such a heavy-handed manner. Nor did it matter that the sentence was longer than those prescribed for far more serious crimes (e.g., aircraft hijackers, terrorists, second-degree murderers, and rapists).³² Moreover, it was irrelevant that jurors who heard his case would have recommended a sentence decades less than that demanded by the prosecution,³³ and that his punishment was opposed by twelve dozen former federal judges and prosecutors, including four former U.S. Attorneys General.³⁴ Most of all, it did not matter that the sentencing judge himself believed that the punishment was "unjust, cruel, and irrational."³⁵ By charging the case as it did and obtaining the relevant convictions, the prosecution was the adjudicator of the sentence, with the court relegated to the role of an unwilling rubber stamp.

The story of Weldon Angelos thereby illustrates the largely unfettered nature of prosecutorial discretion in America and the very real potential for its abuse. Contemporary criminal justice scholars recognize this state of affairs and many find the status quo to be quite disconcerting. In a series of

30. Memorandum from John Ashcroft, Attorney General, to All Federal Prosecutors Regarding Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing, § B(5)(b)(ii) (Sept. 22, 2003), available at http://www.justice.gov/opa/pr/2003/September/03_ag_516.htm.

31. *United States v. Angelos*, 345 F. Supp. 2d 1227, 1233 (D. Utah 2003).

32. *See, e.g., id.* at 1246 ("Amazingly, Mr. Angelos' sentence under § 924(c) is still far more severe than criminals who committed, for example, three aircraft hijackings, three second-degree murders, three kidnappings, or three rapes.").

33. *Id.* at 1242.

34. Brief for 145 Individuals as Amici Curiae in Support of Petitioner at 1, *Angelos v. United States*, 345 F. Supp. 2d 1227 (D. Utah 2003) (No. 06-26).

35. *Angelos*, 345 F. Supp. 2d at 1230, 1263.

articles, William Stuntz has argued that the expansion of crimes and punishments effectively transferred to prosecutors the power to make and adjudicate law.³⁶ Likewise, Marc Miller and Ronald Wright raise many concerns about the concentration of power in the prosecution, from the resulting lack of transparency in the process and the emasculation of judges at sentencing, to the possibility that prosecutorial domination has distorted the system's truth-finding function.³⁷ In turn, Máximo Langer offers a strong critique of one-sided "prosecutorial adjudication," whereby prosecutors deploy coercive plea bargaining tactics that make them the sole judges of crime and punishment.³⁸

At least a few authors, however, have come to appreciate the virtues of a system where prosecutors effectively adjudicate cases. Gerard Lynch, a distinguished scholar and federal judge, may have been the first to use the

36. See William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2549 (2004) [hereinafter Stuntz, *Disappearing Shadow*] ("The law-on-the-street—the law that determines who goes to prison and for how long—is chiefly written by prosecutors, not by legislators or judges."); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 506 (2001) [hereinafter Stuntz, *Pathological Politics*] ("The definition of crimes and defenses plays a different and much smaller role in the allocation of criminal punishment than we usually suppose. In general, the role it plays is to empower prosecutors, who are the criminal justice system's real lawmakers."); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 791 (2006) [hereinafter Stuntz, *Political Constitution*] ("Official discrimination is barred but even where it exists, proof of discriminatory intent is impossible. Laws need not be regularly enforced. Prosecutors can charge a handful of defendants and ignore hundreds of thousands of violators." (citations omitted)).

37. See Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1252 (2004) ("The overwhelming and dominant fact of the federal sentencing system, beyond the Commission and the guidelines and mandatory penalties, is the virtually absolute power the system has given prosecutors over federal prosecution and sentencing."); Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargaining*, 55 STAN. L. REV. 1409, 1410 (2003) ("Only by improving transparency can we address the underlying concerns, such as convicting innocent defendants or providing prosecutors with such complete control over outcomes that defendants retain no realistic access to judges, trials, or trial rights."); Wright & Miller, *Screening/Bargaining*, *supra* note 13, at 30–36 (suggesting a "screening" alternative to negotiated plea bargaining, which would include increased initial investigative information, filing of only appropriate charges, and restriction of plea bargaining); Ronald Wright, *Trial Distortion and the End of Innocence*, 154 U. PA. L. REV. 79, 101 (2005) ("Low acquittal rates in some jurisdictions might reflect a tragic indifference to the truth and the prosecutors' determination above all to secure convictions.").

38. See Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 225–26 (2006) [hereinafter Langer, *Rethinking Plea Bargaining*] (defining and analyzing prosecutorial adjudication).

term *prosecutorial adjudication* in contesting the traditional assumption of a trial-focused adversarial process.³⁹ In today's system,

[T]he prosecutor, rather than a judge or jury, is the central adjudicator of facts (as well as replacing the judge as arbiter of most legal issues and of the appropriate sentence to be imposed). Potential defenses are presented by the defendant and his counsel not in a court, but to a prosecutor, who assesses their factual accuracy and likely persuasiveness to a hypothetical judge or jury, and then decides the charge of which the defendant should be adjudged guilty. Mitigating information, similarly, is argued not to the judge, but to the prosecutor, who decides what sentence the defendant should be given in exchange for his plea.⁴⁰

The upshot is a hybrid process that looks more like the image of criminal justice in continental Europe, with a prosecutor serving the magisterial role of fact-finder and adjudicator of guilt.⁴¹ This approach should not be rejected as "arbitrary," "intrinsically unfair," or "beyond the pale of civilization,"⁴² Judge Lynch argued, but instead should be recognized as comparable to the criminal processes in civil law nations.⁴³

Lynch's account of American prosecutors serving "a quasi-judicial role" in an "indigenous administrative-inquisitorial"⁴⁴ system has been described as "appealing,"⁴⁵ "brilliant,"⁴⁶ even "path-breaking"⁴⁷—but in the end, "too

39. See Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117, 2141, 2147 (1998) [hereinafter Lynch, *Administrative System*] (employing the term "prosecutorial adjudication"); Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 *LAW & CONTEMP. PROBS.* 23, 58 (1997) (same).

40. Gerard E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading Off?*, 55 *STAN. L. REV.* 1399, 1403–04 (2003) [hereinafter Lynch, *Screening*]; see also Lynch, *Administrative System*, *supra* note 39, at 2135 ("[N]egotiated dispositions involve a different process for resolving a social dispute. In that process, the prosecutor acts as the administrative decision-maker who determines, in the first instance, whether an accused will be subject to social sanction, and if so, how much punishment will be imposed.").

41. See *id.* at 2124 (reimagining "the prosecutor as the agent of an inquisitorial state process for determining the facts and assessing the culpability of persons who are or might be accused of crime").

42. *Id.* at 2129, 2124; Lynch, *Screening*, *supra* note 40, at 1405.

43. See Lynch, *Administrative System*, *supra* note 39, at 2142–43 (noting that "[a]dmirers of the civil law system" adopted in many countries "simply fail to realize that the United States is one of those countries").

44. *Id.* at 2150–51.

45. Ronald Wright, *Sentencing Commission as Provocateurs of Prosecutorial Self-Regulation*, 105 *COLUM. L. REV.* 1010, 1027 n.69 (2005).

46. Stuntz, *Political Constitution*, *supra* note 36, at 818 n.208.

47. Langer, *Rethinking Plea Bargaining*, *supra* note 38, at 251.

celebratory."⁴⁸ For instance, Professor Langer rejects the notion that American criminal justice now resembles the continental system where prosecutors serve as inquisitorial adjudicators, arguing instead that prosecutorial adjudication in the United States thrives only through an unfairly coercive, unilateral plea bargaining process that is bereft of fundamental safeguards, which would be unacceptable in a civil law nation.⁴⁹ In contrast, a system of bilateral adjudication involves both the prosecution and the defense in a voluntary, noncoercive process aimed at achieving a fair plea agreement. While neither bilateral adjudication nor unilateral prosecutorial adjudication reflects the inquisitorial style, Langer suggests that at least the former is consistent with the adversarial ideal rather than undermining it.⁵⁰

This does not mean that there are no lessons to be drawn from the comparative study of criminal prosecution. A few years earlier, in fact, Professor Langer conducted an in-depth study of plea bargaining in four civil law nations to test the "Americanization thesis," namely, that foreign legal systems will start to resemble the American system due to the global influence of the United States.⁵¹ Although finding support for a weak version of the thesis based on the adoption of plea bargaining in the studied nations, Langer concluded that the practice within each jurisdiction varied from the American model due to efforts of local reformers and the structural differences among systems.⁵² This process of "legal translation" could even generate a paradoxical divergence, he argued, where historically comparable civil law systems start to vary in their criminal processes under the gravity of American plea bargaining.⁵³

48. Stuntz, *Political Constitution*, *supra* note 36, at 818 n.208.

49. See Langer, *Rethinking Plea Bargaining*, *supra* note 38, at 257–58 ("[P]rosecutorial adjudication can only achieve its adjudicatory decisions through the guilty plea process by threatening unfair outcomes at trial. It is only by threatening to take weak cases to trial, seeking excessive trial sentences or overcharging that the prosecutor can coerce the defendant to plead guilty.").

50. *Id.* at 247.

51. See generally Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L.J. 1 (2004) [hereinafter Langer, *Legal Translations*].

52. See *id.* at 62 (discussing the varying plea bargaining practices in Germany, Italy, Argentina, and France).

53. *Id.* at 4. For an intriguing account of adversarialism transplanted into the highly inquisitorial setting of the Italian criminal justice system, see Michele Caianiello, *The Italian Public Prosecutor: An Inquisitorial Figure in Adversarial Proceedings?*, in THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE (Erik Luna & Marianne Wade eds., forthcoming 2011) [hereinafter Caianiello, *The Italian Public Prosecutor*].

What is of particular interest to us is the extent to which scholars like Professor Langer and Judge Lynch have revived a comparative dialogue on the prosecutorial function, looking at the European approach for similarities and contrasts, seeking insights or even potential solutions to problems like those mentioned above.⁵⁴ Generations of American comparativists have explored European criminal law and procedure, often as a curiosity but sometimes as an inquiry into the improvement of criminal justice on this side of the Atlantic.⁵⁵ Some comparative pieces of the early and mid-twentieth century suggested that American criminal justice would benefit "by examining in a sympathetic spirit a system which has been worked out by the best minds of continental Europe,"⁵⁶ preparing for a future where the terms *adversarial* and *inquisitorial* will no longer serve to distinguish criminal processes.⁵⁷

Over the past half-century, leading comparativists and criminal procedure scholars have reiterated the calls for a "closer look at continental criminal justice"⁵⁸ to help America progress "beyond the Neanderthal stage."⁵⁹ Numerous works have recommended the adoption of a European-style approach to, among other things, search and seizure, interrogation, arrest, pre-trial detention, discovery, defendant testimony, and mixed judge-jury tribunals.⁶⁰ Indeed, scholars now debate whether the civil law and common law systems are converging on a similar criminal process.⁶¹ But

54. Cf. *infra* notes 463–95 and accompanying text (discussing benefits of comparativism).

55. See *infra* Part II.A (exploring existing American scholarship on European prosecution).

56. Frederic R. Coudert, *French Criminal Procedure*, 19 YALE L.J. 326, 340 (1909).

57. Morris Ploscowe, *The Investigating Magistrate (Juge d'Instruction) in European Criminal Procedure*, 33 MICH. L. REV. 1010, 1036 (1935).

58. Gerhard O. W. Mueller, *Lessons of Comparative Criminal Procedure*, 15 AM. U. L. REV. 341, 348 (1966).

59. Rudolf B. Schlesinger, *Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience*, 26 BUFF. L. REV. 361, 374 (1977).

60. See, e.g., Mueller, *supra* note 58, at 349–51 (explaining why the French and German comparably higher standards for arrest are preferable to the American approach); Schlesinger, *supra* note 59, at 369–71 (arguing that America can learn from the comparative study of civil law approaches to arrest and pre-trial detention); *id.* at 372–77 (recommending America adopt civil law approaches to discovery in criminal cases).

61. Compare Craig M. Bradley, *The Convergence of the Continental and Common Law Model of Criminal Procedure*, 7 CRIM. L.F. 471, 474 (1996) ("The differences between the Anglo-American and the continental system have begun to diminish."), and Mary C. Daly, *Some Thoughts on the Differences in Criminal Trials in the Civil and Common Law Legal Systems*, 2 J. INST. STUDY LEGAL ETHICS 65, 65 (1999) ("[The civil and common law legal systems] are separately undergoing a remarkable transformation in which the influence

perhaps the greatest controversy arose several decades ago, revolving around the civil law tenet of strictly limited prosecutorial discretion and the notion that any problems associated with the American prosecutor might be remedied by adopting the restraints placed on his European counterpart.⁶² These ideas have fallen by the wayside, however, and the problems in the United States have only been exacerbated with the passage of time, as epitomized by the case of Weldon Angelos.

This Article seeks to engage and further the comparative dialogue on the prosecutorial function. Like Judge Lynch, we see a surface movement in one legal tradition toward another. But it is not the American prosecutor becoming more like the continental jurist; instead, the European prosecutor has become more like his American counterpart, with the *de facto* and sometimes *de jure* power to adjudicate cases. He is deservedly referred to as "the judge before the judge."⁶³ We agree with Professor Langer, however, that important differences remain between the two adjudicative styles, adversarial versus inquisitorial, and among the plea bargaining-like processes existing in civil and common law countries.⁶⁴ But what is yet to be fully explored is the more complex picture of prosecutorial adjudication across Europe resulting from various discretionary powers that extend beyond the dichotomous view of plea bargaining versus full-fledged trial.

By *prosecutorial adjudication*, we are referring to a functional, rather than formal, conception of adjudication. The prosecutor decides the defendant's guilt, the amount of punishment he deserves, or both. This then determines the outcome of a case either because external approval is not required or it is granted as a matter of course. As Professor Langer notes, prosecutorial adjudication does not assume that the decision-maker reaches a judgment based on a legal hearing with all the procedural rights

of each on the other is substantial."), with Pierre Legrand, *European Legal Systems Are Not Converging*, 45 INT'L & COMP. L.Q. 52, 61-62 (1996) (arguing that the common law and civil law systems "have not been converging, are not converging and will not be converging" in Europe).

62. See, e.g., John H. Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439, 439-40 (1974) [hereinafter Langbein, *Controlling Prosecutorial Discretion*] (suggesting that study of the German model of prosecutorial discretion could help solve American prosecutorial problems).

63. See generally ERHARD KAUSCH, *DER STAATSANWALT: EIN RICHTER VOR DEM RICHTER?* (Düncker & Humblot 1980) (coining the phrase "ein richter vor den richter," or "the judge before the judge").

64. Cf. *infra* notes 496-98, 505-06 and accompanying text (discussing limits of comparativism).

associated with impartial adjudication.⁶⁵ But once the independent analysis and official imprimatur of the court are removed from the definition and focus is placed on the consequences of prosecutorial decision-making, adjudication by a prosecutor is no less real than that of a judge.⁶⁶

In the United States, prosecutors have the unreviewable power to decline cases; their decisions simply cannot be overturned by judges or any other external entity. Under many determinate sentencing schemes, prosecutors also have the power to set punishment upon conviction. Once a defendant is convicted of a crime carrying a mandatory minimum sentence, for example, the prosecutor's opinion about punishment is final—the court cannot impose a lower sentence.⁶⁷ In both cases, the prosecutorial adjudication is *de jure*, decisive, and binding, neither requiring the approval of the court nor being subject to its review. American prosecutors have the power of *de facto* adjudication as well, best exemplified by plea bargaining. The defendant may decline a plea offer, of course, and the judge can reject the agreement. But the vast majority of defendants take these deals, sometimes due to prosecutorial threats of much greater punishment if the cases go to trial. The courts nearly always give their consent after perfunctory review, even where the differential between the plea deal and the potential trial sentence reeks of coercion. In these situations, the prosecutors are adjudicators in effect, requiring the formal agreement of others but almost always getting their way.⁶⁸

Consistent with this functional interpretation of adjudication, European prosecutors also have the effective and even legal authority to adjudicate crimes and punishments. They may drop cases based on insufficient evidence or lack of public interest; they may enter a conditional disposal requiring a suspect to fulfill some obligation prior to his case being formally

65. Langer, *Rethinking Plea Bargaining*, *supra* note 38, at 243 n.72.

66. On the osmosis of power from the judiciary to the prosecutor, see generally Stefan Braum, *Critique of Prosecutorial Control of Investigations in Europe: A Call for Judicial Oversight*, in *THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE* (Erik Luna & Marianne Wade eds., forthcoming 2011).

67. In theory, a court could strike down a sentence based on higher law, the federal or state constitution. Judges are loathe to do so, however, with only a handful of decisions striking down prison sentences on constitutional grounds. See, e.g., *Solem v. Helm*, 463 U.S. 277, 303 (1983) (striking down nonviolent recidivist's sentence of life imprisonment without possibility of parole for uttering "no account" check); *Ramirez v. Castro*, 365 F.3d 755, 775 (9th Cir. 2004) (striking down defendant's twenty-five-years-to-life sentence for his third shoplifting offense); see also *Graham v. Florida*, 130 S.Ct. 2011, 2034 (2010) (striking down juvenile offender's sentence of life imprisonment without the possibility of parole).

68. *Supra* notes 17, 26–29 and accompanying text.

dropped; they may apply for a "penal order" that carries a fine or even a short sentence; and they may enter into negotiated case settlements that seem somewhat similar to American plea bargains. For those resolutions that require court approval, prosecutors virtually lead the judicial hand in signing the orders. But for some types of case-endings, the prosecutor acts independently from the court, resulting in *de jure* prosecutorial adjudication.⁶⁹

This Article seeks to enrich the American understanding of European prosecutors, which might in turn provoke a broader dialogue on the comparative study of prosecution and the possibility of reform in both places. After a brief review of the American literature on this topic, Part II describes and analyzes the various case-ending powers wielded by European prosecutors. Part III then discusses some of the implications of prosecutorial adjudication by comparing the context in which the phenomenon resides in Europe as contrasted with the United States. Part IV offers some thoughts about reforming the scope and application of prosecutorial power in America. At the present time, definitive conclusions may not be possible and various caveats must be kept in mind, as Part V concedes, but we hope that this preliminary work will inspire further comparative research on the prosecutorial function.

II. Prosecutorial Adjudication in Europe

The Anglo-American common law tradition tends to be affiliated with an "adversarial" criminal process, which pits the state against accused defendants. Evidence of the former is gathered by law enforcement and presented by public prosecutors to mostly passive fact-finders (i.e., trial judges or jurors), who then decide the truth of the matter based on their assessment of the competing stories offered by the parties. In contrast, the mainland European civil law (or continental law) tradition is associated with an "inquisitorial" approach, which views the criminal process as an official inquiry aimed at uncovering the truth through a rational, nonpartisan investigation. A judicial officer directs the probe, collecting information into a "dossier" that may provide the basis for criminal charges. A judge or collegial panel then leads the subsequent trial by calling and examining witnesses himself, rather than relying upon the parties to present their cases.

Of particular interest here is the alleged dissimilarity of prosecutorial power in the United States and Europe. As mentioned, the American prosecutor has vast discretion in determining whether to bring a case and how

69. *Infra* notes 175–84 and accompanying text.

to dispose of it once brought. In the federal system, about one out of every five cases is declined by U.S. Attorneys,⁷⁰ for instance, while about 95% of prosecuted cases are terminated by plea bargain.⁷¹ European prosecutors have no such discretion, however, at least according to the traditional image. This conception of constrained authority was forwarded by leading continental scholars, who described compulsory prosecution pursuant to the so-called "legality principle" as the basic rule of prosecutorial decision-making, ensuring equal protection for individuals and a rule-of-law proscription against arbitrary action.⁷² These scholars recognized various exceptions to compulsory prosecution—for instance, reliance upon a principle of "expediency" (or "opportunity") to forego a misdemeanor prosecution where the defendant's guilt was minor and a trial would not serve the public interest.⁷³ Still,

70. COMPENDIUM OF FEDERAL JUSTICE STATISTICS, *supra* note 18, at 9; *see also* *Federal Justice Statistics, 2007—Statistical Tables, Disposition of Suspects in Matters Concluded by Offense, October 1, 2006–September 30, 2007*, FEDERAL BUREAU OF STATISTICS, <http://bjs.ojp.usdoj.gov/content/pub/html/fjsst/2007/tables/fjs07st202.pdf> (last visited Nov. 17, 2010) (finding that U.S. Attorneys declined to prosecute 20.3% of cases brought to them) (on file with the Washington and Lee Law Review); *Federal Justice Statistics, 2007—Statistical Tables, Basis for Declination of Prosecution By U.S. Attorneys, October 1, 2006–September 30, 2007*, FEDERAL BUREAU OF STATISTICS, <http://bjs.ojp.usdoj.gov/content/pub/html/fjsst/2007/tables/fjs07st203.pdf> (last visited Nov. 17, 2010) (describing the reasons why U.S. Attorneys declined to prosecute suspects in criminal matters) (on file with the Washington and Lee Law Review).

71. *See* COMPENDIUM OF FEDERAL JUSTICE STATISTICS, *supra* note 18, at 67 (providing the statistic); SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, *supra* note 18, at tbl.5.35.2009 (finding that 96.3% of convictions in U.S. District Court were obtained by guilty plea); *see also* Sean Rosenmerkel, et al., *Bureau of Justice Statistics, Felony Sentences in State Courts, 2006—Statistical Tables*, U.S. DEPARTMENT OF JUSTICE (Dec. 2009), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf> (finding that 94% of felony offenders in state courts in 2006 plead guilty).

72. STRAFFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, Bundesgesetzblatt [BGBl] § 152(2) (Ger.) [hereinafter StPO], *available at* <http://www.legislationline.org/documents/action/popup/id/9016/preview> ("Except as otherwise provided by law, the public prosecution office shall be obliged to take action in the case of all criminal offenses which may be prosecuted, provided there are sufficient factual indications.").

73. StPO, *supra* note 72, § 153(2). The provision states:

If charges have already been preferred, the court, with the consent of the public prosecution office and the indicted accused, may terminate the proceedings at any stage thereof under the conditions in subsection (1). The consent of the indicted accused shall not be required if the main hearing cannot be conducted for the reasons stated in Section 205, or is conducted in the cases of Section 231 subsection (2) and Sections 232 and 233 in his absence. The decision shall be given in a ruling. The ruling shall not be contestable.

Id.

compulsory prosecution was considered the rule and American-style plea bargaining was verboten.⁷⁴

The stylized depiction of the adversarial and inquisitorial systems belies reality, however, as does the conventional vision of prosecutorial discretion in Europe. A hard contrast between common law and civil law traditions and their associated criminal processes cannot be maintained today. No system is either completely adversarial or inquisitorial, with any stereotype glossing over the very real differences among nations within each legal tradition. For this reason, some scholars have sought a different typology, possibly a measure for the degree of "adversariness" within a particular system.⁷⁵ In Europe, "the traditional distinction is tending to blur" as individual nations "bring their laws and regulations more closely into line with what are now common European principles."⁷⁶ More importantly for present purposes, prosecutorial discretion in Europe is far broader than the historical image, with the range and depth of case-ending powers increasing markedly in recent times. The resulting forms of prosecutorial adjudication will be described and analyzed below. But before then, the next section will briefly summarize the present American understanding of the European prosecutor.

A. American Scholarship on European Prosecutors

By and large, two aspects of continental criminal justice allegedly serve to limit prosecutorial discretion, the first being the investigating

74. See Hans-Heinrich Jescheck, *Discretionary Powers of the Prosecuting Attorney in West Germany*, 18 AM. J. COMP. L. 508, 511 (1970) (explaining how the German prosecuting attorneys lack the legal discretion to enter into plea bargains with the accused and his counsel, and describing this type of plea bargaining as "fundamentally prohibited in German law"); see also Robert Vouin, *The Role of the Prosecutor in French Criminal Trials*, 18 AM. J. COMP. L. 483, 488–89 (1970) (describing the expectation of compulsory prosecution).

75. See, e.g., MIRJAN DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* 5–6 (1986) (describing a typology of understanding adversarial and inquisitorial systems not in rigid definitions, but by instead identifying the adversarial and inquisitorial aspects of different legal systems); Albert W. Alschuler, *Introduction: Adding a Comparative Perspective to American Criminal Procedure Classes*, 100 W. VA. L. REV. 765, 767 (1998) ("[T]he issue is what degree of adversariness is appropriate and what independent responsibility for truth-finding judges should have.").

76. Comm. of Ministers of the Council of Eur., *The Role of Public Prosecution in the Criminal Justice System, Recommendation 19 and Explanatory Memorandum*, at 2 (2000) [hereinafter *Recommendation 19*], available at [http://www.venice.coe.int/site/main/texts/JD_docs/rec\(2000\)19_E.pdf](http://www.venice.coe.int/site/main/texts/JD_docs/rec(2000)19_E.pdf).

magistrate or examining judge (*juge d'instruction*). As described by John Merryman in his primer on civil law:

The examining judge controls the nature and scope of [the pre-trial phase of the criminal process]. He is expected to investigate the matter thoroughly and to prepare a complete written record, so that by the time the examining stage is complete, all the relevant evidence is in the record. If the examining judge concludes that a crime was committed and that the accused is the perpetrator, the case then goes to trial. If he decides that no crime was committed or that the crime was not committed by the accused, the matter does not go to trial.⁷⁷

The second aspect is the idea of compulsory prosecution pursuant to the legality principle, requiring trial of all crimes for which there is sufficient evidence. Mandatory prosecution promotes the rule of law and the legislative intent in categorical criminal prohibitions, while American-style plea bargaining would violate the principle of legality.

Where discretion is permitted, it is controlled by law and, perhaps more importantly, by hierarchical review procedures within the prosecutorial bureaucracy. In most civil law nations, the victim of the crime also has standing to object to the abuse of prosecutorial discretion. Most significant of all is the different effect of the guilty plea In the civil law world, a trial cannot be averted by a guilty plea. The accused's confession can be admitted as evidence, but the trial must go on. The court determines guilt, it is said, not the defendant or the prosecutor.⁷⁸

It was this understanding that touched off a series of works in the American legal literature. Toward the end of his seminal 1969 book, *Discretionary Justice*, Kenneth Culp Davis pointed to Europe and, in particular, Germany as a prosecutorial model for the United States. Whenever it was clear that a defendant had committed a crime, a prosecution must ensue.

The German prosecutor does not withhold prosecution for such reasons as that he thinks the statute overreaches, that justice requires withholding enforcement because of special circumstances, that the statute ought to be enforced against some violators and not others, that he lacks time for bringing a marginal prosecution, or that he finds political advantage in not prosecuting. Hence the German prosecutor never has discretionary power to engage in plea bargaining.⁷⁹

77. JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* 129 (2d ed. 1985).

78. *Id.* at 130–31.

79. KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 194 (1969).

The heavy constraint on discretion was buttressed by hierarchical supervision of line prosecutors and the potential for victims to legally compel prosecution. In contrast to the practice in America, German prosecutors were not authorized to selectively enforce the criminal code.⁸⁰

The issues came to a head in a now-classic debate of comparative criminal justice. In 1974, John Langbein argued that unbridled discretion of American prosecutors could be curbed through the continental model of compulsory prosecution.⁸¹ By requiring charges for all serious crimes for which a sufficient factual basis exists, the German code precluded arbitrary enforcement, political manipulation, and the reviled convention of plea bargaining.⁸² Moreover, compulsory prosecution was reinforced by the hierarchical, meritocratic organization of state's attorneys and the various avenues for aggrieved victims to counter nonprosecution decisions.⁸³ Langbein did refer to the aforementioned principle of expediency and various means to avoid trial,⁸⁴ but actual practice did not threaten the fundamental preference for prosecution in Germany.

A few years later, Lloyd Weinreb offered his own proposal to improve American criminal justice based on observations of continental procedure, especially the French criminal process.⁸⁵ Among other things, his 1977 book called for the institution of an examining judge to investigate crime and consider charges. "If he has found insufficient basis for an accusation, he should enter an order closing the investigation," Weinreb argued, but "[i]f he has found proof of a crime, he should close the investigation with an order making a specific accusation against the defendant."⁸⁶ The charges would not be a prelude to real fact-finding but instead the culmination of a

80. *Id.* at 195.

81. See JOHN LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY* 89 (1977) ("What the Germans have largely done, and the Americans largely not done, is to devise means to regulate the prosecutor's monopoly."); Langbein, *Controlling Prosecutorial Discretion*, *supra* note 62, at 439-40 (suggesting that study of the German model of prosecutorial discretion could help solve American prosecutorial problems).

82. See Langbein, *Controlling Prosecutorial Discretion*, *supra* note 62, at 443 (explaining the German rule of "compulsory prosecution" and its limit on prosecutorial discretion).

83. See *id.* at 447-48 ("German police and prosecutors are professionals, hierarchically organized and controlled from the state level and subject to effective administrative and judicial review and discipline upon citizen complaint.").

84. See *id.* at 458 (explaining that the German rule of compulsory discretion is limited by the counterprinciple of discretionary nonprosecution, also known as the principle of expediency).

85. See generally LLOYD L. WEINREB, *DENIAL OF JUSTICE* (1977).

86. *Id.* at 135.

neutral judicial investigation. Moreover, the presence of an evidentiary record supporting the allegations would ensure that all guilty pleas had a factual basis.⁸⁷

That same year, however, Abraham Goldstein and Martin Marcus critically examined, among other things, the extent to which continental systems curtail prosecutorial discretion and avoid plea bargaining.⁸⁸ Building upon a theme of Goldstein's previous work—that Europeans "may tolerate more discretion than their literature concedes"⁸⁹ and a dispassionate comparison will show that "the two systems tend to converge"⁹⁰—the authors sought to debunk a number of myths. In France, examining magistrates came into play in a small fraction of criminal cases, for instance, while compulsory prosecution in Germany was limited by both explicit and tacit means to avoid bringing (severe) charges. More generally, all civil law countries recognized analogues to plea bargaining. Although parties were formally prohibited from striking deals, implicit agreements developed from mutual recognition that a defendant's confession and cooperation could lead to reduced punishment.⁹¹

In a vigorous response, Langbein and Weinreb took their rivals to task for treating criminal justice officials in America and Europe as indistinguishable. It was erroneous to assume that "the French *procureur* and German *Staatsanwalt* are simply district attorneys who speak a foreign language," given the vast differences in legal and professional ethos.⁹² There was no proof that mandatory prosecution was "anything less than completely effective,"⁹³ for example, and the continental legal process rejects the defining characteristics of plea bargaining, such as party negotiation and greater punishment if the defendant insists upon trial and is subsequently convicted.⁹⁴ In a reply, Goldstein and Marcus claimed that

87. *Id.* at 138.

88. See generally Abraham S. Goldstein & Martin Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany*, 87 YALE L.J. 240 (1977) [hereinafter Goldstein & Marcus, *The Myth*].

89. Abraham S. Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009, 1019 (1974).

90. *Id.* at 1020.

91. Goldstein & Marcus, *The Myth*, *supra* note 88, at 279.

92. John H. Langbein & Lloyd L. Weinreb, *Continental Criminal Procedure: "Myth" and Reality*, 87 YALE L.J. 1549, 1550 (1978).

93. *Id.* at 1563.

94. See *id.* at 1558 (describing the French *procureur's* choice to "correctionalize" the accused or charge him with the crime). In this process, the *procureur* does not speak with the accused or his attorney. *Id.* Furthermore, "[t]he accused ordinarily has no reason to

their scholarly adversaries' bedazzlement with continental law on the books had blinded them to the law in action.⁹⁵ To assume that the absence of overt deals between prosecutors and defendants means that plea bargaining does not occur in Europe, for instance, confuses formal law for actual practice.⁹⁶

The high quality and pitch of this debate reverberated for two decades, with some authors taking sides or offering their own angle on the issues. In the 1980s and 1990s, a few scholars attempted to advance the discussion beyond the apparent "stalemate."⁹⁷ Especially thoughtful were the works of Richard Frase and Thomas Weigend, who suggested that smaller, selective transplants from France and Germany were feasible.⁹⁸ Among the proposals were a continental approach to the selection, training, and supervision of prosecutors⁹⁹ and the adoption of European restraints on prosecutorial charging and plea bargaining practices.¹⁰⁰ But in a "gentle" but "long overdue" defense of the American district attorney, William Pizzi

suppose that the more elaborate proceeding for a *crime* would give him an advantage, lost if he pleads guilty, comparable to the American defendant's chance for an acquittal." *Id.*

95. Abraham S. Goldstein & Martin Marcus, *Comment on Continental Criminal Procedure*, 87 YALE L.J. 1570, 1575 (1977) ("In general [Langbein and Weinrib] assume that because there is no explicit bargaining, face-to-face or otherwise, there are also no trade-offs and compromises.").

96. *Id.* Another prominent scholar, Mirjan Damaška, claimed that the real limit on prosecutorial discretion in Europe was not the external legal system but internal organizational structures and norms—hierarchical, centralized supervision of the prosecutorial corps and a professional emphasis on consistent, uniform decisionmaking. See generally Mirjan Damaška, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480, 503–04 (1975). In large part, our analysis in Part III is consistent with Damaška's claims.

97. Thomas Weigend, *Continental Cures for American Ailments: European Criminal Procedure as a Model for Law Reform*, 2 CRIME & JUST. 381, 418 (1980).

98. See Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 CAL. L. REV. 539, 662 (1990) ("The differences suggest possibilities for useful reform of American procedures, and the similarities suggest that transplants may be feasible."); 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, 352 (1995) (noting that some similarities in the American, French, and German legal systems suggest that the countries' various rules and practices would be receptive to transplant from one to the other).

99. See Frase, *supra* note 98, at 554 (discussing French policies in regard to police, prosecutorial, and judicial organization); Frase & Weigand, *supra* note 98, at 353 (noting that the German criminal justice system includes careful selection, supervision, and training of judges and prosecutors).

100. See, e.g., Frase & Weigand, *supra* note 98, at 354 (noting the benefits of the German control of prosecutorial discretion and the German plea bargaining practice).

challenged the idea that prosecutorial controls could be cleanly separated from a civil law system and then incorporated into the criminal processes of the United States.¹⁰¹ Moreover, the American political ideology—including a preference for local decision-making, an insistence on popular control of public officials, and a general distaste for centralized governmental authority—would make European-based prosecutorial reforms a political nonstarter.¹⁰²

For the past decade or so, comparative scholarship on the prosecutorial function has focused almost exclusively on plea bargaining. Certainly, there was good reason for this concentration, given America's addiction to the practice coupled with the revelation that Germany could no longer be called the "land without plea bargaining."¹⁰³ As it turns out, German practitioners had been covertly engaged in negotiated settlements since the early 1970s.¹⁰⁴ The most recent comparative works in this area have examined the degree to which American-style plea bargaining has spread throughout the Western world. The jury is still out, so to speak, as the practice of negotiated case settlements continues to expand and mutate around the world, with scholars following any developments to achieve a greater understanding of the plea bargaining phenomenon and the possibility of reform in the United States.¹⁰⁵

101. See William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 OHIO ST. L.J. 1325, 1330 (1993) ("The idea that we can leave our criminal justice system and our legal tradition substantially intact, but yet achieve meaningful reform of prosecutorial discretion by borrowing mechanisms for controlling such discretion from the civil law tradition is mistaken and unfair to both great traditions.").

102. As will be discussed below in Part III, this marks a fundamental difference between adversarial and inquisitorial styles of adjudication, given the emphasis upon certainty and uniformity in continental legal systems, particularly those of Germany and France.

103. See John H. Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204, 224 (1979) (coining this nickname).

104. See Markus Dirk Dubber, *American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure*, 49 STAN. L. REV. 547, 549–50 (1997) (discussing the debate over plea bargaining in Germany); Joachim Hermann, *Bargaining Justice—A Bargain for German Criminal Justice?*, 53 U. PITT L. REV. 755, 755 (1992) (discussing the origins of plea bargaining in the German criminal justice system).

105. See, e.g., Langer, *Legal Translations*, *supra* note 51, at 3 (considering American style plea bargaining in Germany, Italy, Argentina, and France); Turner, *Judicial Participation*, *supra* note 17, at 3 (discussing judicial participation in plea bargaining in Germany, Connecticut, and Florida).

B. European Scholarship on European Prosecutors

The preceding summary was offered for several reasons. To begin with, it is necessary to get a lay of the scholarly terrain and, in particular, a sense of the main motivation behind comparative scholarship in this area—a long-standing attempt by American scholars to address problems of domestic criminal justice by importing solutions from foreign legal systems. To a large extent, these efforts have concentrated on the criminal processes of two nations, Germany and France, with relatively little discussion about other continental systems. While the discourse that began nearly four decades ago had the potential to be a wider-ranging inquiry into prosecutorial power, it narrowed rather quickly to a debate about plea bargaining in a few European countries.

The foregoing literature review is relevant for yet another reason: American scholars seem to have been far more interested in the discretion of European prosecutors than their continental colleagues. Until recently, little attention was paid to what European prosecutors actually do. It was not until the publication of the first *European Sourcebook on Crime and Criminal Justice Statistics*¹⁰⁶ that scholars began to take notice of a seemingly strong shift in power toward prosecutorial decision-making in the criminal process. Although several European studies have been published since 2000,¹⁰⁷ Europe's new concern about the power of the

106. See generally EUROPEAN SOURCEBOOK OF CRIME AND CRIMINAL JUSTICE STATISTICS (1st ed. 1999), available at http://www.europeansourcebook.org/sourcebook_start.htm.

107. See generally THE PROSECUTOR OF A PERMANENT INTERNATIONAL CRIMINAL COURT (Louise Arbour et al. eds., 2000) [hereinafter THE PROSECUTOR OF A PERMANENT] (providing reports concerning the prosecution services in selected countries); THE ROLE OF THE PUBLIC PROSECUTOR IN THE EUROPEAN CRIMINAL JUSTICE SYSTEMS 9–138 (Tom Vander Beken & Michael Kilchling eds., 2000) [hereinafter THE ROLE OF THE PUBLIC PROSECUTOR] (discussing the role of the public prosecutor in Austria, Belgium, Denmark, England and Wales, Germany, Hungary, Italy, and the Netherlands); TASKS AND POWERS OF THE PROSECUTION SERVICES IN THE EU MEMBER STATES 17–457 (Peter J.P. Tak ed., 2004) [hereinafter Tak, PART I] (discussing the prosecution services in Austria, Belgium, Denmark, England and Wales, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and Sweden); TASKS AND POWERS OF THE PROSECUTION SERVICES IN THE EU MEMBER STATES II 481–681 (Peter J.P. Tak ed., 2005) [hereinafter Tak, PART II] (discussing prosecution services in Cyprus, the Czech Republic, Latvia, Lithuania, Malta, Poland, the Slovak Republic, and Slovenia); Cyrille Finjaut et al., *Special Issue: The Future of the Public Prosecutor's Office in the European Union*, 8 EUR. J. CRIME, CRIM. L. & CRIM. JUST. 149 (2000) (discussing the public prosecutor's office in Belgium).

public prosecutor has not emerged in American legal scholarship. The present work seeks to fill that gap.

The lack of European interest in the prosecution has several sources. The British had no prosecution service until the mid-1980s, when one was created as a reaction to a series of extraordinary miscarriages of justice due to police suppression and manipulation of exonerating evidence.¹⁰⁸ Of note, the Prosecution of Offenses Act subjected the police charging decision to review by the newly formed Crown Prosecution Service.¹⁰⁹ Since its inception, this institution has been fighting to establish a right to exist against a hostile and virtually omnipotent police force.¹¹⁰ In fact, it was not until 2003 that the power to charge a suspect was given to full-time prosecutors without reservation.¹¹¹

In contrast, prosecution services were well established in continental European systems. The academic debate assumed prosecutors were abiding by the principle of legality, thereby making their discretion a topic of little interest.¹¹² In general, prosecutors were viewed as a rather dull lot, inspecting files and sifting out cases with insufficient evidence as required by the principle of legality, and then passing any real decision-making on to the courts. The array of powers that slowly crept into criminal procedure codes—allowing prosecutors to drop "minor cases,"¹¹³ for instance—were legislative responses to the demands of practice. These were either ignored by scholars or assumed to be of no concern, premised on the notion that lawyers were to be trusted in using such provisions in the exceptional case

108. See THE REVIEW OF THE CROWN PROSECUTION SERVICE 33 (1998) (noting that the Crown Prosecution Service "started to operate in April 1986 in Metropolitan Counties and in October 1986 in the remainder of England and Wales").

109. Prosecution of Offenses Act, 1985, c. 23 § 8 (Eng.).

110. See, e.g., LORD JUSTICE AULD, REVIEW OF THE CRIMINAL COURTS OF ENGLAND AND WALES 399 (2001) (making policy recommendations for the development of the Crown Prosecution Service); IAIN GLIDEWELL, THE REVIEW OF THE CROWN PROSECUTION SERVICE 33 (1998) (discussing the early history of the Crown Prosecution Service); Marianne Wade, Bruno Aubusson & Josef Zila, *Tinker, Tailor, Policy-Maker*, 14 EUR. J. CRIM. POL'Y & RES. 181, 183–84 (2008) [hereinafter Wade et al.].

111. Criminal Justice Act, 2003, c. 44, § 29 (Eng.).

112. See Tak, PART I, *supra* note 107, at 9–11 (discussing the application of the legality principle in Europe).

113. STPO, *supra* note 72, § 153.

of no real importance.¹¹⁴ The image was one of prosecutors as bureaucratic administrators who hardly seemed worthy of attention.¹¹⁵

With the fall of the Iron Curtain came the need to reform the ill-reputed and even blood-stained *prokuratura* in former communist states. This inspired a certain level of interest within the Council of Europe,¹¹⁶ particularly regarding the competing concerns of political accountability and independence of the prosecution service.¹¹⁷ The Council and affiliated bodies sought increased unity among European nations, a degree of harmony across criminal justice systems, and eventually, a set of common principles for public prosecutors.¹¹⁸ More recently, a number of scholars have "discovered" the changing prosecutorial role in Europe, somewhat similar to the revelation about criminal justice discretion in the U.S. a half-century earlier.¹¹⁹ As occurred in America, the impetus for increased power

114. Cf. Hans-Jörg Albrecht, Ein Nachruf auf Günther Kaiser [A TRIBUTE TO GÜNTHER KAISER], Emmendingen, Sept. 2008 (providing a *laudatio* read by Professor Albrecht at Professor Kaiser's funeral).

115. Studies documented by Hans-Heinrich Jescheck and Rudolf Leibinger offered a noteworthy outlier. See generally DIE FUNKTION UND TÄTIGKEIT DER ANKLAGEBEHÖRDE IM AUSLÄNDISCHEN RECHT (Hans-Heinrich Jescheck & Rudolf Leibinger eds., 1979). More recent exceptions in the American literature are provided by Professors Weigend and Herrmann. See generally Herrman, *supra* note 104; Weigend, *supra* note 97.

116. *The Council of Europe in Brief, Who We Are*, COUNCIL OF EUROPE, <http://www.coe.int/aboutcoe/index.asp?page=quisommesnous&l=en>, (last visited Nov. 17, 2010) (noting history and goals of the Council of Europe) (on file with the Washington and Lee Law Review).

117. See, e.g., Eur. Parl. Ass., *Role of the Public Prosecutor's Office in a Democratic Society Governed by the Rule of Law, Recommendation 1604 and Explanatory Memorandum*, Doc. No. 9796 (2003) [hereinafter *Recommendation 1604*], available at <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc03/EDOC9796.htm> (discussing the role of the public prosecutor in Council of Europe members states); *Recommendation 19*, *supra* note 76 (discussing the relationship between the public prosecutor and various governmental bodies); Comm. of Ministers of the Council of Eur., *Report of the Committee of Experts on the Role of the Public Prosecution in the Criminal Justice System* (1997) (outlining the proper relation of the public prosecutor to governments, courts, police, and citizens).

118. See, e.g., *Recommendation 1604*, *supra* note 117, ¶ 3 (advocating harmonization between the criminal justice systems in Council of Europe member states); *Recommendation 19*, *supra* note 76, ¶ 3 (discussing the function of the public prosecutor in certain criminal justice systems); Introductory Memorandum by Marc Robert, *Discretionary Powers of Public Prosecution: Opportunity or Legality Principle—Advantages and Disadvantages*, Conference of Prosecutors General of Europe, 5th Session (May 2004) [hereinafter *Conference of Prosecutors General*], available at http://www.coe.int/t/dghl/cooperation/ccpe/conferences/cpge/2004/default_EN.asp (discussing prosecution services in Europe).

119. See THE PROSECUTOR OF A PERMANENT, *supra* note 107, at 191–485 (presenting national reports concerning prosecution services in Austria, Belgium, England and Wales, Finland, France, Georgia, Germany, Hungary, the Netherlands, Russia, and Spain, as well as

of European prosecutors has been a surge in criminal caseloads across the continent,¹²⁰ which scholars now recognize as the source for the proliferation of plea bargaining.¹²¹

What has not been acknowledged, however, is the extent to which a different, broader convergence may be occurring. Until now, the working premise—at least with regard to European case-ending options, particularly plea bargaining—was that the manager of case resolutions will remain the trial judge, not the state's attorney *à la* American prosecutorial

certain non-European countries); THE ROLE OF A PUBLIC PROSECUTOR, *supra* note 107, at 7 (noting recent scholarly discussion of the public prosecutor in certain European countries); Tak, PART II, *supra* note 107, at 462 (noting responses of EU member states to a questionnaire regarding prosecution services); Finjaut et al., *supra* note 107, at 150–51 (discussing recent developments in European prosecutorial systems).

120. See, e.g., Comm. of Ministers of the Council of Eur., *The Management of Criminal Justice, Recommendation 12* (1995) ("[O]ver recent years criminal justice systems throughout Europe have faced an increase in the number and often in the complexity of cases, unwarranted delays, budgetary constraints and increased expectations from public and staff . . ."); Comm. of Ministers of the Council of Eur., *The Simplification of Criminal Justice, Recommendation 18 and Explanatory Memorandum* (1988) [hereinafter *Recommendation 18*] ("[T]he increasing number of criminal offences committed in the exercise of the activities of enterprises . . . cause considerable damage to both individuals and the community . . ."); Conference of Prosecutors General, *supra* note 118 (noting the phenomenon of rising case-loads); JÖRG-MARTIN JEHLE & MARIANNE WADE, COPING WITH OVERLOADED CRIMINAL JUSTICE SYSTEMS: THE RISE OF PROSECUTORIAL POWER ACROSS EUROPE 5 (2005) [hereinafter JEHLE & WADE] ("If one looks at the numbers of offenses and suspects recorded one can observe that for decades an enormous rise in crime has taken place in Western Europe, even if in some countries the crime rates have stabilized or are slightly declining in the last years."); THE ROLE OF A PUBLIC PROSECUTOR, *supra* note 107, at 149 ("It was found that each European and international criminal justice system is confronted with the challenge to administer the enormous input of criminal cases."); Jörg-Martin Jehle, *Prosecution in Europe: Varying Structures, Convergent Trends*, 8 EUR. J. CRIM. POL'Y RES. 27, 34 (2000) (offering data on the caseloads in select European countries); Marianne Wade, *The European Prosecution Service*, 16 CRIM. L.F. 387, 392 (2005) [hereinafter Wade, *European Prosecution*] (reviewing Tak, PART I, *supra* note 107); Shawn Marie Boyne, *Prosecutorial Discretion in Germany's Rechtsstaat: Varieties of Practice and the Pursuit of Truth* 68 (Aug. 28, 2007) (unpublished Ph.D. dissertation, University of Wisconsin) [hereinafter Boyne, *Varieties of Practice*] (noting prosecutors' "increasing workload pressures") (on file with the Washington and Lee Law Review).

121. See, e.g., *Recommendation 19*, *supra* note 76 (offering recommendations to member states as to the operation of their public prosecution systems); THE PROSECUTOR OF A PERMANENT, *supra* note 107, at 525 (noting the introduction of "certain mechanisms of bargaining" in prosecutions world-wide); THE ROLE OF A PUBLIC PROSECUTOR, *supra* note 107, at 149–50 (discussing the fading distinction between legality and expediency based prosecution systems); Jehle, *supra* note 120, at 38 (discussing the increased use of plea bargaining in Europe); Langer, *Legal Translations*, *supra* note 51, at 37 (discussing the differences between inquisitorial-style systems and plea bargaining based systems); Wade, *European Prosecution*, *supra* note 120, at 388–89 (assessing Tak's argument regarding prosecutorial discretion).

adjudication.¹²² The assumption proves debatable, we believe, based on a review of a variety of resources. Particularly noteworthy are the results of the first study to go beyond basic legal comparison, which draws upon empirical research, analysis of guidelines, and review of working practices, all to establish what prosecutors really do within criminal justice systems across Europe.¹²³ Collectively, these resources suggest a potentially troubling convergence on both sides of the Atlantic—the power of prosecutors to adjudicate cases through a variety of case-ending mechanisms, often undermining the power of the judiciary in most matters passing through the criminal justice systems. Although one probably cannot overstate the degree of legal diversity among European nations, this sidelining of judges is a turning point for all of them, challenging a long-held tenet of their criminal justice systems—the power of highly independent, often constitutionally protected judges to adjudicate cases in public trials.

1. *The Reality of Prosecution in Europe*

The six-country comparison presented here grew out of research for the *European Sourcebook*, focusing upon different countries (e.g., large, small, long-established Western, former communist, etc.) that represent the major legal traditions across Europe: England and Wales, France, Germany, the Netherlands, Poland, and Sweden. The three-year project utilized a comprehensive questionnaire requesting an assortment of details—including information on the ambit of the criminal justice system, the structure and powers of the police force, the roles and powers of prosecutors as well as the structure of their offices, the prosecutor-court relationship, and issues concerning victims, juveniles, and constitutional constraints—all complemented by comparative data analysis and standardized country reports.¹²⁴

122. Langer, *Legal Translations*, *supra* note 51, at 44 (discussing the role of the trial judge in German plea bargaining).

123. See JEHL & WADE, *supra* note 120, at 3 (outlining the approach that the authors take in their study); Marianne Wade, *The Januses of Justice*, 16 EUR. J. OF CRIME, CRIM. L. & CRIM. JUST. 433, 434 (2008) (presenting the findings of a study on the prosecution services of England and Wales, France, the Netherlands, Germany, Poland, and Sweden).

124. To view the questionnaires, see *The Prosecution Service Function Within the Criminal Justice System: A European Comparison*, GEORG-AUGUST-UNIVERSITÄT GÖTTINGEN INSTITUT FÜR KRIMINALWISSENSCHAFTEN, available at <http://www.kriminologie.uni-goettingen.de/pps>. For all other results, see JEHL & WADE, *supra* note 120, at 315–29.

The study showed a surprising level of similarity across Europe, despite the historical diversity of the systems examined. In many countries, prosecutors have an array of case-ending options (sometimes shared with the police) coupled with powers to control investigations, sway court decisions, and even obtain convictions with a great degree of independence. For definitional purposes, a case-ending decision is one that ceases criminal proceedings. The standard examples are the trial court's verdict of conviction or acquittal, as well as a prosecutor's decision to drop a case on technical or evidentiary grounds. Beyond these resolutions, which seem almost obligatory, European justice systems feature a variety of other case-ending options that are not intrinsic components of a legitimate criminal process. Although labeled differently within each system and containing nation-specific facets, these case-ending methods have so much in common across Europe that they can be appropriately grouped together in descriptive categories.

a. Simple Drop

The decision not to pursue a case due to insufficient evidence or some dispositive legal bar is characterized as a "simple drop." This classic case-ending is considered to be in line with the principle of legality, which, as mentioned, is the polestar of a number of continental criminal justice systems and is often associated with the rule of mandatory prosecution in Germany. A primary purpose of the prosecution service is to filter out untenable cases, including those where no crime has been committed, the offender cannot be found, the available evidence is inadequate to support a trial against the suspect, or a law precludes bringing the case to begin with (e.g., amnesty, double jeopardy, expiration of the statute of limitations, etc.). Declining prosecution in such situations fulfilled rather than subverted the legality principle, which was intended to guarantee that all *viable* cases were prosecuted.¹²⁵ Where the prosecution would be futile or illegal, a simple drop is considered the appropriate case-ending.

125. See Michael Kilchling, *Germany*, in *THE ROLE OF THE PUBLIC PROSECUTOR IN THE EUROPEAN CRIMINAL JUSTICE SYSTEMS*, 81–82 (Tom Vander Beken & Michael Kilchling eds., 2000) [hereinafter Kilchling, *Germany*] (discussing nonprosecution from an historical perspective) (citations omitted).

b. Public Interest Drop

This category refers to a prosecutor's decision that proceedings should be dropped without any further consequence, even though he believes the suspect is guilty, and sufficient evidence is available to take the case to court. The public interest drop can be seen as recognizing that certain cases are not worth the prosecutorial capital required for a more intense response, implying that these resources would be better expended on more pressing matters.¹²⁶ The decision is recorded in an internal register—often accessible to the police—informing future prosecutors that this individual may not have an entirely unblemished background. The suspect will be informed that the case has been dropped in spite of his being considered guilty, and he cannot appeal the decision even though the information will be noted in law enforcement records. This case-ending option is available to prosecutors in England and Wales,¹²⁷ France,¹²⁸ Germany,¹²⁹ the Netherlands,¹³⁰ and Sweden.¹³¹

The public interest drop is the simplest discretionary case-ending for those who are presumed guilty, although it precludes prosecutors from having any further influence on suspects. For this reason, the action represents one of the least potent forms of prosecutorial adjudication, and it was usually the first to be introduced or featured in European criminal justice systems. Typically, prosecutors use public interest drops to deal with first-time offenders who have committed minor crimes, such as petty theft and marijuana possession.¹³² The public interest drop can be seen as inherent in the British and Dutch systems, which do not adhere to the

126. See Boyne, *Varieties of Practice*, *supra* note 120, at 67–73 (discussing pressures on prosecutors to close cases).

127. Code for Crown Prosecutors, 2010, §§ 4.10 et seq.

128. CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CODE OF CRIMINAL PROCEDURE] art. 40-1, 40-3 (Fr.) [hereinafter C. PR. PÉN.], available at <http://195.83.177.9/code/liste.phtml?lang=uk&c=34&r=3885>.

129. See STPO, *supra* note 72, § 153 (providing for the nonprosecution of petty offenses).

130. See WETBOEK VAN STRAFVORDERING [SV] [CODE OF CRIMINAL PROCEDURE] arts. 167-II, 242-II (Neth.) [hereinafter SV] (allowing nonprosecution for public interest).

131. RÄTTEGÅNGSBALKEN [RB] [CODE OF JUDICIAL PROCEDURE] 23:4a (Swed.) [hereinafter RB], available at <http://www.sweden.gov.se/sb/d/3926/a/27778>.

132. See MARIANNE WADE, *The Power to Decide*, in JÖRG-MARTIN JEHL & MARIANNE WADE, *COPING WITH OVERLOADED CRIMINAL JUSTICE SYSTEMS: THE RISE OF PROSECUTORIAL POWER ACROSS EUROPE* 5, 67 (2005) [hereinafter WADE, *The Power to Decide*] (cataloging the use of public interest drops in certain European countries).

principle of legality and its obligation to prosecute.¹³³ Although France and Sweden have allowed drops of this kind from the very outset of their systems (e.g., 1808 in France),¹³⁴ the option was only introduced in Germany in the last half-century, providing a limited alternative intended to ease the case-load pressures that German prosecutors had reported to lawmakers.¹³⁵ In contrast, the option of a public interest drop was taken away from the Polish prosecution service in 1997, signaling a fundamental shift in decision-making and an attempt to disempower the once mighty *prokuratura*.¹³⁶

In England and Wales, the prosecution evaluates the option of a public interest drop in accordance with a number of considerations listed in the Code for Crown Prosecutors: the likelihood of a nominal sentence; the relative insignificance of the offense in relation to other charges against the suspect; the infliction of only minor loss or harm in a single criminal incident, especially if deemed the result of sincere misjudgment by the offender; the potential delay in bringing the case; the harm to the victim from a trial; the age of the suspect; reparations provided by the offender; and concerns for national security.¹³⁷ Likewise, Swedish prosecutors may waive a case under the following circumstances: the expected outcome is no more than a fine, or possibly a "conditional sentence";¹³⁸ the potential

133. See Chris Lewis, *The Prosecution Service Function Within the English Criminal Justice System*, in JÖRG-MARTIN JEHL & MARIANNE WADE, *COPING WITH OVERLOADED CRIMINAL JUSTICE SYSTEMS: THE RISE OF PROSECUTORIAL POWER ACROSS EUROPE* 5, 158 (2005) [hereinafter Lewis, *The Prosecution*] (discussing "public interest factors in favour and against prosecution"); see also Martine Blom & Paul Smit, *The Prosecution Service Function Within the Dutch Criminal Justice System*, in JÖRG-MARTIN JEHL & MARIANNE WADE, *COPING WITH OVERLOADED CRIMINAL JUSTICE SYSTEMS: THE RISE OF PROSECUTORIAL POWER ACROSS EUROPE* 5, 242–43 (2005) [hereinafter Blom & Smit, *Dutch Justice System*] (discussing Dutch prosecutors' decisions as to whether to prosecute).

134. See Bruno Aubusson de Cavarlay, *The Prosecution Service Function Within the French Criminal Justice System*, in JÖRG-MARTIN JEHL & MARIANNE WADE, *COPING WITH OVERLOADED CRIMINAL JUSTICE SYSTEMS: THE RISE OF PROSECUTORIAL POWER ACROSS EUROPE* 5, 185 (2005) [hereinafter Aubusson de Cavarlay, *French Criminal Justice System*] (discussing the provisions of the 1808 code).

135. See Hans-Jörg Albrecht, *Criminal Prosecution: Developments, Trends and Open Questions in the Federal Republic of Germany*, 8 EUR. J. OF CRIME, CRIM. L. & CRIM. JUST. 245, 246 (2000) [hereinafter Albrecht, *Criminal Prosecution*] (discussing the criteria for such drops when they were introduced in the 1960s).

136. Theodor Bulenda et al., *The Prosecution Service Function Within the Polish Criminal Justice System*, in JÖRG-MARTIN JEHL & MARIANNE WADE, *COPING WITH OVERLOADED CRIMINAL JUSTICE SYSTEMS: THE RISE OF PROSECUTORIAL POWER ACROSS EUROPE* 5, 267 (2005) [hereinafter Bulenda et al., *Polish Criminal Justice System*].

137. Code for Crown Prosecutors, 2010, § 4.17.

138. Josef Zila, *The Prosecution Function within the Swedish Criminal Justice System*,

charge is irrelevant in relation to other charges; the suspect requires psychiatric or special care that would not disregard a compelling public or private interest; or, the costs of the proceedings would exceed any societal benefit.¹³⁹ German prosecutors also have the authority—independent for petty cases and contingent upon court approval for others—to drop cases involving suspects with "minor guilt" (*geringer Schuld*), with the term more closely defined in guidelines issued by the Ministry of Justice or the relevant Prosecutor-General.¹⁴⁰ This case-ending option has become somewhat unpopular in France and the Netherlands, however, after the respective governments declared that public interest drops should be used less frequently.¹⁴¹

c. Conditional Disposal

A "conditional disposal" refers to the prosecutorial decision that although a case need not proceed to trial, the suspect deserves some type of state reaction. In these situations, prosecutors (and courts with prosecutorial approval) may offer to drop a case if the suspect performs a given task or accepts the imposition of a consequence. Until the individual fulfills the assigned condition, the drop does not become legally binding and the state retains the right to prosecute, which almost invariably occurs when a suspect fails to meet his obligations. Conditional disposals are typically used to divert routine criminal cases out of the criminal justice system—particularly unremarkable instances of petty theft, marijuana possession, traffic offenses, lesser acts of violence, and minor property crimes—with the most frequent condition being the payment of a fine.¹⁴²

in JÖRG-MARTIN JEHLÉ & MARIANNE WADE, COPING WITH OVERLOADED CRIMINAL JUSTICE SYSTEMS: THE RISE OF PROSECUTORIAL POWER ACROSS EUROPE 5, 292 (2005) [hereinafter Zila, *Swedish Criminal Justice System*] ("[T]he conditional sentence is an alternative sanction to imprisonment.").

139. RB, *supra* note 131, 1942:740, 20:7.

140. See Beatrix Elsner & Julia Peters, *The Prosecution Service Function Within the German Criminal Justice System*, in JÖRG-MARTIN JEHLÉ & MARIANNE WADE, COPING WITH OVERLOADED CRIMINAL JUSTICE SYSTEMS: THE RISE OF PROSECUTORIAL POWER ACROSS EUROPE 5, 220 (2005) [hereinafter Elsner & Peters, *German Criminal Justice System*] (discussing the German prosecutor's ability not to prosecute cases in which "the offender's guilt is to be seen as of a minor nature and there is no public interest in prosecution").

141. PETER J.P. TAK, THE DUTCH CRIMINAL JUSTICE SYSTEM 53 (2003) [hereinafter TAK, *DUTCH CRIMINAL JUSTICE SYSTEM*], available at http://projektintegracija.pravo.hr/download/repository/Dutch_criminal-justice-system.pdf; Wade et al., *supra* note 110, at 188.

142. Community service, addiction treatment, and mediation are also possible. The

The suspect is not formally considered guilty but is regarded as acquiescing to the prosecutorial presumption of guilt, which is noted in an internal record.

The conditional disposal is available to prosecutors in England and Wales,¹⁴³ France (including the *rappel a loi* and *médiation pénale*),¹⁴⁴ the Netherlands,¹⁴⁵ Poland,¹⁴⁶ and Germany.¹⁴⁷ This case-ending option can be a mechanism for specific policy objectives, such as support for victim-offender mediation. Conditional disposals are most often lauded as achieving greater efficiency by diverting relatively low-level offenders out of the criminal justice system and thereby minimizing court congestion. In fact, this option was often introduced alongside the public interest drop, with both intended to ease caseload pressures. The conditional disposal is used for slightly more serious offenses than the public interest drops, and it may require court approval in some systems.¹⁴⁸ However, the option is not available for recidivists except in France via the *médiation pénale*¹⁴⁹ and in Germany in exceptional cases.¹⁵⁰

In England and Wales, the Criminal Justice Act of 2003 introduced "conditional cautioning" to add the bite of a task or consequence to traditional police cautioning that only resulted in official documentation about the offense and offender.¹⁵¹ Although it was first employed by the

conditional disposals are not used for crimes of violence in Sweden or for petty theft and marijuana possession in Germany. See WADE, *The Power to Decide*, *supra* note 132, at 71 (listing uses of the conditional disposal in England and Wales, France, Germany, the Netherlands, Poland, and Sweden). It should be noted that data was not available for Poland or England and Wales, and the data from the Netherlands was only for the *transactie*.

143. Code for Crown Prosecutors, 2010, § 7.1–7.4.

144. See C. PR. PÉN., *supra* note 128, arts. 41-1–40-3, 389, 706–72 (setting out the way in which the conditional disposal operates in the French system).

145. See WETBOEK VAN STRAFRECHT [SR] [CRIMINAL CODE] art. 74c (Neth.) (stating conditions under which the conditional disposal may be used).

146. See KODEKS POSTĘPOWANIA KARNEGO [K.P.K.] [CODE OF CRIMINAL PROCEDURE] art. 67 (Pol.) [hereinafter K.P.K.] (providing for conditional disposal).

147. STPO, *supra* note 72, § 153a.

148. See, e.g., Elsner & Peters, *German Criminal Justice System*, *supra* note 140, at 221–22 (describing the German conditional disposal).

149. C. PR. PÉN., *supra* note 128, art. 41-1; see also WADE, *The Power to Decide*, *supra* note 132, at 71, 125 (describing how the *médiation pénale* can be used for recidivists).

150. See WADE, *The Power to Decide*, *supra* note 132, at 71, 125 (noting that a conditional disposal is available for all offenses but is more frequently used for traffic offenses, minor violent offenses, minor property offenses, and first-time offenders).

151. See Criminal Justice Act, 2003, c. 44, pt. 3 (Eng.) (outlining the conditional caution option and the requirements that must be satisfied).

police alone, the conditional caution must now be exercised jointly with the British prosecution service.¹⁵² The judiciary is not involved in the cautioning process, but this case-ending still carries the stigma of a criminal record. In France, prosecutors were authorized to divert addicts to treatment three decades ago, and they have been amassing powers of conditional disposal ever since, particularly during the 1990s when the legal system embarked upon the *troisième voie* (the third way).¹⁵³ By issuing a formal warning known as a *rappel a loi*, French prosecutors can independently order the suspect to perform any number of actions, such as fulfilling a previously imposed duty (e.g., spousal or child support payments), compensating the victim for the harm caused, or making efforts to improve his employment status.¹⁵⁴ With court approval, French prosecutors can also refer the case to a community justice center (*maison de justice et du droit*) for mediation¹⁵⁵ or impose a punishment via a *composition pénale*.¹⁵⁶ All such disposals are noted in official records, with a *composition pénale* recorded in the criminal register as well.¹⁵⁷

In the mid-1970s, the German prosecution service was empowered to impose nonpunitive fines (*Geldbußen*) and other conditions in low-level cases where the suspect is deemed to have minor guilt.¹⁵⁸ The power to refer suspects to mediation was introduced more recently as increased political attention was paid to victims' rights issues.¹⁵⁹ These disposals are contingent upon court approval and are often pursuant to guidelines issued by the Ministry of Justice for specific crimes like shop-lifting and drug

152. See Code for Crown Prosecutors, 2010, § 7.1–7.8 (detailing the prosecutor's role in the conditional caution process).

153. See Aubusson de Cavarlay, *French Criminal Justice System*, *supra* note 134, at 185 (describing "a period of experimenting with disposals, known as alternative proceedings, which produced a rapid succession of legislative reforms starting in 1993").

154. *Id.* at 193.

155. *Id.* at 194.

156. *Id.* at 191.

157. See WADE, *The Power to Decide*, *supra* note 132, at 70 (noting that conditional disposals in France, Germany, and the Netherlands are recorded in the public prosecutor service register, and the *composition pénale* is recorded in the criminal register).

158. See Albrecht, *Criminal Prosecution*, *supra* note 135, at 247 (stating that German prosecutors are authorized to dismiss cases of minor guilt if the offender satisfies certain conditions such as fines, community service, compensation to the victim, and/or maintenance duties).

159. See Elsner & Peters, *German Criminal Justice System*, *supra* note 140, at 207, 234 (noting that the Victim's Rights Reform Act established mediation as a possible case-ending procedure).

possession.¹⁶⁰ Since Poland's criminal procedure reforms of 1997, a conditional disposal has been subject to relatively stringent judicial control, making it a less attractive case-ending option.¹⁶¹ Likewise, Polish prosecutors must apply for mediation through a separate court procedure.¹⁶²

Over several decades, the traditional power of Dutch prosecutors to issue a reprimand or waive a prosecution conditionally was flanked and eventually overshadowed by the case-ending option known as the *transactie*.¹⁶³ In particular, a political realization of the high rate of public interest drops prompted a major policy shift in the Netherlands during the 1980s, with prosecutors instructed to use the *transactie* whenever possible to ensure that suspects receive some response by the criminal justice system.¹⁶⁴ At the same time, the theoretical basis for prosecutorial discretion, the principle of opportunity, was reinterpreted toward a presumption in favor of court proceedings absent some legitimate grounds to forego prosecution.¹⁶⁵ Recently, however, a new case-ending option (the *strafbeschikking*, discussed below) was introduced by Dutch lawmakers, signaling the beginning of the end for the *transactie*, which should be phased out entirely in the next few years.¹⁶⁶

160. See Albrecht, *Criminal Prosecution*, *supra* note 135, at 251 (stating prosecutors have to follow directives issued by their superiors that include general guidelines and directives aimed at individual cases). For an interesting exploration of prosecutorial decisions and their effects in different contexts relating to serious crime cases, see Shawn Marie Boyne, *Uncertainty and the Search for Truth at Trial: Defining Prosecutorial "Objectivity" in German Sexual Assault Cases*, 67 WASH. & LEE L. REV. 1287 (2010).

161. See Bulenda et al., *Polish Criminal Justice System*, *supra* note 136, at 263 (stating that prosecutors have to acquire approval from the court).

162. See K.P.K., *supra* note 146, art. 23a (describing the process of mediation).

163. See TAK, DUTCH CRIMINAL JUSTICE SYSTEM, *supra* note 141, at 53–54 (describing the process of transaction, or *transactie*, whereby the offender pays a fine in order to avoid further prosecution and a trial).

164. See *id.* (noting extension of the *transactie* from misdemeanors to crimes with a prison sentence of less than six years, which encompasses ninety percent of all crimes under the Dutch Criminal Code).

165. See Blom & Smit, *Dutch Justice System*, *supra* note 133, at 237, 246 (describing change and its role in the decline of prosecutorial drops).

166. See *id.* at 253 (noting that the *strafbeschikking* will replace the *transactie* and that there will be a period of overlap); Peter J.P. Tak, *The Criminal Justice System in the Netherlands*, in 6 STRUCTURES OF EUROPEAN CRIMINAL JUSTICE part II.B.3 (Ulrich Sieber & Marianne Wade eds., Düncker & Humblodt forthcoming) [hereinafter Tak, *Criminal Justice System in the Netherlands*] (same).

d. Penal Order

The case-ending categorized as a penal order typically involves a court judgment, but one so strongly based on information provided by the prosecution service and so rarely rejected that it is properly considered a prosecutorial case-ending. In its conventional form, a penal order is requested by the prosecution through a standardized application form containing a brief summary and a suggested punishment, accompanied by the government's case file. Based upon the written information, the court either accepts the prosecution's request or rejects it outright, with the latter triggering the traditional process and a full trial. When the application is approved, as usually occurs, the court issues a penal order to the accused informing him of the judgment and the resulting punishment, as well as the time period in which he may formally object and thereby receive a standard trial. If the accused does not object within the stipulated period—seven days in Poland,¹⁶⁷ for instance, and two weeks in Germany¹⁶⁸—a conviction ensues, and the punishment is imposed, typically resulting in a criminal record. In practice, sanctions are limited to fines or, in a small number of cases, (suspended) short-term sentences. Although this option is available for recidivists and can be employed for more serious offenses than those dealt with by conditional disposals, penal orders are used for minor acts of violence, low-level property crimes, petty theft, marijuana possession, and even traffic offenses.

This case-ending is found in France,¹⁶⁹ Germany,¹⁷⁰ Poland,¹⁷¹ Sweden,¹⁷² and now the Netherlands.¹⁷³ The German penal order

167. See K.P.K., *supra* note 146, art. 506 §1 (providing that defendant has seven days after receiving a penal order to object).

168. See STPO, *supra* note 72, § 410 ("Within two weeks following service of the penal order the defendant may lodge an objection against the penal order at the court which issued it, either in writing or orally to be recorded by the registry.").

169. See C. PR. PÉN., *supra* note 128, arts. 524–528-2 (detailing the French penal order process).

170. STPO, *supra* note 72, §§ 407–12.

171. See K.P.K., *supra* note 146, arts. 500–02 (describing the procedure for the Polish penal order proceedings). No data is available for the use of penal orders in Poland. WADE, *The Power to Decide*, *supra* note 132, at 77.

172. See RB, *supra* note 131, at 48:1–12 (describing the Swedish procedure for a penal order called a summary punishment by fine or *strafföreläggande*).

173. See *Wet OM-afdoeing* [Law on Prosecutorial Case-Ending Decisions], <http://www.rechtspraak.nl/Actualiteiten/Themadossiers/Wet+OM-afdoening.htm> (last visited Nov. 17, 2010) (describing the system in the Netherlands) (on file with the Washington and Lee Law Review).

(*Strafbefehl*) has been particularly influential across Europe and has served as a model for other nations.¹⁷⁴ As mentioned, some systems may require court review and approval, although this is often pro forma, with the prosecutor acting as a veritable judge before the judge. The penal order in Sweden, however, literally removes the court from the process, giving prosecutors independent power to impose convictions and sanctions.¹⁷⁵ Using this case-ending, known as the *strafföreläggande*, Swedish prosecutors issue a signed order to the suspect informing him that punishment is to be imposed and stating the relevant details about the offense, the governing law, and the intended sanction.¹⁷⁶ It also describes how the individual can agree to the order and what action he must take, such as paying a fine.¹⁷⁷ Upon acceptance, the suspect becomes a convict with a criminal record.¹⁷⁸

The *strafföreläggande* has always been something of an anomaly in Europe, having been introduced in 1948 and expanding in scope ever since.¹⁷⁹ In 2007, however, the Netherlands adopted a nearly identical form of penal order, the so-called *strafbeschikking*, for which the prosecutor is expected to exercise true adjudicatory power in a wide range of cases.¹⁸⁰ This substitute for the *transactie* was spurred by doubts about whether Dutch conditional disposals complied with human rights standards. Cases heard by the European Court of Justice relating to *ne bis in idem* (double jeopardy) highlighted problems with such measures, in particular, whether

174. For instance, the German penal order served as a model for Croatia. See ZAKON O KRIVICNOM POSTUPKU [Criminal Procedure Act] arts. 465–69 (Croat.) (describing proceedings for an issuance of a penal order).

175. See Zila, *Swedish Criminal Justice System*, *supra* note 138, at 292 ("Any approving of the penal order by a court is not required.").

176. RB, *supra* note 131, 48:6.

177. See *id.* at 48:9 (stating that the offender consents to the order by signing a declaration admitting to the commission of the act, accepting the punishment, and sending the declaration to the proper authorities).

178. See *id.* at 48:3 ("Orders consented to by the suspect shall have the same effect as a judgment which has become conclusive."); see also Zila, *Swedish Criminal Justice System*, *supra* note 138, at 292 ("Thus, the penal order represents, if accepted by the suspect, a final decision on criminal responsibility and, as such, it is recorded in the criminal register.").

179. See generally Josef Zila, *Prosecutorial Powers and Policy-Making in Sweden and the Other Nordic Countries*, in THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE Part IV.C (Erik Luna & Marianne Wade eds., forthcoming 2011) [hereinafter Zila, *Prosecutorial Powers*].

180. SV, *supra* note 130, arts. 257a-h; see also Blom & Smit, *Dutch Justice System*, *supra* note 133, at 253 ("[T]he *strafbeschikking* is a formal sanction which is not imposed by a judge but by the prosecutor. There is no court involvement at all.").

they should be considered judicial decisions that impose punishment, thereby precluding prosecution in a sister nation.¹⁸¹ The Netherlands sought to avoid any potential problems by enacting the *strafbeschikking*, which will enable prosecutors to convict and sanction without court involvement.¹⁸² Like the *transactie*, this option will be available for offenses punishable by up to six years imprisonment,¹⁸³ providing the Dutch prosecutor tremendous authority to establish guilt and impose punishment without the necessity of even cursory oversight by a court, let alone its judgment.¹⁸⁴

e. Negotiated Case Settlements

In a negotiated case settlement, the conviction and the sanction imposed are the subject of an agreement between the prosecution and defense. During an abbreviated hearing, the parties present selected evidence in support of the proposed resolution, leading to a court decision on the defendant's guilt and punishment. The process is available for serious offenses (e.g., Polish crimes carrying up to ten years imprisonment), with the defendant receiving a criminal record and possibly a term of incarceration. Despite the fact that negotiated settlements have been around for quite some time, official authorization of the process is a relatively new phenomenon in European criminal justice systems. As mentioned earlier, this form of case-ending has existed in Germany since the 1970s, though the practice was originally covert. In 2005, negotiated settlements finally received the approval of the Federal Court of Justice

181. See, e.g., Angelina Tchobadjiyska, *Joint Cases C-187/01 and C-385/01 Gözütok and Brügge* (E.C.J. February 11, 2003) 2003 E.C.R. I-1345, 10 COLUM. J. EUR. L. 549, 555–58 (2004) (discussing the European Court of Justice's expansive interpretation of the *ne bis in idem* principle in the *Gözütok* and *Brügge* cases).

182. The *strafbeschikking* is expected to come into full force within the next few years. *Supra* note 166 and accompanying text.

183. Tak, *Criminal Justice System in the Netherlands*, *supra* note 166, at Part II.B.3.

184. For a detailed exploration of penal orders as well as of their relationships to negotiated case-endings, see Stephen C. Thaman, *The Penal Order: Prosecutorial Sentencing as a Model For Criminal Justice Reform?*, in *THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE* (Erik Luna & Marianne Wade eds., forthcoming 2011).

(*Bundesgerichtshof*),¹⁸⁵ and just last year, the German legislature authorized the practice under certain circumstances.¹⁸⁶

Negotiated case settlements also exist in England and Wales, which is unsurprising for Europe's bastion of common law, party-led adversarialism. The history of British plea bargaining is long but also uncharted. This option only obtained express statutory recognition in 2003.¹⁸⁷ Likewise, negotiated case settlements are recent legislative introductions in France¹⁸⁸ and Poland.¹⁸⁹ With the intent of saving time and resources, France adopted the so-called "appearance before a court after prior admission of guilt" (*comparution sur reconnaissance préalable de culpabilité*)¹⁹⁰ for crimes punishable by up to five years imprisonment.¹⁹¹ The French criminal procedure code requires prosecutors to develop an individualized punishment for a defendant, with terms of incarceration capped at half the statutorily prescribed sentence and no more than one year imprisonment.¹⁹² The defendant must receive the proposal in the presence of his lawyer, and if the parties reach an agreement, the court may either accept or reject the proposed resolution.¹⁹³

In Poland, two forms of negotiated case settlements are available: a prosecutor's request for passing judgement without trial (*skazania bez rozprawy*)¹⁹⁴ and a defendant's voluntary submission to punishment

185. See Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 3, 2005, 50 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN [BGHSt] 40 (Ger.) (approving negotiated case settlements).

186. See StPO, *supra* note 72, § 257c (providing statutory authorization for negotiated case settlement); see also Bundesministerium der Justiz, "Bundestag verabschiedet Gesetzentwurf zur Verständigung in Strafverfahren," May 28, 2009, available at http://www.bmj.bund.de/enid/ce14742dd2f053fd2fddde272e982bba,c25684636f6e5f6964092d0935393333093a095f7472636964092d0932343736/Pressestelle/Pressemitteilungen_58.html (press release of the German Federal Ministry discussing new law). All papers relating to the legislative process are available at <http://gesetzgebung.beck.de/node/181982>.

187. See Criminal Justice Act, 2003, c. 44, sch. 3 (Eng.) (providing statutory authorization for negotiated case settlement).

188. See C. PR. PÉN., *supra* note 128, arts. 495-7-495-16 (providing for negotiated case settlement).

189. See K.P.K., *supra* note 146, arts. 335, 387 (stating the procedures for negotiated case settlements); Bulenda et al., *Polish Criminal Justice System*, *supra* note 136, at 264-65 (detailing the two types of negotiated case settlements under the Polish system).

190. C. PR. PÉN., *supra* note 128, arts. 495-7-495-16.

191. *Id.* art. 495-7.

192. *Id.* art. 495-8.

193. *Id.* art. 495-9.

194. K.P.K., *supra* note 146, art. 335; see also Bulenda et al., *Polish Criminal Justice System*, *supra* note 136, at 264 (stating that the *skazania bez rozprawy* involves an offender

(*dobrowolnego poddania się karze*).¹⁹⁵ As their names indicate, these proceedings involve either a prosecutorial proposal for the court to sentence a defendant without carrying out a trial or a defense application to receive a specific punishment for a given crime, both being available for offenses punishable by up to ten years imprisonment.¹⁹⁶ The accused must always be represented by legal counsel during the court hearing, which generally involves a brief description of the case facts by the applicant and the agreement of the nonmoving party to the proposed resolution.¹⁹⁷

It should be noted that negotiated settlements in most European nations cannot be traced as a statistical matter because they are not formally recognized as a separate form of proceeding. Instead, the requisite procedural path for this case-ending is an official trial, albeit abbreviated and oriented toward a particular resolution. For this reason, negotiated settlements are subsumed within the data for cases taken to court in all countries except France and Poland, where they are registered as a special form of court proceeding. This has obvious ramifications for the analysis below.

2. Analysis of European Prosecution

In contrast to the conventional wisdom both here and abroad, the palette of options available to the European prosecutor is wide and varied, with the countries examined here featuring styles of prosecutorial adjudication in a number of case-ending decisions and related procedures. Prosecutors possess the classic option to drop a case on evidentiary or public interest grounds, effectively rendering a not guilty verdict. But they also maintain a range of powers to resolve cases on discretionary grounds *and* to impose a consequence upon a suspect they presume to be guilty. In essence, prosecutors judge an individual to be responsible and likely to be convicted at trial but circumvent the traditional court process, thereby adjudicating the case based on some evidence of culpability and inflicting a sanction of sorts. In certain cases, there is no legal finding of guilt and concomitant conviction, and thus no official stigma inflicted upon the suspect. In other cases, the individual is in fact convicted and punished for

agreeing to a prosecutor's request to enter a judgment without a trial).

195. K.P.K., *supra* note 146, art. 387; *see also* Bulenda et al., *Polish Criminal Justice System*, *supra* note 136, at 264–65 (describing the *dobrowolnego poddania się karze* whereby the accused requests the court to enter a judgment without hearing the evidence).

196. Bulenda et al., *Polish Criminal Justice System*, *supra* note 136, at 264–65.

197. K.P.K., *supra* note 146, art. 387.

a crime, which is reflected in official records. Where such case-endings are subject to judicial approval, prosecutors are engaged in effective adjudication and serve as a type of judge behind the judge. But where the decisions are made independently, the form of prosecutorial adjudication may involve far softer parameters than those used in court.

Table 1 summarizes much of the foregoing information on the availability of and requirements for each case-ending option. Figures 1–6 then provide the actual use of these case-ending options (in 2002 for Sweden and 2004 for the other nations), based on official data and a cross-analysis of official and internal prosecution statistics.¹⁹⁸ This information offers the most recent empirical insights into prosecutorial decision-making, given that very few jurisdictions regularly monitor prosecutors' work closely enough to provide official data on their case-ending decisions. Based upon the research detailed above, the latest edition of the *European Sourcebook*¹⁹⁹ sought to gather and present more detailed prosecution data. Unfortunately, the resulting statistics are not as comprehensive as those provided in the aforementioned six-country study, and the *European Sourcebook*'s approach is largely incompatible with the statistics presented here because it uses broader statistical categories and includes, for instance, cases involving unknown offenders. Moreover, the latest data stem from 2006 and 2007 and therefore do not reflect the recent Dutch and German legislative changes. Nonetheless, the statistics in the *European Sourcebook* provide a good overview of developments in the jurisdictions for which statistics are available, and most importantly, the results do not appear to contradict our analysis.²⁰⁰

198. The corresponding data for these figures can be found in Appendix 1, *infra*.

199. EUROPEAN SOURCEBOOK OF CRIME AND CRIMINAL JUSTICE STATISTICS (4th ed. 2010), available at http://www.europeansourcebook.org/ob285_full.pdf.

200. *Id.* at 127–62. The data from the *European Sourcebook* can be found in Appendix 2, *infra*.

Table 1: Availability and Requirements of Case-Endings^[a]

Country	Case-Ending Type	Available in Jurisdiction	Suspect: (1) Must Agree (2) Must Comply (3) May Reject	Court Approval Necessary (4) Court Decision	Used for More Serious Crimes and Recidivists ^[b]	Documented in Criminal Record (5) Internal Register	Possibility of Prison Sentence
England and Wales	Public Interest Drop	✓			✓	✓ ⁽⁵⁾	
	Conditional Disposal	✓	✓ ⁽¹⁾			✓	
	Penal Order	✓	✓ ⁽¹⁾	✓ ⁽⁴⁾	✓	✓	✓
	Negotiated Settlement						
France	Public Interest Drop	✓				✓ ⁽⁵⁾	
	Conditional Disposal	✓	✓ ^{(1,2,3)[c]}	✓ ^[d]	✓ ^[e]	✓ ⁽⁵⁾	
	Penal Order	✓	✓ ⁽³⁾	✓ ⁽⁴⁾	✓	✓	✓
	Negotiated Settlement	✓	✓ ⁽¹⁾	✓ ⁽⁴⁾		✓	
Germany	Public Interest Drop	✓		✓ ^[f]		✓ ⁽⁵⁾	
	Conditional Disposal	✓	✓ ⁽²⁾	✓ ^[f]	✓	✓ ⁽⁵⁾	✓
	Penal Order	✓	✓ ⁽³⁾	✓ ⁽⁴⁾	✓	✓	✓
	Negotiated Settlement	✓	✓ ⁽¹⁾	✓ ⁽⁴⁾		✓	
The Netherlands	Public Interest Drop	✓			✓	✓ ⁽⁵⁾	
	Conditional Disposal	✓	✓ ⁽²⁾		✓	✓ ⁽⁵⁾	✓
	Penal Order ^[g]	✓	✓ ⁽³⁾		✓	✓	
	Negotiated Settlement						
Poland	Public Interest Drop						
	Conditional Disposal	✓	✓ ⁽²⁾	✓	✓	✓ ⁽⁵⁾	✓
	Penal Order	✓	✓ ⁽³⁾	✓ ⁽⁴⁾	✓	✓	✓
	Negotiated Settlement	✓	✓ ⁽¹⁾	✓ ⁽⁴⁾		✓	
Sweden	Public Interest Drop	✓					
	Conditional Disposal						
	Penal Order	✓	✓ ⁽¹⁾		✓	✓	✓ ^[h]
	Negotiated Settlement						

[a] The table excludes simple drops and cases taken to court, which are available in all jurisdictions.

[b] What is theoretically allowed by the law may be far broader than actual practice.

[c] "Must Agree" applies to *mediation pénale* and *composition pénale*. "May Reject" applies to *rappel a loi*.

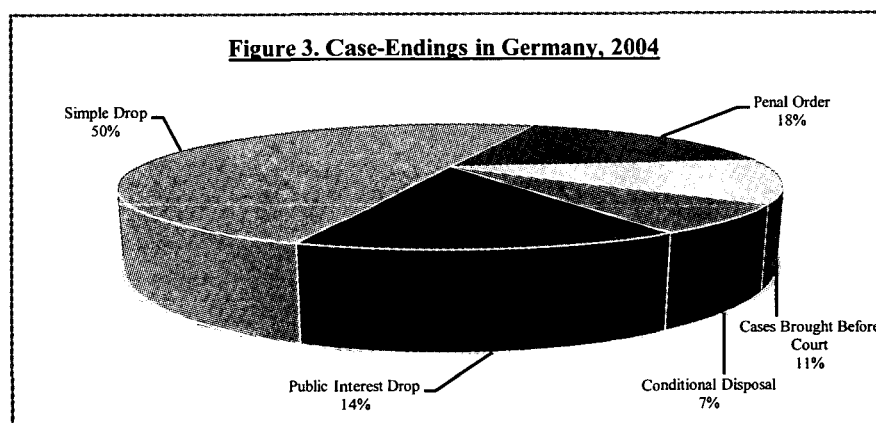
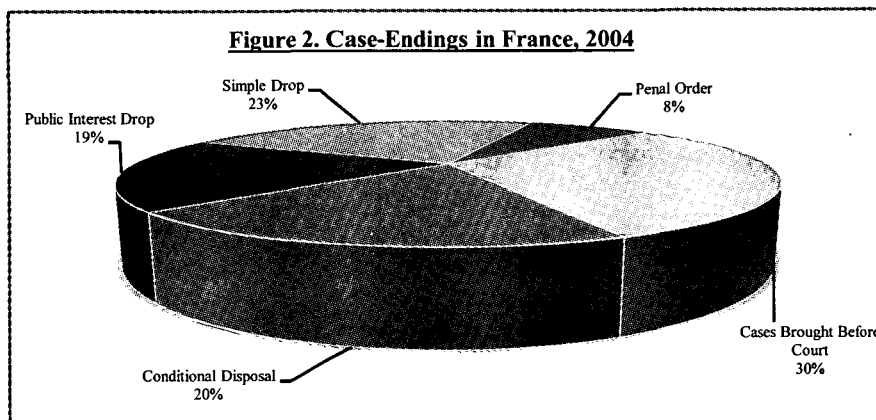
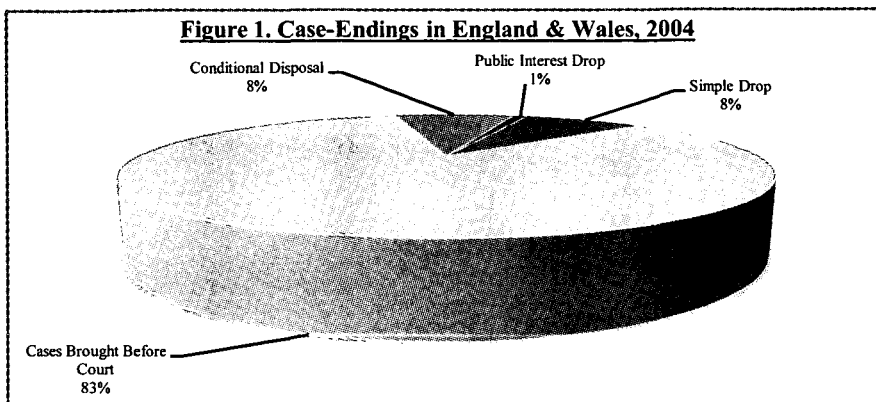
[d] "Court Approval" applies to *composition pénale*.

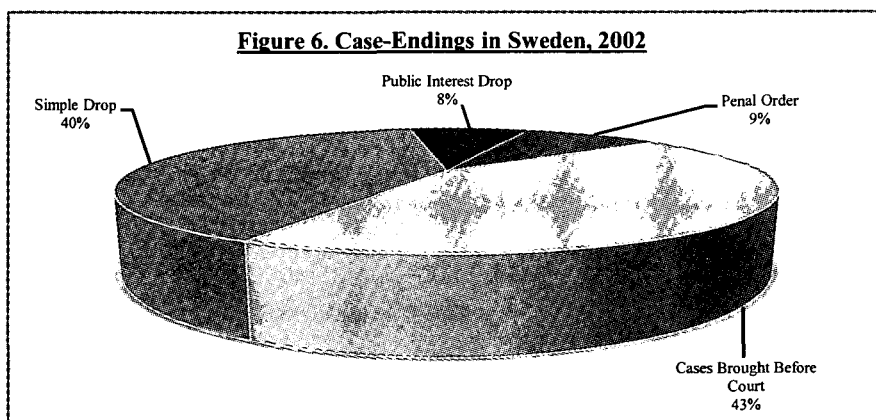
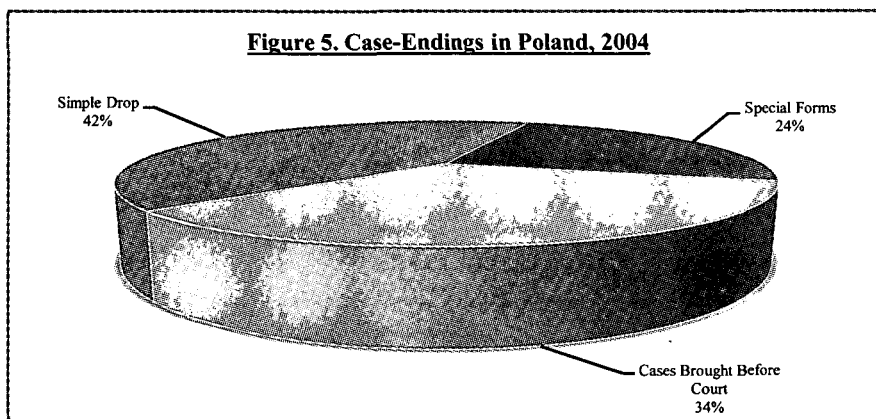
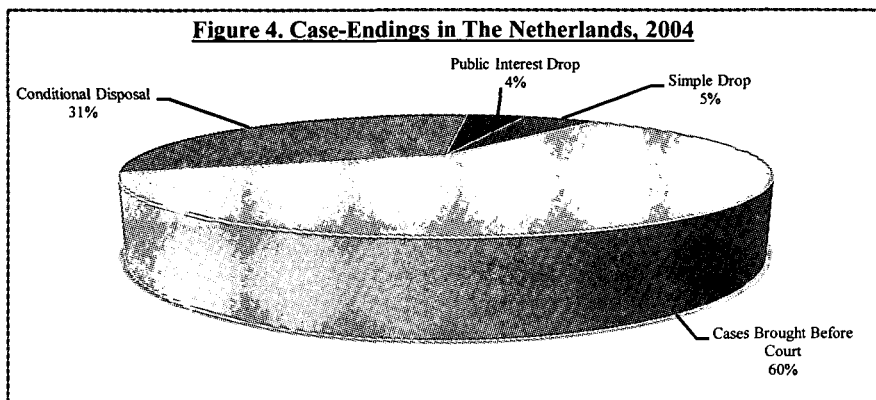
[e] *Composition pénale* and *mediation pénale* are possible for recidivists.

[f] Approval not necessary in petty cases.

[g] Dutch "penal order" (*strafbeschikking*) is too new for statistics to be available.

[h] The prison sentence for the Swedish "penal order" (*strafföreläggande*) is suspended.





Putting aside Poland for the moment, nations that rely upon full trial proceedings in a large proportion of cases use speedier formats, which are still profoundly influenced, if not essentially predetermined, by prosecutors. For instance, full trials in the Netherlands are based almost exclusively on written submissions—live witnesses are rarely heard and even complicated cases take only a few hours—with the court ultimately relying upon the dossier arranged by the prosecutor.²⁰¹ In England and Wales, most court cases are handled by summary or simplified processes, such as guilty plea proceedings negotiated by the prosecution. In contrast, France, Germany, and Sweden employ court proceedings in a minority of cases. A low proportion of trials might suggest that a given system is unable to deal with increasing caseloads, an idea that is supported by existing information. Although other reasons exist for the demise of the continental trial—for instance, the desire for diversionary measures that include victims—the general trend toward increasing prosecutorial power is clearly linked to an otherwise unmanageable criminal docket, with prosecutors across Europe facing caseloads sometimes above 1,000 cases per year.²⁰²

The system-overload argument becomes all the more persuasive when the figures are considered in relation to the proportion of cases receiving a simple drop. Those countries with a relatively low percentage of full court trials display the highest rates of cases being dropped for evidentiary reasons.²⁰³ To be sure, in every criminal process there will be some number of cases that must be rejected for technical deficiencies or insufficient evidence. But the growth in this category indicates a larger systemic dilemma—too many crimes and suspects, not enough time and resources, and an unspoken decision to forego cases of modest value—all hidden within a historically accepted case resolution. By comparison, Dutch prosecutors need not scuttle such cases *en masse* and have low rates of simple drops due to the broad availability of time-saving conditional disposals (which only impose fines) and the relative ease of court processes in the Netherlands.

201. See TAK, DUTCH CRIMINAL JUSTICE SYSTEM, *supra* note 141, at 62 (describing the trial phase and its heavy reliance on written statements by witnesses that expedite the trial).

202. See Boyne, Varieties of Practice, *supra* note 120, at 61 (noting that prosecutors in the German lower court, *Amtsgericht*, handle over 1,000 cases a year); see also Shawn Marie Boyne, *Is the Journey from the In-Box to the Out-Box a Straight Line?: The Drive for Efficiency and the Prosecution of Low-Level Criminality in Germany*, in THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE (Erik Luna & Marianne Wade eds., forthcoming 2011) (describing the tension between caseload pressures and the legality principle, and its consequences for German prosecutors).

203. Poland is the exception.

The rate of public interest drops is also higher in the countries showing signs of case overload, although this option is not highly regarded in many European criminal justice systems. As mentioned, even the historic discretion of Dutch prosecutors to reject cases as unworthy of sanctions has been effectively curtailed over the past decade in response to political pressure, with only about five percent of cases now dropped on public interest grounds.²⁰⁴ The more (presumably) guilty individuals that are allowed to escape any consequence, even in cases of petty offenses,²⁰⁵ the less a criminal justice system will be viewed as being both effective and legitimate. This is particularly true in nations subscribing to the legality principle, where a high rate of public interest drops indicates a criminal justice system capitulating to pressures outside of the legal framework.

It should also be noted that the prosecution's screening process and its use of case drops are necessarily affected by the powers accorded the police force, which vary from nation to nation. For this reason, the official statistics may not represent the total number of cases dropped in specific countries. For instance, the British police have a long tradition of independently ending cases on both evidentiary and public interest grounds,²⁰⁶ while police officers in the Netherlands are delegated certain case disposal powers by the prosecution service.²⁰⁷ Both police cultures are therefore conducive to case drops without the involvement of prosecutors, and, in fact, officers are expected to serve as a type of filter. Such action is formally impossible in the French²⁰⁸ and German²⁰⁹ systems, however, where the police are under an absolute requirement to pass cases on to the prosecution service.

Statistics on conditional disposals demonstrate that the Netherlands and, to some extent, France entrust prosecutors with dispositive power over a large number of cases. Other jurisdictions are less inclined to leave such decisions entirely in the hands of the prosecution; indeed, German

204. TAK, *DUTCH CRIMINAL JUSTICE SYSTEM*, *supra* note 141, at 53.

205. WADE, *The Power to Decide*, *supra* note 132, at 67.

206. See Lewis, *The Prosecution*, *supra* note 133, at 151, 167 (noting the complete discretion of police to drop a case).

207. Blom & Smit, *Dutch Justice System*, *supra* note 133, at 243.

208. See Aubusson de Cavarlay, *French Criminal Justice System*, *supra* note 134, at 198 ("According to French law, judicial police officers at all levels are never allowed to decide independently of the track to be followed by a criminal offence once it is reported.").

209. See Elsner & Peters, *German Criminal Justice System*, *supra* note 140, at 224 ("German criminal procedure does not include an option for the police to end cases independently.").

prosecutors are required to seek court approval in all but the most minor cases.²¹⁰ Nonetheless, authorization is routinely given, meaning that prosecutors effectively determine the appropriate reaction in a significant proportion of cases. Likewise, requests for penal orders are almost always accepted by the courts, with any real scrutiny left to the prosecutor. These case-endings thus provide the prosecution de facto adjudicative powers to convict a suspect and impose a fine or even a short term of incarceration.²¹¹ In contrast, the Swedish *strafföreläggande*²¹² and the Dutch *strafbeschikking*²¹³ remove the court from the process, providing the prosecution with de jure authority to convict and sentence. Arguably, the British prosecution service also has actual adjudicative powers, in cooperation with the police, by issuing cautions to criminal suspects.²¹⁴ Although the judiciary is not involved in the cautioning process, an official record is kept and a punishment associated with an admission of guilt can be imposed, thereby carrying the official stigma of the British adversarial system.

In several ways, conditional disposals and penal orders are the most important case-endings in Europe. They reflect the extent to which European criminal justice systems now allow the prosecution to determine the appropriate state reaction for those suspects believed to be guilty, whether its power is de facto or de jure. When these case-endings are viewed as forms of prosecutorial adjudication, it becomes clear that even the iconic continental criminal justice systems—those of Germany and France—rely heavily upon the discretion of the prosecution services and their effective or actual adjudication of cases. German prosecutors determine or strongly influence the vast majority of resolutions, with truly independent court adjudication occurring in less than one-fifth of all cases. In France, prosecutors make nearly half of all case-ending decisions resulting in a conviction.²¹⁵

210. STPO, *supra* note 72, § 153.

211. See WADE, *The Power to Decide*, *supra* note 132, at 75 (stating that because courts rarely reject penal order applications, the prosecutors are "effectively pre-forming court decisions").

212. *Supra* note 172 and accompanying text.

213. *Supra* note 180 and accompanying text.

214. See Lewis, *The Prosecution*, *supra* note 133, at 166 (stating that the Crown Prosecution Service advises the police on whether a caution should be offered).

215. For an account of the shift of power from the judge d'instruction to the prosecutor, providing another context of the rise of prosecutorial power, see Jacqueline Hodgson, *Guilty Pleas and the Changing Role of the Prosecutor in French Criminal Justice*, in THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE Part III (Erik Luna & Marianne Wade eds.,

The most intriguing development may be the new penal order process in the Netherlands. Like its Swedish analogue, the Dutch *strafbeschikking* amounts to true prosecutorial adjudication, where the prosecutor is not merely the judge before the judge, so to speak, but instead the sole judge of a case. But while the *strafföreläggande* is a relatively obscure mechanism employed in less than ten percent of all cases in Sweden, the *strafbeschikking* is intended to eventually replace the *transactie*, which is used in roughly one-third of all cases in the Netherlands. Moreover, while the Swedish criminal justice system has had little impact outside of Scandinavia, Dutch reforms have historically had great influence in European policy debates. Given that the powers provided to prosecutors via the *strafbeschikking* have traditionally been reserved for judges in continental systems, it will be interesting to see whether other countries will follow the Netherlands' lead.

Today, however, the most discussed form of case-ending is the negotiated settlement. As mentioned, guilty plea proceedings brokered by prosecutors constitute a high proportion of criminal actions in England and Wales. In 2004, two-thirds of all cases before Crown Courts and three-quarters of all cases before Magistrates' Courts were resolved by guilty pleas.²¹⁶ A burgeoning British interest in negotiated settlements thus might be based upon the sheer number of crimes involved, as well as lingering questions about the relatively young Crown Prosecution Service. In turn, some Swedish prosecutors have expressed dissatisfaction with their lack of negotiating authority,²¹⁷ although it remains to be seen whether this will lead to an increase in their already considerable powers. Negotiated settlements in Germany have received considerable attention in certain classes of crime—such as highly complex cases of economic wrongdoing—and the number of French cases using such proceedings has grown in recent years. Nonetheless, the debate in these countries seems to be more academic and theoretical than practical.

Presently, little is known about the actual use of negotiated settlements in France, besides the fact that they have been met with judicial resistance and are employed in only a small proportion of cases.²¹⁸ The role of

forthcoming 2011) [hereinafter Hodgson, *Guilty Pleas*].

216. HOME OFFICE, CRIMINAL STATISTICS 2004: ENGLAND AND WALES tbls.2.2, 2.10, available at www.homeoffice.gov.uk/rds/pdfs05/hosb1905.pdf.

217. See generally Göran Berling, *The Criminal Justice System in Sweden*, in 4 STRUCTURES OF EUROPEAN CRIMINAL JUSTICE (Ulrich Sieber & Marianne Wade eds., Düncker & Humblodt forthcoming).

218. Bruno Aubusson de Cavarlay, *Questionnaires of the Second Project Wave*,

German prosecutors in negotiated settlements also remains unclear, given that the practice only recently received judicial and legislative authorization.²¹⁹ Moreover, negotiated settlements in Germany require the prosecution to take the cases to court for trial,²²⁰ meaning that this approach will constitute some fraction of an already small proportion of all case-endings.²²¹ What makes negotiated settlements controversial in France and Germany is not that they represent a disproportionate number of cases, however, or that they might be used in some dastardly manner, but instead the fundamental challenge they pose to these nations' criminal justice systems. The notion that a conviction and resulting punishment are the product of negotiation strikes many as antithetical to the core principles of continental jurisprudence.

From a distance, negotiated settlements may seem familiar to U.S. practitioners and scholars, but the actual practice in Europe demonstrates significant differences from American-style plea bargaining. The process is not "a glorious Turkish rug market,"²²² to use Professor Langbein's phrase, where the parties furiously haggle over an agreeable crime and punishment, nor does it appear to have the coercive character of plea bargaining in the United States. There is no evidence that prosecutors threaten harsher consequences if the parties are unable to reach a settlement; instead, prosecutors simply lodge the basic charges irrespective of the failed negotiations. Indeed, settlement discussions may occur between the court and defense, in contrast to the prosecution-centric American approach. Moreover, unlike the courtroom process for guilty pleas in the United States—which typically involves a short colloquy without any evidentiary presentation—in Europe the parties actually introduce (selected) evidence in court as a means of bolstering the proposed settlement and obtaining approval by the judge. In fact, the German court decision that upheld negotiated settlements also specified that this type of case-ending must take place within the main trial stage.²²³ Despite these differences, however, the

<http://www.kriminologie.uni-goettingen.de/pps> (last visited Sept. 15, 2010) (on file with the Washington and Lee Law Review); Hodgson, *Guilty Pleas*, *supra* note 215, at pt. I.C.

219. *Supra* note 185 and accompanying text.

220. *See supra* note 185 and accompanying text (discussing Germany's use of negotiated case settlements).

221. *See infra* Appendices 1, 2 (providing statistics on case disposals in Germany).

222. John H. Langbein, *On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trial*, 15 HARV. J.L. & PUB. POL'Y 119, 125 (1992).

223. *Supra* note 185 and accompanying text.

European negotiated settlement remains a center of attention on both sides of the Atlantic.

This brings us to the intriguing state of affairs in Poland. In 2002, lawmakers attempted to curtail the power of the ill-reputed prosecution service, seeking to ensure that courts had exclusive control over criminal justice. This major criminal procedure reform, which was the third in less than a decade, had the potential to make Poland an outlier in an otherwise clear trend toward greater prosecutorial power across Europe. The effort to revert to the court-controlled continental model of the past appears to have failed, however, as suggested by the vast increase in the use of case-ending procedures featuring prosecutorial power. Poland has a high rate of simple drops, for instance, which may mask prosecutorial decisions to ignore cases on policy rather than evidentiary grounds. Moreover, negotiated settlements—in the form of a defendant's voluntary submission to punishment or a prosecutor's application for a conviction without a full trial—have become increasingly popular in Poland, rising from less than eight percent of all adjudicated cases in 2002 and 2003, to a quarter of cases in 2004 and more than forty percent of cases in 2005.²²⁴ A substantial proportion of court cases are thereby premised upon party negotiations, which are presented by the prosecution or defense for judicial approval and consented to by the nonmoving party.

The driving force behind this shift is not complicated. A criminal justice system might be analogized to a balloon—if you squeeze it in one area, another will expand. By constricting the options available to prosecutors, Polish policymakers may have inadvertently encouraged more case drops and made negotiated settlements the only remaining method to effectively punish criminal suspects absent a full trial, with both paths relied upon to save time and resources in a highly overloaded system.²²⁵ Ironically, then, the attempt to transfer power from prosecutors to the courts seems to have backfired. Judicial review has been eliminated in a significant number of cases via simple drops. Likewise, negotiated

224. MINISTERSTWO SPRAWIEDLIWOŚCI, INFORMACJA STATYSTYCZNA O DZIAŁALNOŚCI POWSZECHNYCH JEDNOSTEK ORGANIZACYJNYCH PROKURATURY W 2005 ROKU (Warszawa 2005) [MINISTRY OF JUSTICE, STATISTICAL INFORMATION ON THE ACTIVITY OF CIVIL PROSECUTORS IN 2005 (Warsaw 2005)], translated by Professor Antoni Bojańczyk, Chair of Criminal Law, Faculty of Law and Admin., Univ. of Stefan Cardinal Wyszyński, Warsaw, Poland.

225. See Bulenda et al., *Polish Criminal Justice System*, *supra* note 136, at 264–65 (stating that between 2000 and 2004, the number of requests for a "voluntary submission to penalty" increased over four times, and the number of a "prosecutor's request for passing a judgment without conducting a trial" increased twelve times).

settlements have been transformed into a key feature of the Polish criminal justice system, with the prosecution effectively determining the outcome in serious cases that would not be amenable to conditional disposals or penal orders. Prosecutorial adjudication is now the norm in Poland, and the trend toward case-ending procedures without full trial appears to be spreading to other former communist nations.

III. Some Context

With the foregoing in mind, the range of case-ending options for European prosecutors seems to have a rough resemblance to those available to their American counterparts. Both groups decline or drop a substantial number of cases, either for evidentiary reasons or for lack of public interest.²²⁶ The various forms of conditional disposal seem somewhat comparable to American diversion schemes, which dispose of cases without criminal convictions so long as the defendant fulfills the stipulated obligations.²²⁷ As in Europe, if the defendant fails to meet the requirements, a prosecution may be instituted. A good analogy for the European penal order is a little more difficult to find, although the process in low-level American courts often becomes so standardized, with a widely understood "going rate" (i.e., punishment) for a given crime, that the resulting plea agreements may not be altogether different from penal orders.²²⁸ As noted, there are important differences between European negotiated case settlements and American plea bargains, but they do have enough in common as to be treated by scholars as members of the same species.

Moreover, the various forms of prosecutorial adjudication on both sides of the Atlantic may have at least one similar motivation—caseload pressure. Neither American prosecutors nor their European counterparts

226. See Michael Edmund O'Neill, *Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predictive Factors*, 41 AM. CRIM. L. REV. 1439, 1439–41 (2004) (analyzing the factors that go into American federal prosecutorial decision-making on whether to pursue or disregard a case); Michael Edmund O'Neill, *When Prosecutors Don't: Trends in Federal Prosecutorial Declinations*, 79 NOTRE DAME L. REV. 221, 221–26 (2003) (detailing American federal prosecutorial discretion and the reasons prosecutors decide not to proceed with a case).

227. NAT'L DIST. ATTORNEYS ASS'N, NAT'L PROSECUTION STANDARDS 152 (1977); 4 LAFAYE ET AL., CRIMINAL PROCEDURE § 13.1(d) (3d ed. 2007).

228. See MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 187–89 (1992) (noting that the plea bargaining system in American lower courts involves established sentences and minor negotiation).

can try all of the cases on their respective dockets, requiring the use of discretion and alternative case-ending mechanisms. Sometimes the adjudication is de jure, when an American district attorney dismisses a case, for instance, or a Dutch prosecutor uses the *strafbeschikking* procedure. Other times, prosecutors engage in de facto adjudication, with judges "rubber stamping" the prosecutorial application,²²⁹ giving it the formal license of the court. As such, the prosecutor is the court, for all intents and purposes, leading the judge's hand in signing the judgment.²³⁰

One basic conclusion is that prosecutorial adjudication exists in America and Europe, and the phenomenon goes beyond plea bargaining. But like Professor Langer's insightful multi-country study,²³¹ our review only supports a "weak" hypothesis, premised on surface similarities and trends. A stronger statement—for example, that prosecutorial adjudication in Europe is virtually identical to that in the United States—cannot be sustained once the larger context is taken into consideration. Although it is difficult to succinctly and accurately describe the American prosecutor, given the sheer number and diversity of prosecution offices,²³² some admittedly broad points might be made.

For instance, aspirational language may describe the prosecutorial function as an impartial "minister of justice,"²³³ but there should be little

229. See generally Report by Jörg-Martin Jehle, *Discretionary Powers of Public Prosecution: Opportunity or Legal Principle—Advantages and Disadvantages*, Conference of Prosecutors General, Conference of Prosecutors General of Europe, 5th Session (May 2004) at 8 [hereinafter Report by Jörg-Martin Jehle], available at http://www.coe.int/t/dghl/cooperation/ccpe/conferences/cpge/2004/RapportJehle_en.pdf; Erik Luna, *Gridland: An Allegorical Critique of Federal Sentencing*, 96 J. CRIM. L. & CRIMINOLOGY 25 (2005) [hereinafter Luna, *Gridland*].

230. WADE, *The Power to Decide*, *supra* note 132, at 80. The Italian system features a conscious attempt to avoid this de facto shift in power by leaving dismissing decisions in the hands of the judiciary. Caianiello, *The Italian Public Prosecutor*, *supra* note 53, at pt. IV.B.1. But see *id.* at pt. IV.B.2 (noting the presence of bargaining and accelerated proceedings within the Italian system).

231. See *supra* notes 52–54 and accompanying text (discussing study).

232. See, e.g., STEVEN W. PERRY, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PROSECUTORS IN STATE COURTS, 2005, at 1 (2006), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/psc05.pdf> (providing statistics on U.S. state prosecutors' offices).

233. MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2007); see also A.B.A. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION Standard 3-1.2 (1993) (describing the prosecutor as "an administrator of justice, an advocate, and an officer of the court; [who] must exercise sound discretion in the performance of his or her functions"). Though frequently employed in English language discussions, the term "minister of justice" is highly problematic. It is intended as shorthand for the more impartial role played by continental prosecutors and their position as representatives of the public

doubt that American prosecutors see themselves as advocates in a sometimes brutally adversarial process.²³⁴ Their role is not necessarily to find the truth²³⁵—that is the job of the trial court—but instead to marshal the evidence and arguments that support a conviction and sentence. The American legal system and its so-called "battle model" assume that the truth will be uncovered and justice achieved through a contest between adversaries, the prosecution and defense, as the judge and jury sift through opposing stories.

The adversarial role conception can be exacerbated by prosecutorial incentive structures. Typically, state attorneys general, district attorneys, county and city attorneys, and other chief prosecutors are elected officials. In the rough-and-tumble of American politics, a key factor in reelection is the number and rate of convictions and the aggregate amount of punishment.²³⁶ Line attorneys have similar incentives within their offices, where prosecutors with the highest conviction and sentencing statistics are in the best position for career advancement.²³⁷ Although receiving an

interest. In Europe, however, the actual Minister of Justice is a politician and member of the executive branch, and thus not necessarily associated with impartiality at all.

234. See, e.g., KAGAN, *supra* note 21, at 61–96 (analyzing adversarialism in the American criminal justice system).

235. Johnson, *supra* note 21, at 263–64.

236. See, e.g., MICHAEL TONRY, THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE 207 (2004) (noting that "many American prosecuting attorneys are continuously campaigning and formulate . . . their tactics in individual cases on the basis of" public opinion); Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 902–03 ("[I]n evaluating prosecutors' work, the public tends to overemphasize the measurable or obvious aspects of what prosecutors do (e.g., the number of convictions they obtain, the length of sentences, and prosecutors' behavior in public trials) and tend to overlook more momentous decisions that occur behind the scenes."); Eric Rasmusen et al., *Convictions Versus Conviction Rates: The Prosecutor's Choice*, 11 AM. L. & ECON. REV. 47, 75–76 (2009) (using statistical analyses to determine that prosecutors are motivated by gaining votes and finding that elected prosecutors have higher conviction rates); cf. Alexandra White Dunahoe, *Revisiting the Cost-Benefit Calculus of the Misbehaving Prosecutor: Deterrence Economics and Transitory Prosecutors*, 61 N.Y.U. ANN. SURV. AM. L. 45, 59–62 (2005) (describing political and nonpolitical incentives of state prosecutors).

237. See, e.g., Richard T. Boylan, *What do Prosecutors Maximize?: Evidence From the Careers of U.S. Attorneys*, 7 AM. L. & ECON. REV. 379, 379 (2005) (finding that the length of prison sentences is positively related to subsequent favorable career outcomes for U.S. Attorneys); Edward L. Glaeser et al., *What Do Prosecutors Maximize?: An Analysis of the Federalization of Drug Crimes*, 2 AM. L. & ECON. REV. 259, 263–65 (2000) (describing various motivating factors for prosecutors to gain convictions and finding that "federal attorneys are likely to accept cases with higher career returns and with higher social returns"); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 134–35 (2004) ("Prosecutors with the highest

education in legal adversarialism, perhaps complemented by some clinical experience in law school, new prosecutors may obtain only "rudimentary" job training when compared to the approaches taken in other nations.²³⁸ Moreover, many young attorneys stay in a prosecution office only for a few years, seeking to build their resumes and credentials as a means to achieve a high-paying job in the private sector.²³⁹

Despite all of this, American prosecutors tend to have enormous autonomy in their decision-making, including powers that amount to prosecutorial adjudication, with relatively weak hierarchical supervision of the discretion exercised in individual cases.²⁴⁰ As noted in the introduction, not every office promulgates written guidelines on the exercise of discretion, and those that do often keep the guidelines unofficial and even confidential.²⁴¹ The language tends to be general and flexible, sounding more like policy statements than directives and providing little in terms of actual, case-specific guidance. But even relatively specific terms are not binding on prosecutors in any meaningful way. Internal discipline for failing to abide by office guidelines is virtually unknown, and courts refuse to enforce these guidelines in criminal cases. Moreover, the prosecution is rarely involved in investigations and never responsible for police activities, despite its reliance on law enforcement agents for trial evidence.

conviction rates (and, thus, reputations as the best performers) stand the greatest chance for advancement internally."). *But see* Boylan, *supra*, at 379 (finding that "conviction rates do not appear to affect the careers of U.S. attorneys").

238. Frase, *supra* note 98, at 562–63; *see also supra* Part IV.B.1 (discussing the law school trend toward enhanced skills training and clinical experiences).

239. *See, e.g.,* TONRY, *supra* note 236, at 208 ("Many elected state prosecutors and appointed U.S. attorneys serve only a few years and aspire . . . to enter a lucrative private law practice."); Dunahoe, *supra* note 236, at 59–61 (same); *cf.* Richard T. Boylan & Cheryl X. Long, *Salaries, Plea Rates, and the Career Objectives of Federal Prosecutors*, 48 J.L. & ECON. 627 (2005) (discussing why prosecutors want to work for the government instead of going into the private sector); Todd Lochner, *Strategic Behavior and Prosecutorial Agenda Setting in United States Attorneys' Offices: The Role of U.S. Attorneys and Their Assistants*, 23 JUST. SYS. J. 271, 278–81 (2002) (analyzing post-U.S. Attorney job positions to determine prosecutors' motivations finding that many are motivated by the desire to impress future employers or to gain media attention for political purposes). *But cf.* Lochner, *supra*, at 282–88 (analyzing and discussing trends in career federal prosecutors).

240. *See, e.g.,* Johnson, *supra* note 21, at 255–56 ("What stands out is not that such review occasionally occurs, but rather how infrequently and superficially superiors monitor their subordinates' decisions. Oversight in American offices is especially conspicuous by its absence in the great bulk of relatively 'nonserious' cases . . ."). *See generally* KAGAN, *supra* note 21, at 72.

241. *See supra* notes 16–17 and accompanying text (discussing problems with internal guidelines in American prosecutors' offices).

Prosecutors often argue for the introduction of such evidence against defense claims of police illegality, but they do so as advocates for their cases rather than as participants or supervisors of the investigations.

Although this description is necessarily broad and incomplete, it does highlight some of the reasons why prosecutorial power in the United States should be disconcerting to scholars, policymakers, and the general public. If adjudication is about truth-finding and the impartial review of all aspects of a case, there is good reason to doubt that the American prosecutor is the appropriate actor to fulfill this function. A key question here is whether adjudication by European prosecutors raises the same problems. As mentioned earlier, U.S. scholarship has highlighted various factors that allegedly constrain prosecutors in Europe, although some have proven to be more theoretical than practical. For instance, private prosecutions by victims are relatively uncommon occurrences that can be precluded by case-ending choices, which tends to make the potential for victim-led actions somewhat irrelevant to the decision-making process.²⁴² Other factors, however, strongly influence European prosecutors in the exercise of their discretion and therefore merit greater attention in comparative analysis.

A. *The Context of Prosecution in Europe*

1. *Prosecutorial Role*

To begin with, the inquisitorial tradition displays a vision of the prosecutorial role as nonpartisan public service. European criminal justice systems typically charge prosecutors with a duty to be completely objective in their pursuit of the truth, based on a belief in the existence of a "substantive" or "material" truth that can be determined by a dispassionate fact-finder.²⁴³ Continental prosecutors assume a high degree of

242. See WADE, *The Power to Decide*, *supra* note 132, at 63–65 (showing statistical infrequency of private prosecution in England and Wales and Sweden).

243. See, e.g., *Recommendation 19*, *supra* note 76, at 8 (instructing prosecutors to "carry out their functions fairly, impartially and objectively"); Francisca Van Dunem, *The Role of the Public Prosecution Office in the Penal Field*, in *THE ROLE OF THE PUBLIC PROSECUTION OFFICE IN A DEMOCRATIC SOCIETY* 109–10 (1997) [hereinafter Van Dunem, *The Role*] (describing prosecutorial adherence in Europe to "principles that seek the closest possible correspondence between procedural veracity and the underlying facts in order to secure substantive justice"); Marianne Löschnig-Gspandl, *Austria*, in *THE ROLE OF THE PUBLIC PROSECUTOR IN THE EUROPEAN CRIMINAL JUSTICE SYSTEMS* 12 (Tom Vander Beken & Michael Kilchling eds., 2000) [hereinafter Löschnig-Gspandl, *Austria*] (describing

independence in their activities and are frequently associated with the judicial function,²⁴⁴ thereby reinforcing the expectation to act with a degree of detachment, assisting the courts in achieving the criminal justice system's goal of discovering the truth and reacting appropriately to it. The extent to which prosecutors live up to such expectations is uncertain and perhaps inherently opaque, and the notion of complete objectivity will sound preposterous to many scholars. Nonetheless, the basic ideal deeply affects the way in which European prosecutors view their role and work.²⁴⁵

As an independent body with an affiliation with the judiciary, prosecutors of continental Europe are likely to have quite different aims and motivations than their counterparts working in truly adversarial settings. Success is not measured by convictions, and acquittals are not seen as failures.²⁴⁶ Instead, continental prosecutors are supposed to find the truth and achieve evenhanded outcomes. This expectation and the concomitant job culture affect discretionary decision-making and encourage case-ending solutions that comport with the interests of justice, whatever those interests may be. While it would be naïve to assume that prosecutors will "get it right" every time, given enormous time pressures and typically limited information, there is no evidence that prosecutors in the study countries are led by anything other than a judicially informed vision of truth and fairness.

Despite their quasi-judicial role and independence, prosecutors are held accountable through a hierarchical system and series of guidelines (discussed below).²⁴⁷ It is widely believed that the lack of such measures would leave prosecutors free to interpret the needs of justice as they alone see fit, regardless of the democratically supported goals of government. No less than undue political meddling in individual cases, a free-wheeling prosecution would be perceived as undermining the legitimacy of the criminal justice system. Still, these competing concerns are consistent with

Austrian public prosecutors as "obligated by law to be objective and to explore substantive truth").

244. See, e.g., LISBON NETWORK, SIXTH MEETING OF THE MEMBERS OF THE EUROPEAN NETWORK FOR THE EXCHANGE OF INFORMATION BETWEEN PERSONS AND ENTITIES RESPONSIBLE FOR THE TRAINING OF JUDGES AND PUBLIC PROSECUTORS 4–5 (Nov. 2003) (discussing the similar roles and training requirements of judges and prosecutors in European nations).

245. See, e.g., Boyne, Varieties of Practice, *supra* note 120, at 271–72 (reflecting on German prosecutors' "deep commitment to the German *Rechtsstaat* or law-based state" and to "*Objectivitätsprinzip*" or principles of objectivity).

246. *Id.* at 32 (noting that "the majority of German prosecutors do not regard convictions as victories and acquittals as losses.").

247. See *infra* Part III.A (discussing various constraints on European prosecutors).

and arguably balanced by a controversial but core feature of continental law: the prosecution's connection with both the judiciary and the executive. This arrangement seeks to provide prosecutorial independence in performing an objective truth-finding function, while also ensuring that prosecutors remain politically accountable and guided by official policy in more general terms, all with the goal of impartial decision-making.

Discussions about prosecutorial positioning within the branches of government have taken on new dimensions in recent decades in response to democratic reforms in former communist bloc states and some major changes within the criminal justice systems of Western Europe. To this day, the placement of prosecutors remains a hotly debated constitutional issue.²⁴⁸ In France and the Netherlands, for instance, prosecutors are officially members of the judiciary, although hierarchically subordinate to a member of the executive, the Minister of Justice.²⁴⁹ In other systems, the prosecution service is regarded as an adjunct of the executive, but one that requires a great deal of independence and acts as a sort of "second judge" in the criminal process.²⁵⁰ This is epitomized by the German doctrine that the prosecution service is a judicial organ of the executive.²⁵¹ European

248. See, e.g., Giulio Illuminati, *Italy*, in *THE PROSECUTOR OF A PERMANENT INTERNATIONAL CRIMINAL COURT* 370, 414–17 (Louise Arbour et al. eds., 2000) [hereinafter *Illuminati*, in *Arbour et al.*] (describing the "wide political debate" in Italy over "whether the unity of prosecutors and judges should be maintained"); Giulio Illuminati, *Italy*, in *THE ROLE OF THE PUBLIC PROSECUTOR IN THE EUROPEAN CRIMINAL JUSTICE SYSTEMS* 111–13 (Tom Vander Beken & Michael Kilchling eds., 2000) [hereinafter *Illuminati*, in *Vander Beken & Kilchling*] (giving a brief history of the "public debate" over the public prosecutor's role in Italy).

249. WET OP DE RECHTERLIJKE ORGANISATIE [WET RO] [LAW OF JUDICIAL ORGANIZATION] art. 1 (Neth.) (listing prosecutors as members of the judiciary); Wade et al., *supra* note 110, at 184 (asserting that "[t]he French prosecution service is considered part of the judiciary"); see also Blom & Smit, *supra* note 133, at 241 (same); Hodgson, *supra* note 215, at pt. I.A (discussing judicial status of French prosecutors); Jacqueline Hodgson, *The French Prosecutor in Question*, 67 WASH. & LEE L. REV. 1361 (2010) (same); Peggy Pflützer, *Strafrechtspflege in Frankreich*, in 2 *STRUCTURES OF EUROPEAN CRIMINAL JUSTICE* pt. II.B (Ulrich Sieber & Marianne Wade eds., Düncker & Humblodt forthcoming) (same); Peter J.P. Tak, *The Dutch Prosecutor: A Prosecuting and Sentencing Officer*, in *THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE* (Eric Luna & Marianne Wade eds., forthcoming 2011) [hereinafter *Tak, The Dutch Prosecutor*] (discussing judicial status of Dutch prosecutors); Tak, *Criminal Justice System in the Netherlands*, *supra* note 166, at pt. II.B (same).

250. See Boyne, *Varieties of Practice*, *supra* note 120, at 1, 28, 31, 94, 192, 204, 219 ("[I]n Germany's inquisitorial system, prosecutors function as second judges dedicated to finding the objective truth.").

251. See, e.g., Kilchling, *Germany*, *supra* note 125, at 76 (describing the hybrid judicial-executive role played by German public prosecutors); see also Marc Engelhart, *Strafrechtspflege in Deutschland*, 6 *STRUCTURES OF EUROPEAN CRIMINAL JUSTICE* pt. II.B

prosecutors may thus combine "political foundations with judicial functions," serving as "a kind of suspension bridge between politics and the judiciary which brings to mind the Bridge on the River Kwai."²⁵² Continental prosecution services are keenly aware of the balance, with their prosecutors expected to play a role that combines the truth-seeking objectivity of the judiciary with fidelity to criminal policy set by the executive.

2. Education, Training, and Culture

The institutionalization of prosecutors as objective truth-seekers reflects the inquisitorial tradition central to continental European legal cultures. Under this view, law is a science, the product of rational decision-making that can establish the truth and achieve justice through logical, balanced analysis. The clearest expression of this philosophy is seen in German substantive criminal law, which has been described as "one of the great achievements of the human sciences."²⁵³ As Markus Dubber notes, the German penal code is surprisingly brief and its statutory norms may seem quite vague.²⁵⁴

[But] they are, in fact, incomplete by design. The ambiguities and gaps in the code are filled by the professor-scientists, who through continuous scientific research and discourse refine the science that is the criminal law, and whose discoveries aid—or at least should aid—judges in resolving particular cases and, more ambitiously still, the legislature in reforming the criminal code.²⁵⁵

(Ulrich Sieber & Marianne Wade eds., Düncker & Humblodt forthcoming) (discussing judicial status of German prosecutors).

252. Roger Perrot, *Role of the Public Prosecution Office in Criminal, Civil and Commercial Fields*, in *THE ROLE OF THE PUBLIC PROSECUTION OFFICE IN A DEMOCRATIC SOCIETY* 166 (Council of Europe et al. eds., 1997) [hereinafter Perrot, *Criminal, Civil, and Commercial Fields*].

253. Markus Dirk Dubber, *The Promise of German Criminal Law: A Science of Crime and Punishment*, 6 *GERMAN L.J.* 1049, 1051 (2005) (quoting Enrique Gimbernat Ordeig, *Sind die bisherigen dogmatischen Grunderfordernisse eines Allgemeinen Teils geeignet, dem heutigen Stand der Kriminalität, der Strafzumessung und des Sanktionensystems zu genügen*, in *KRISE DES STRAFRECHTS UND DER KRIMINALWISSENSCHAFTEN?* 152, 165 (Hans-Joachim Hirsch ed. 2001)).

254. *Id.* at 1054.

255. *Id.*

In contrast to the American system, the scientific approach of the German criminal process assumes that every case has a correct solution that can be achieved through the court's discovery of the truth.²⁵⁶

The viability of law as a science is certainly debatable, Professor Dubber acknowledges, having been devastated in the United States by the advent of legal realism and its challenge to formalistic analysis.²⁵⁷ It is emphasized here, however, only to understand the European prosecutorial mindset. All continental legal systems have been influenced by this tradition, duly instilled in French, German, Dutch, Polish, and, to some extent, Swedish prosecutors through education and training. They have been indoctrinated with a conception of the legal system as a rational instrument applied scientifically in order to discover the truth and achieve just outcomes,²⁵⁸ which in turn affects their own views of the prosecutorial function and practice within their respective criminal justice systems. Across Europe, the scientific conception is core to the education and professional training of prosecutors, who in the end become career civil servants largely insulated from political pressure.²⁵⁹

Moreover, European prosecutors are in the profession for the sake of being prosecutors—in other words, it is an occupational goal rather than a means to another end (e.g., a law firm job). Although the fledgling prosecution service in England and Wales is only beginning to achieve higher status, competition to become a prosecutor in continental Europe can be fierce. Those who become prosecutors will usually remain in this position for the rest of their working lives, unless they are in a system that allows (or even encourages) prosecutors to switch into the judiciary and vice versa, such as in France and some German states.²⁶⁰ A trainee prosecutor joins a professional civil service surrounded by experienced

256. *Id.* at 1053, 1059.

257. *See id.* at 1053 (comparing the divergent views of criminal law as science in Germany and the United States).

258. *See, e.g., id.* at 1054–55 (characterizing German criminal law as "the province of scientists" and describing the structured and lengthy education in criminal law received by German law students); Boyne, *Varieties of Practice*, *supra* note 120, at 26–27 (describing the "socialization and professionalization process of . . . German lawyers").

259. *See, e.g.,* TONRY, *supra* note 236, at 206 (noting that European prosecutors are "substantially removed from partisan political influence and the temptation to do things solely because they are politically popular").

260. *See, e.g.,* Peter Morr , *Germany*, in *THE PROSECUTOR OF A PERMANENT INTERNATIONAL CRIMINAL COURT* 341 (Louise Arbour et al. eds., 2000) [hereinafter Morr , *Germany*] (finding that "[i]n Germany chief prosecutors" often "have been prosecutors or judges before" becoming chief prosecutors).

attorneys, immersed in a strong working culture that ideally expects and nurtures exchange among prosecutors, encouraging them to draw upon the experience of colleagues and superiors. Typically, young prosecutors are employed for a training and test period of a few years before receiving a more permanent status, which includes strong employment safeguards that protect against untoward pressure.²⁶¹ As a general rule, European prosecutors are only accountable to their superiors, providing a buffer from direct political influence and public opinion.

The legal culture, the education and training, and the expectations placed upon prosecutors all shape their self-perception and practice. In continental Europe, these factors contribute to a particular profile: prosecutors as judicial professionals. Indeed, prosecutors and judges often receive the same training and continuing legal education, which contributes to a prosecutorial culture with a distinct tie to the judiciary.²⁶² The German system offers a paradigmatic model derived from its conception of the rule of law (*Rechtsstaats*) and a European affinity for bureaucracy.²⁶³ German prosecutors are members of a professional caste, a well-trained group of lawyers specializing in their area of work, honed through regular exchange with their colleagues and involvement in country-wide and international professional organizations, but shielded from direct influence by the populace.

For the European prosecutor, career advancement will be within the institution, with the likelihood of promotion limited by the number of superior positions available. Still, it is a highly regarded form of public service, providing good pay, reasonable hours, a collegial environment, and employment security, which in turn leads to a dedication to the prosecutorial role. This does not mean that prosecutors are unaffected by the pressures related to high caseloads, for instance, or the desire for promotion. They also face the demands of interested parties in individual

261. See, e.g., Peter Morr , *Position of the Public Prosecution Office*, in *THE ROLE OF THE PUBLIC PROSECUTION OFFICE IN A DEMOCRATIC SOCIETY* 44 (1997) [hereinafter Morr , *Position*] (outlining protection of prosecutorial independence in Germany, including lifetime appointment with removal only for cause).

262. See, e.g., Morr , *Germany*, *supra* note 260, at 341 (noting that, in Germany, both prosecutors and judges "need the same legal education and professional requirements" in order to serve in their respective offices). See generally *supra* note 255.

263. See Morr , *Germany*, *supra* note 260, at 342–46 (describing in detail the structure of the German prosecutorial bureaucracy, wherein "directions and instructions" pass "hierarchically" from a central "executive organ" down to "subordinate prosecutors," with the result being that "[p]rosecutors are bound by the directives and instructions of their superiors").

disputes and may even experience the anxiety of a media blitz in certain high-profile cases. All the same, prosecutors will still see themselves as long-term inhabitants of a working culture that places a profound emphasis on professional ethics and expectations, to which they will have to answer for any compromise made to political or popular demand.²⁶⁴ These norms, rather than a drive for courtroom victories, exert the greatest influence on prosecutorial decision-making.²⁶⁵

3. *Hierarchy and Guidelines*

As alluded to above, accountability is ensured through formal structures that guide and constrain discretion, including those that directly relate to case-endings.²⁶⁶ First and foremost is a clear, established hierarchy for European prosecution services.²⁶⁷ Line prosecutors work within an

264. For instance, public controversy was sparked by the conditional disposals of powerful defendants in the *Ackermann* and *Mannesmann* cases. See, e.g., Melanie Amann, *Wie Ackermann unter die Kirschdiebe kam*, FRANKFURTER ALLGEMEINE SONNTAGSZEITUNG, Nov. 26, 2006 (providing an example of such controversy); Georg Bönisch & Frank Dohmen, *Freikauf erster Klasse*, DER SPIEGEL, Nov. 27, 2006 (same); Anke Brunner, *Ist Justitia bei einigen blinder als bei anderen?*, DER TAGESSPIEGEL, Dec. 3, 2006 (same); Rainer Frenkel, *Eiertanz in Saal 111*, DIE ZEIT, Nov. 30, 2006, <http://www.zeit.de/2006/49/Mannesmann> (last visited Nov. 17, 2010) (same) (on file with the Washington and Lee Law Review).

265. See, e.g., Boyne, *Varieties of Practice*, *supra* note 120, at 271 ("[I]n contrast to prosecutors in the U.S. system who may be driven by a desire to vanquish the opposition at trial, German prosecutorial decision-making is sharply constrained by collegial norms of decision-making.").

266. See, e.g., *Recommendation 19*, *supra* note 76, at 9 (demanding that public prosecutors "define general principles and criteria to be used by way of references against which decisions in individual cases should be taken, in order to guard against arbitrary decision-making"); *id.* at 22–23 (elaborating, in the explanatory memorandum, upon the need for "a certain level of co-ordination and an effort at consistency" in public prosecutorial decisions in order to "safeguard" the public).

267. See, e.g., Boyne, *Varieties of Practice*, *supra* note 120, at 23 (describing the "hierarchically" structured prosecutorial service in Germany); Morr , *Germany*, *supra* note 260, at 342 (describing the "hierarchically" structured prosecutorial service in Germany); Perrot, *Criminal, Civil, and Commercial Fields*, *supra* note 252, at 168 ("As a general rule, Public Prosecution Offices have a pyramidal structure and instructions from the top filter down to local prosecutors and their deputies and then to the most junior staff."); Antoine Reinhard, *France*, in *TASKS AND POWERS OF THE PROSECUTION SERVICES IN THE EU MEMBER STATES II* 851 (Peter J.P. Tak ed., 2005) [hereinafter Reinhard, *France*] (describing the "hierarchically" structured prosecutorial service in France); Peter J.P. Tak, *The Netherlands*, in *THE ROLE OF THE PUBLIC PROSECUTOR IN THE EUROPEAN CRIMINAL JUSTICE SYSTEMS* 126 (Tom Vander Beken & Michael Kilchling eds., 2000) [hereinafter Tak, *The Netherlands*] (describing the "hierarchically" structured prosecutorial service in the Netherlands). Italy appears to be the exception. See, e.g., Illuminati, in *Arbour et al.*, *supra* note 248, at 370

organizational structure in which their immediate superior, if not all superior prosecutors, have the authority to direct and even substitute a prosecutor in a given case. Senior prosecutors are expected to make sure that those under their supervision apply the law even-handedly and in line with policy, especially as expressed in guidelines.²⁶⁸ Powers going down the hierarchy may be used to direct a prosecutor to act in a certain way or to pull him off a case, where his actions are deemed contrary to the law or the relevant guidelines as interpreted by his hierarchical superiors.²⁶⁹ In these situations, the immediately superior prosecutor can take over the case or appoint another prosecutor under his supervision. Such substitution may also occur where, for one reason or another, a junior prosecutor is unable to work on a case or lacks the experience to handle its intricacies.

Prosecutorial decision-making thus takes place within a hierarchical system that provides prosecutors with both formal and informal opportunities to review and discuss cases with their colleagues. Unlike their American counterparts, however, European prosecutors have no immediate structural accountability to the general public. The idea of elected prosecutors would be outlandish to most Europeans, and it certainly would not be seen as a necessary component of democratic legitimacy. A degree of populism may be integrated to some extent through juries and lay judges—typically used in more serious cases—but the actors within the criminal justice system are professionals whose connection to political decision-making is derivative, provided through guidelines set by democratically legitimized institutions.

Any political accountability is therefore indirect. Frontline prosecutors are expected to apply the criminal law as set by the country's legislature, and

(labeling Italian prosecutorial power as "diffuse and not centralised"); Illuminati, *in* Vander Beken & Kilchling, *supra* note 248, at 111 ("Nowadays, no hierarchical organization of the prosecution offices exists at a national level [in Italy]."); Perrot, *Criminal, Civil, and Commercial Fields*, *supra* note 252, at 168 ("It is in the nature of the Public Prosecution Office to be structurally subject to other superior bodies, with the exception of the Italian Public Prosecution Office, to which this observation seems not to apply.").

268. See, e.g., Morré, *Position*, *supra* note 261, at 42, 46–48 (describing the German prosecutorial "chain of superiors," which bears collective responsibility for providing subordinates with "guidelines" on "how to fulfil [*sic*] duties").

269. See, e.g., *id.* at 48 (citing the German Court Organization Act, which gives a "superior prosecutor" the power to substitute one prosecutor on a case for another if a "disagreement arises" between the subordinate prosecutor and his superior); *Recommendation 19*, *supra* note 76, at 21–22 (noting, in the explanatory memorandum, the need for hierarchical review of public prosecutorial decisions not to prosecute); Kilchling, *Germany*, *supra* note 125, at 76 (discussing the German prosecutorial hierarchy, under which prosecutors "can be instructed to deal with a certain case in a particular way or can even be replaced").

they are remotely tied to elective government through a chain of command that eventually leads to an executive official.²⁷⁰ In England and Wales, a member of government, the Attorney General, supervises the Director of Public Prosecutions, who runs the prosecution service.²⁷¹ Likewise, the Swedish Minister of Justice is politically accountable for the prosecution service throughout his country.²⁷² In France, Germany, the Netherlands, and Poland, the Minister of Justice is formally the head of service with varying degrees of power to issue orders down the chain of command.²⁷³ In the Netherlands, the Ministry of Justice merely appoints the influential College of Prosecutors-General, a body that enjoys great autonomy and authority in running the criminal justice system as a whole, including formulating guidelines for the prosecution service.²⁷⁴ In Germany, state Prosecutors-General enforce the criminal law and report to the respective state (*Länder*) Minister of Justice.²⁷⁵

270. See, e.g., Kai Ambos, *Comparative Summary of the National Reports*, in THE PROSECUTOR OF A PERMANENT INTERNATIONAL CRIMINAL COURT 499–501, 503–05, 510–11, 524–25 (Louise Arbour et al. eds., 2000) [hereinafter Ambos, *Comparative Summary*] (comparing different mechanisms of electoral accountability for prosecutors).

271. See, e.g., Andrew Sanders, *England and Wales (United Kingdom)*, in THE PROSECUTOR OF A PERMANENT INTERNATIONAL CRIMINAL COURT 297 (Louise Arbour et al. eds., 2000) [hereinafter Sanders, *England and Wales*] (noting that, in England and Wales, the Deputy of Public Prosecutions "is appointed by, and accountable to, the Attorney-General").

272. See, e.g., Josef Zila, *Sweden*, in TASKS AND POWERS OF THE PROSECUTION SERVICES IN THE EU MEMBER STATES II 1160–61 (Peter J.P. Tak ed., 2005) (identifying the "Ministry of Justice" as the sole executive body capable of giving "instructions as to prosecution policy" in Sweden).

273. See, e.g., Arkadiusz Lach, *The Prosecution Service of Poland*, in TASKS AND POWERS OF THE PROSECUTION SERVICES IN THE EU MEMBER STATES II 606 (Peter J.P. Tak ed., 2005) (noting that the Polish Minister of Justice is "accountable before the Parliament and he can be held liable for prosecution policy or even decisions in particular cases"); Reinhard, *France*, *supra* note 267, at 851 (characterizing the French Minister of Justice as "politically accountable for the policy of the prosecution service" and able to "direct the Prosecutor General to initiate a . . . prosecution by written instructions"); Tak, *The Netherlands*, *supra* note 267, at 128 (describing the Dutch Minister of Justice's power to "give general or specific instructions on the exercise of tasks and powers of the prosecution service" and to "give instructions on . . . prosecution in individual cases as well"); Boyne, *Varieties of Practice*, *supra* note 120, at 25–26 (describing the German Minister of Justice's power to issue "general rules and regulations which seek to guide prosecutorial decision-making").

274. See, e.g., Peter J.P. Tak, *The Dutch Prosecution Service*, TASKS AND POWERS OF THE PROSECUTION SERVICES IN THE EU MEMBER STATES 365–66 (Peter J.P. Tak ed., 2004) ("The Board of Prosecutors-General may give instructions to the members of the prosecution service concerning their tasks and powers in relation to the administration of criminal justice and other statutory powers, e.g. supervision of the police.").

275. See, e.g., Kilchling, *Germany*, *supra* note 125, at 75 (explaining that every German "State has its own prosecution service, which is subordinated to the Ministry of Justice" and

As mentioned, some nations have placed explicit restraints on case-specific orders. In France, for instance, controversy concerning partisanship and self-interested decision-making in individual cases has resulted in limits on the Minister of Justice, who now cannot demand that a case be dropped. Instead, this political official only has the power to order prosecution, with the duly instructed prosecutor remaining free to voice his own contrary opinion in court when filing such charges.²⁷⁶ Likewise, frequent orders to file or drop charges under Poland's previous Minister of Justice have led the current administration to plan reforms curtailing such powers. For the most part, the hierarchical structure of European prosecution services allows political officials only to issue guidelines that provide general direction to prosecutors in their daily work, ensuring that they enforce criminal policy as foreseen by the legislature and executive.²⁷⁷ Only on rare occasions do political officials interfere in individual cases.²⁷⁸

"[h]eaded by a General Prosecutor"); Boyne, *Varieties of Practice*, *supra* note 120, at 22 ("Germany's prosecution offices . . . are organized on the state or *Länder* level and are subsumed within the state-level Ministries of Justice.").

276. See, e.g., Aubusson de Cavarlay, *French Criminal Justice System*, *supra* note 134, at 198, (noting that the French Minister of Justice, and French superior prosecutors generally, have "the power both to impose prosecution and to determine what the public prosecutor is to request of the court, but . . . not to order that a case be dropped"); WADE, *The Power to Decide*, *supra* note 132, at 101 (discussing the ability of French prosecutors to tell "the court that they believe the charges are unfounded"); see also Perrot, *Criminal, Civil, and Commercial Fields*, *supra* note 252, at 171 (noting several examples of the exercise of prosecutorial autonomy in European countries, including France); Eugène Frencken, *Position and Status of the Public Prosecution Office*, in *THE ROLE OF THE PUBLIC PROSECUTION OFFICE IN A DEMOCRATIC SOCIETY* 38 (1997) [hereinafter Frencken, *Position and Status*] (discussing generally the importance of prosecutorial autonomy from political pressure in European countries and the growing prevalence of restrictions on "ministerial interventions" into public prosecutors' affairs); cf. Otto Triffterer, *Austria*, in *THE PROSECUTOR OF A PERMANENT INTERNATIONAL CRIMINAL COURT* 212–13 (Louise Arbour et al. eds., 2000) [hereinafter Triffterer, *Austria*] (discussing mechanisms by which Austrian prosecutors can voice their disagreement with a superior's decision to prosecute or not prosecute a certain case).

277. See, e.g., *Recommendation 18*, *supra* note 120, at 22, 24–25 (providing guidance in this area); *Recommendation 19*, *supra* note 76, at 6, 9 (emphasizing, in the explanatory memorandum, that government officials in Europe are only permitted to provide general direction to prosecutors in their daily work); Frencken, *Position and Status*, *supra* note 276, at 33–34 (stating that the Belgian Minister of Justice may address instructions or recommendations to the Public Prosecution Office, but he may not intervene in the direction of the criminal proceedings); Morr , *Position*, *supra* note 261, at 42–43 (explaining that only the Minister of Justice in Germany, not the government, may instruct the prosecutor directly).

278. See, e.g., Dan Fr nde, *Finland*, in *THE ROLE OF THE PROSECUTOR OF A PERMANENT INTERNATIONAL CRIMINAL COURT* 319–20 (Louise Arbour et al. eds., 2000) (stating that the last time there was political interference in a routine criminal case was in 1983); Peter

Still, prosecutors must follow the guidelines issued by the managing heads of their service when using their discretion to end cases or choosing particular procedural paths.²⁷⁹ Although the detail provided by such guidelines varies, the Dutch system provides an example of meticulous control.²⁸⁰ This point-based approach not only guides prosecutorial charging decisions but also predetermines which case-ending solutions are possible.²⁸¹ For instance, if a suspect amasses a certain number of points, the case must be brought to court, or if the amount falls within certain boundaries the prosecutor must use a conditional disposal.²⁸² Any deviation from the prescribed solution requires a Dutch prosecutor to give detailed, written reasoning for his decision, which will be reviewed by his superiors.²⁸³

In general, European prosecutors who regularly disregard service guidelines are likely to be reprimanded, disciplined, and in exceptional cases,

Garde, *Denmark*, in *THE ROLE OF THE PUBLIC PROSECUTOR IN THE EUROPEAN CRIMINAL JUSTICE SYSTEMS* 41 (Tom Vander Beken & Michael Kilchling eds., 2000) (explaining how the Minister avoided a potential hostile majority in Parliament by declining to interfere in a celebrated case in Denmark); Illuminati, in *Arbour et al.*, *supra* note 248, at 376–77 (explaining that there is a risk that prosecutorial decisions will be affected by political influences even though political pressures should have no effect in routine criminal cases); Morré, *Germany*, *supra* note 260, at 346 (explaining that prosecutors are not supposed to interfere in routine criminal cases); Triffterer, *Austria*, *supra* note 276, at 221–22 (stating that prosecuting offices do not interfere in routine criminal cases in Austria).

279. See, e.g., Andrew Sanders, *England and Wales*, in *THE ROLE OF THE PUBLIC PROSECUTOR IN THE EUROPEAN CRIMINAL JUSTICE SYSTEMS* 64 (Tom Vander Beken & Michael Kilchling eds., 2000) [hereinafter Sanders, *England*] (stating that prosecutors must follow internal policies and controls when using discretion); Tak, *The Netherlands*, *supra* note 267, at 132 (stating that the Board of Prosecutors-General directed public prosecutors to follow national prosecution guidelines to harmonize the utilization of discretion).

280. See, e.g., Intervention by Egbert Myjer, *Discretionary Powers of Public Prosecution: Opportunity or Legal Principle—Advantages and Disadvantages*, *Conference of Prosecutors General*, Conference of Prosecutors General of Europe, 5th Session (May 2004) at 3–4 [hereinafter Intervention by Egbert Myjer], available at http://www.coe.int/t/dghl/cooperation/ccpe/conferences/cpge/2004/InterventionMYJER_en.pdf (describing the computerized system of the Netherlands Board of Prosecutors-General); Tak, *The Netherlands*, *supra* note 267, at 138 (discussing national guidelines for sentencing in the Netherlands); Tak, *Criminal Justice System in the Netherlands*, *supra* note 166, at II.C.2.c (same).

281. See, e.g., *infra* Figure 2 (providing examples of the Dutch point-based approach); see also Intervention by Egbert Myjer, *supra* note 280, at 3–4 (describing the computerized system of the Netherlands Board of Prosecutors-General).

282. See, e.g., *infra* Table 2 (explaining that offenders who amass a certain number of points will be taken to court).

283. See, e.g., Intervention by Egbert Myjer, *supra* note 280, at 3–4 (stating that the prosecutor must provide his superior with reasons why he has decided to seek a higher penalty or why he has decided not to prosecute).

dismissed from their post. Moreover, those jurisdictions that publish the guidelines necessarily create an enforceable right to receive the prescribed case-ending. For instance, a Dutch suspect can insist upon a conditional disposal when his point score "entitles" him to this resolution.²⁸⁴ In England and Wales, judicial review of a prosecutorial decision may be deemed unreasonable if it deviates significantly from the resolution provided by the guidelines; in extreme cases, a decision of this kind may even provide grounds for legal action against the prosecutor for malicious prosecution.²⁸⁵

Ultimately, these structures seek to protect prosecutorial independence while limiting the danger of self-interested decision-making.²⁸⁶ In 2000, the European Council of Ministers concluded that coordination of prosecutorial services and a concerted effort at consistency were required to guarantee equal treatment of all citizens and efficient functioning of criminal justice systems.²⁸⁷ In particular, the Council emphasized the aforementioned means to limit prosecutorial discretion:

- a well designed hierarchy, with no place for insidious bureaucracy, in which all members of the Public Prosecution service should feel responsible for their own decisions and capable of taking the initiatives needed to do their particular job;
- general guidelines on the implementation of crime policy, setting out priorities and the means of pursuing them, having account of the discretionary powers recognized to the public prosecutor; and
- a set of criteria to guide decision-making in individual cases, with the aim, for example, of preventing inconsistencies such as that of certain offenses systematically attracting prosecution in certain public prosecutors' offices and not in others or being dealt with under different procedures or categorized differently.²⁸⁸

The extent to which hierarchy, guidelines, and the like actually regulate prosecutorial behavior across Europe remains to be tested. But the patterns of decision-making seem to indicate that these formal structures, along with education, training, culture, and role perception, place significant restraints on a prosecutor's use of discretionary authority.

284. TAK, DUTCH CRIMINAL JUSTICE SYSTEM, *supra* note 141, at 134–37.

285. Sanders, *England*, *supra* note 279, at 65.

286. See, e.g., *Recommendation 19*, *supra* note 76, at 15 (arguing that prosecutorial independence "must be fixed by law so as to rule out . . . any risk of drift towards self-interest by public prosecutors themselves").

287. *Id.* at 22.

288. *Id.* at 23.

Table 2: Case Examples Evaluated in Accordance with the Dutch Polaris Guidelines*

<u>Basic Offenses Score</u>	<u>Penalty Points</u>
<i>A</i> steals a bicycle (10 points)	10
<i>B</i> breaks into a house (60 points) to steal a computer	60
<i>C</i> commits assault against <i>V</i> (47 points)	47
<u>Qualification</u>	
<i>A</i> stole 3 bicycles (add 15 points)	25
<i>A</i> is a persistent offender (add 100%)**	50
<i>C</i> used a knife (add 17 points)	64
<i>C</i> randomly selected <i>V</i> (add 25%)	80
<u>Results</u>	
0-20 pts:	prosecutor will end the case with a fine at most (drop/conditional disposal)
21-30 pts:	prosecutor will end the case with a fine or task (conditional disposal)
31-60 pts:	prosecutor will end the case provided a task is performed (conditional disposal)
61-120 pts:	prosecutor will demand sentencing to a task or, if a crime of severe violence, imprisonment (conviction)
>120 pts:	prosecutor will demand sentencing to imprisonment (conviction)
<u>Penalty Points Values**</u>	
1 point = € 29 of fine, 2 hours of task punishment (e.g., community service), or 1 day of imprisonment	
<u>Case Application</u>	
If <i>A</i> committed the basic offense, he will face a prosecutorial drop or fine of € 290. If <i>A</i> stole three bikes and is a persistent offender, he will face a fine of € 1450 or 100 hours of community service, for example.	
If <i>B</i> committed the basic offense, he will face a conditional disposal of 120 hours of, e.g., community service.	
If <i>C</i> committed the basic offense, he will face a conditional disposal of 94 hours of, e.g., community service. If <i>C</i> used a knife and chose his victim randomly, he will be taken to court with the prosecutor requesting 80 days of imprisonment.	
* The authors would like to thank Marcel Bijen and Floris Varenkamp of the Dutch Prosecution Service's Head Office for their assistance in compiling these examples.	
** As of January 1, 2011.	

4. *The Full Ambit of the Prosecutorial Function*

Consistent with the European vision of law enforcement, prosecution services also have duties stretching beyond the narrow mandate of making case-ending decisions.²⁸⁹ Continental prosecutors are considered representatives of the public interest,²⁹⁰ a conception that is starting to apply to British prosecutors in their practice and priority setting.²⁹¹ As such, they are expected not only to act objectively and fairly in relation to the suspect, but also to consider, inform, and sometimes even compensate others affected by case decisions, particularly crime victims.²⁹² Prosecutors are directly involved in the formulation of crime prevention and policing strategies, and in some countries (e.g., France) they can be required to participate in civil trials that affect the public interest.²⁹³ The latter responsibility allows the "operation of the judicial branch of power"²⁹⁴ where individual citizens and private actions alone would be unable to secure the rule of law. While these duties may not have a deep impact on

289. See, e.g., Conference of Prosecutors General, *supra* note 118, at 20–24 (discussing the duties of prosecutors in different countries); Report by Silvij Šinkovec, *Prosecutors' Duties Outside the Criminal Justice Sector*, Conference of Prosecutors General of Europe, 5th Session (May 2004) at 6–9, [hereinafter Report by Silvij Šinkovec], available at http://www.coe.int/t/dghl/cooperation/cpe/conferences/cpge/2004/RapportSINKOVEC_en.pdf (stating examples of the different extra-judicial powers and relations of public prosecutors in various European countries); *Recommendation 19*, *supra* note 76, at 4 (describing additional duties of public prosecutors in certain jurisdictions); *Recommendation 1604*, *supra* note 117, at ¶¶ 26–27, App. ¶ 5 (explaining, in the explanatory memorandum, the nonpenal law responsibilities of public prosecutors); Mario Busacca, *The Role of the Public Prosecution Office in Civil and Commercial Fields*, in *THE ROLE OF THE PUBLIC PROSECUTION OFFICE IN A DEMOCRATIC SOCIETY* 157–64 (1997) [hereinafter Busacca, *Civil and Commercial Fields*] (discussing the different duties and powers of the Public Prosecutor in Italy); Perrot, *Criminal, Civil, and Commercial Fields*, *supra* note 252, at 174–75 (explaining the ways the Public Prosecution Office can intervene in civil cases).

290. See, e.g., *Recommendation 19*, *supra* note 76, at 4 (stating that public prosecutors act on behalf of society and in the public interest).

291. See, e.g., Wade et al., *supra* note 110, at 182–84 (explaining that the prosecution services in Britain are converging with the continental systems and taking on more roles).

292. See, e.g., *Recommendation 19*, *supra* note 76, at 9 (stating that public prosecutors should take proper account of the views and concerns of crime victims); Morré, *Germany*, *supra* note 260, at 344 (explaining the existence of prosecutorial accountability towards victims); Marianne Wade et al., *Well Informed? Well Represented? Well-Nigh Powerless?*, 14 EUR. J. CRIM. POL'Y & RES. 249, 250–51 (2008) (discussing a prosecutor's role in relation to victim's rights).

293. See, e.g., Wade et al., *supra* note 110, at 184 (explaining that French prosecutors have the right to intervene in procedures beyond the criminal justice arena when necessary).

294. Report by Silvij Šinkovec, *supra* note 289, at 10–12.

the daily work of most European prosecutors, they provide insight into the broader expectations of the prosecutorial service.

Most importantly, the prosecutorial function includes oversight of police investigations to guarantee accuracy and compliance with individual rights.²⁹⁵ European prosecutors are expected to play an active role in making sure a case is fully investigated and any evidence brought to court

295. See, e.g., *Recommendation 19*, *supra* note 76, at 7–8 (describing the public prosecution's involvement in police investigations); *Recommendation 1604*, *supra* note 117, at App. ¶ 1(a) (explaining, in the explanatory memorandum, what role the personnel of public prosecution services play in the investigation of a crime); Ambos, *Comparative Summary*, *supra* note 270, at 513–15 (explaining that the criminal police in France are controlled by the prosecutor); Giacomo Barletta, *Opening Speech*, in *THE ROLE OF THE PUBLIC PROSECUTION OFFICE IN A DEMOCRATIC SOCIETY* 11 (1997) (stating that the Public Prosecution Office supervises the police); Carlo Bellitto, *The Role of the Public Prosecution Office in the Criminal Field*, in *THE ROLE OF THE PUBLIC PROSECUTION OFFICE IN A DEMOCRATIC SOCIETY* 78 (1997) (stating that the prosecution office has the police at its disposal); Jacques Buisson, *The Role of the Public Prosecution Office in the Criminal Field*, in *THE ROLE OF THE PUBLIC PROSECUTION OFFICE IN A DEMOCRATIC SOCIETY* 54–65 (1997) [hereinafter Buisson, *Criminal Field*] (explaining the prosecuting authorities' command over police activities); Carlos Castresana Fernandez, *The Role of the Public Prosecution in the Criminal Field*, in *THE ROLE OF THE PUBLIC PROSECUTION OFFICE IN A DEMOCRATIC SOCIETY* 100–01, 103 (1997) (discussing the investigative procedure in force in numerous European countries, specifically with regard to police); Kálmán Györgyi, *Hungary*, in *THE PROSECUTOR OF A PERMANENT INTERNATIONAL CRIMINAL COURT* 354–56 (Louise Arbour et al. eds., 2000) [hereinafter Györgyi, *Hungary*] (stating that the prosecution supervises the investigation); Illuminati, in Arbour et al., *supra* note 248, at 374–75 (explaining that the prosecution has the power to direct investigations); Illuminati, in Vander Beken & Kilchling, *supra* note 248, at 113–14 (explaining that the prosecutor directs the investigations and gives guidelines to the police); Löschnig-Gspandl, *Austria*, *supra* note 243, at 15 (explaining the role of the public prosecutor with regard to police); L. Miskolci, *Hungary*, in *THE ROLE OF THE PUBLIC PROSECUTOR IN THE EUROPEAN CRIMINAL JUSTICE SYSTEMS* 97 (Tom Vander Beken & Michael Kilchling eds., 2000) [hereinafter Miskolci, *Hungary*] (stating that the prosecutor serves as a mediator between the court and the investigation office, and as a result, he may supervise the legality of the police actions more efficiently); Morré, *Position*, *supra* note 261, at 43 (stating that the police are subject to the directives given by the prosecutor); Morré, *Germany*, *supra* note 260, at 344–45 (explaining that the prosecutor is the "master of investigations"); Miroslav Ruzicka, *Czech Republic*, in *THE PROSECUTOR OF A PERMANENT INTERNATIONAL CRIMINAL COURT* 286–87 (Louise Arbour et al. eds., 2000) (stating that prosecutors supervise the activities of investigators); Alexandre Shushanashwili & Georgi Glonti, *Georgia*, in *THE PROSECUTOR OF A PERMANENT INTERNATIONAL CRIMINAL COURT* 336–37 (Louise Arbour et al. eds., 2000) (discussing the role of the prosecutor in investigations); Triffterer, *Austria*, *supra* note 276, at 218–19 (explaining the prosecutorial responsibilities for the investigation and prosecution of a case); Van Dunem, *The Role*, *supra* note 243, at 111 (explaining the common characteristics of the relations between legal and police departments across different countries); cf. Wade, *European Prosecution*, *supra* note 120, at 391 (explaining that the line between prosecutorial functions and police duties is blurring across Europe because of a tendency towards inter-agency cooperation).

represents the truth.²⁹⁶ Despite national variations, Europe has reached a virtual consensus that prosecutors should be personally involved in the investigation of serious crimes, and their office should provide direction in other cases through general guidelines.²⁹⁷ Swedish prosecutors take the lead on all complex crime investigations, for example, and even British police are expected to consult and work with prosecutors regarding the collection of evidence in serious and complicated cases.²⁹⁸ In other countries, the prosecution service is formally in charge of all investigations and required to provide the police with guidance in every case.²⁹⁹ Although time and resource constraints tend to limit direct oversight to situations where prosecutorial leadership is indispensable,³⁰⁰ continental prosecutors

296. Prosecutors are explicitly placed in charge of investigative proceedings by Article 81 of the French Code of Criminal Procedure, Article 160 of the German Code of Criminal Procedure, Section 148 of the Dutch Code of Criminal Procedure (as well as Section 13 of the Police Act), and Article 298, paragraph 1, of the Polish Code of Criminal Procedure. Chapter 23, Section 3, of the Swedish Code of Judicial Procedure requires the prosecution service to take charge of complex investigations as soon as someone is reasonably suspected of the offense; the prosecution service will also assume immediate responsibility of investigations if special reasons so require. Zila, *Swedish Criminal Justice System*, *supra* note 138, at 298–99 (quoting RB 23:3). No matter who leads the investigation, the Swedish prosecution service retains responsibility for it. *Id.* at 299. Despite Italy's new adversarialism in criminal procedure, once an Italian prosecutor is informed of an investigation (which is supposed to occur without delay), the police become subservient to the prosecutor's orders. Caianiello, *The Italian Public Prosecutor*, *supra* note 53, at Part III.A.1.

297. Ambos, *Comparative Summary*, *supra* note 270, at 514–15; Buisson, *Criminal Field*, *supra* note 295, at 58–59; Nico Keijzer, *The Netherlands*, in *THE PROSECUTOR OF A PERMANENT INTERNATIONAL CRIMINAL COURT* 419 (Louise Arbour et al. eds., 2000); Miskolci, *Hungary*, *supra* note 295, at 96–97; TAK, *DUTCH CRIMINAL JUSTICE SYSTEM*, *supra* note 141, at 126–28; WADE, *The Power to Decide*, *supra* note 132, at 58–59.

298. See *supra* note 138 and accompanying text (discussing role of Swedish prosecutors in complex investigations); Sanders, *England and Wales*, *supra* note 271, at 297, 301–02 (stating that British police choose to seek the advice of the CPS in particularly serious or complex cases); Ambos, *Comparative Summary*, *supra* note 270, at 512–13. For the newly reformed contours of this somewhat different position, see Chris Lewis, *The Evolving Role of the English Crown Prosecution Service*, in *THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE* pt. II.A (Eric Luna & Marianne Wade eds., forthcoming 2011) [hereinafter Lewis, *The Evolving Role*].

299. See *supra* note 304 (providing countries in which the prosecution is in charge of investigations).

300. See Györgyi, *Hungary*, *supra* note 295, at 355 (explaining that the police may start proceedings, except in cases which are the exclusive responsibility of the prosecution); TAK, *DUTCH CRIMINAL JUSTICE SYSTEM*, *supra* note 141, at 128 (asserting that prosecutors must prioritize when instituting investigations because of financial constraints); WADE, *The Power to Decide*, *supra* note 132, at 58–59 (explaining that the PPS only becomes involved where it is really necessary).

are held responsible for the legality of investigations.³⁰¹ Their formal status as "ruler," "director," or "master" of the investigative stage in France, Germany, the Netherlands, and Poland, as well as in all complex cases in Sweden, carries with it an obligation to ensure fairness of criminal investigations and adherence to procedural rules at all times.³⁰²

The criminal trial of continental Europe is discussed at length elsewhere, but a few aspects deserve mention here. The civil law tradition is marked by a less aggressive defense bar and the prominence of written documents, especially the prosecution's files.³⁰³ With regard to the former, the continental judge and prosecutor are expected and trusted to protect the rights of the accused—in fact, the prosecutor has a duty to present exculpatory and mitigating evidence³⁰⁴—which ostensibly limits the need for a vigorously independent defense. As for the latter, the abiding conception of prosecutors as quasi-judicial officers in pursuit of the truth provides their case files a presumption of veracity and considerable weight in court, particularly given that the files are open and available to the defense.³⁰⁵ For these and other reasons, trials in continental Europe are vastly different from those in adversarial-based systems. In the Netherlands, for instance, judges rely almost entirely upon case files in making their decisions and thereby manage to complete most trials in a few hours and the most complicated cases in a matter of days.³⁰⁶ Even in continental systems where case files themselves are not considered evidence and trials require live witnesses (e.g., in Germany through its

301. See, e.g., Kilchling, *Germany*, *supra* note 125, at 75 ("[T]he prosecutor holds the position of a watchdog of legality even with respect to judicial decision-making.").

302. See, e.g., Ambos, *Comparative Summary*, *supra* note 270, at 512–16 (explaining the role of prosecutors in the investigation); see also Hodgson, *Guilty Pleas*, *supra* note 215, at pt. I.C (discussing role of French prosecutors in the investigation); Caianiello, *The Italian Public Prosecutor*, *supra* note 53, at pt. III.A.1 (discussing the role of Italian prosecutors in the investigation); Tak, *The Dutch Prosecutor*, *supra* note 249 (discussing the role of Dutch prosecutors in the investigation); Zila, *Prosecutorial Powers*, *supra* note 179, at pt. III.B (discussing the investigatory role of prosecutors in Nordic countries).

303. *Infra* notes 338–39.

304. See, e.g., *Recommendation 19*, *supra* note 76, at 8 (explaining the duties of the public prosecutor towards defendants).

305. European Convention for the Protection of Human Rights and Fundamental Rights art. 6(1), Nov. 4, 1950, 213 U.N.T.S. 222, entered into force Sept. 3, 1953; *Recommendation 19*, *supra* note 76, at 8.

306. Piet-Hein A.J. Cremers, *Fight Against Criminality Relations Between Public Prosecutor and Police*, in *THE ROLE OF THE PUBLIC PROSECUTION OFFICE IN A DEMOCRATIC SOCIETY* 67, 75 (1997); Tak, *Criminal Justice System in the Netherlands*, *supra* note 166, at pt. III.C.

principle of immediacy, or *Unmittelbarkeitsprinzip*), courts utilize and rely upon the files in a manner that would be unacceptable in the United States.³⁰⁷ A prosecutor's influence upon a trial in continental Europe is thus twofold, through oral presentation and the evidence provided in the file.

Another important distinction, which is also well-covered in the literature, involves the rules of evidence in civil law systems. European prosecutors have an affirmative duty to disregard evidence against the accused that they have reason to believe was the product of unlawful conduct, and when uncertain, they should seek a court ruling on the evidence.³⁰⁸ Prosecutors are thereby expected to act on their own accord and to not use incriminating evidence obtained by illegal methods.³⁰⁹ Continental judges have the power to declare such evidence inadmissible, although they are not bound by the theoretical rigor of the American exclusionary rule. Suppression is not mandatory and technicalities or minor irregularities will be ignored, with the court instead focusing on evidentiary reliability and the integrity of the legal system.³¹⁰

Moreover, continental judges will consider *all relevant information* when evaluating the case before them, pursuant to the principle of "free evaluation of evidence" (e.g., *Grundsatz der freien Beweiswürdigung* in Germany).³¹¹ A defendant's prior convictions and other arguably probative but prejudicial information can be taken into account by the court, which is supposed to evaluate the reliability of this evidence while also paying due respect to issues of fairness.³¹² Although a confession will have a significant impact at trial, it will not have the near-conclusive effect seen in common law proceedings. Consistent with their charge to seek the truth, continental judges require further evidence of guilt independent of any

307. Among other things, the continental approach would be inconsistent with the U.S. Supreme Court's Confrontation Clause jurisprudence. See *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2542 (2009) (refining the requirements of the U.S. Constitution's Confrontation Clause); *Giles v. California*, 128 S.Ct. 2678, 2693 (2008) (same); *Crawford v. Washington*, 541 U.S. 36, 68–69 (2004) (same).

308. *Recommendation 19*, *supra* note 76, at 28.

309. See, e.g., *id.* at 19 (stating, in the explanatory memorandum, that the prosecutor "must take account of the manner in which incriminating evidence is obtained").

310. Erik Luna, *A Place for Comparative Criminal Procedure*, 42 BRANDEIS L.J. 277, 319–21 (2003) [hereinafter Luna, *Comparative Criminal Procedure*].

311. See STPO, *supra* note 72, § 261 ("The court shall decide on the result of the evidence taken according to its free conviction gained from the hearing as a whole."). This norm provides that information relating to a broad range of findings of guilt (e.g., administrative fines for misdemeanors alongside criminal convictions) will be considered during sentencing. *Id.*

312. *Id.* § 243(4).

inculpatory statements, which has repercussions for the role played by the prosecution and its case-ending powers.³¹³

5. Prosecutorial Adjudication

This brings us back to the issue of prosecutorial adjudication. As discussed in the previous part, all European countries feature prosecutorial case-ending discretion that amounts to adjudication.³¹⁴ Sometimes this discretion results in de facto prosecutorial adjudication, where, for instance, a negotiated case settlement requires agreement by the defendant and approval by the judge.³¹⁵ The latter is rarely withheld, however, meaning that the prosecutor's discretionary decision effectively adjudicates the case. A minority of European criminal justice systems also provide for prosecutorial adjudication in its fullest sense, with prosecutors replacing judges by finding guilt and imposing punishment directly upon suspects.³¹⁶

While de jure adjudication in Sweden via the *strafföreläggande* is restricted to a relatively narrow category of offenses for which a fine or conditional sentence would be appropriate,³¹⁷ the analogous Dutch *strafbeschikking* marks a landmark in prosecutorial power.³¹⁸ As mentioned, prosecutors in the Netherlands are expected to gradually phase out conditional disposals (i.e., *transacties*) in favor of their new means of de jure prosecutorial adjudication. The *strafbeschikking* is applicable to the

313. The British system is similar to the American system in certain respects, including the possibility of a jury fact-finding, a ban on introducing previous convictions as evidence of guilt, an adversarial trial with a less active judge, and a conclusive effect of a defendant's guilty plea. As for evidentiary admission, a British judge will suppress evidence he deems to be unfair to the defendant. See, e.g., *R. v. Gerald Gall*, [1990] 90 Crim. App. 64, 68–69 (Eng.) (discussing and applying evidentiary suppression rule).

314. See, e.g., *Recommendation 18*, *supra* note 120, at 2 (explaining the principle of discretionary prosecution); *Compilation of Replies to the Questionnaire, Conference of Prosecutors General*, Conference of Prosecutors General of Europe, 5th Session (May 2004) at 6–19 [hereinafter *Compilation of Replies*], available at http://www.coe.int/t/dghl/cooperation/ccpe/conferences/cpge/2004/CPGE_2004_03Replies_bil.pdf (providing questionnaire answers regarding discretionary powers of public prosecutors).

315. *Illuminati*, in *Vander Beken & Kilchling*, *supra* note 248; *Löschnig-Gspandl, Austria*, *supra* note 243.

316. *Zila*, *Swedish Criminal Justice System*, *supra* note 138; *Tak, The Dutch Prosecutor*, *supra* note 249.

317. See, e.g., *Zila, Swedish Criminal Justice System*, *supra* note 138, at 292–93 (providing conditions in which this case disposition is allowed).

318. See, e.g., *Tak, The Dutch Prosecutor*, *supra* note 249 (discussing *strafbeschikking*).

vast majority of offenses in the Netherlands, and if the percentage of drops and trials remains the same, prosecutors will be legally adjudicating a third of all cases in the near future.³¹⁹ This change could reverberate across Europe, given the high profile of Dutch criminal justice reforms and the inspiration they provide for neighboring countries.

All told, prosecutorial discretion is extensive and robust throughout Europe, where cases can be effectively, if not legally, adjudicated by prosecutors. In contrast to the continental assumption that case-ending discretion only applies to minor cases,³²⁰ prosecutorial adjudication is occurring in virtually every category of crime.³²¹ The use of this discretion in Germany, for instance, demonstrates not only that it is a land *with* plea bargaining but also one of prosecutorial adjudication through several case-ending options.³²² Some European academics and practitioners will continue to deny this,³²³ producing heated debate.³²⁴ Prosecutorial adjudication presents a theoretical indictment of any process claiming to adhere to a principle of legality that demands prosecution whenever a crime is discovered with sufficient evidence against a given suspect.³²⁵ The

319. That is, the number of cases disposed of using the *transactie*.

320. See, e.g., *Recommendation 18*, *supra* note 120, at 2, 22–23 (explaining the principle of discretionary prosecution); *Conference's Summary, Conference of Prosecutors General*, Conference of Prosecutors General of Europe, 5th Session (May 2004) at 6, available at http://www.coe.int/t/dghl/cooperation/ccpe/conferences/cpge/2004/Resume_Conference_en.pdf (stating that the discretionary prosecution is less applicable to moderately serious offenses).

321. See generally KARSTEN ALTENHAIN ET AL., *DIE PRAXIS DER ABSPRACHEN IN WIRTSCHAFTSSTRAFVERFAHREN* (Nomos 2007).

322. Kilchling, *Germany*, *supra* note 125, at 91–93.

323. *Compilation of Replies*, *supra* note 314, at 6–19; *Contribution by Mr. Jerzy Szymanski, Discretionary Powers of Public Prosecution: Opportunity or Legality Principle—Advantages and Disadvantages*, Conference of Prosecutors General of Europe, 5th Session (May 2004) at 2–4, available at http://www.coe.int/t/dghl/cooperation/ccpe/conferences/cpge/2004/ContributionSZYMANSKI_en.pdf; see also *Opening Address by Mr. Harold Range*, Conference of Prosecutors General of Europe, 5th Session (May 2004) at 2, available at http://www.coe.int/t/dghl/cooperation/ccpe/conferences/cpge/2004/AllocationRANGE_en.pdf (“[T]he German prosecution service has been governed by the principle of mandatory prosecution since the outset and still is today.”); Perrot, *Criminal, Civil, and Commercial Fields*, *supra* note 252, at 172 (comparing mandatory and discretionary prosecutions and stating which European countries follow each framework).

324. See, e.g., *Conference's Summary*, *supra* note 320, at 7 (discussing how different countries view discretionary prosecution); Kilchling, *Germany*, *supra* note 125, at 76–77 (explaining that the application of law always involves some discretionary decision-making even though German statutes do not provide any discretion for the prosecutorial decision).

325. Tom Vander Beken & Michael Kilchling, *General Conclusions: The Challenge of Balancing the Input and the Output Within Criminal Justice Systems*, in *THE ROLE OF THE*

practice on the ground is far different,³²⁶ however, as the principle of legality appears to have become a somewhat mild presumption rather than an outcome-determinative rule.³²⁷

A related but more significant concern, we believe, is the sidelining and even elimination of courts from the criminal process. Scholars are only starting to recognize "the new judge-like role of the public prosecution," which is "so extensive that [the prosecutor] in fact becomes a judge besides the judge."³²⁸ Whatever its consequences for the mandatory prosecution doctrine, prosecutorial adjudication threatens important legal concepts

PUBLIC PROSECUTOR IN THE EUROPEAN CRIMINAL JUSTICE SYSTEMS 9–138 (Tom Vander Beken & Michael Kilchling eds., 2000) [hereinafter Vander Beken & Kilchling, *General Conclusions*] (explaining that the prosecution in a country with a strong legality-tradition can exercise discretion when there is insufficient evidence).

326. See, e.g., *Contribution by Italy, Discretionary Powers of Public Prosecution: Opportunity or Legality Principle—Advantages and Disadvantages*, Conference of Prosecutors General of Europe, 5th Session, (May 2004) at 3, available at http://www.coe.int/t/dghl/cooperation/ccpe/conferences/cpge/2004/ContributionItalie_en.pdf (explaining that it is impossible to always take action against all crimes and stating that the objective of mandatory prosecution only exists in theory); Report by Jörg-Martin Jehle, *supra* note 229, at 14 (explaining that there is almost no European country that follows the principle of legality without exception); Ambos, *Comparative Summary*, *supra* note 270, at 505–09, 525–26 (discussing the presence of prosecutorial discretion); Györgyi, *Hungary*, *supra* note 295, at 352–53 (stating that the prosecutor has discretion to decide the outcome of a case during the course of the investigation); Illuminati, in Vander Beken & Kilchling, *supra* note 248, at 122 (stating that a factual discretion exists in practice because the legality principle is not cost-effective); Kilchling, *Germany*, *supra* note 125, at 74–77 (explaining that the application of law always involves some discretion); *Id.* at 92–93 (emphasizing that a new form of legality must be established); Löschnig-Gspandl, *Austria*, *supra* note 243, at 17 (explaining that a degree of discretion remains with even the strictest forms of the legality principle); Miskolci, *Hungary*, *supra* note 295, at 107 (emphasizing that even a state traditionally based on the principle of legality must broaden the scope of discretionary power in order to maintain expediency); Morré, *Germany*, *supra* note 260, at 342–43 (explaining that there are exceptions to the strict rule of mandatory prosecution); Triffiterer, *Austria*, *supra* note 276, at 214–15 (stating that the principle of mandatory prosecution is substituted by discretionary prosecutions); Vander Beken & Kilchling, *General Conclusions*, *supra* note 325, at 149–50 (stating that the differences between legality and expediency based systems are fading in practice).

327. See, e.g., Kilchling, *Germany*, *supra* note 125, at 93 (stating that there are new interpretations of legality); Löschnig-Gspandl, *Austria*, *supra* note 243, at 17 (asserting that the principle of legality has some flexibility); see also Report by Jörg-Martin Jehle, *supra* note 229, at 13–15 (stating that there are exceptions to the principle of legality); Perrot, *Criminal, Civil, and Commercial Fields*, *supra* note 252, at 172–73 (explaining that there is a margin of uncertainty in assessing the legal elements of an offense, which leaves room for arbitrariness and discretion).

328. Löschnig-Gspandl, *Austria*, *supra* note 243, at 22, 27; Busacca, *Civil and Commercial Fields*, *supra* note 289, at 158; Perrot, *Criminal, Civil, and Commercial Fields*, *supra* note 252, at 166.

found in both the civil law and common law traditions, including the separation of powers doctrine—namely, between judicial and executive branches—and the principle that a party (e.g., a prosecutor) cannot be a judge in his own case.³²⁹ Moreover, there are practical concerns about political influence on prosecutorial decision-making,³³⁰ as well as the possibility of "net widening," where cases that should be declined and removed from the criminal justice system altogether instead become standard fare for adjudication by prosecutors.³³¹ An honest debate about the use and extent of prosecutorial adjudication and the ramifications it has for the role of prosecutors and judges—not to mention the position of victims and suspects within criminal proceedings—appears long overdue.³³²

What is more, prosecutorial adjudication in Europe may pose the most troubling risk of all: the conviction and punishment of innocents.³³³ This phenomenon may be an inevitable occurrence in any system of criminal justice. To date, however, there is a marked difference in the discussion of wrongful convictions in England and Wales as compared to continental Europe.³³⁴ While the British literature is replete with such miscarriages of

329. See, e.g., *Recommendation 19*, *supra* note 76, at 7 (stating that the role of prosecutors cannot interfere with the independence and impartiality of court judges); *Recommendation 1604*, *supra* note 117, at ¶ 2 (explaining that there must be a separation of powers between the prosecutor and the judiciary). See generally Frencken, *Position and Status*, *supra* note 276, at 39; Jiri Toman, *The Role of the Public Prosecution Office in the Criminal Field*, in *THE ROLE OF THE PUBLIC PROSECUTION OFFICE IN A DEMOCRATIC SOCIETY* 137 (1997); Tom Vander Beken, *Belgium*, in *THE ROLE OF THE PUBLIC PROSECUTOR IN THE EUROPEAN CRIMINAL JUSTICE SYSTEMS* 37 (Tom Vander Beken & Michael Kilchling eds., 2000) [hereinafter Vander Beken, *Belgium*].

330. See, e.g., Vander Beken & Kilchling, *General Conclusions*, *supra* note 325, at 150 (emphasizing that criminal law will become more "executivistic" and open to political influence).

331. See, e.g., Sanders, *England and Wales*, *supra* note 279, at 63 ("[O]ffenders committing minor offences can be diverted from no action at all, as much as from prosecution."); Vander Beken, *Belgium*, *supra* note 329, at 37 ("[T]he danger of *net-widening* should be taken into account when evaluating the growing diversion possibilities of the public prosecutor.").

332. See, e.g., Vander Beken & Kilchling, *General Conclusions*, *supra* note 325, at 150 ("From a substantive perspective, prosecutors . . . take over and exercise a judicial or quasi-judicial decision-making position whereas, from a functional perspective, they act as a (nonindependent) part of the executive. It is the disjunction between . . . these two perspectives that is deserving a permanent and critical examination.").

333. *Id.*

334. See Kent Roach, *Wrongful Convictions: Adversarial and Inquisitorial Themes*, 35 N.C. J. INT'L L. & COM. REG. 387, 437 (2010) (describing "the Criminal Case Review Commission for England, Wales, and Northern Ireland" created to investigate potential wrongful convictions, and noting that such bodies are not present in many other European countries).

justice, there is a conspicuous absence of reported incidents in other European nations.³³⁵ Continental jurists often see this as an affirmation of their respective systems, with any discussion of miscarriages in Britain and the United States focusing on the inherent weaknesses of the adversarial process.³³⁶ The continental systems feature few, if any, professional groups with an inherent interest in uncovering wrongful convictions, however, and as mentioned, the defense bar is relatively weak when compared to its common law counterpart.³³⁷

All parties, including defense attorneys, are expected to work constructively with the courts to discover the truth, based upon the belief that balanced prosecutors and judges will ensure that only the guilty are convicted.³³⁸ This perspective might well be an advantage in shaping and controlling how prosecutors work, but it may also engender a more docile approach in which mistakes are less likely to be discovered, even where all parties act in good faith.³³⁹ Prosecutorial adjudication, particularly in its new *de jure* forms, would seem to heighten the danger, given the absence of much, or any, court review.³⁴⁰ Whether the professional ethos and role conception of the continental prosecutor minimize the chances of wrongful convictions is unknown.³⁴¹ It seems clear, however, that continental Europe lags behind the common law systems in its understanding of the phenomenon.

Then again, the professional culture and judicial mindset of continental prosecutors may preclude, or at least temper, the psychological biases that tend to produce wrongful convictions and various other errors often

335. See Andrew Ashworth, *Developments in the Public Prosecutor's Office in England and Wales*, 8 EUR. J. CRIME CRIM. L. & CRIM. JUST. 149, 260 (2000) (noting that in England and Wales, there has been "the exposure of major miscarriages of justice which resulted in people's spending 15 years or longer in prison, having been convicted after all kinds of errors and irregularities by the police, prosecutors, scientific experts and judges").

336. See Roach, *supra* note 334, at 391 ("There is nothing particularly new to the idea that inquisitorial systems might be better suited than adversarial systems in preventing wrongful convictions, and such conclusions have been reached by some of the best minds that have examined the phenomena of wrongful convictions.").

337. *Id.* at 390.

338. See, e.g., Thomas Weigend, *The Prosecution Service in the German Administration of Criminal Justice*, in TASKS AND POWERS OF THE PROSECUTION SERVICES IN THE EU MEMBER STATES 205 (Peter J.P. Tak ed., 2004) [hereinafter Weigend, *The Prosecution Service*] (describing the ways in which prosecutors are expected to ensure accurate verdicts).

339. Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 579-80 (1973).

340. Sanders, *England and Wales*, *supra* note 271, at 300.

341. Roach, *supra* note 334, at 395.

associated with extreme adversarialism.³⁴² More generally, the broader context suggests that prosecutorial adjudication need not undermine the legitimacy of European criminal justice.³⁴³ The trends described in this Article are not indicative of ad hoc or even ad hominem decision-making, and increasing prosecutorial discretion does not necessarily lead to uncontrolled case-ending or arbitrary use of procedural paths.³⁴⁴ In fact, the available information evinces a degree of uniformity in the use of case-ending options across Europe.³⁴⁵

What constrains the discretion of the European prosecutor, particularly those of the civil law tradition, are various "soft" factors that nonetheless reduce the potential for abusive decision-making.³⁴⁶ Continental prosecutors regard themselves as judicial officers who apply the law as a science and find the truth through rational analysis.³⁴⁷ They accept the job as an end itself, serving as representatives of the public interest who are imbued by a collegial environment of professional ethics and are never beholden to the whims of politics.³⁴⁸ Accountability comes through hierarchy, guidelines, the review of superior prosecutors, and the desire to conform to role conceptions.³⁴⁹

Pressures do exist, for sure, especially due to the sometimes enormous number of cases that must be resolved.³⁵⁰ But unlike in the United States, the number and rate of convictions and the amount of punishment are not the basic measures of success.³⁵¹ The judicial-minded goals of finding the truth and achieving just outcomes are primary and affect oversight of police investigations, the preparation of case files, the exercise of case-ending discretion, the presentation of evidence, and all other aspects of the prosecutorial function.³⁵² It might even be argued that European

342. Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1626 (2006); Erik Luna, *System Failure*, 42 AM. CRIM. L. REV. 1201, 1211 (2005); Medwed, *supra* note 237, at 133.

343. WADE, *The Power to Decide*, *supra* note 132, at 112.

344. *See id.* at 64 ("Where the PPS has discretionary powers to drop or dispose of cases . . . this is regulated by law, and in more detail, by guidelines.").

345. *Id.* at 109.

346. Ambos, *Comparative Summary*, *supra* note 270, at 526.

347. Francois Falletti, *The French Prosecution Service*, in TASKS AND POWERS OF THE PROSECUTION SERVICES IN THE EU MEMBER STATES 177 (Peter J.P. Tak ed., 2004).

348. Tak, PART I, *supra* note 107, at 7.

349. Ambos, *Comparative Summary*, *supra* note 270, at 498.

350. *Id.* at 28.

351. Tak, PART I, *supra* note 107, at 12–13.

352. Ambos, *Comparative Summary*, *supra* note 270, at 500.

prosecutors, rather than the courts, are in the best position to achieve fairness and consistency in the criminal justice system.³⁵³ Subjecting prosecutors to strict guidance in using their discretion is far less controversial as a matter of law and culture than taking such action in relation to judicial decision-making.³⁵⁴ The idea that prosecutors across Europe are expected to ensure the even-handed application of law is reflected in, among other things, their powers to appeal *against* court sentences that are too high as compared to similar cases.³⁵⁵ So although it poses a fundamental challenge to traditional continental theory and doctrine, prosecutorial adjudication does not necessarily produce an affront to individual or aggregate justice.³⁵⁶

Most importantly, European nations limit the potentially alarming consequences of prosecutorial adjudication (including the harms of wrongful convictions) by maintaining far narrower criminal codes and milder schemes of punishment than those found in the United States.³⁵⁷ In Europe, criminal provisions have remained relatively stable, concepts like vicarious liability and guilt without a culpable mental state are generally rejected, and imprisonment is used only as the *ultima ratio*, the last resort.³⁵⁸ In contrast, the past few decades have witnessed a massive growth in American criminal justice: more crimes on the books (e.g., 4,000-plus federal offenses), more liability expanding doctrines (e.g., strict liability), and more potential punishment (e.g., mandatory minimum sentences).³⁵⁹ As a result, the United States has become the most punitive nation in the Western world by virtually every measure.³⁶⁰ Today, America leads the world in prison population, with

353. Tak, PART I, *supra* note 107, at 8–9.

354. *Id.* at 5.

355. See, e.g., STPO, *supra* note 72, § 296 ("Both the public prosecution office and the accused shall be entitled to file the appellate remedies admissible against court decisions."); Weigend, *The Prosecution Service*, *supra* note 338, at 205 (noting that "[t]he prosecutor can move for acquittal at the end of the trial, and he can even file an appeal in favour of the accused").

356. Tak, PART I, *supra* note 107, at 12.

357. See JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 70–71 (2003) (elucidating how the European punishment schemes are significantly milder than their American counterparts).

358. See, e.g., Markus Dirk Dubber, *Theories of Crime and Punishment in German Criminal Law*, 53 AM. J. COMP. L. 679, 692 (2005) ("The criminal law, in other words, is said to be the state's *ultima ratio* in its effort to protect legal goods; it must employ less intrusive, civil, means if they can provide sufficient protection for the legal good in question.").

359. See, e.g., Luna, *Overcriminalization*, *supra* note 19, at 704–12 (describing growth of American criminal justice); Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 21 (2010) (same).

360. See, e.g., Michael Tonry & David P. Farrington, *Punishment and Crime Across*

2.3 million people behind bars. More than one in every ninety-nine Americans is incarcerated, a rate more than eight times greater than that of Germany.³⁶¹

A number of reasons have been offered for the punitive gap between the United States and Europe. For instance, James Q. Whitman has argued that continental Europe's historic aversion to degrading penalties for the upper classes and its maintenance of relatively mild punishments for high-status offenders offered a standard for sentencing reform in a new egalitarian age.³⁶² In other words, modern class-neutral sanctioning regimes arose from a "leveling up" of lenient treatment previously reserved for the upper classes.³⁶³ In contrast, Professor Whitman points to a "leveling-down" trend in America, with harsh punishments meted out to all people regardless of status.³⁶⁴ This argument is bolstered by the influence of politics on criminal justice. In the United States, law-and-order campaigns have been especially successful, drawing upon high-profile crimes or various moral panics,

Space and Time, 33 *CRIME & JUST.* 1, 6 (2005) (finding that American policies were the most punitive in terms of probability of commitment given a conviction, expected days imprisonment per recorded crime, expected days imprisonment per conviction, and average times served by imprisoned); Alfred Blumstein, Michael Tonry & Asheley Van Ness, *Cross-National Measures of Punitiveness*, 33 *CRIME & JUST.* 347, 348 (2006) (finding that the United States had the harshest sentences for homicide, rape, robbery, residential burglary, assault, and motor vehicle theft); see also *Crime and Punishment in America: Rough Justice*, *THE ECONOMIST* (2010), available at http://www.economist.com/node/16640389?story_id=16640389 (last visited October 19, 2010) (discussing the exceptional punitiveness of American criminal justice) (on file with the Washington and Lee Law Review).

361. See, e.g., International Centre for Prison Studies, King's College London, World Prison Brief, available at <http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief> (last visited October 19, 2010) (noting that America's per capita prison rate is 748 per 100,000—with the world's highest prison population at roughly 2.3 million inmates—while Germany's per capita prison rate is 87 per 100,000) (on file with the Washington and Lee Law Review); Adam Liptak, *U.S. Imprisons One in 100 Adults, Report Finds*, *N.Y. TIMES*, Feb. 29, 2008, at A14 (same).

362. See WHITMAN, *supra* note 357, at 9–10 ("[H]igh-status continental convicts . . . could expect certain kinds of privileged treatment. They were permitted a relatively normal and relatively comfortable existence, serving their time in 'fortresses' rather than in prisons. Their 'cells' were something like furnished apartments, where they received visitors and were supplied with books and writing materials.").

363. See *id.* at 10 ("[W]ithin the limits of the possible, everyone in a continental prison is now treated in the way only aristocrats and the like were once treated These countries are the scene of a *leveling-up* egalitarianism . . . whose aim is to raise every member of society up in social status.").

364. See *id.* at 11 ("From a very early date, America[] showed instead, at least sporadically, a typical tendency to generalize norms of *low-status* treatment—to level down.").

inevitably resulting in the enactment of more crimes and harsher punishments.³⁶⁵ On the other side of the Atlantic, criminal justice issues are less influenced by raw politics.³⁶⁶ Instead, legal experts and practitioners help shape continental European policy, opting for progressive approaches, such as decriminalization and diversion,³⁶⁷ rather than following populist calls for punitiveness.³⁶⁸

Where do prosecutors fit within the criminalization debate? European prosecutors are among the criminal justice professionals who have helped maintain the status quo.³⁶⁹ In the continental tradition, they are first and foremost quasi-judicial officers whose role conception is based on truth-finding and just outcomes, not on convictions and tough sentences.³⁷⁰ Their interests and allegiances lie with the profession, and they are invested in maintaining the criminal justice system's current structure. Moreover, they do not face election and need not respond to public pressures.³⁷¹ Even though important changes are occurring across Europe, there is a great deal of reluctance to adopt practices that seem to undermine the legitimacy of criminal justice.³⁷² Despite an increase in negotiated case settlements, for instance, most European professionals are aghast at plea bargaining practices reported in the United States. As happened with German practitioners, British lawyers were careful to deny the existence of negotiated settlements—even in the face of very high rates of guilty pleas before the courts—and only recently did Parliament acknowledge and endorse the practice of plea and sentence bargaining.³⁷³ Continental

365. See Luna, *Overcriminalization*, *supra* note 19, at 719–20 (describing politics of overcriminalization); Luna & Cassell, *supra* note 359, at 22–24 (same).

366. See WHITMAN, *supra* note 357, at 199 (noting that "democratic politics has much less impact on criminal justice in Europe than it does in the United States").

367. See generally JEHLE & WADE, *supra* note 120, at 5–6, 19, 24–25; Conclusions, Conference of Prosecutors General, *supra* note 118, at 3–4.

368. For a partial critique of Whitman's theory, see generally Richard S. Frase, *Historical and Comparative Perspectives on the Exceptional Severity of Sentencing in the United States*, 36 GEO. WASH. INT'L L. REV. 227 (2004). For an alternative theory of American punitiveness, see generally Michael Cavadino & James Dignan, *Penal Policy and Political Economy*, 6 CRIMINOLOGY & CRIM. JUST. 435 (2006) (arguing that a nation's political economy is strongly related to its punitiveness). *But see* David Nelken, *Comparative Criminal Justice: Beyond Ethnocentrism and Relativism*, 6 EUR. J. CRIMINOLOGY 291, 295–306 (2009) (critiquing Cavadino and Dignan's thesis).

369. WADE, *The Power to Decide*, *supra* note 132, at 27–28.

370. *Id.* at 28.

371. Ambos, *Comparative Summary*, *supra* note 270, at 501.

372. Sanders, *England and Wales*, *supra* note 279, at 111.

373. Weigend, *The Prosecution Service*, *supra* note 338, at 216.

Europe, particularly Germany, continues to debate the propriety of such practices in light of the principle of legality and the doctrine of compulsory prosecution.³⁷⁴ Nonetheless, there appears to be a general consensus in Europe that the use of coercive plea bargaining through expanded criminal liability and threats of harsh punishment would be beyond the pale.³⁷⁵

By comparison, prosecutors in the U.S. have every incentive to extend criminal liability and increase potential sentences. Both chief and line prosecutors are players in America's competitive enterprise of law enforcement, not neutral and detached actors without a personal stake in individual case-outcomes or net results over time. As mentioned above, success is typically measured by the number of convictions and amount of punishment, leading to reelection for district attorneys and promotion for their deputies.³⁷⁶ With more crimes and punishments on the books, prosecutors exercise greater authority in the criminal justice system.³⁷⁷ The expansion of criminal liability makes it easier to prosecute a course of conduct,³⁷⁸ while the increase in punishment gives defendants every reason to cooperate by providing information, entering into plea agreements, and waiving constitutional rights.³⁷⁹ All of this enhances the power of prosecutors, who can obtain more and cheaper convictions via plea bargaining or, if that fails, deploy potent legal weaponry against their opponents at trial.

In sum, it is the difference in role perception, incentive structures, and punitive potential that separates the danger of prosecutorial adjudication in Europe versus the United States. For European prosecutors, case-ending options are only a means to deal with overwhelming dockets while achieving just outcomes. It would be an impermissible use of prosecutorial

374. Sanders, *Prosecutions in England and Wales*, in *TASKS AND POWERS OF THE PROSECUTION SERVICES IN THE EU MEMBER STATES* 12, 116 (Peter J.P. Tak ed., 2004).

375. *Supra* note 357 and accompanying text.

376. *Supra* notes 236–37 and accompanying text.

377. See Luna, *Overcriminalization*, *supra* note 19, at 723–24 (noting incentive structures).

378. See Stuntz, *Pathological Politics*, *supra* note 36, at 519 (describing how eliminating a difficult-to-prove element in a given offense or criminalizing alleged precursors to the target behavior allows prosecutors to "continue to enforce the original crime, but more cheaply, by enforcing the substitutes").

379. See Luna, *Overcriminalization*, *supra* note 19, at 724 (noting that punishment can be raised by, among other things, increasing the attached penalties, enacting an anti-recidivist statute, or charging a single course of conduct as multiple crimes). Even where European systems have adopted more punitive American ideas, they take on a much milder form, as seen with the introduction of a "three strikes" policy for certain offenses in England and Wales.

discretion to threaten defendants with drastic increases in punishment for exercising their right to trial. Prosecutors in the United States face similar docket pressures, but for them, punishment is not merely a matter of justice but an adversarial tool to be used to increase conviction rates via plea bargaining. Threats of harsh sentences are not only allowed, they are to be expected. For those defendants who reject a plea bargain, the end result may be punishment grossly disproportionate to their offenses.

B. A Comparative Example

To help make this more concrete and highlight the relative dangers of prosecutorial adjudication in Europe and America, consider a case discussed at the outset of this Article: *United States v. Weldon Angelos*.³⁸⁰ Certainly, Angelos was no angel, but he was hardly public enemy number one. To reiterate, the twenty-three-year-old Utah native was arrested for dealing marijuana and possessing firearms, none of which seemed particularly newsworthy at the time. If he had been prosecuted and convicted in local court, Angelos might have served a few years in prison, at most, and today he would be a free man. Instead of bringing state charges, however, officials decided to prosecute the case in federal court, where lengthy sentences under statutes like 18 U.S.C. § 924(c) provide the government enormous leverage over defendants. Such was the case for Angelos, as described by the trial court:

[T]he government told Mr. Angelos, through counsel, that if he pled guilty to the drug distribution count and a § 924(c) count, the government would agree to drop all other charges, not supersede the indictment with additional counts, and recommend a prison sentence of 15 years. The government made clear to Mr. Angelos that if he rejected the offer, the government would obtain a new superseding indictment adding several § 924(c) counts that could lead to Mr. Angelos facing more than 100 years of mandatory prison time Ultimately, Mr. Angelos rejected the offer and decided to go to trial. The government then obtained two superseding indictments, eventually charging twenty total counts, including five § 924(c) counts which alone carried a potential minimum mandatory sentence of 105 years.³⁸¹

In this way, the prosecution sought to adjudicate the case by posing an extreme sentencing differential unless the defendant pled guilty—a fifteen-

380. *United States v. Angelos*, 345 F. Supp. 2d 1227, 1263 (D. Utah 2003).

381. *Id.* at 1231–32.

year sentence under the plea bargain versus a potential trial punishment of more than a century in prison. This was an attempt at de facto adjudication, given that the defendant could and did reject the deal and proceed to trial. The harshness of the threatened sentence makes the entire enterprise coercive, however, with many, if not most, individuals likely to plead out to avoid a draconian penalty. Of course, evaluating the "unfairness" of a trial sentence can be difficult, as reasonable minds can differ on the appropriate sentence for a given offense.³⁸² But this case appears straightforward. Virtually every commentator and case participant—including the judge, the jury, and, at least initially, the prosecution—recognized that Angelos's crimes did not merit an effective life sentence.³⁸³

This conclusion can be buttressed by relatively objective points of reference, such as the punishment imposed on other offenders. For instance, Angelos's sentence is longer than the maximum federal term of imprisonment for an aircraft hijacker, a second-degree murderer, a kidnapper, and a child rapist.³⁸⁴ Consider also the fate of the confidential informant who arranged the marijuana deals and testified against Angelos at trial. This key witness had nearly identical charges pending against him—for drug dealing and firearms possession—but unlike Angelos, he had a serious criminal record, making him a better candidate for hard time. Through the power of prosecutorial discretion, however, the informant's case "magically" disappeared entirely from the criminal justice system.

In turn, Angelos's sentence after trial, fifty-five years, was a form of de jure prosecutorial adjudication. Indeed, the government was quite literally the master of this sentence through its controlled buys of relatively small amounts of marijuana, with the criminal acts "in some sense procured by the government."³⁸⁵ Law enforcement could have arrested Angelos after the first incident but decided to wait for additional conduct that would multiply potential charges and punishment. Once Angelos was found guilty of three § 924(c) counts at trial, the punishment sought by the prosecution was mandatory. The sentence followed from the prosecutor's charging decisions and not the judge's independent evaluation of a fair sentence given the facts of the case.³⁸⁶

382. Langer, *Rethinking Plea Bargaining*, *supra* note 38, at 245.

383. See, e.g., Angelos, 345 F. Supp. 2d at 1230–32, 1242 (noting prosecutor's plea offer, jury's opinion on sentencing, and court's belief "that to sentence Mr. Angelos to prison for the rest of his life is unjust, cruel, and even irrational").

384. *Id.* at 1244–46 & tbl.1.

385. *Id.* at 1253.

386. See *id.* at 1261 (concluding that the sentence was "unjust, disproportionate to his

All of this provides the makings for animated conversation among almost any group, including criminal justice scholars and practitioners in other nations. In fact, the plight of Weldon Angelos provides a striking point of comparison to prosecutorial adjudication abroad. When informed about this case, our European colleagues were critical of the prosecutorial decision-making and shocked by the level at the punishment. None of the systems surveyed would have empowered a prosecutor to seek and achieve an effective life sentence in such a case. The following summarizes the likely results in six European nations.³⁸⁷

1. England and Wales (Two to Four Year Sentence)

In England and Wales, an adult with no previous convictions convicted at trial of selling marijuana on several occasions and possessing firearms could be sent to prison for around five years, largely the result of mandatory punishment for weapons possession. If he had pled guilty in a timely fashion, his sentence might be reduced by one-third for cooperation with the court. Recent research on similar controlled purchases by law enforcement resulted in low-level drug dealers like Angelos receiving two to four year sentences, with the more serious leaders of drug gangs getting up to thirteen years, but only if serious violence were involved in their drug dealing. It should be noted, however, that the lack of judicial discretion in the mandatory sentencing cases for firearms possession has resulted in courts finding ways around obligatory punishment, and in due course, it will probably lead to a revision of the law. In the past, Britain had mandatory sentences for drug possession, but the law was revised once it was shown to be unjust.

2. France (One Year Sentence or Probation)

In France, the average length of imprisonment for domestic drug trafficking (transporting and selling) is sixteen months, with the actual length depending on factors like the participation of the offender in a drug trafficking network, the kind and amount of drug involved, and his personal

offense, demeaning to victims of actual criminal violence—but nonetheless constitutional").

387. For providing us information, our thanks are due to Chris Lewis of the University of Portsmouth (England and Wales); Bruno Aubusson de Cavarlay of CESDIP (France); Paul Smit of the Dutch Ministry of Justice Research Centre (the Netherlands); Piotr Sobota of the Polish Ombudsman's Office (Poland); and Josef Zila of Örebro University (Sweden).

situation. Selling marijuana rather than heroin, for instance, would lead to a less severe sentence, for instance, and an individual's regular participation in drug trafficking would probably be taken into account as an aggravating circumstance. Carrying a firearm is a separate offense, but since the maximum penalty for this crime is lower than for drug trafficking, the judge would only be limited by the ten-year maximum sentence for drug trafficking. A sentence of one year might be requested by the prosecutor, although an individual without a prior conviction and who maintains lawful employment would probably receive a noncustodial or suspended sentence with supervision.

3. *Germany (Five Year Sentence or Less)*

Under the German Narcotics Act (*Betäubungsmittelgesetz*),³⁸⁸ a person dealing anything other than a small quantity of the relevant substances while carrying a firearm will be sentenced to no less than five years imprisonment. The fact that an individual like Angelos sold such quantities more than once is likely to be treated as evidence of drug dealing rather than several smaller separate offenses. However, because he was dealing marijuana instead of a harder drug like heroin, he did not use the weapon, and he was a first-time offender, there would be no reason for a court to impose a sentence above the statutory minimum. In fact, discussions with prosecutors suggest that they would tend to adopt a different charging strategy for these facts, aiming to achieve a sentence of between one and two years imprisonment, which would automatically be suspended.

4. *The Netherlands (Fine of 300–350 Euros)*

To begin with, this prosecution would probably never have occurred, as the Dutch criminal justice system does not allow law enforcement to "incite" a crime (e.g., conduct controlled drug purchases). Even if the case somehow made it into the system, however, there would be no minimum punishment, only a statutory maximum sentence. Here, an offender like Angelos would be charged with two offenses, drug trafficking and illegal possession of a firearm. Given that he is a first-time offender who did not actually use the firearm, a custodial sentence would be an unlikely result.

388. *Betäubungsmittelgesetz* [BtMG] [Narcotics Act], Mar. 1, 1994, BÜRGERLICHES GESETZBUCH [BGB] I, at 358.

In all probability, this case would be resolved out of court by allowing the offender to pay a fine (*transactie*) of around €300–350. If the offender did not agree to the fine, the case would go to court and would likely produce a similar outcome without a prison sentence. In practice, though, most offenders accept the fine rather than demanding trial.

5. Poland (3.5 Year Sentence or Less)

Under Polish law, selling marijuana (or any other illegal drug) is punishable by one to ten years imprisonment, with an average sentence of around sixteen months. If, as in Angelos's case, every act of drug sales was executed over a relatively short period of time, it would likely be classified as a single offense. If the court were to find separate acts of drug sales, however, the offender could be sentenced for multiple offenses with a maximum penalty of fifteen years imprisonment. Nonetheless, it is doubtful that the sentence would exceed three years. The offense of possessing a firearm without permission carries a sentence of six months to eight years imprisonment, with an average punishment of about ten months. In all likelihood, the sentence for someone like Angelos would be the sum of the average punishments for drug sales and firearms possession, with a probable outcome of no more than 3.5 years imprisonment.

6. Sweden (One Year Sentence or Less)

An offender like Angelos would be sentenced by the court for two offenses, a drug crime and a weapons crime. Under the guidelines adopted by the Swedish appellate court (*Hovrätten för Skåne och Blekinge*), the starting point for sentencing is to establish the "penal value" (*straffvärde*) for the drug offense. Selling 0.2 kilograms of marijuana (roughly eight ounces) on one occasion carries a penal value of four months imprisonment, with multiple sales resulting in slightly higher values. The penal value for the marijuana in Angelos's case would probably correspond to, more or less, six to eight months imprisonment. The penal value for carrying a firearm, one not considered an especially dangerous or advanced weapon, is approximately one month imprisonment. After establishing the penal value, various other steps are taken in the process of sentencing, although these tend to involve issues of mitigation and normally lead to a more lenient penalty than the base penal value of the case. In total, the sentence in this case might be between eight and ten months imprisonment; a lower

sentence of three to six months might be possible, however, and the total punishment certainly would not exceed one year imprisonment.

* * * * *

The story of Weldon Angelos thus offers a poignant case for comparing prosecutorial adjudication. On both sides of the Atlantic, prosecutors exercise discretion in dealing with offenders like Angelos. Through their charging decisions and choice among case-ending options, American and European prosecutors may become adjudicators of guilt and punishment, with courts simply confirming the underlying decisions. Part of this is a response to increasing criminal dockets in virtually every Western nation. In contrast to the United States, however, prosecutorial discretion in Europe is not a tool for adversarial gamesmanship. Rather, it is a means to ensure that charges and sentences fit the offenders and their offenses despite the reality of caseload pressures and resource limitations.

This goal is consistent with the quasi-judicial role ascribed to the continental prosecutor, whose duty is to determine the truth of the case and an appropriate outcome for an individual defendant in light of the full spectrum of crimes and criminals, rather than to maximize conviction rates and aggregate sentences. The prosecutorial function in Europe is constrained by hierarchical structures and detailed guidelines, as well as more subtle but influential factors like professional training and culture. Moreover, the relatively narrow codes and mild sentencing schemes—and, should all else fail, the ability of the court to reject the prosecutor's opinion—guarantee that the problems seen in America, exemplified by the case of Weldon Angelos, would not come to fruition. As suggested by the responses above, such outcomes would be unthinkable in Europe.³⁸⁹

IV. A Thematic Problem and the Prospects for Reform

This Article has sought to demonstrate that *de facto* and *de jure* prosecutorial adjudication is not a uniquely American phenomenon. European prosecutors have acquired an assortment of tools to dispose of cases, which are being used in almost every category of crime and at a rate

389. For a comparison based on a hypothetical case, see Jenia Iontcheva Turner, *Prosecutors and Bargaining in Weak Cases: A Comparative View*, in *THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE* (Erik Luna & Marianne Wade eds., forthcoming 2011).

few scholars would have thought possible. The concept of compulsory prosecution pursuant to the principle of legality is a "myth,"³⁹⁰ to use Professor Goldstein's words from three decades ago. Prosecutors are effectively adjudicating cases across Europe, determining the outcome with at most cursory oversight by the courts and thereby acting as a judge before the judge. The authority to actually adjudicate cases extends beyond the essential capacity to drop charges, with some systems empowering prosecutors to determine guilt and impose punishment on their own. Like the situation in America, prosecutorial adjudication in Europe raises serious concerns, such as the separation of powers, the accumulation of too much force in too few hands, and the specter of innocent individuals wrongfully convicted.

With that said, however, the phenomenon in Europe proves far less treacherous than that in the United States. Professors Langbein and Weinreb were absolutely correct that European prosecutors are not American district attorneys who simply speak another language (or in the case of the British, with a different accent).³⁹¹ As discussed in Part III, the role perception of the continental prosecutor is distinctly judicial, one of independence and objectivity, aimed at truth-finding and fair results.³⁹² This image is instilled through education, training, and a professional culture of civil service. Unlike their American counterparts, European prosecutors are not elected or directly influenced by politics; conviction rates and sentence lengths are neither indicators of success nor grounds for retention or promotion; and those who become prosecutors see their position as an end itself, a lifetime calling, not a segue to another career. Moreover, European legal systems limit the power of prosecutors and the results of their decision-making by employing narrower conceptions of criminal responsibility and imposing far milder punishments. In the remaining pages, we would like to explore in greater depth a principal source of the troubles associated with prosecutorial adjudication in America, which, in turn, allows us to contemplate possible correctives for its most disquieting aspects.

390. Goldstein & Marcus, *The Myth*, *supra* note 88.

391. Langbein & Weinreb, *supra* note 92, at 1550.

392. *Supra* Part III.

A. American Adversarialism

Although various factors may contribute to the problems of prosecutorial adjudication, one potential cause seems to have considerable explanatory value: the extreme adversarialism, or hyper-adversarialism, of the American legal process. In his 2002 book, *Adversarial Legalism*, Robert Kagan offers an account and critique of America's reliance upon lawyer-controlled litigation as a means not only to resolve individual disputes, but also to make and implement public policy.³⁹³ Practicing lawyers thoroughly dominate the process—they allege claims for relief, raise potential defenses, gather legal precedents, marshal supporting evidence, and so on—while judges occupy the largely passive position of reacting to the parties' arguments.³⁹⁴

The sources of American-style adversarialism are diverse, including some well-known historical and cultural roots.³⁹⁵ The nation's collective ideology has been shaped by several overarching themes, including: rugged individualism, with private citizens ordering their own affairs and demanding control over their interests; and generalized anti-statism, where mistrust of government runs deep and bureaucracy is a near four-letter word.³⁹⁶ When state intervention is deemed unavoidable, however, the conventional wisdom argues for decentralized decision-making by elected officials accountable to the local citizenry.³⁹⁷ None of this means that Americans have an inherent desire to sue, but instead that legal conventions encourage dispute resolution by adversarial processes.³⁹⁸ And none of this means that U.S. citizens have a preference for haphazard enforcement of overly broad crimes and extreme punishment. Rather, American ideology in practice lends itself to punitive responses.³⁹⁹

Criticism of hyper-adversarialism in the United States is hardly new. More than a century ago, Roscoe Pound detailed a series of reasons to be

393. See generally KAGAN, *supra* note 21.

394. *Id.* at 9 ("[T]he assertion of claims, the search for controlling legal arguments, and the gathering and submission of evidence are dominated not by judges or government officials but by disputing parties or interests, acting primarily through lawyers.").

395. *Id.* at 15.

396. *Id.*

397. See *id.* at 40 ("Americans have attempted to articulate and implement the socially transformative politics of an activist, regulatory welfare state through the political and legal institutions of a decentralized, nonhierarchical governmental system.").

398. See *id.* at 34 (arguing that "political traditions and legal arrangements . . . provide incentives to resort to adversarial legal weapons").

399. *Id.* at 61.

dissatisfied with the legal system, including the "sporting theory of justice" that many assume is a fundamental principle of American law.⁴⁰⁰

[W]e take it as a matter of course that a judge should be a mere umpire, to pass upon objections and hold counsel to the rules of the game, and that the parties should fight out their own game in their own way without judicial interference It leads the most conscientious judge to feel that he is merely to decide the contest, as counsel present it, according to the rules of the game, not to search independently for truth and justice. It leads counsel to forget that they are officers of the court and to deal with the rules of law and procedure exactly as the professional football coach with the rules of the sport.⁴⁰¹

Since Pound's time, scholars have repeatedly critiqued the adversarial approach, describing it as a "battle model" of the legal process, for instance, and a "fight theory" of litigation.⁴⁰² These metaphors are not just descriptive but also normative, with the authors seeking to draw an alarming comparison between the supposedly prudent, blind justice of the American legal system and the emotionally charged, precarious nature of warfare or sporting events.⁴⁰³ To this day, the entire adversarial process is filled with such images, although not always intended or understood to be pejorative. For example, case decisions and legal texts⁴⁰⁴ use militaristic metaphors to describe the participants and process. Lawyers are "heroes," "hired guns," "gladiators," "warriors," "champions," "generals," "lone gunfighters," or "the man on the firing line"; those who help the lawyer are "allies," his opponents are "barbarians" and "enemies," and those hurt in the process are "casualties"; and the process may involve "Rambo tactics," "Pearl Harbor tactics," "scorched earth tactics," "kamikaze tactics," and "Hiroshima tactics," all culminating in "victors" and "vanquished."⁴⁰⁵

400. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729, 736 (1906).

401. *Id.* at 738–39.

402. See JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 80–90, 368–69 (1949) ("[T]he Battle Model [is] the process conceived as a 'battle' or 'fight' or 'duel,' . . . [there are other] associated military terms: the defense counsel is a 'champion of the accused' . . . the defendant is the 'target' of the criminal process, to confess is to 'surrender'"); John Griffiths, *Ideology in Criminal Procedure or a Third 'Model' of the Criminal Process*, 79 YALE L.J. 359, 367–68 (1970); KARL N. LLEWELLYN, *JURISPRUDENCE: REALISM IN THEORY AND PRACTICE* 444–50 (2008).

403. *Supra* notes 400–402 and accompanying text.

404. The present article is no exception.

405. Elizabeth G. Thornburg, *Metaphors Matter: How Images of Battle, Sports, and Sex Shape the Adversary System*, 10 WIS. WOMEN'S L.J. 225, 233–36 (1995).

Such terms are more than rhetorical flare. They reflect the way in which litigants view the means and ends of the legal system and their function within it. The lawyer is a hero, akin to a celebrated general or successful athlete, where his role as competitor is considered appealing.⁴⁰⁶ In fact, the parallel between the legal system and sport or war may be one of the reasons for public support of adversarialism—it is entertaining, involves strategic choices and maneuvering, makes terrific fodder for news outlets and shows, and like the *Wide World of Sports*, it delivers the thrill of victory and the agony of defeat.⁴⁰⁷ The mass media generates images that tend to reinforce the alleged benefits of adversarialism and the virtues of its practitioners. For instance, Michael Asimow recently suggested that popular culture "glorifies heroic and dedicated prosecutors," who "protect us from predatory criminals," "unmask perjury and conspiracy in the courtroom and trounce slithery defense lawyers."⁴⁰⁸ Hollywood's burnished image of American prosecution affirms the value of adversarialism, as only the zealous advocacy of individual prosecutors can ensure that justice is done.⁴⁰⁹

This picture is consistent with the aforementioned ideological principles and corollaries, especially individualism and decentralized decision-making,⁴¹⁰ which remain strong in America's collective conscience and lend themselves to adversarial litigation. Of course, there are other rationales for public and professional support of legal adversarialism, including a general ignorance about alternatives and the self-interests of repeat players.⁴¹¹ The current approach is the only one known to most of the citizenry, and many lawyers may be surprised to learn that American adversarialism is so extreme that it has no close parallel, even among common-law nations.⁴¹² Besides, lawyers have a vested

406. *Id.* at 245.

407. Michael Asimow, *Popular Culture and the Adversary System*, 40 *LOY. L.A. L. REV.* 653, 667 (2007) ("Scholars trace the origins of the adversarial system back to primitive systems of trial by battle and trial by ordeal. It may be that people like adversarial trials for some of the same reasons they like sporting events and other contests . . .").

408. *Id.* at 679.

409. *Id.*

410. *Supra* notes 395–97 and accompanying text.

411. See Asimow, *supra* note 407, at 677 (explaining how the media creates a "narrative undoubtedly served to legitimate the existing adversary system by constantly repeating the message that adversarialism is the only true path to justice.").

412. *Supra* Part III.B.

interest in maintaining the status quo in the United States, where they control the process and the courts merely respond.⁴¹³

Moreover, American-style adversarialism does have positive traits.⁴¹⁴ Among other things, the adversary system has provided the machinery for some of America's greatest moments of law and public morality, such as the landmark desegregation cases and myriad suits protecting the values enshrined in the First Amendment.⁴¹⁵ This was made possible by a decentralized adversarial system receptive to novel arguments by private parties who might be shut out of the political process.⁴¹⁶ In this way, adversarialism and the litigation it fosters provide legitimacy to the American form of government.⁴¹⁷ Indeed, adversarialism has advantages in the arena of crime and punishment. Bearing in mind the plurality of public opinion and the diversity of the populace, some issues of criminal justice may be best resolved on a more local level, where policy judgments can be made by politically accountable district attorneys and put into practice by line prosecutors in contested proceedings.⁴¹⁸

Adversarialism has also produced benefits for criminal defendants. The Constitution enshrined adversarial rights to check abuses of power, and over time, adversarialism generated rules of criminal procedure that sought to curb police misconduct, especially with regard to poor and minority suspects.⁴¹⁹ During the 1960s, adversarial litigation prompted the U.S. Supreme Court to constitutionalize several critical points in the investigative

413. See Asimow, *supra* note 407, at 669 ("One reason why we retain pure adversarialism is that it is good for lawyers. Like all human beings, lawyers prefer a system that they control (whether through trials or through settlements and plea bargains) rather than one that subordinates them to figures, such as judges, whom they cannot control.").

414. See KAGAN, *supra* note 21, at 23 ("[A]dversarial legalism has enabled political underdogs in the United States to demand better treatment from the government, first and foremost in the cause of racial equality but also in the quest for more equitable electoral districts, more compassionate welfare administration, and more civilized law enforcement practices.").

415. *Id.* at 22.

416. *Id.* at 22–23.

417. *Id.* at 3.

418. As Professor Pizzi notes, "it is almost guaranteed that prosecutors who are elected in highly rural counties will have quite different constituencies and will face very different criminal problems from those prosecutors elected in heavily urban counties." Pizzi, *supra* note 101, at 1344. Given the "differences in resources [and] enforcement philosophies and priorities," it should be expected that "two prosecutorial offices in the same state will treat the possession of a small amount of cocaine, a first time property offense, and drunk driving differently." *Id.*

419. Andrew E. Taslitz, *Temporal Adversarialism, Criminal Justice, and the Rehnquist Court: The Sluggish Life of Political Factfinding*, 94 GEO. L.J. 1589, 1597 (2006).

process—search and seizure, arrest, custodial interrogation, identification procedures, and so on—and then provided an adversarial-based enforcement mechanism through the exclusionary rule.⁴²⁰ Likewise, the basic necessities of a decent adversarial criminal process, one that ensures a rough equality of arms via the right to counsel, prompted the creation of public defenders' offices across the nation.⁴²¹ As discussed previously, a properly working adversarial process may offer innocent defendants better opportunities to uncover exonerating evidence, to question dubious testimony and claims, and to obtain post-conviction relief, all premised on criminal procedure rights and the ethical duty of defense counsel to zealously represent their clients, which are products of adversarialism itself.

In some circumstances, however, the harm of adversarialism may far outweigh any benefits. Professor Kagan highlights a pair of negative consequences: the costliness of party-directed adversarial decision-making, which generates prolonged, complicated, and resource-intensive litigation; and the legal uncertainty produced by pliable, complex norms and unpredictable rulings, which result from decision-making that is fragmented and largely nonhierarchical.⁴²² Both characteristics raise issues of equality, with adversarial litigation producing sometimes drastically inconsistent results across cases and among parties. It can also generate significant agency costs, as the vast discretion associated with adversarialism practically invites lawyers to serve their own self-interests rather than those of their clients. Moreover, the battle nature of legal adversarialism inspires a mentality where the ends always justify the means. Like war, victory is all that matters in hyper-adversarial litigation. Otherwise unthinkable tactics—bringing questionable or excessive legal claims, shaping beneficial testimony and mercilessly attacking opposing witnesses, ignoring or even hiding unfavorable evidence, appealing to base emotions and prejudices, and so on—all become conceivable when winning means everything.

Along the way, lawyers can forget or may choose to ignore an important fact—at issue is the welfare of real individuals, whose lives may be irreparably and unjustifiably harmed by a take-no-prisoners approach to law. Nowhere is the danger of extreme adversarialism more pronounced than in the criminal justice system. As noted, the last few decades have

420. *Id.*

421. *See id.* at 1598 (describing how "new constitutional rules . . . gave lawyers more power to conduct effective investigations, and they improved the resources with which to conduct the adversarial battle—for example, encouraging the rise of public defenders' offices").

422. KAGAN, *supra* note 21, at 9.

seen drastic increases in the breadth of criminal liability and the amount of punishment in the United States. Prosecutors on this side of the Atlantic are partisans in the criminal process, with chief prosecutors and their line deputies having strong incentives to maximize convictions and aggregate sentences. Sometimes, this leads otherwise reasonable people to threaten excessive charges and disproportionate punishment in order to induce guilty pleas. At other times, prosecutors employ dubious evidence and disconcerting strategies, all to sway fact-finders toward conviction. The plight of Weldon Angelos exemplifies some of these issues and the problems associated with prosecutorial adjudication, but it is hardly the only case.

Consider, for instance, the most awesome prosecutorial power of all—to seek and obtain the death penalty. As is true in noncapital cases, self-interest can play a significant role in decisions about capital punishment, with some prosecutors explicitly seeking election based on the defendants they have put on death row.⁴²³ Putting aside whether this political reality is troubling in and of itself, the resulting incentive structure may well encourage prosecutors to pursue unsavory strategies in capital cases, such as presenting inconsistent theories in pursuit of multiple death verdicts (e.g., arguing in one case that a particular person killed the victim, but then claiming in another case that someone else was the actual killer).⁴²⁴ Moreover, the infusion of politics and self-interest into a decentralized, unguided approach to prosecution virtually ensures inconsistent decision-making in death cases. Some studies have suggested that capital charging decisions are correlated to irrelevant factors (e.g., race) or, conversely, are so arbitrary as to have a "lightning-strike" quality.⁴²⁵ But in many

423. See, e.g., Kenneth Bresler, *Seeking Justice, Seeking Election, and Seeking the Death Penalty: The Ethics of Prosecutorial Candidates' Campaigning on Capital Convictions*, 7 GEO. J. LEGAL ETHICS 941, 943 (1994) (detailing the "particularly gruesome campaign practice . . . of prosecutors and former prosecutors politicking on the defendants they have sent to death row").

424. See, e.g., *Stumpf v. Mitchell*, 367 F.3d 594, 613 (6th Cir. 2004) ("In this case, the state clearly used inconsistent, irreconcilable theories at Stumpf's hearing and Wesley's trial."), *rev'd sub nom.*, *Bradshaw v. Stumpf*, 545 U.S. 175 (2005); *Thompson v. Calderon*, 120 F.3d 1045, 1057 (9th Cir. 1997), *rev'd*, 523 U.S. 538 (1998) ("The prosecutor manipulated evidence and witnesses, argued inconsistent motives, and at Leitch's trial essentially ridiculed the theory he had used to obtain a conviction and death sentence at Thompson's trial.").

425. See SAMUEL R. GROSS & ROBERT MAURO, *DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING* 1 (1989) (outlining racial disparities in capital sentencing); David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 731 (1983) ("[O]ur analyses suggest that Georgia's death-sentencing system is tainted by the influence of

instances, the mere threat of the death penalty allows the prosecutor to effectively adjudicate the case, with defendants entering into plea bargains to avoid execution regardless of any factual or legal claims they might raise.

In all fairness, the disturbing aspects of hyper-adversarialism are not solely related to the prosecutorial function. Imagine, for instance, the not-so-hypothetical situation where grieving family members simply want to know the location of their loved-one's body. If defense counsel is approached about whether he has any details that might help their search, the lawyer is not only duty bound but personally incentivized to withhold information about the murder victim unless he can secure sufficient concessions for his client. Similar conclusions can be reached in (arguably) more jarring circumstances, as illustrated by two high-profile cases from the past decade. In one, a prominent defense attorney knew that his client had killed a seven-year-old girl, but at trial he adamantly denied that the defendant had anything to do with the crime and, more importantly, attacked the lifestyle of the victim's family, suggesting that one of the parents' friends might be the real killer.⁴²⁶ In the other case, defense attorneys kept quiet about a murder confession by their client while an innocent man served more than a quarter-century in prison for that crime.⁴²⁷

To be sure, the defense tactics in the first case fell squarely within the canons of professional conduct,⁴²⁸ while the attorneys in the second case could have been disbarred for revealing their client's admission. The basic issue remains, however: American adversarialism and its full expression in

arbitrary and capricious factors, notably the victim's race and the place where the defendant is prosecuted."); Glenn Pierce & Michael Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-99*, 46 SANTA CLARA L. REV. 1 (2005) (study finding geographic variations in capital punishment and an association between the death penalty and victim race and ethnicity); Michael L. Radelet et al., *Race, Gender, Region and Death Sentencing in Colorado, 1989-1999*, 77 U. COLO. L. REV. 549, 549 (2006) ("[T]he death penalty is most likely to be sought for homicides with white female victims, and . . . the probability of death being sought is 4.2 times higher for those who kill whites than for those who kill blacks."); cf. *Furman v. Georgia*, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring) (analogizing arbitrary death sentences to "being struck by lightning").

426. See, e.g., Alex Roth, *Experts Make Case for Defense Attorneys*, SAN DIEGO UNION-TRIB., Sept. 22, 2002, at A-1 (providing an account of David Westerfield's trial).

427. See, e.g., *Sixty Minutes: A 26-Year Secret* (CBS television broadcast May 25, 2008) (explaining that Alton Logan spent twenty-six years in prison for a crime he did not commit even though the real murderer had confessed to his own attorneys).

428. Roth, *supra* note 426 ("Two ethics experts said there is absolutely no evidence Westerfield's attorneys committed any violations of the California Rules of Professional Conduct . . .").

the criminal process seem to have an infinite capacity to produce ethical dilemmas. In these situations, the defense attorney can only avoid pangs of conscience, in David Luban's words, by "retreat[ing] into a nearby phonebooth and return[ing] moments later clothed in the Adversary System, trailing clouds of glory."⁴²⁹ Needless to say, any candid rethinking of American criminal justice must take into consideration adversarialism's impact on both the prosecutorial *and* defense functions.

Moreover, the foregoing is not meant to implicitly lionize the European prosecutor by casting aspersions on the American district attorney. The bureaucratic, hierarchical approach may be tedious and at times ineffective; European civil service and its protections can breed laziness; and the pressure to close files hardly seems a transcendental component of justice. Likewise, the near automation of some prosecutorial offices, such as the Dutch point system, resembles a mechanical jurisprudence that can easily lose sight of the fact that it is a human being who is prosecuted and punished, not an inanimate object.⁴³⁰ As mentioned, there are legitimate, if not at times compelling, arguments in favor of an adversarial criminal justice system, political accountability, local control, and ample prosecutorial discretion, all of which are engrained in the American legal tradition.⁴³¹

B. Possible Solutions

What is equally clear is that the context and consequences of prosecutorial adjudication in the United States are different and far graver than in Europe. Although the American criminal justice system will not (and arguably should not) be supplanted by the inquisitorial approach or any of its European variants, there may be ways to eliminate or at least temper the worst aspects of prosecutorial adjudication in the United States, drawing upon the experiences of other nations. In this endeavor, comparative criminal justice scholarship becomes all the more important, requiring serious contemplation of the arguments by Professors Frase and Weigend for selective transplants from France and Germany,⁴³² for

429. David Luban, *The Adversary System Excuse*, in *THE GOOD LAWYER* 83, 89 (David Luban ed., 1983).

430. See, e.g., Luna, *Gridland*, *supra* note 229 (critiquing mechanical sentencing).

431. See, e.g., Pizzi, *supra* note 101, at 1336–51 (highlighting advantages the American adversarial system enjoys over civil law criminal justice systems).

432. See *supra* note 98 and accompanying text (outlining Richard Frase and Thomas

instance, with due consideration to Professor Langer's concept of "legal translation"⁴³³ and the groundbreaking discourse by Professors Goldstein, Langbein, and Weinreb.

Some alternatives may seek to recalibrate the balance of powers among the branches of government and thereby reduce the negative consequences of prosecutorial adjudication. This might involve the courts asserting a greater role at the front-end and back-end of the criminal process, that is, at charging and sentencing. Several scholars have examined such possibilities, offering theoretical arguments based on the harm principle or notions of human dignity and autonomy.⁴³⁴ As a matter of constitutional law, judicial review of prosecutorial charging and sentencing decisions might be premised on the separation of powers doctrine, the due process clause, and the ban on cruel and unusual punishment.⁴³⁵ Although a few lower courts have suggested as much, they represent outliers with no impact on legal doctrine.⁴³⁶

Weigend's reform proposals involving transplants from France's and Germany's criminal justice systems).

433. See generally Langer, *Legal Translations*, *supra* note 51.

434. See Markus Dirk Dubber, *Toward a Constitutional Law of Crime and Punishment*, 55 HASTINGS L.J. 509, 530–70 (2004) (arguing that notions of dignity and personal autonomy should limit substantive criminal law); Claire Finkelstein, *Positivism and the Notion of an Offense*, 88 CAL. L. REV. 335, 358–93 (2000) (arguing that "[t]he definition of an offense must be constructed in a way that makes the infringement of liberty justified in light of the harm the prohibited conduct inflicts").

435. See, e.g., Stuntz, *Pathological Politics*, *supra* note 36, at 594–95 (suggesting a constitutional basis for checking abuses).

436. See, e.g., *United States v. Green*, 346 F. Supp. 2d 259, 289 (D. Mass. 2004) (questioning constitutionality of prosecutorial decision-making); *United States v. Dyck*, 287 F. Supp. 2d 1016, 1021 (D.N.D. 2003) (same); *United States v. Sidhom*, 144 F. Supp. 2d 41, 41 (D. Mass. 2001) (same).

[T]he power to impose a sentence has been virtually transferred from the court to the government, which, as the prosecuting authority, is an interested party to the case. This transfer continues an erosion of judicial power and a breach in the wall of the doctrine of the separation of powers.

Thus, the government, not only has the authority to prosecute crime and to decide the nature of the criminal charge to be preferred, but now has the power to determine the severity of the punishment. As a result, courts are required to react passively as automatons and to impose a sentence which the judge may personally deem unjust.

Sidhom, 144 F. Supp. 2d at 41. Arguably, a due process violation occurs when the court is prevented from sentencing the defendant as an individual based on its assessment of the offense and offender, and instead is required by prosecutorial charging decisions and determinate sentencing laws to impose an excessive punishment. "The concept of individualized sentencing is deeply rooted in our legal tradition and is a fundamental liberty interest," one district court judge opined, and a "due process right arises at sentencing

Of course, the courts and constitutional judicial review are not the only means to adjust the balance of authority in criminal justice. Through appropriate legislation, lawmakers themselves could ameliorate some of the worst consequences of prosecutorial adjudication. They could affirmatively empower judges to review charging decisions and strike those that are excessive or duplicative, subject to oversight by higher courts. Legislators could mandate that prosecution offices promulgate a comprehensive set of charging guidelines enforceable by the judiciary. Likewise, they could enact a type of general "safety valve" provision that allows sentencing judges to go below otherwise obligatory sentences when certain criteria are met.⁴³⁷ Or lawmakers could try to depoliticize the entire process of creating crimes and punishment, authorizing a blue-ribbon commission to draft a thinner, milder, more rational and comprehensible scheme, with, for instance, the American Law Institute's Model Penal Code and its current sentencing project serving as a template. To some extent, these ideas mirror the limitations on prosecutorial adjudication in Europe.

A different tack would focus not on the weaponry wielded by the prosecution but on the composition of its office, employing a somewhat "soft" solution to the excesses of prosecutorial adjudication. In recent years, prominent scholars have endorsed this approach, drawing upon concepts from other legal traditions as a remedy for hyper-adversarialism in American criminal justice. For example, Michael Tonry has argued for the professionalization of prosecutors as career civil servants, specially trained and appointed based on merit, along the lines of the European model:

Career officials are more likely than politically selected officials to decide individual cases on the merits of their distinctive circumstances and to consider policy proposals from long-term perspectives of whether they will improve the quality of justice or the effectiveness of administration. Commitment to abstract principles of justice is part of the professionalism and professional self-esteem of career officials, and buffers individual decisions and policy choices from raw emotions and officials' self interest.⁴³⁸

Consider also George Thomas's ingenious idea of creating "criminal law specialists" who both prosecute and defend criminal defendants,

because sentencing involves the most extreme deprivation of personal liberty and therefore calls for a highly individualized process where a person must be assessed and sentenced as an individual." *Dyck*, 287 F. Supp. 2d at 1021.

437. See, e.g., Luna & Cassell, *supra* note 359 (advocating adoption of such a measure).

438. TONRY, *supra* note 236, at 207-08.

roughly akin to the British system prior to the introduction of the Crown Prosecution Service. Unlike the ethos of prosecutorial domination and defense dismay that currently exists in the United States, the pool of specialists would face the exact same pressures, possibilities, and pitfalls, thereby providing a basis for mutual understanding and respect:

The district attorney and her assistants would draw from the pool to prosecute, and the chief public defender and his assistants would draw from the pool to defend. We have instantly equalized case loads for criminal law specialists. We have also reduced the built-in stresses and strains of seeing the world from only one perspective. Specialists will no longer view defense requests for exculpatory evidence as a mere annoyance and, instead, will be much more willing to cooperate with defense discovery. [They will also be] more attuned to the possibility that a defendant might be innocent.⁴³⁹

A still "softer" solution would require no action by government at all. Rather than changing the law to limit prosecutorial power or restructuring the relevant status and experiences of the profession, reform efforts could be focused on the cradle of prosecutors and, for that matter, all lawyers and judges—the American law school. In a sense, legal education has always been a work-in-progress, evolving in response to developments in law and society or, conversely, seeking to transform the legal system and affected social structures from the bottom up. The rise (and fall) of various theoretical frameworks in legal scholarship—formalism, realism, legal process theory, critical legal studies, empiricism, interdisciplinarity, and so on—have corresponded to new pedagogical styles and course texts.⁴⁴⁰ Yet aspects of legal education have been remarkably resistant to change, especially from the bar and bench. Nonetheless, two areas of pedagogical

439. George C. Thomas III, *When Lawyers Fail Innocent Defendants: Exorcising the Ghosts That Haunt the Criminal Justice Systems*, 2008 UTAH L. REV. 25, 45–46. One appealing alternative involves prosecutorial self-regulation, such as rewarding prosecutors based on performance indicators other than convictions and sentences. *See generally* Stephanos Bibas, *Rewarding Prosecutors for Performance*, 6 OHIO ST. J. CRIM. L. 441 (2009); Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851 (1995). Another involves implementing office policies that encourage thorough, upfront case-screening over plea bargaining later in the process. *See generally* Wright & Miller, *Screening/Bargaining*, *supra* note 13.

440. Ernest J. Weinrib, *Can Law Survive Legal Education?*, 60 VAND. L. REV. 401 (2007). Further, "[w]hen these understandings originate in the universities and are thus invested with the authority of prestigious institutions of learning, the practice of law itself can become either . . . more aware of law's distinct voice in the conversation of civilized humanity or . . . more prone to succumb to prevailing academic orthodoxies." *Id.*

reform have achieved a degree of support from the academy and could be relevant to adversarial excesses manifested in the prosecutorial function.

1. *The Practical Turn*

In 1992, a taskforce of the American Bar Association issued the so-called "MacCrate Report," aimed at narrowing the gap between doctrinal education and practical training that left many new attorneys unprepared for legal practice upon graduation from law school.⁴⁴¹ After providing a historical overview of the legal profession, the report developed a list of skills necessary for competent lawyering (e.g., problem solving and efficient practice management) and a set of core values for the profession and its members (e.g., continuous self-development).⁴⁴² Fifteen years later, the Carnegie Foundation for the Advancement of Teaching published another appeal for the academy to reexamine itself, questioning the dominance of the case-based teaching methodology, for instance, and the failure of educators to connect legal analysis with the complexity of actual practice and the skills it requires.⁴⁴³

The MacCrate and Carnegie Reports, complemented by various articles and books,⁴⁴⁴ sound a clarion call to law schools that "a great profession [is] suffering from varying degrees of confusion and demoralization," and that any "reawakening of professional élan must include revitalizing legal preparation."⁴⁴⁵ In particular, the Carnegie Report places great emphasis on the integration of practical and experiential learning through exposure to authentic lawyering issues, presumably through realistic simulations and live-client experiences.⁴⁴⁶ But because

441. A.B.A., LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) [hereinafter MACCRATE REPORT]; see also Russell Engler, *The MacCrate Report Turns 10: Assessing Its Impact and Identifying Gaps We Should Seek to Narrow*, 8 CLINICAL L. REV. 109 (2001) (discussing the MacCrate Report and its antecedents).

442. MACCRATE REPORT, *supra* note 441, at 121–221.

443. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) [hereinafter CARNEGIE REPORT].

444. See generally ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (2007).

445. CARNEGIE REPORT, *supra* note 443, at 19.

446. See, e.g., David M. Siegel, *The Ambivalent Role of Experiential Learning in American Legal Education and the Problem of Legal Culture*, 10 GERMAN L.J. 815, 815–19 (2009) (exploring these alternative methods of learning).

much of this burden will be borne by practitioners in the form of clinical and adjunct faculty, it might seem that the practical turn in legal education might only exacerbate the problems of hyper-adversarialism among lawyers in general and prosecutors in particular. After all, the most successful practitioners are often those who are most adroit at the battle model of the American legal process.

The Carnegie Report and its predecessors were not simply interested in skills training in the art of litigation, however. To the contrary, a primary concern was the extent to which the traditional approach of legal education teaches students to focus on "only those details that contribute to someone's staking a legal claim on the basis of precedent" and to redefine complex disputes "as opportunities for advancing a client's cause through legal argument."⁴⁴⁷ What is often left out is the moral dimension of legal conflicts and the ethical questions they raise.

Law schools fail to complement the focus on skill in legal analyses with effective support for developing ethical and social skills. Students need opportunities to learn about, reflect on and practice the responsibilities of legal professionals. Despite progress in making legal ethics a part of the curriculum, law schools rarely pay consistent attention to the social and cultural contexts of legal institutions and the varied forms of legal practice.⁴⁴⁸

With appropriate implementation, many of the recommendations for legal education might help alter the traditional mindset and concomitant practices. Dynamic skills training and clinical education might go a long way toward limiting the excesses of American adversarialism. Well-constructed skills courses and in-house clinics (or externship programs with substantial faculty involvement and supervision) not only connect substantive law with the legal profession but also provide opportunities to teach students the "best practices" of a principled lawyer. Instead of learning what can be done or what is begrudgingly allowed—which new attorneys might only discover through trial-and-error or gather from war stories and tips of the trade provided by the most successful (or cagey) litigators in the office—legal educators can emphasize what a principled lawyer should do or what professional ethics aspire to in the practice of law. Having ethics permeate the entire curriculum could have a similar impact, forcing students to go beyond doctrinal issues of torts, contracts, and

447. CARNEGIE REPORT, *supra* note 443, at 187.

448. *Id.*

property, and to examine whether the law and its application in real cases further the highest values of the profession and society-at-large.⁴⁴⁹

Along these lines, prosecutor clinics and externship programs with concurrent coursework could be part of an educational process that, among other things, speaks to the most troubling instances of prosecutorial adjudication.⁴⁵⁰ The enormous power wielded by government attorneys makes the education of future prosecutors crucial, former Attorney General Janet Reno argued a few years ago, and clinical programs "hold a special opportunity of bettering our criminal justice system."⁴⁵¹

Clinical programs provide a wonderful opportunity to expose potential prosecutors to the many different disciplines that come into play in the criminal justice system. The ideal program should mine—and maintain—the idealism and desire to change and improve that is present in all young people, and instill in them the notion that crime does not happen in a vacuum. Let them, for example, consider and discuss whether society is better off incarcerating a drug offender without providing drug treatment. Give them the means with which to explore innovative and alternative ways of preventing, rather than merely prosecuting, crime. Expose them to the real and traditional workings of prosecutor offices, and to interdisciplinary approaches to crime fighting.⁴⁵²

Most of all, Reno suggested that clinical programs can help law students become fair and ethical prosecutors, not just forceful and efficient ones, by stressing the imperative of doing justice rather than securing courtroom victories.⁴⁵³

449. See, e.g., DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD 4 (1994) ("Ethics deserves discussion in all substantive areas because it arises in all substantive areas."); Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31, 51 (1992) (arguing for the pervasive method of legal ethics instruction because "enhance[ing] capacities for moral judgment . . . requires continuing opportunities for reflection"). See generally *Symposium: Teaching Legal Ethics*, 58 LAW & CONTEMP. PROBS. 1 *et seq.* (1995) (including various proposals for implementing the pervasive method of legal ethics education).

450. For discussions of prosecutor ethics and externship programs, see *Symposium: Prosecutorial Externship and Clinical Programs*, 74 MISS. L.J. i. *et seq.* (2005); Lisa K. Halushka, *The Prosecution Externship from the Classroom to the Courtroom*, 11 T.M. COOLEY J. PRAC. & CLINICAL L. 323 (2005); and Norman Fell, *Development of a Criminal Law Clinic: A Blended Approach*, 44 CLEV. ST. L. REV. 275 (1996).

451. Hon. Janet Reno, *The Importance of Prosecution Training in Law School*, 74 MISS. L.J. xii, xiii (2005).

452. *Id.* at xiii–xiv.

453. *Id.* at xiv.

The classroom component of a clinical/extern program offers educators the occasion for in-depth exploration of the ethical rules and special obligations of prosecutors.⁴⁵⁴ This may begin with relatively abstract or systemic considerations, like the role of prosecutors in the criminal justice system, as well as the ways in which their responsibilities are different, and higher, than those of other attorneys and the reasons for the differences. Students may be asked to evaluate real-world cases or realistic hypotheticals using prevailing rules and their own sense of justice. Conflicts between professional standards and actual case resolutions can be especially edifying, forcing students to consider the tension between zealous advocacy and the rules of ethics, between personal self-interest and the ideal of a public interest representative, and between legally permissible outcomes and their own conception of right and wrong. For instance, the *Angelos* case might provide a helpful exercise on the use and abuse of prosecutorial power in charging, plea bargaining, and sentencing.⁴⁵⁵

Future prosecutors can also benefit from classroom interaction with future defense attorneys, possibly through a combined criminal clinic course.⁴⁵⁶ Students are allowed to discuss their views and experiences with the "other side"—they might even be asked to switch sides for classroom exercises or as a form of role play—all with the goal of establishing a basis for mutual understanding and respect. Moreover, students should be encouraged to act as "savvy participant-observers" in their prosecution placements, using the opportunity to study the criminal justice system and the prosecutor's role within it, and comparing how different prosecutors exercise their discretion.⁴⁵⁷ These experiences may crystallize through

454. MODEL RULES OF PROF'L CONDUCT R. 3.8 (2002). See generally AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993) [hereinafter ABA STANDARDS FOR PROSECUTION FUNCTION AND DEFENSE FUNCTION]; Stacy Caplow, "Tacking too Close to the Wind": *The Challenge to Prosecution Clinics to Set Our Students on a Straight Course*, 74 MISS. L.J. 919 (2005); Peter A. Joy, *Prosecution Clinics: Dealing with Professional Role*, 74 MISS. L.J. 955 (2005).

455. ABA STANDARDS FOR PROSECUTION FUNCTION AND DEFENSE FUNCTION, *supra* note 454, Standards 3-3.9, 3-6.1; ABA STANDARDS FOR CRIMINAL JUSTICE, PROPOSED REVISIONS TO STANDARDS FOR THE PROSECUTION FUNCTION 53–54, 62–67, 77–80, 101–02 (draft June 2010).

456. See, e.g., Jean Montoya, *The University of San Diego Criminal Clinic: It's All in the Mix*, 74 MISS. L.J. 1021, 1037 (2005) (saying that a combined criminal clinic promotes the goal of getting students "to appreciate the opponent's perspective, not only to promote civility respect and professionalism more generally, but also to enhance their competency"). See generally Linda F. Smith, *Benefits of an Integrated (Prosecution & Defense) Criminal Law Clinic*, 74 MISS. L.J. 1239 (2005) [hereinafter Smith, *Benefits*].

457. Linda F. Smith, *Designing an Extern Clinical Program: Or As You Sow, So Shall You Reap*, 5 CLINICAL L. REV. 527, 550 (1999).

reflection, possibly by contemporaneous journal writing,⁴⁵⁸ transforming disparate incidents into larger themes that can help shape or change perspectives.

Based on the foregoing, it might seem that real cases and stories are only helpful as examples of how prosecutors should *not* behave. But there are countless American lawyers, both past and present, who can serve as positive models for aspiring attorneys and a contrast conception to the win-at-all-cost approach of hyper-adversarialism.⁴⁵⁹ Consider, for instance, then-Attorney General Robert Jackson's famous address to the conference of U.S. Attorneys, where he argued that federal prosecutors can "afford to be just" in light of the awesome power they are entrusted with.⁴⁶⁰ "Any prosecutor who risks his day-to-day professional name for fair dealing to build up statistics of success has a perverted sense of practical values, as well as defects of character."⁴⁶¹ Even when it loses a case, Jackson maintained, the government has actually won if justice was achieved.⁴⁶²

As discussed above, current law does little to stop prosecutors from overcharging defendants and threatening disproportionate punishment, producing *de facto* or *de jure* prosecutorial adjudication and thus an enhanced record of success for the state's attorney. While the law does nothing to prevent this, an imperative ethical issue lingers. Should a

458. See, e.g., William P. Quigley, *Reflections from the Journals of Prosecution Clinic Students*, 74 MISS. L.J. 1147, 1152–74 (2005) (discussing the themes raised by students' reflective writings about their clinic experiences); Smith, *Benefits*, *supra* note 456, at 1259–79 (same).

459. For instance, then-practitioner Abraham Lincoln offered the following advice to a prospective client:

Yes, we can doubtless gain your case for you; we can set a whole neighborhood at loggerheads; we can distress a widowed mother and her six fatherless children and thereby get you six hundred dollars to which you seem to have a legal claim, but which rightfully belongs, it appears to me, as much to the woman and her children as it does to you. You must remember that some things legally right are not morally right. We shall not take your case, but will give you a little advice for which we will charge you nothing. You seem to be a sprightly, energetic man; we would advise you to try your hand at making six hundred dollars in some other way.

2 WILLIAM HERNDON & JESSE WEIK, *HERNDON'S LINCOLN* 345 (1889) (quoted in DAVID LUBAN, *LAWYERS AND JUSTICE* 174 (1988)).

460. Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUD. SOC. 18, 19 (1940).

461. *Id.*

462. *Id.*; see also Geoffrey M. Klineberg & Janet Reno, *What Would Jackson Do?: Some Old Advice for the New Attorney General*, 2 HARV. L. & POL'Y REV. 197 (2008) (discussing this speech and suggesting Jackson as a model for the new U.S. Attorney General).

principled prosecutor engage in such behavior, pursuing victories rather than appropriate outcomes? Unfortunately, such questions are rarely raised in law school classes today.

2. *The Transnational Turn*

The preceding suggests that a new emphasis in American legal education on ethics and experiential learning could, over time, help moderate hyper-adversarialism and its impact on the prosecutorial function. Interestingly, legal education in Europe is going through a transformation of its own.⁴⁶³ Pursuant to the so-called Bologna process, all EU nations and many non-EU countries are seeking to create a single "European Higher Education Area" that would provide, among other things, uniform grading, quality assurance programs, comparable and mutually recognized degrees, and career mobility for university graduates.⁴⁶⁴ There have been some questions about the extent to which particular nations will adapt to the Bologna process and whether, for instance, clinical education can be incorporated into European law schools.⁴⁶⁵ What is clear, however, is that legal education in Europe has moved toward a comparative, transnational, and/or global curriculum,⁴⁶⁶ with the aim of expanding students' minds and preparing them for an interconnected legal world.⁴⁶⁷

463. See generally *Special Issue: Transnationalizing Legal Education*, 10 GERMAN L.J. 629 *et seq.* (2009). For discussions of traditional legal education and its reform in Europe (especially Germany), see Annette Keilmann, *The Einheitsjurist—A German Phenomenon*, 7 GERMAN L.J. 293 (2006); see also Jutta Brunnée, *The Reform of Legal Education in Germany: The Never-Ending Story and European Integration*, 42 J. LEGAL EDUC. 399 (1992); MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS: TEXT, MATERIALS AND CASES* 130–52, 539–53 (2d ed. 1994).

464. Laurel S. Terry, *The Bologna Process and Its Impact in Europe: It's So Much More Than Degree Changes*, 41 VAND. J. TRANSNAT'L L. 107, 135 (2008).

465. See, e.g., Richard J. Wilson, *Western Europe: Last Holdout in the Worldwide Acceptance of Clinical Legal Education*, 10 GERMAN L.J. 823, 826–31 (2009) (explaining the author's studies on the growth of clinical legal education throughout the world and Western Europe's resistance to this growth); Laurel S. Terry, *Living With the Bologna Process: Recommendations to the German Legal Education Community from a U.S. Perspective*, 7 GERMAN L.J. 11 (2006) (discussing the effect of the Bologna Process on Germany).

466. Cf. Catherine Valcke, *Global Law Teaching*, 54 J. LEGAL EDUC. 160, 161–67 (2004) (critiquing the use of the terms global law, comparative law, and transnational law); Sadiq Reza, *Transnational Criminal Law and Procedure: An Introduction*, 56 J. LEGAL EDUC. 430, 430 (2006) (noting potential definitions of "transnational criminal law").

467. See, e.g., Simon Chesterman, *The Evolution of Legal Education: Internationalization, Transnationalization, Globalization*, 10 GERMAN L.J. 877, 877 (2009)

In the U.S., "globalization" has become a sort of buzzword in legal education, with schools marketing themselves as "global law schools," hiring faculty with expertise in international and comparative law, establishing exchange and dual degree programs with foreign law schools, and encouraging a global focus in scholarship and activities.⁴⁶⁸ Along these lines, this Article's comparative analysis is consistent with the inclusion of transnational law within the law school curriculum. Despite being a recurrent topic of reform,⁴⁶⁹ curricular integration of transnational perspectives was not discussed in the MacCrate and Carnegie Reports and related works—and, to be honest, it is unlikely to have the relatively straightforward pedagogical impact of pervasive ethics, skills training, and clinical experience.

Nonetheless, there is precedent for the utilization of foreign experiences in American education and law. After the Civil War, leading university administrators borrowed from the continental approach to higher education in the sciences and professional schools, with, for instance, German legal education providing an especially influential model for American law schools.⁴⁷⁰ In more recent times, the U.S. Supreme Court has

(examining "the evolution of legal education as it has moved through international, transnational, and now global paradigms"); Jaakko Husa, *Turning the Curriculum Upside Down: Comparative Law as an Educational Tool for Constructing the Pluralistic Legal Mind*, 10 GERMAN L.J. 913, 913 (2009); Alexander H.E. Morawa & Xiaolu Zhang, *Transnationalization of Legal Education: A Swiss (and Comparative) Perspective*, 26 PENN ST. INT'L L. REV. 811, 811–12 (2008); Rosalie Jukier, *Transnationalizing the Legal Curriculum: How to Teach What We Live*, 56 J. LEGAL EDUC. 172, 173–74 (2006) (analyzing "[h]ow the Faculty of Law at McGill University" has "integrate[d] transnational legal perspectives into its curriculum"); Soogeun Oh, *Globalization in Legal Education of Korea*, 55 J. LEGAL EDUC. 525 (2005) (explaining how Korea has "set globalization as part of the national agenda" and how "in this flow of globalization legal education has absorbed the concept and applied it to the actual reform process"); Brunnée, *supra* note 463, at 424.

468. See Chesterman, *supra* note 467, at 883–85 ("[T]he first mark of globalization as distinct from transnationalization was the move from exchange programs to double-degree programs across national jurisdictions."); see also John Edward Sexton, *The Global Law School Program at New York University*, 46 J. LEGAL EDUC. 329 (1996) (explaining New York University's Law School's efforts to increase students' global experience and education); Harry W. Arthurs, *Law and Learning in an Era of Globalization*, 10 GERMAN L.J. 629, 630–31 (2009) (explaining the current growth of globalization in the law school curriculum).

469. Sadiq Reza, *Transnational Criminal Law and Procedure: An Introduction*, 56 J. LEGAL EDUC. 430, 430–595 (2006); *Workshop Papers: Transnational Legal Education*, 55 J. LEGAL EDUC. 475–599 (2005); Mathias Reimann, *The End of Comparative Law as an Autonomous Subject*, 11 TUL. EUR. & CIV. L.F. 49, 50–51 (1996) (noting the long history of calls for incorporating comparative law into American legal education).

470. See Gail J. Hupper, *The Rise of An Academic Doctorate in Law: Origins Through World War II*, 49 AM. J. LEGAL HIST. 1, 7–13 (2007) (explaining the adoption of some

drawn upon foreign law as persuasive authority in some prominent decisions.⁴⁷¹ Although the latter practice is highly controversial,⁴⁷² the softer, less divisive option of incorporating transnational law into legal education might have long-term benefits for the profession and American society as a whole.

As advocates have noted, a transnational perspective comports with the globalization of legal issues and the expectations of lawyers.⁴⁷³ The global marketplace, realized through international systems of communication and transportation, requires practitioners fluent in multijurisdictional issues of law and competent at cross-border problem solving.⁴⁷⁴ The modern channels of interaction and exchange that have fostered the global marketplace, however, have also facilitated criminal activity that transcends borders, from drug smuggling and human trafficking, to computer crimes and multinational corporate misconduct, to high-sea piracy and international terrorism. The investigation and prosecution of such crimes requires cooperation among affected nations—to secure the arrest and extradition of suspects, for instance, and to obtain evidence abroad—based on the knowledge of international agreements and an understanding of the relevant foreign actors and legal processes.⁴⁷⁵

attributes of the German legal education into the American legal education).

471. See *Roper v. Simmons*, 543 U.S. 551, 576–77 (2005) (citing foreign materials); *Lawrence v. Texas*, 539 U.S. 558, 573, 576–77 (2003) (same); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (same). *But see* *Printz v. United States*, 521 U.S. 898, 921 n.11 (2003) (“Justice Breyer’s dissent would have us consider the benefits that other countries, and the European Union, believe they have derived from federal systems that are different from ours. We think such comparative analysis inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one.”).

472. See *Roper*, 543 U.S. at 604–05 (O’Connor, J., dissenting) (acknowledging use of foreign materials); see also *id.* at 622–28 (Scalia, J., dissenting) (rejecting use of foreign materials); *Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting) (same); *Atkins*, 536 U.S. at 347–48 (Scalia, J., dissenting) (same); *id.* at 324–25 (Rehnquist, C.J., dissenting) (same); *Printz*, 521 U.S. at 921 n.11 (2003) (refusing to look at other countries to assess the U.S. Constitution).

473. John B. Attanasio, *The Globalization of the American Law School*, 46 J. LEGAL EDUC. 311, 311 (1996); W. Michael Reisman, *Designing Law Curricula for a Transnational Industrial and Science-Based Civilization*, 46 J. LEGAL EDUC. 322, 324 (1996); GLENDON ET AL., *supra* note 463, at 9.

474. Still other issues for the legal profession may be presented by the creation of supranational institutions and tribunals (e.g., the European Union and the International Court of Justice) and attempts to unify or harmonize law across nations. See, e.g., HIRAM E. CHODOSH, *GLOBAL JUSTICE REFORM: A COMPARATIVE METHODOLOGY* 3, 29–30, 32–34 (2005) (describing the issues created by forming supranational institutions); Arthurs, *supra* note 468, at 634–35 (same).

475. Richard S. Frase, *Main-Streaming Comparative Criminal Justice: How to*

More importantly for present purposes, the pedagogical integration of transnational law helps challenge "ethnocentrism," the assumption that other countries necessarily view and respond to problems in the same way or that the approach taken in one's own nation is superior to all others. This type of parochialism is a long-recognized and nearly universal phenomenon, leading many to believe that the domestic status quo is natural and inevitable rather than the result of historical and cultural contingencies.⁴⁷⁶ The problem seems particularly acute in the United States,⁴⁷⁷ where it may diminish the ability to question existing arrangements or even to recognize the need for critical review.

In the legal profession, this intellectual boundary can be traced back to law school and the formation of a less-than-worldly legal worldview. Law students who are tutored in domestic law alone, oblivious to differences across cultures and over time, may come to view the existing legal system as preordained and inexorable, making it difficult to question the status quo. For instance, as Craig Bradley notes, "I and, I'm sure, most of my contemporaries managed to pass through three years of law school without ever finding out that jury trials do not generally occur in criminal cases on the European continent."⁴⁷⁸ With the understanding that "perfectly civilized countries dispense with juries altogether," an American practitioner might

Incorporate Comparative and International Concepts and Materials into Basic Criminal Law and Procedure Courses, 100 W. VA. L. REV. 773, 781–83 (1998) [hereinafter Frase, *Main-Streaming*]; Erik Luna, *Comparative Criminal Procedure*, *supra* note 310, at 277–81, 327; Ellen S. Podgor, *Incorporating Transnational Law in First Year Criminal Law and Procedure Classes*, 56 J. LEGAL EDUC. 444, 444 (2006); PHILIP L. REICHEL, *COMPARATIVE CRIMINAL JUSTICE SYSTEMS: A TOPICAL APPROACH* 3–10 (3d ed. 2002).

476. As one legal comparativist opined in 1922, "When one is immersed in his own law, in his own country, unable to see things from without, he has a psychologically unavoidable tendency to consider as natural, as necessary, as given by God, things which are simply due to historical accident or temporary social situation." Pierre Lepaulle, *The Function of Comparative Law with a Critique of Sociological Jurisprudence*, 35 HARV. L. REV. 838, 858 (1922); *see also* CHODOSH, *supra* note 474, at 13, 15 (quoting prominent comparative law books); W.J. Kamba, *Comparative Law: A Theoretical Framework*, 23 INT'L & COMP. L. Q. 485, 491 (1974).

477. *See, e.g.*, John H. Langbein, *The Influence of Comparative Procedure in the United States*, 43 AM. J. COMP. L. 545, 547 (1995) ("American legal dialogue starts from the premise that no relevant insights are to be found beyond water's edge."). *See generally* Craig M. Bradley, *Overview*, in *CRIMINAL PROCEDURE: A WORLDWIDE STUDY* xvii, xxii (Craig M. Bradley ed., 2d ed. 2007) [hereinafter Bradley, *Overview*]. Of course, there are many positive aspects of national pride and confidence, such as instilling a sense of shared identity among the citizenry and a willingness to act for the common good in spite of one's own self-interests. *See, e.g.*, Luna, *Comparative Criminal Procedure*, *supra* note 310, at 282 (noting some positive attributes); REICHEL, *supra* note 475, at 2–3 (same).

478. Bradley, *Overview*, *supra* note 477, at xxii.

have a different perspective on the alleged necessity and jurisprudence of jury trials.⁴⁷⁹

The more optimistic scholars see comparative law as a vehicle for reform, where foreign legislation, judicial decisions, and practices provide alternative models that might be adopted (or adapted, transplanted, translated, etc.) in the United States.⁴⁸⁰ Given the aforementioned convergence in criminal processes, with traditional components of an adversarial system being adopted in civil law nations, the remaining differences may be particularly enlightening on the fundamental values, policy choices, and the street-level and courtroom practices that animate the American legal system.⁴⁸¹ The similarities may assuage knee-jerk reactions against legal approaches in other nations. They also make it more likely that some approaches could be transplanted in the United States, as evidenced by a history of roughly comparable systems adopting each other's practices.⁴⁸²

Even if adoption proves infeasible, comparativism presents an opportunity to reflect upon the American legal system. By contrasting domestic and foreign practices—looking at a nation's legal system in "the tell-tale mirror" of another system, which may appear indifferent or even hostile to principles heralded in one's homeland⁴⁸³—professionals, scholars, and students may come to a fuller appreciation of their own laws and practices.⁴⁸⁴ Someone who studies the criminal justice systems of other nations and their experiences with similar phenomenon may thereby gain a clearer perspective of his home criminal justice system and the reasons to modify or sustain some current approach.⁴⁸⁵ After all, it seems hard to

479. *Id.* See generally REICHEL, *supra* note 475, at 4.

480. *Supra* note 475 and accompanying text; see also generally Frase, *Main-Streaming*, *supra* note 475, at 777–80; GLENDON ET AL., *supra* note 463, at 9–10; REICHEL, *supra* note 475, at 5.

481. *Supra* note 475 and accompanying text.

482. Frase, *Main-Streaming*, *supra* note 475, at 780.

[I]ncreasing similarity means that potential "donor" and "recipient" systems have become more compatible, thus lessening the risk of "rejection" of legal transplants. The fact that foreign systems have already borrowed many practices from the United States, and from each other, shows that such international legal transplants are indeed feasible, even across systems that remain fundamentally different in important respects.

Id.

483. CHARLES J. HAMSON & THEODORE F. PLUCKNETT, *THE ENGLISH TRIAL AND COMPARATIVE LAW* 8 (1955).

484. GLENDON ET AL., *supra* note 463, at 9.

485. See, e.g., Stephen C. Thaman, *A Comparative Approach to Teaching Criminal*

know the merits and demerits of one's own system without considering the alternatives.⁴⁸⁶

Of course, comparison is a basic approach to human decision-making, and it remains a principal method of legal education in the United States (and elsewhere). Every day we are called upon as individuals and collectives to make choices—from the trifling (e.g., what to have for breakfast) to the momentous (e.g., whether to enact a national health care program)—and the ultimate decisions often turn on an evaluation of the alternatives.⁴⁸⁷ Comparative analysis pervades all forms of legal judgment, from the framing of cases by litigants, to the selection of decision rules by courts, to the drafting and analysis of proposed legislation by lawmakers.⁴⁸⁸ In the classroom, law professors are constantly engaged in comparativism, whether they recognize it or not. One way to conceive the Langdellian shift in law school pedagogy is that it changed most legal educators into *domestic* or *internal* comparativists, who invariably draw upon contrasting legal rules and doctrines in different states as part of the case method and Socratic dialogue.⁴⁸⁹

Indeed, courses in criminal law and procedure often implicate comparativism, either explicitly or implicitly. First-year criminal law has become a comparative enterprise, involving a mix of state and federal decisions (and a smattering of common law chestnuts), all interpreting different criminal codes and providing contrasting doctrines for classroom

Procedure and its Application to the Post-Investigative Stage, 56 J. LEGAL EDUC. 459, 463 (2006) [hereinafter Thaman, *Comparative Approach*]; REICHEL, *supra* note 475, at 4–5; Frase, *Main-Streaming*, *supra* note 475, at 792.

486. See, e.g., HAMSON & PLUCKNETT, *supra* note 483, at 7–8 ("It is a good deal easier to have a dispassionate and clear view of our own system of law, of its advantages as much as of its disadvantages, if we begin to see it in the contrasts which it presents to another system"); see also Giovanni Sartori, *Comparing and Miscomparing*, 3 J. THEORETICAL POL. 243, 245 (1991) ("[C]omparing is 'learning' from the experience of others and, conversely, he who knows only one country knows none."); 2 THE LATER WORKS OF JOHN DEWEY, 1925–1953, at 304 (Jo Ann Boydston ed., 1984) (noting that "all intelligent political criticism is comparative"). See generally Mattei Dogan & Dominique Pellassy, *The Compass of the Comparativist*, in 1 COMPARATIVE POLITICS: CRITICAL CONCEPTS IN POLITICAL SCIENCE 33 (Howard J. Wiarda ed., 2005); Andrew Huxley, *Golden Yoke, Silken Text*, 106 YALE L.J. 1885, 1896–99 (1997).

487. See generally CHODOSH, *supra* note 474, at 9, 21; GLENDON ET AL., *supra* note 463, at 8–9.

488. See generally CHODOSH, *supra* note 474, at 9–10.

489. Peter Strauss, *Transsystemia—Are We Approaching a New Langdellian Moment?*, 56 J. LEGAL EDUC. 161, 161–62 (2006); see also Markus D. Dubber, *Legitimizing Penal Law*, 28 CARDOZO L. REV. 2597, 2601 (2007) (noting that analysis of American criminal law is "domestic" or "internal" comparative law).

discussion.⁴⁹⁰ In turn, basic criminal procedure courses invoke comparisons between abstract models, historical and modern approaches, state and lower federal court cases, and, on occasion, foreign practices.⁴⁹¹ Once criminal law and procedure are seen as a form of (largely internal) comparative law, the incorporation of foreign laws and practices hardly seems risky or excessive.⁴⁹²

Overall, the addition of transnational materials into legal education serves important pedagogical goals,⁴⁹³ like challenging ethnocentric thinking and helping students to understand other cultures, bringing this knowledge and perspective to bear on legal problems here and abroad, and preparing future practitioners for a world without hard borders and all the possibilities and pitfalls that globalization entails. In the present context, a transnational turn in education may offer an indirect method of responding to and potentially easing the problems associated with hyper-adversarialism. If future practitioners were familiar with the prosecution function in other countries, they might agree that a civilized nation can have an effective and fair criminal justice system without countenancing heavy-handed prosecutorial adjudication.

This experience might increase the likelihood that when these students become lawyers, judges, and legislators, they might look favorably on reforms to prosecutorial power. But even if the transnational turn does not generate hard legal changes, law students might be affected by an

490. Markus D. Dubber, *Criminal Law in Comparative Context*, 56 J. LEGAL EDUC. 433, 436 (2006) [hereinafter Dubber, *Comparative Context*].

491. See, e.g., MARC L. MILLER & RONALD F. WRIGHT, *CRIMINAL PROCEDURES: CASES, STATUTES & EXECUTIVE MATERIALS* (3d ed. 2007) (incorporating federal, state, and local materials); Christopher Slobogin, *Transnational Law and Regulation of the Police*, 56 J. LEGAL EDUC. 451, 451 (2006) (explaining the importance of studying Transnational Law and how it is applicable to all courses in law school); Albert W. Alschuler, *Introduction: Adding a Comparative Perspective to American Criminal Procedure Classes*, 100 W. VA. L. REV. 765, 765 (1998) (emphasizing the need to have up to date studies and resources on comparative countries' laws); Frase, *Main-Streaming*, *supra* note 475, at 792 (explaining the importance of looking at transnational law); Thaman, *Comparative Approach*, *supra* note 485, at 463 (explaining the need to look at other countries' criminal justice processes to reform the issues with the United States'); Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 6 (1964) (describing the "crime control" and "due process" models of the criminal process).

492. See Dubber, *Comparative Context*, *supra* note 490, at 436 (explaining how first-year criminal law looks at comparative law internally, involving a mix of state and federal decisions).

493. See, e.g., Shirley M. Hufstедler, *World in Transition*, CHANGE, May/June 1980, at 8-9 (warning of the dangers of parochial education and calling for pedagogical change in American universities).

introduction to foreign prosecution services, covering not only the powers that European prosecutors have (and those they do not), but also their education, training, and culture. Today, a law student is exposed, at most, to the differences between state and federal prosecutors, with the latter often portrayed as being far more ethical and judicious in their decision-making. Recent events, however, have provided reason to question any alleged difference in kind across jurisdictions.⁴⁹⁴ In this light, an exploration of European prosecutors—their quasi-judicial role perception and obligation to impartially pursue the truth, seeking just outcomes rather than certain convictions and tough sentences—might be instructive for American prosecutors-to-be.⁴⁹⁵

V. Caveats and Conclusion

Admittedly, this Article has raised more questions than it could ever answer. To begin with, it does not delve into ongoing methodological debates in comparative law, where methodology provides the ostensible justification for taking the field seriously. Comparative law is not *law* per se but instead a mode of legal analysis,⁴⁹⁶ the success of which may depend on its capacity for "metacomparison," that is, a theoretical and practical framework for comparing comparisons.⁴⁹⁷ Despite the important goals and exciting prospects of such research, some scholars have expressed disappointment at the condition of the discipline, which lacks any

494. See, e.g., Ellen S. Podgor, *The Tainted Federal Prosecutor in an Overcriminalized Justice System*, 67 WASH. & LEE L. REV. 1569 (2010) (discussing politicization of federal prosecution and potential for abuse); see also *supra* note 1 and accompanying text (noting problems in federal prosecution).

495. For articles advocating the incorporation of transnational materials and referencing prosecutorial issues, see Dubber, *Comparative Context*, *supra* note 490, at 438–39 (discussing the legality principle and sentencing); Podgor, *Incorporating Transnational Law*, *supra* note 475, at 447–48; Slobogin, *supra* note 491, at 453 (noting prosecutorial oversight of police); Thaman, *Comparative Approach*, *supra* note 485 at 462–63, 468–72 (discussing rise in power of American prosecutors, as well as plea-bargaining, procedural diversity, and the legality principle); Alschuler, *supra* note 491, at 768 (discussing plea bargaining in Germany); Frase, *Main-Streaming*, *supra* note 475, at 778, 785–86 (discussing plea bargaining in Germany and France).

496. "As we all know, there is only foreign law and comparison between laws," Mathias Reimann notes. Reimann, *supra* note 469, at 70. "Foreign law is substance but comparison is simply a method." *Id.*; see also ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 1–2 (1993) (analyzing the study of comparative law); cf. Sartori, *supra* note 486, at 243 (making a similar argument regarding comparative politics).

497. CHODOSH, *supra* note 474, at 1, 4.

agreement on methodology, either as a descriptive or prescriptive matter, and little basis for assessing the relative worth of comparative works.⁴⁹⁸

Change may be afoot, however, as the literature has begun both to emphasize methodological questions and to provide responses.⁴⁹⁹ But again, the Article does not seek to engage this critical topic. Rather, we simply note that the approach taken here is cognizant of the methodological debate and the difficulties of any comparative endeavor. We believe the Article's foci—prosecutors in the United States and Europe—are comparable in a worthwhile sense, if not as the clichéd apples-to-apples, at least as types of "fruit" whose similarities and differences are intellectually interesting and perhaps quite telling.⁵⁰⁰ In other words, prosecutors on different sides of the Atlantic are not "stones and monkeys," to use Giovanni Sartori's phrase, a comparison of no interest that "ends where it begins."⁵⁰¹ For comparative analysis, the prosecutor presents a meaningful category of criminal justice actor, whose case-ending powers and resulting social impacts provide significant features worthy of examination. We also attempt to provide a thicker account of the prosecutorial function by examining the milieu of prosecutors in Europe and America, as well as offering (hopefully) enlightening examples to the reader.

So although the Article is intended to be provocative, its ambition is fairly modest—more or less, a hypothesis-generating inquiry into prosecutorial power, its sources, and its limitations. As the authors of a leading casebook note, "What [comparativists] are usually looking for is, initially, a deepened understanding of the problem, a source of inspiration."⁵⁰² Along these lines, ours is just an opening venture that seeks

498. *Id.* at 4.

499. *See, e.g., id.* at chs. 2–5 (developing a conceptual framework for comparative studies and applying it to justice reform in India and Indonesia); Vernon Valentine Palmer, *From Leretholi to Lando Some Examples of Comparative Law Methodology*, 53 *AM. J. COMP. L.* 261, 261 (2005) (challenging methodological critiques as establishing unattainable research standards and calling for a more pragmatic, inclusive view of comparative law methodology).

500. *See* CHODOSH, *supra* note 474, at 22–23.

501. *See generally* Sartori, *supra* note 486, at 245.

502. GLENDON ET AL., *supra* note 463, at 10; *see* CHODOSH, *supra* note 474, at 19–20, 57–60. Dean Chodosh notes that,

The questions of which variables to choose, how to measure them consistently, and according to which purpose are nearly impossible to answer in advance of conducting a comparison. Once the comparison accounts for these questions, evaluating and improving the comparison then becomes possible. Incommensurability and indeterminacy, when supported by a comparative evaluation, are useful justifications for humility, but not if they cause one to

to inspire other works in this area, regardless of whether they are supportive or critical. In particular, the primary goal of this Article is to enrich the American understanding of European prosecutors, which might in turn provoke a broader dialogue on the comparative study of prosecution and the possibility of reform in both places. What is more, the ideas forwarded in the previous section, especially the "soft" options, are not death-defying.

Still, there may be substantial barriers to any reform efforts. As discussed, the adversarial approach to law and criminal justice is deeply engrained in the American psyche, derived from principles like individualism, anti-statism, and federalism. Likewise, the populace has a certain fetish with competition, whether it is in the economy, in sports arenas, or in the courtroom. None of this is inherently bad. In fact, the American approach to law carries many benefits, such as its capacity to vindicate rights in individual cases and instigate better policies through public interest litigation, for instance, and its responsiveness to local values and criminal justice needs via elected district attorneys and line prosecutors.

Even assuming that a consensus can be reached about the problems of adversarialism, at least when it leads to oppressive prosecutorial adjudication, some reforms may prove impracticable or ineffective. As noted, the courts have shown little inclination to curb prosecutorial power directly, whether out of fear of being labeled "activist" judges or due to the natural human bias toward the status quo. Lawmakers may face the same pressures and incentives—to add crimes, expand culpability principles, and increase sentences—and the results of criminal justice commissions have been mixed.⁵⁰³ As for the less direct options, professionalizing prosecution along the civil-service model may raise the hackles of those opposed to government bureaucracies in any form, for instance, while the notion of a criminal law specialist who both prosecutes and defends will be subject to difficult questions of constitutional rights and conflicts of interests.

Both suggestions would also face a degree of professional intransigence and simple inertia, as will the proposed reforms to American

make perfect the enemy of good.

Id. at 59.

503. For instance, sentencing commissions in several states and in the federal system "abandoned their insulating functions and competed with elected officials to show who was tougher." TONRY, THINKING ABOUT CRIME, *supra* note 236, at 211. Indeed, the work-product of the federal government's sentencing commission, the U.S. Sentencing Guidelines, is needlessly complex and virtually incomprehensible. *See generally* Luna, *Gridland*, *supra* note 229 (critiquing federal sentencing guidelines); KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS (1998) (same).

legal education. To be sure, legitimate concerns have been raised about the extent to which the practical turn in legal education ignores the fundamental role of conventional classroom teaching and its emphasis on basic analytical reasoning. Others worry that heavy skills training will so consume the curriculum that core doctrinal courses will be marginalized and upper-division specialty or interdisciplinary classes will become extinct.⁵⁰⁴ The incorporation of transnational materials will confront hurdles as well. Despite a long history of calls to integrate comparative studies across the curriculum,⁵⁰⁵ comparative law is still largely viewed as a discrete subject in U.S. law schools. Numerous explanations have been offered, from the persistence of legal ethnocentrism in America, to the lack of a coherent educational vision and feasible organizational strategy, to the self-doubts of some legal educators.⁵⁰⁶

None of these obstacles are insurmountable, however, as revealed by history and confirmed by recent developments. In the past, the courts have announced constitutional doctrines to rein in police abuses; and although coercive police tactics may be more provocative, the excesses of prosecutorial discretion can be just as consequential. Likewise, at least a few commissions have been able to insulate sentencing policy from raw politics and self-interest,⁵⁰⁷ and the Model Penal Code has served as the archetype for criminal law reforms across the nation.⁵⁰⁸ Moreover, there are some small but promising signs that the American public and its elected

504. See, e.g., Joyce McConnell, *A 21st Century Curriculum*, W. VA. LAW., Sept./Oct. 2008, at 12 (noting such concerns). See generally David M. Siegel, *The Ambivalent Role of Experiential Learning in American Legal Education and the Problem of Legal Culture*, 10 GERMAN L.J. 815 (2009) (discussing ambivalent position of legal clinics and adjunct faculty in American legal education).

505. See Roscoe Pound, *The Place of Comparative Law in the American Law School Curriculum*, 8 TUL. L. REV. 161, 165 (1934) (recommending comparative law education in American law schools); see also Reimann, *supra* note 469, at 50–51 (analyzing the history of recommending the consideration of comparative laws).

506. Dubber, *Comparative Context*, *supra* note 490, at 435; Frase, *Main-Streaming*, *supra* note 475, at 774–75; Husa, *supra* note 467, at 920; Jukier, *supra* note 467, at 173, 180–84; Podgor, *Incorporating Transnational Law*, *supra* note 475, at 444–45; Reimann, *supra* note 469, at 52–53; Valcke, *supra* note 466, at 160.

507. TONRY, *THINKING ABOUT CRIME*, *supra* note 236, at 211.

508. See, e.g., Erik Luna, *Principled Enforcement of Penal Codes*, 4 BUFF. CRIM. L. REV. 515, 516 (2000) ("Over two-thirds of the states have adopted new statutory schemes under the heavy influence of the Model Penal Code; a similar proportion of American jurisdictions trace the MPC's substantive crime definitions; and more than two thousand criminal cases have cited to the Code and its provisions.").

representatives are beginning to question the nation's approach to crime and punishment.⁵⁰⁹

In fact, the transformation in American legal education may already be underway. Leading administrators and educators have voiced agreement in the need for change expressed in the Carnegie Report and its precursors, and some schools have announced bold initiatives and major curricular reforms.⁵¹⁰ As for the study of transnational law, some believe we are approaching a Langdellian-type moment in legal education, requiring law schools to move from a predominantly domestic focus to a more global perspective.⁵¹¹ As mentioned, American criminal law professors already engage in internal comparativism; and although it requires some effort, the move to external comparative law need not be overwhelming.⁵¹²

All of this should be taken to heart by those who care about American criminal justice—and by those concerned about the dangers of prosecutorial discretion. To an extent, the ideas mentioned here draw upon the function and limits of law enforcement in other nations, whose experiences with prosecutorial adjudication can enlighten American dialogue on prosecutors, their powers, and their perils. But the foregoing should not be taken as a plea for the adoption of any specific aspect of a foreign legal system, an appeal for any given legal remedy or institutional reform, or advocacy for any particular detailed agenda for educational change. If it is even possible, a comprehensive solution to the many problems with American criminal justice will take time, resources, and concerted efforts by numerous constituencies.

509. See, e.g., Luna & Cassell, *supra* note 359, at 1–5 (discussing growing public and political opposition to mandatory minimum sentencing).

510. See generally *Symposium: Radical Proposals to Reform Legal Pedagogy*, 43 HARV. C.R.-C.L. L. REV. 595 (2008).

511. *From the Editors*, 56 J. LEGAL EDUC. 330, 330 (2006).

512. Anxious educators may be reassured by distinguishing comparative law *scholarship*—portrayed in the literature as "a very serious business, which, accordingly, starts to look very much as something for only those truly initiated," Husa, *supra* note 467, at 920—from comparative law *teaching*. Moreover, the growing pedagogical interest in comparative criminal law and procedure has produced books and articles aimed at facilitating the incorporation of transnational perspectives into criminal justice coursework. See generally *CRIMINAL PROCEDURE: A WORLDWIDE STUDY* (Craig M. Bradley ed., 2d ed. 2007); STEPHEN C. THAMAN, *COMPARATIVE CRIMINAL PROCEDURE: A CASEBOOK APPROACH* (2002); *Symposium: Transnational Criminal Law and Procedure*, 56 J. LEGAL EDUC. 430 (2006); *Comparative Law Symposium: Is There a European Advantage in Criminal Procedure?*, 100 W. VA. L. REV. 763 (1998); Luna, *Comparative Criminal Procedure*, *supra* note 310; see also *supra* note 491 (referencing discussions of comparative materials on prosecutors).

Instead, this Article has merely tried to prime the discussion by highlighting an overarching trend that seems to have gone unnoticed in comparative criminal justice scholarship. This development is larger than plea bargaining, which is but a part of a bigger phenomenon, extending beyond Germany and France to the entirety of Europe and, we suspect, to all reaches of the common law and civil law world. The intercontinental convergence is toward greater authority of the public prosecutor, especially a power to adjudicate criminal cases with little or no judicial oversight. The issue raises serious concerns in Europe, despite the training and culture of its prosecutors, indoctrinated with a judicial mindset of impartiality and the centrality of truth-finding and fairness. Given the persistence of adversarial combat and harsh punishment in the United States, prosecutorial adjudication deserves at least as much attention on this side of the Atlantic.

Appendix 1. Number of Cases by Case-Ending Decision

Case-Ending Type	England and Wales	France	Germany	The Netherlands	Poland	Sweden
Simple Drop	148,000	407,451	1,754,603	13,995	297,493	107,003
Public Interest Drop	13,000	325,192	505,125	11,808	n.a.	22,283
Conditional Disposal	152,000	343,497	252,635	81,819	^[b]	n.a.
Penal Order	n.a.	133,403	623,021	n.a.	^[b]	24,626
Negotiated Settlements	n.d.a.	n.d.a.	n.a. ^[c]	n.a.	169,006	n.a.
Full Trial Before Court ^[d]	1,491,000	532,279	382,286	160,594	246,052	116,204

^[a] This statistical comparison excludes cases in which no suspect was found (which are passed on to the prosecution service in France and Germany). The data for Sweden are from 2002; the data for the other countries are from 2004.

^[b] This option is available to prosecutors but is not used in a statistically relevant number of cases.

^[c] Until 2009, negotiated settlements were not foreseen by statute but are tolerated by the courts under certain circumstances. Although the category of cases taken to court includes such settlement, research has been piecemeal and no reliable statistical estimate can be provided.

^[d] Except for Poland, this figure includes a large proportion of cases involving a guilty plea and thus the potential of plea bargaining.

Appendix 2. Percentage of Cases by Disposal Category

Disposal Category	France	Germany	The Netherlands	Poland ^[b]	Sweden
Cases Brought Before a Court	9.7	12.3	61.1	32.2	56.2
Sanctions Imposed by the Prosecutor ^[c]	5.4	11.9	--	--	12.6
Conditional Disposals by the Prosecutor without a Formal Verdict	2.5	4.8	29.0	0.8	--
Proceedings Dropped in Combination with a Cautioning of the Suspect	4.8	--	--	--	7.7
Proceedings Dropped Unconditionally Due to Lack of Public Interest or for Efficiency Reasons	6.0	21.8	3.8	0.5	23.5
Proceedings Dropped for Legal or Factual Reasons	11.0	27.4	5.0	20.4	--
Proceedings Dropped Because the Offender Remained Unknown	60.5	16.5	--	27.1	--
Other Disposals ^[d]	--	21.8	1.2	--	--

^[a] The *European Sourcebook* does not have meaningful data for England and Wales. For the available statistics for England and Wales, see Lewis, *The Evolving Role*, *supra* note 298, Part II.E. The data from Germany, Poland, and Sweden are from 2007; the data for France and the Netherlands are from 2006.

^[b] The data on Poland are incomplete.

^[c] Specifically, this category is entitled "sanctions imposed by the prosecutor (or by the court, but on application of the prosecutor and without a formal court hearing) that lead to a formal verdict and count as a conviction." It would include, for instance, penal orders.

^[d] This category includes, for instance, recommendations of private criminal prosecution and cases transferred to another competent domestic.