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# The Worldwide Accountability Deficit for Prosecutors

Ronald F. Wright\*

Marc L. Miller\*\*

## *Abstract*

*In democratic governments committed to the rule of law, prosecutors should be accountable to the public, just like other powerful government agents who make important decisions. The theoretical need for prosecutor accountability, however, meets practical shortcomings in criminal justice systems everywhere. Individual prosecutors everywhere express allegiance to the rule of law through the wise decisions made by each prosecutor and across offices as a whole. But the claim "trust us" does not in fact generate the level of public trust that one should expect in a government of laws. Institutional strategies to guarantee prosecutor accountability all fall short of the mark. Call it the accountability deficit.*

*Speaking broadly, the answers to this problem in the United States and elsewhere in the world appear at first to be quite different. Prosecutor accountability in the United States builds on electoral accountability. This external check is designed to compensate for the shortcomings of weak judicial review and overbroad criminal codes. By contrast, most European and indeed most criminal justice systems around the world rely on internal bureaucratic accountability to keep prosecutors in line with rule of law norms. Prosecutors join a centralized bureaucracy and then follow explicit articulated guidance in crucial areas of the job, enforced by regular internal review.*

*The two forms of accountability, however, have more in common than casual observation suggests. Systems in the United States, driven by long-term growth in prosecutors' offices and the arrival of information technology, rely more heavily all the time on internal bureaucratic controls. Likewise, systems elsewhere in the world rely on public oversight and*

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*respond to public input. Systems with a blend of internal and external controls on criminal prosecutors are now the norm around the world.*

*This convergence of the two main mechanisms for achieving prosecutorial accountability, however, does not mean that the accountability gap is about to disappear. The scale of the responses that will close the accountability gap must combine boldness and practicality, as modeled in the law of sentencing in the 1980s.*

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### *I. Introduction*

Prosecutors the world over must cope with an accountability deficit. Scholars have noted this deficit for years, but their proposals to confront the problem have either been too modest, or else they have been too unrealistic and thus have gone unheeded. Just as it was with bail reform in the 1960s and sentencing reform in the 1980s, it is time to set out on a path to greater accountability for prosecutors in the United States and beyond, one that is both realistic and bold enough to address the scope of the problem.

The need for accountable criminal prosecutors runs deep. Prosecutors enforce the most serious moral commitments of a society, and control the most serious punishments that a government can impose, short of waging war.<sup>1</sup> In democratic governments committed to the rule of law, the prosecutor must exercise this power responsibly and be able to demonstrate that fact to the public. A responsible exercise of power means judgments that are consistent with current public preferences and with fundamental, long-term legal principles. In short, the prosecutor must be accountable both to the people and to their laws.

The theoretical need for prosecutor accountability, however, meets practical shortcomings in criminal justice systems everywhere. The strategies used around the world to ensure that prosecutors apply the criminal law consistently with public priorities have proven to be a disappointment.<sup>2</sup> This official, who exercises some of the most profound powers of government, also remains the most profoundly free to exercise individual discretion.

This is not to say that prosecutors everywhere violate the law and the wishes of the people. A few do; most don't, or at least they don't most of the time. Prosecutors in many countries, including American prosecutors, pay careful attention to the power that goes with their everyday decisions—whether to decline or to charge, how to choose among available charges, whether to enter plea negotiations, what sentence to recommend, and so forth. Most prosecutors, in our experience, are conscientious public servants. This restraint, however, is based on individual virtue. Because *individual* responsibility is the origin of good behavior among prosecutors, it does not generate the level of public trust that one might expect in a government of laws.<sup>3</sup> Both in the United States and elsewhere in the world, *institutional* strategies to guarantee prosecutor accountability all fall short of the mark.

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1. See *infra* notes 41–42 and accompanying text (describing the importance of the prosecutor's role).

2. See *infra* Part III (discussing various solutions to the "accountability deficit").

3. This aspiration for prosecutors evokes a broader commitment of democratic government embodied in the famous language of the Massachusetts Constitution article 30 (drafted by John Adams), establishing separation of powers among branches of state government "to the end it may be a government of laws and not of men." MASS. CONST. of 1780, pt. I, art. XXX. A comparable phrasing appears in the European Court of Justice Case 294/83, *Les Verts v. Parliament*: "[A] Community based on the rule of law." See Case 294/83, *Les Verts v. Parliament*, 1986 E.C.R. 1339, 1365 (noting that "the European Economic Community is a Community based on the rule of law").

The accountability deficit that affects criminal justice in the United States is sometimes portrayed as an example of American exceptionalism. Many U.S. prosecutorial practices, including some routine and uncontroversial functions, are indeed seen as anathema in other highly developed legal systems.<sup>4</sup> But the deeper issue of accountability is more similar than different from country to country. The challenge is particularly salient in countries where the criminal justice systems cope with the largest volume of cases.<sup>5</sup>

While the need for prosecutor accountability is largely the same in many countries, the answers that various legal systems offer to this problem appear at first to be quite different. Prosecutor accountability in the United States builds on electoral accountability.<sup>6</sup> The voters elect most prosecutors at the local level; this external check is designed to compensate for the shortcomings of weak judicial review and overbroad criminal codes in the United States.<sup>7</sup>

By contrast, the rest of the world's criminal justice systems rely on internal bureaucratic accountability. Prosecutors join a centralized bureaucracy and then follow explicit articulated guidance in crucial areas of the job, enforced by regular internal review.<sup>8</sup> One approach emphasizes external and popular checks on the prosecutor, while the other approach stresses internal and technical constraints on the prosecutor.

Despite the design differences among these systems around the world, however, we believe that the two forms of accountability have more in common than casual observation or the existing scholarly literature suggest. Systems in the United States rely more heavily all the time on the internal bureaucratic controls that are the hallmarks of civil law systems.<sup>9</sup> Likewise, systems elsewhere in the world rely on public oversight and respond to public input.<sup>10</sup> Systems with a blend of internal

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4. See *infra* Part IV (describing different approaches to problems).

5. See *infra* notes 116–17 and accompanying text (noting approaches to the problem that are taken by high-volume jurisdictions).

6. See *infra* notes 81–95 and accompanying text (describing prosecutors' electoral accountability in the United States).

7. See *infra* notes 16–29 and accompanying text (analyzing the history of the American approach to public accountability).

8. See *infra* notes 58–65 and accompanying text (discussing a comparative view of prosecutorial accountability).

9. See *infra* Part IV.B (explaining internal controls on prosecutors in the United States).

10. See *infra* Part IV.A (describing public input into prosecutorial choices in the civil law world).

and external controls on criminal prosecutors are now the norm around the world.<sup>11</sup>

Two forces are driving prosecutors in the United States to embrace internal bureaucratic controls. First, the long-term growth of prosecutors' offices makes informal monitoring by the chief prosecutor impractical and therefore makes more formal bureaucratic control more appealing.<sup>12</sup> Second, the long-delayed arrival of information technology to the work of criminal prosecutors opens enormous opportunities for tighter bureaucratic control of individual prosecutors.<sup>13</sup>

This convergence of the two main mechanisms for achieving prosecutorial accountability, however, does not mean that the accountability gap is about to disappear. Each approach operating alone leaves a disconcerting range of decisions within the individual discretion of the prosecutor; the same remains true for the combinations of internal and external controls that are now common in so many systems around the world. Legal institutions do not yet demonstrate that prosecutors are in fact accountable to public preferences and legal norms.

If the combined efforts of the two dominant models are not enough, is it even possible to achieve the necessary institutional accountability of prosecutors? This Article closes with reflections on the scale of the responses that will be necessary to close the accountability gap.<sup>14</sup> As the transformation of the law and institutions of pre-trial release in the 1960s and sentencing in the 1980s demonstrate, bold strokes are both possible and necessary.

## *II. The Accountability Deficit in the Administrative State and in Administrative Criminal Justice*

Every democracy struggles with the best way to blend the technical expertise available to the government with public input—that is, the expressed wishes of the people about how to govern. Indeed, the history of administrative government in the United States can be framed as a story about combining expertise and public input.<sup>15</sup>

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11. See *infra* Part IV (explaining different controls used around the world).

12. See *infra* Part IV.B.1 (detailing the effects of the prosecutorial office growth).

13. See *infra* notes 135–47 and accompanying text (noting that changes in information technology have impacted prosecutors).

14. See *infra* Part V (discussing the role of transparency as a strategy for reform).

15. See A. Shapiro & Richard Murphy, *Eight Things Americans Can't Figure Out*

Governments at all levels expanded in the late nineteenth and early twentieth centuries. This happened in response to expanding private bureaucracies, such as railroads and limited liability corporations for the organization of capital. As government took on new functions, its legitimacy came into question.<sup>16</sup> Did government have any business addressing these subjects? More pointedly, did government have any business operating through these administrative actors, who had no obvious home in the constitutional structure? What gave constitutional legitimacy to the work of an unelected bureaucracy?<sup>17</sup>

The answers to these questions have always struck some balance between expertise and public input, even as the balance changed over time. In the 1930s, New Deal agencies such as the National Labor Relations Board and the Federal Trade Commission explained their role based on expertise that they developed within the agency.<sup>18</sup> They were scientists who observed social reality and offered technically superior solutions to social problems that private market actors could not cure. As scientists, they deserved insulation from politics.<sup>19</sup>

In the 1960s and 1970s, as new health and welfare agencies such as the Environmental Protection Agency and the Occupational Safety and Health Administration flourished, external participatory controls over administrative agencies became more prominent. Although these agencies addressed topics with clearly technical components, the public no longer accepted expertise as a sufficient explanation for the legitimacy of agency action. By that time, experience had demonstrated that values played a crucial role in regulatory choices, and pure expertise did not settle most issues.<sup>20</sup> As a result, courts started interpreting the administrative

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*About Controlling Administrative Power*, 61 ADMIN. L. REV. 5, 5–6 (2009) (describing the importance of public participation in the agency decision-making process).

16. See Ronald F. Wright, *Why Not Administrative Grand Juries?*, 44 ADMIN. L. REV. 465, 466 (1992) (noting that "[e]xcluding citizens from the administration of public affairs calls into question its legitimacy and undermines the incentives for agencies to pursue sound government").

17. See Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362, 1470 (2010) [hereinafter *Gilded Age*] (noting that the "question of what makes internal administrative law 'law' is a deep one").

18. See *id.* at 1394 (discussing the "expert administrative 'third state' that emerged in the first half of the twentieth century").

19. See JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 24 (1966) (suggesting that agencies' "relationship to the other parts of the government" be "properly solved").

20. See Shapiro & Murphy, *supra* note 15, at 5, 25 ("The door is open for judges to follow their ideological impulses because judicial review doctrines in administrative law are indeterminate . . .").

procedural statutes to promote more public participation in administrative rulemaking and adjudication.<sup>21</sup> The agencies came to resemble a pluralist legislature; their actions were legitimate not because they were scientific, but because they listened to stakeholders.<sup>22</sup>

This administrative dilemma remains vivid today. Current doctrines of administrative law carve out special zones of influence for expertise and for public input.<sup>23</sup> On the one hand, the courts actively enforce law-based external constraints on the agency.<sup>24</sup> These limits originate in political institutions, both in statutes and in executive orders. On the other hand, judicial review doctrines purport to leave policy choices, generated primarily through expertise, to the agency itself.<sup>25</sup> According to this scheme for blending expertise and public input, courts are especially amenable to claims that an agency exceeded its statutory authority.<sup>26</sup> At the same time, judges should be more reluctant to accept claims that the agency made a sub-optimal decision. In theory, the agency itself selects policy based on some measure of public input, tempered with some expertise.<sup>27</sup>

The effort to balance expertise and public input is not limited to health and safety regulation or economic regulation. Criminal justice systems

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21. See *id.* at 6 (noting that U.S. administrative law fosters "public participation in agency decision[-]making").

22. See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1805 (1975) (noting that "interest representation might be the generative principle in the emergence of a new, embracing model of administrative law whose apparent limitations and dilemmas will be resolved as the model matures").

23. See Eric Biber & Berry Brosi, *Officious Intermeddlers or Citizen Experts? Petitions and Public Production of Information in Environmental Law*, 58 UCLA L. REV. (forthcoming 2010) (manuscript at 1) (arguing that "public participation frequently distract agencies from the priorities that experts believe should be the focus of regulatory efforts") (on file with the Washington and Lee Law Review); Jerry L. Mashaw, *Bureaucracy Democracy and Judicial Review: The Uneasy Coexistence of Legal, Managerial and Political Accountability*, in OXFORD HANDBOOK OF AMERICAN BUREAUCRACY (Robert F. Durant ed., forthcoming 2010) (manuscript at 11) (suggesting that labor relations policy is "subject to accountability to the political branches") (on file with the Washington and Lee Law Review).

24. See *Gilded Age*, *supra* note 17, at 13 (noting that courts "insert procedural constraints into bureaucratic regimes").

25. See RICHARD J. PIERCE, JR. ET AL., *ADMINISTRATIVE LAW AND PROCESS* 411 (5th ed. 2009) (discussing agencies' freedom to make policy decisions).

26. See *id.* at 129 (noting that "judicial review confines agency discretion within limits set by Congress").

27. See CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 22 (1990) (discussing the "need for managerial sophistication, public initiative, flexibility in procedure and over time, continuous powers of supervision and coordination, and accountability to the democratic process and to shifting public desires").



have become far more administrative and less adversarial over the years as they deal with greater volume.<sup>28</sup> Experts run the criminal courts: Professional police assemble the evidence, professional prosecutors file and pursue the charges, professional defense counsel test the evidence, and expert judges evaluate the evidence and select the sentence.<sup>29</sup> Technical expertise abounds.

It is not expertise, however, but appeals to public (and political) values that drive legislatures as they define crimes and set the rules for law enforcement officials.<sup>30</sup> In the administration of crime policy, as in other government activities, expertise has become essential, yet justice officials must also come to terms with public input. The public expresses its wishes about individual cases and about more general enforcement policies and priorities. Public preferences about criminal justice take forms that are more local, and sometimes more intense, than public opinion in many other bureaucratic settings.<sup>31</sup>

In societies that send a high volume of misconduct and social problems into the criminal system, prosecutors enforce the criminal laws in ways that would not always receive public approval, at least if the voters were aware of prosecutor actions. Highly visible cases—such as notorious murder cases or public corruption investigations—often dominate public views about the overall work of prosecutors.<sup>32</sup> These cases that receive intense media scrutiny do not raise questions about the technical expertise of the prosecutor. Instead, they raise questions about the opposite side of the balance: Public input into prosecutor choices. What holds the prosecutor within the boundaries of the criminal law? What constrains the

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28. See Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2118 (1998) (noting that "the American system as it actually operates in most cases looks much more like what common lawyers would describe as a non-adversarial, administrative system of justice than like the adversarial model they idealize").

29. See, e.g., Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904, 904–06 (1962) (discussing the interaction of procedural requirements and individual discretion in the legal system).

30. See Darryl K. Brown, *Can Criminal Law Be Controlled?*, 108 MICH. L. REV. 971, 971 (2010) (noting that "we criminalize only harmful conduct, or risk-creating conduct, or immoral conduct, or conduct the criminalization of which carries an expressive message of public values").

31. See, e.g., FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 151 (2003) (discussing the impact of "direct democracy" on criminal law policy).

32. See Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 602 (2009) [hereinafter Wright, *How Prosecutor*] (noting that "an outcome in one big case tells us little about the quality of prosecution work more generally").

prosecutor to exercise discretion in ways that remain consistent with current public priorities about criminal enforcement? In short, the more the public learns about prosecutor decisions in highly visible cases, the more urgent becomes the search for methods of holding the prosecutor accountable.

Call it the accountability deficit.<sup>33</sup> In systems all over the world, the question goes to the basic legitimacy of prosecutors: How do the prosecutors explain the choices they make when the law does not compel only one action? High volume in a system highlights the potential for inconsistency, making it possible to question the principles or habits that guide the actors' decisions.

The traditional answer to the accountability question in most criminal justice systems outside the United States is to deny the existence of the problem. The most well-developed civil code systems have two advantages that make the accountability of prosecutors seem relatively unimportant. First, criminal codes in many civil law countries present a relatively narrow and coherent set of choices that limit the choices of criminal prosecutors.<sup>34</sup> Certainly by comparison to criminal codes in most American jurisdictions, the typical criminal code in a civilian system is a model of clarity that offers the prosecutor a limited set of options for charges based on a given set of facts.<sup>35</sup>

Second, most criminal justice systems around the world adopt the "principle of legality"—that is, the tradition of mandatory prosecution.<sup>36</sup> By tradition, a prosecutor does not exercise legitimate discretion over the criminal charges. If the evidence supports a criminal charge, the prosecutor in theory is obliged to file those charges and does not ask if the prosecution

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33. Cf. Robert Rohrschneider, *The Democracy Deficit and Mass Support for an EU-Wide Government*, 46 AM. J. POL. SCI. 463, 464 (2002) (discussing concerns that EU institutions do not reflect citizen priorities).

34. See, e.g., Richard S. Frase & Thomas Weigand, *German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions*, 18 B.C. INT'L & COMP. L. REV. 317, 330-37 (1995) (outlining the narrow choices that limit the discretion of German prosecutors).

35. See Emilio S. Binavince, *The Structure and Theory of the German Penal Code*, 24 AM. J. COMP. L. 594, 601 (1976) ("The revised Code is a great achievement in its simplicity of drafting, systematic and organized legislative technique, and is moderately progressive in its philosophy."); Frase & Weigand, *supra* note 34, at 318 (1995) (discussing "American reforms based on certain desirable features of the German system").

36. See JOHN HENRY MERRYMAN & ROGELIO PEREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 126 (3d ed. 2007) (discussing the "emphasis in civil law jurisdictions on the principle that every crime and every penalty shall be embodied in a statute enacted by the legislature").

is a wise use of limited resources or if it serves appropriate social objectives. Those are questions for other government officials to answer.<sup>37</sup>

The increased volume that besets criminal justice systems in many industrialized democracies, however, wreaks havoc with the principle of legality. When too many cases enter the system and overwhelm the capacity of the judges and the other actors, it becomes necessary to limit the reach of the criminal code, or to divert some cases from the entry point and to dispose summarily of others.<sup>38</sup> Restrictions on the reach of the criminal codes occurred in some European systems, but the effect was not dramatic enough to preserve the tradition of compulsory prosecution.<sup>39</sup> Both early screening and summary dispositions become crucial techniques for handling the high volume of charges, and the duty to exercise each of these techniques falls to the criminal prosecutor.<sup>40</sup>

In this context, the prosecutor is no longer a secondary or ministerial figure.<sup>41</sup> She becomes the key actor who decides, for many defendants, whether or not they will face the most severe available criminal penalties. Once the other criminal justice actors (not to mention the public) understand that the prosecutor holds meaningful discretion, it becomes

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37. See Joachim Herrmann, *The Rule of Compulsory Prosecution and the Scope of Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 468, 469 (1974) ("The Code of Criminal Procedure of the German Reich was enacted in 1877 and, with numerous revisions, is still in effect in Germany. The Code adopted the idea of compulsory prosecution; equal enforcement of the criminal law and protection against prosecutorial arbitrariness were deemed predominant values."); Robert Vouin, *The Role of the Prosecutor in French Criminal Trials*, 18 AM. J. COMP. L. 483, 489 (1970) (noting that "when the state's attorney, after receiving an information or a complaint, decides on non-prosecution (*classer sans suite*), he always acts under the orders of his hierarchic superiors").

38. See JORG-MARTIN JEHL & MARIANNE WADE, *COPING WITH OVERLOADED CRIMINAL JUSTICE SYSTEMS: THE RISE OF PROSECUTORIAL POWER ACROSS EUROPE* 28 (2006) (discussing "discretionary powers involving a certain value judgment as to the worth of or public interest in taking a case to court").

39. See Marianne Wade, *Prosecutors and Drugs Policy: A Tale of Six European Systems*, 2009 UTAH L. REV. 153, 174 ("[D]rug cases are seen to be subject to far higher rates of dropping and diversionary measures than most other offense types, and less serious drug offenses are subject to decriminalizing or depenalizing policy. The latter are also reported to form a major proportion of diversionary decisions made by prosecutors.").

40. See Jorg-Martin Jehle et al., *The Public Prosecutor as Key-Player: Prosecutorial Case-Ending Decisions*, 14 EUR. J. CRIM. POL'Y & RES. 161, 162 (2008) ("Thus [prosecution services] have significant statutorily defined powers to decide who will face no reaction from the criminal justice system, which defendant will be given a 'sanction' of sorts and who will face a court trial.").

41. See William C. Gourlie, *Role of the Prosecutor: Fair Minister of Justice with Firm Convictions*, 46 SASK. L. REV. 293, 301 (1981) (discussing the "emergence of the prosecutor as the central figure in the administration of criminal justice").

important to build institutions that will ensure the consistent and principled exercise of that discretion. In sum, increased volume in a criminal justice system nullifies the principle of legality as a sufficient explanation for the work of the prosecutor, and raises questions about how to hold the prosecutor accountable to the law and to the public.

In the United States, the prosecutor's discretion to enforce the criminal law selectively has deep historical roots.<sup>42</sup> The accountability problem is a common tie among several familiar critiques of prosecutor decisions. Although the problems are familiar, notice how little is known about the exact scope or factual basis for the perceived problem. In our view, limited knowledge of actual prosecutor practices has contributed to the turmoil and dissatisfaction that surrounds these hot spots of the prosecutor's work:

- *Declination & Diversion.* The charges that a prosecutor declines to file form a crucial question for the quality of criminal justice,<sup>43</sup> but it stays off the public radar.<sup>44</sup> If one were to poll the public (or even the local legal community) about the typical level of declination for felonies in the prosecutor's office, how accurate would the results be? In terms of the social impact of the criminal law, these "in/out" decisions (and their cousins such as diversion, special courts, or delayed charging) are among the most important choices that prosecutors make.<sup>45</sup>

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42. See Joan E. Jacoby, *The American Prosecutor's Discretionary Power*, PROSECUTOR (Nov.-Dec. 1997), at 25 [hereinafter Jacoby, *Discretionary Power*] (discussing the "long history" of prosecutorial discretion); Joan E. Jacoby, *The American Prosecutor in Historical Context*, PROSECUTOR (May-June 1997), at 33 (discussing the European and Colonial origins of the American prosecutor).

43. See Michael Edmund O'Neill, *When Prosecutors Don't: Trends in Federal Prosecutorial Declinations*, 79 NOTRE DAME L. REV. 221, 233 (2004) (discussing concerns regarding prosecutorial discretion); Cassia Spohn et al., *Prosecutorial Justifications for Sexual Assault Case Rejection: Guarding the "Gateway to Justice,"* 48 SOC. PROBS. 206, 206 (2001) (noting that the decision of whether to prosecute or not is "critical"); H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695, 1696 (2000) (describing the decision of whether or not to prosecute as a "calibration of the level of contextual social outrage").

44. See Frank J. Remington, *The Decision to Charge, the Decision to Convict on a Plea of Guilty, and the Impact of Sentence Structure on Prosecution Practices, in DISCRETION IN CRIMINAL JUSTICE: THE TENSION BETWEEN INDIVIDUALIZATION AND UNIFORMITY* 73, 79 (Lloyd Ohlin & Frank Remington eds., 1993) (discussing the effects of failure to document the exercise of charging discretion).

45. See William F. McDonald, *From Plea Negotiation to Coercive Justice: Notes on the Respecification of a Concept*, 13 LAW & SOC'Y REV. 385, 389 (1979) (including diversion in the dispositions that are critical to analyze).

- *Charge selection.* Concerns about the fairness, wisdom and consistency of the charge selections of prosecutors appear in the academic literature and in public discourse.<sup>46</sup> The conditions that produce this problem include the multiple charging options in all but the simplest cases, and the incoherence and bloat of most American criminal codes.<sup>47</sup> For some important aspects of charging, we hardly even have the language yet to see the problem: Think of "multiplicity" (that is, how acts over space and time should be apportioned to charges) and of inter-systemic sorting (federal/state, state/state, and county/county).<sup>48</sup>
- *Plea bargaining.* Perhaps the most familiar concern about prosecutorial powers focuses on the use of plea bargains to adjudicate guilt and innocence.<sup>49</sup> The longstanding public and academic concerns have been, first, the "back room" nature of plea bargains; and second, the sense that plea bargains distort truth, perhaps leading to conviction of the legally or factually innocent.<sup>50</sup> Returning to the thought experiment of public polling about the work of prosecutors, what might the public say is the percentage of convictions obtained through guilty pleas rather than trial? Would their answers fall anywhere close to the mark?
- *Selective prosecution and race bias.* While there is some level of concern about arbitrary or inconsistent use of the declination, charge selection, and plea bargaining powers, those concerns take on a higher urgency when combined with the risk

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46. See ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 4 (2007) (discussing the disparities in the way prosecutors handle cases).

47. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 507 (2001) (noting that the "criminal law's breadth is old news").

48. See MARC L. MILLER & RONALD F. WRIGHT, *CRIMINAL PROCEDURES: CASES, STATUTES, AND EXECUTIVE MATERIALS* 1002–07 (3d ed. 2007) [hereinafter MILLER & WRIGHT, *CRIMINAL*] (discussing the issue of multiplicity); Ronald F. Wright, *Federal or State? Sorting as a Sentencing Choice*, CRIM. JUST., Summer 2006, at 16, 16 (describing the sorting of cases into the state and federal systems as "crucial").

49. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2547 (2004) [hereinafter Bibas, *Plea Bargaining*] (noting the "flaws and inequities" of plea bargaining); William J. Stuntz, *Bordenkircher v. Hayes: The Rise of Plea Bargaining and the Decline of the Rule of Law*, in CRIMINAL PROCEDURE STORIES 351 (Carol S. Steiker & Pamela S. Karlen eds., 2006) (comparing a noted case to a "card trick").

50. See Russell D. Covey, *Signaling and Plea Bargaining's Innocence Problem*, 66 WASH. & LEE L. REV. 73, 74 (2009) (noting that plea bargaining has an "innocence problem"); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 82 (2005) (noting that "facts supporting guilty pleas can be remarkably thin").

of selective prosecution, and in particular the risk of racially biased prosecutorial decisions.<sup>51</sup>

- *Sentencing.* The development of a genuine law of sentencing over the past forty years has sometimes obscured the extent to which prosecutorial choices drive sentencing outcomes.<sup>52</sup> One window into the prosecutor's persistent sentencing power is the question of whether consecutive or concurrent sentencing is appropriate for conviction on multiple counts.<sup>53</sup> Another high visibility choice is the decision whether to pursue a death sentence.<sup>54</sup>

In each of these areas, prosecutors make many choices that the public does not see or appreciate. The choices remain hidden in individual cases and in practices that apply across many cases.<sup>55</sup>

Together, these prosecutorial decisions create an accountability deficit, a dilemma of democracy and legitimacy. The problem is not simply prosecutorial misconduct. The term "misconduct" reeks of wrongfulness. But the challenge of accountability arises not only for malicious or unwise

51. See Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of Armstrong*, 73 CHI.-KENT L. REV. 605, 607 (1998) (stating that "racially selective prosecution is at least as likely as race discrimination in employment markets"); Anne Bowen Poulin, *Prosecutorial Discretion and Selective Prosecution: Enforcing Protection After United States v. Armstrong*, 34 AM. CRIM. L. REV. 1071, 1108 (1997) (discussing the risks posed by "discriminatory purpose").

52. See Ronald F. Wright, *Charging and Plea Bargaining as Forms of Sentencing Discretion*, in OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS (Kevin Reitz & Joan Petersilia eds., forthcoming 2010) (manuscript at 21–23) (describing the effect of sentencing law) (on file with the Washington and Lee Law Review).

53. See Michael Seigel & Christopher Slobogin, *Prosecuting Martha: Federal Prosecutorial Power and the Need for a Law of Counts*, 109 PENN. ST. L. REV. 1107, 1124 (2005) (discussing the possibility of multiple charges that skew plea negotiations and jury deliberations).

54. See DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 398 (1990) (explaining that a prosecutor's discretion is prominent in capital cases); Anne Blythe, *Victim's Race Skews Death Penalty*, NEWS & OBSERVER (Raleigh, N.C.), July 23, 2010, <http://www.newsobserver.com/2010/07/23/593942/victims-race-skews-death-penalty.html> (last visited Nov. 16, 2010) (discussing the role of race in death penalty cases) (on file with the Washington and Lee Law Review).

55. See Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 912 (2006) (asserting that many important prosecutorial decisions are made out of public view). Part of the difficulty arises from the structure of public records laws and freedom of information laws, which tend to include broad exemptions for the work of criminal law enforcement and prosecution. See Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649, 657 (1984) (stating that information accessibility laws have provided exemptions for law enforcement agencies).

decisions, and not only where there is the *potential* for prosecutorial misconduct. The challenge of accountability runs to the day-to-day wisdom of prosecutorial decisions, across all of their decisions, both good and bad.

When framed this way, prosecutors themselves offer the solution to the accountability problem.<sup>56</sup> An accountable prosecutor's office can keep citizens informed about its progress in reaching goals such as rough equality across cases and transparency in decision-making. Ultimately, an accountable prosecutor does more than prevent misconduct: Accountability creates faith and trust in the workings of prosecutors, courts, and government more generally.

### *III. Two Systems, Two Solutions*

The accountability deficit is a problem for prosecutors in many locations around the world. Prosecutors and the legal systems in which they function have responded. This Part compares the two principal responses in civil law systems and in the U.S. systems—the mechanisms that allow prosecutors to demonstrate that they are acting consistently across cases, and consistently with public values.

#### *A. Internal Bureaucratic Solution of the Civilian World*

The strategy for holding prosecutors accountable in many civil law systems depends on routine forms of control within a bureaucracy. First, prospective legal rules set primarily by the legislature establish the outer bounds of the prosecutor's choices.<sup>57</sup> Then within those outer boundaries, a combination of (1) expertise developed through professional training and experience, (2) regularity of process defined through statements of general policy, and (3) internal reviews all work together to promote consistency of prosecutor decisions.

The first piece of this strategy calls for external legal constraints on the government actor. In the criminal justice context, this means criminal

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56. See Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 129 (2008) [hereinafter Miller & Wright, *The Black*] (stating that internal office policies and practices of prosecutors can achieve the accountability sought by those who desire firmer external accountability mechanisms).

57. See KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 194 (1969) (contrasting the wide discretion of American prosecutors with their German counterparts' narrow set of choices).

codes that meaningfully limit the prosecutor. Criminal codes outside the United States tend to offer the prosecutor fewer options for charging common factual scenarios.<sup>58</sup> Codes in other nations also provide for less severe penalties for comparable crimes, meaning that prosecutors in those systems remain within narrower bounds.<sup>59</sup> Because the code gives the criminal prosecutor fewer charging options with less severe consequences, the stakes are lower in the civil law world than in the United States.

The principle of legality reinforces the boundaries set in the criminal code by pressing the prosecutor to defer to legislative judgment.<sup>60</sup> From the earliest moments in their education, law students learn about a prosecutorial role that resembles the judicial role.<sup>61</sup> The prosecutor applies law without considering public safety or other larger social objectives.<sup>62</sup> In this view of prosecutorial power, each prosecutor is simply building a file to determine if the evidence can meet the relevant standard of proof.

As we have noted, high case volumes compromise the principle of legality.<sup>63</sup> As a result, a number of civilian systems now also recognize a principle of expediency, which allows the prosecutor to refuse to file charges or dismiss charges, even when they are supported by adequate evidence, if other more weighty public interests would be served.<sup>64</sup> The principle of expediency, however, has not entirely displaced the principle of

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58. See *id.* at 192 (describing continental European countries' approach to prosecutorial discretion as "less discretion, more justice").

59. See Alfred Blumstein et al., *Cross-National Measures of Punitiveness*, 33 CRIME & JUST. 347, 348 (2006) (explaining that American sentences are generally longer than European sentences); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 710 (2005) (describing the American punishment regime as unparalleled in size).

60. See DAVIS, *supra* note 57, at 194–95 (explaining that German prosecutors generally must prosecute cases even when they think it is unjust).

61. See Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH & LEE L. REV. 1413, 1516 (2010) (describing law students' educations about the prosecutorial role); Thomas Weigand, *Prosecution: Comparative Aspects*, in ENCYCLOPEDIA OF CRIME & JUSTICE 1232, 1233 (Joshua Dressler ed., 2d ed. 2002) (describing the overlap of function and personnel between the continental judiciary and procuracy).

62. See DAVIS, *supra* note 57, at 194 (emphasizing German prosecutors' lack of discretion).

63. See JEHL & WADE, *supra* note 38, at 5 (explaining how high case volumes adversely impact the principle of legality).

64. See Frase & Weigand, *supra* note 34, at 337 (explaining the mechanisms by which German prosecutors may decline to prosecute when such declination is in the public interest); Peter J.P. Tak, *The Dutch Prosecutor: A Prosecuting and Sentencing Officer*, in THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVES (Erik Luna & Marianne Wade eds., forthcoming 2011) (describing the prosecutor's power).



legality. Although the legality principle does not hold the strength it once did, it remains an aspiration with a real impact on prosecutorial culture.<sup>65</sup> It contributes to a mindset of accountability to the enacted law.

The second aspect of the civil law strategy for holding prosecutors accountable looks to the structure of the prosecutorial hierarchy to shape individual actions. Prosecutors join the prosecutorial service immediately after completion of legal education and successful completion of an entrance examination targeted specifically to the work of prosecutors.<sup>66</sup> The typical new arrival in the public prosecutor service intends to make an entire career as a criminal prosecutor.<sup>67</sup> In the United States, by contrast, it is more common for new prosecutors to leave the office after a few years for other (often more lucrative) positions, either in criminal defense or in civil litigation.<sup>68</sup> American judges are also disproportionately drawn from the ranks of former prosecutors, at least compared to former defense attorneys.<sup>69</sup>

Once the new prosecutors in civil systems join the service, they receive training that is more systematic than prosecutors usually receive in the United States.<sup>70</sup> They also operate under written guidelines that address a wide range of the routine decisions that individual prosecutors face.<sup>71</sup> In Japan, for instance, managers in the prosecutor's office develop written

65. See MICHAEL TONRY, *THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE* 206 (2004) (describing the aspiration to insulate the justice system from political processes).

66. See Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How the French Do It, How Can We Find Out, and Why Should We Care?*, 78 CALIF. L. REV. 539, 561–62 (1990) (explaining the specialized training and examination regimen of French prosecutors and judges).

67. See Luna & Wade, *supra* note 61, at 1502 ("[T]hose who become prosecutors see their position as an end itself . . .").

68. See Cheryl X. Long & Richard T. Boylan, *Salaries, Plea Rates, and the Career Objectives of Federal Prosecutors*, 48 J.L. & ECON. 627, 629 (2005) (noting that American prosecutors often leave for private sector jobs after accumulating human capital while working in the procuracy).

69. See Theresa M. Beiner, *How the Contentious Nature of Federal Judicial Appointments Affects "Diversity" on the Bench*, 39 U. RICH. L. REV. 849, 863–64 (2005) (noting the large proportion of American prosecutors that are tapped to become judges).

70. See Luna & Wade, *supra* note 61, at 1474–81 (describing the role of the written guidelines).

71. See JACQUELINE HODGSON, *FRENCH CRIMINAL JUSTICE: A COMPARATIVE ACCOUNT OF THE INVESTIGATION AND PROSECUTION OF CRIME IN FRANCE* 76 (2005) (describing the French Minister of Justice's use of written guidelines to control prosecutors); Frase & Weigand, *supra* note 34, at 337 (noting a German prosecutor's lack of discretion in deciding whether to charge).

policy directives, instructing line prosecutors about presumptive charging decisions and sentence recommendations.<sup>72</sup> Individual prosecutors consult a chart of starting point sentence recommendations.<sup>73</sup> They also consult large databases of cases looking for the most analogous cases prosecuted in the past.<sup>74</sup>

Finally, the daily decisions of the line prosecutor in most prosecutor services go through a review process, leaving relatively few prosecutorial decisions that are truly the work of an individual. Again, consider the bureaucratic reviews at work on Japanese prosecutors.<sup>75</sup> The Supreme Public Prosecutor's Office in the Ministry of Justice sits at the top of an organization that includes eight High Offices, fifty District Offices, and 453 Local Offices.<sup>76</sup> All levels of the bureaucracy are tied together by "the principle of prosecutor unity," which declares that subordinates must obey superiors.<sup>77</sup> Based on oral summaries of more serious cases and a review of documents in minor cases, managers must approve several key decisions in the case—whether to arrest a suspect, whether to file charges, and how to dispose of a case.<sup>78</sup> Random audits of cases also expose prosecutor choices to more intensive review further up the bureaucratic chain.<sup>79</sup>

Two features of prosecutorial services in many other countries reinforce the power of these internal bureaucratic checks on the work of individual prosecutors. First, the organizations are large. A single prosecutorial service encompasses the work of individual prosecutors for an entire region or country. Even though the prosecutors are located in different local offices, they are all subject to centralized policies and reviews.<sup>80</sup> By contrast, the work of prosecutors in the United States usually happens in small local offices that do not answer to a centralized

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72. See David T. Johnson, *The Organization of Prosecution and the Possibility of Order*, 32 LAW & SOC'Y REV. 247, 251–52 (1998) (outlining the procedures followed by Japanese prosecutors).

73. *Id.*

74. See *id.* (describing the procedures).

75. See DAVID T. JOHNSON, *THE JAPANESE WAY OF JUSTICE: PROSECUTING CRIME IN JAPAN* 120 (2002) (describing the bureaucratic review process of the Japanese procuracy).

76. *Id.*

77. *Id.* at 121.

78. *Id.* at 130.

79. *Id.*

80. See PETER J.P. TAK, *TASKS AND POWERS OF THE PROSECUTION SERVICES IN THE EU MEMBER STATES, PART I* at 56 (2004) (describing the centralized policies and review in civil prosecutorial office structures).

prosecutorial authority at the state or national level.<sup>81</sup> The large size of the unitary prosecutorial organizations in most nations places a high value on bureaucratic routines.

Second, the litigation process in the civil law tradition depends heavily on written files rather than oral hearings.<sup>82</sup> In a world built around files, the work of individual prosecutors is more likely to be documented. As a result, it is more accessible to review by superiors, either at the time of the decision or after the fact.

In sum, most prosecutorial services around the world promote accountability through internal bureaucratic tools. Training, articulated standards, internal review of individual decisions and writing-based processes all strengthen the concept of the prosecutor's job as a neutral quasi-judicial officer. These techniques are designed to mute concerns about the consistency of prosecutorial decisions. The end result, in theory, produces prosecutorial decisions that are more consistent with one another, more consistent with the values embodied in the criminal code, and more consistent with the current enforcement priorities of the public.

### *B. United States Strategy*

In the United States, the simple answer to the accountability deficit of prosecutors has been to rely on local elections. Chief prosecutors in the federal criminal justice system—the ninety-three United States Attorneys—are appointed, but this is the exception in the United States, and the more than 2,300 prosecutors in the state systems are typically elected.<sup>83</sup> The exceptions are Alaska, Connecticut, Rhode Island, and New Jersey, where the elected attorney general appoints the local chief prosecutors.<sup>84</sup> State systems handle roughly 95% of all felonies, including most of the serious

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81. See STEVEN W. PERRY, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PROSECUTORS IN STATE COURTS, 2005, at 9 (2006), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/psc05.pdf> (noting the local nature of the American procuracy).

82. See Frase & Weigand, *supra* note 34, at 342–43 (noting the importance of the written record in German criminal proceedings despite the primacy of oral evidence); MERRYMAN & PEREZ-PERDOMO, *supra* note 36, at 131 (noting that civil law proceedings rely heavily on a written record).

83. See CAROL J. DEFRAANCES & GREG W. STEADMAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PROSECUTORS IN STATE COURTS, 1996, at 1 (1998), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/psc96.pdf> (stating that the vast majority of prosecutors are elected locally).

84. PERRY, *supra* note 81, at 2.

street crime that holds public attention.<sup>85</sup> So it is the states, not the federal system, that define the American norm.

In fact, the largest urban areas within state systems can rival the volume of the entire federal criminal justice system. In 2008, the Los Angeles District Attorney filed over 64,000 felony cases and over 138,000 misdemeanor cases.<sup>86</sup> In the same year the United States Attorney for the Central District of California—covering Los Angeles along with a much larger area and population—charged just 2,688 criminal defendants.<sup>87</sup> Indeed, the Los Angeles District Attorney processed about two-thirds the number of felony cases as the entire federal justice system (about 91,000 defendants were charged in Fiscal Year 2008 in the federal system).<sup>88</sup> The misdemeanor caseload in Los Angeles pushes the local system's volume well past the entire federal system.<sup>89</sup>

The case volume for urban prosecutors in the state courts produces different pressures for the exercise of prosecutorial discretion, and different opportunities and limits for the administration and regulation of prosecutorial power.<sup>90</sup> These pressures combine with a long tradition of American criminal codes that are at best intricate and frequently incoherent. Messy, overlapping and conflicting code sections limit the ability of those statutes to constrain prosecutorial power.<sup>91</sup> Statutes that appear to regulate prosecutors, including mandatory sentencing provisions and (less commonly encountered) mandatory prosecution provisions, have demonstrated little constraining power in practice.<sup>92</sup>

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85. See Ronald F. Wright & Marc L. Miller, *Country Report: United States of America*, in MAX PLANCK REPORT, forthcoming 2011 (providing the statistic).

86. CALIFORNIA OFFICE OF THE ATTORNEY GENERAL, CRIMES, 2008: LOS ANGELES COUNTY 1, available at [http://stats.doj.ca.gov/cjsc\\_stats/prof08/19/11.pdf](http://stats.doj.ca.gov/cjsc_stats/prof08/19/11.pdf) (last visited Nov. 16, 2010).

87. See FEDERAL JUSTICE STATISTICS RESOURCE CENTER, <http://fjsrc.urban.org/> (last visited Nov. 17, 2010) (providing the statistics) (on file with the Washington and Lee Law Review).

88. See *id.* (providing the federal system's case load).

89. See *id.* (listing the charges).

90. See Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1140–41 (2008) (discussing the effect of caseloads on prosecutorial decisions).

91. See PAUL H. ROBINSON & MICHAEL T. CAHILL, LAW WITHOUT JUSTICE: WHY CRIMINAL LAW DOESN'T GIVE PEOPLE WHAT THEY DESERVE 210 (2005) (critiquing the current state of American criminal codes); Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1283–84 (2005) (describing the effect of incoherent criminal codes on a prosecutor's discretionary power).

92. See Stephen Schulhofer, *Rethinking Mandatory Minimum Sentences*, 28 WAKE FOREST L. REV. 199, 200 (1993) (discussing the ineffectiveness of mandatory sentencing).

These background facts are the source of the accountability deficit. The popular election of most American prosecutors is said to be the cure.

In theory, electoral control of prosecutors in the United States takes its most powerful form: Local control. Many prosecutors are elected on a countywide or citywide basis, while many others serve districts that only serve a few counties. There are just over 3,100 U.S. counties to match the 2,300 separate prosecutor offices.<sup>93</sup> The local prosecutor remains close to the community, where democratic accountability is thought to be strongest. The overarching theory is that public input and monitoring will control the power of prosecutors. Elections work in tandem with other mechanisms to provide public input and monitoring; others include news stories and pressures from victims and other parties interested in particular disputes.<sup>94</sup>

Elections of prosecutors, however, deliver less than they promise. Incumbents hold a large advantage, reflected by greater than 95% re-election rates.<sup>95</sup> These are retention rates that would make a candidate for the Supreme Soviet blush. Sitting district attorneys face challenges less often than candidates in state legislative elections. About 85% of prosecutor incumbents run unopposed, a much higher rate than for state legislators.<sup>96</sup> Prosecutors in larger jurisdictions are more likely to be challenged—but also more likely to win, even when challenged.<sup>97</sup>

Win or lose, incumbents in contested prosecutorial elections do not face much meaningful public scrutiny of their policies or priorities for the office. Instead, elections turn on generic claims about "competence," familiar but unhelpful measures ("conviction rate"), and—most common of all—claims about high profile cases (both successes and failures). Election rhetoric does not highlight ideological or policy differences.<sup>98</sup>

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93. See PERRY, *supra* note 81, at 1 (noting that there are approximately 2,300 state prosecutor offices); ANSWERS ENCYCLOPEDIA, <http://answers.encyclopedia.com/question/many-counties-there-united-states-217060.html> (last visited Nov. 17, 2010) (providing that there are 3,100 counties in the United States) (on file with the Washington and Lee Law Review).

94. See ROBERT A. DAHL, *DILEMMAS OF PLURALIST DEMOCRACY: AUTONOMY VERSUS CONTROL* 66 (1982) (explaining some of the group inputs in democratic government); W. Lance Bennett & Jarol B. Manheim, *The Big Spin: Strategic Communication and the Transformation of Pluralist Democracy*, in *MEDIATED POLITICS: COMMUNICATION IN THE FUTURE OF DEMOCRACY* 279, 280 (W. Lance Bennett & Robert M. Entman eds., 2001) (describing the interplay of elections and other forms of political action).

95. See generally Wright, *How Prosecutor*, *supra* note 32 (stating re-election statistics).

96. *Id.*

97. *Id.*

98. *Id.*

Other political controls on chief prosecutors in the United States come from observation and commentary from interest groups. Some prosecutors now pay more attention to community preferences in setting prosecution priorities under the banner of "community prosecution."<sup>99</sup> Perhaps such informal but routine forms of public engagement will eventually provide the kind of democratic constraints that elections do not appear to have delivered.

The use of competing government institutions to check and balance the work of American prosecutors is quite limited, despite a decades-old academic literature citing the need for such controls.<sup>100</sup> The affirmative acts of prosecutors would seem to require judicial review in every case. Nominally that is true: Defendants can challenge charges for a lack of probable cause, and guilty pleas are subject to review and acceptance by courts.<sup>101</sup> But judges have shown little interest in regulating any aspect of prosecutorial decision-making.<sup>102</sup> Courts in the United States operate within a tradition of immense deference to executive discretion in prosecutorial decision-making.<sup>103</sup> This tradition derives from the constitutional doctrine of separation of powers.

Prosecutors are members of the bar.<sup>104</sup> Therefore regulation of prosecutors by bar authorities, through practice rules and ethics review,

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99. See NAT'L RESEARCH COUNCIL, WHAT'S CHANGING IN PROSECUTION? REPORT OF A WORKSHOP 36 (Phillip Heymann & Carol Petrie eds., 2001) (describing community prosecution); Kelley Gray, *Community Prosecution: After Two Decades, Still New Frontiers*, 32 J. LEGAL PROF. 199, 201 (2008) (describing community prosecution); M.E. Nugent & G.A. Rainville, *The State of Community Prosecution: Results of a National Survey*, 35 PROSECUTOR 26, 30 (2001) (outlining the development of community prosecution).

100. See Donald A. Dripps, *Overcriminalization, Discretion, Waiver: A Survey of Possible Exit Strategies*, 109 PENN. ST. L. REV. 1155, 1175 (2005) ("If in fact the key decisions about the defendant's liberty are made by prosecutors, rather than by legislators and courts, then it makes sense to admit this openly as a matter of constitutional doctrine.").

101. See VA. CODE ANN. § 19.2-11.01 (West 2010) ("The court shall not accept the plea agreement unless it finds that, except for good cause shown, the Commonwealth has complied with clauses (i) and (ii)."); *id.* § 19.2-254 ("The court may refuse to accept a plea of guilty to any lesser offense in the charge upon which the accused is arraigned . . .").

102. See Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 871-72 (2009) ("[F]ederal judges continue to rubber stamp cooperation, charging, and plea decisions.").

103. See *id.* (describing federal courts' general acceptance of prosecutorial decisions); Wayne A. Logan, Comment, *A Proposed Check on the Charging Discretion of Wisconsin Prosecutors*, 1990 WIS. L. REV. 1695, 1724 ("[D]eference by the courts to the publicly elected office of the prosecutor has been extended to preclude private counsel from even assisting district attorneys in prosecutions.").

104. See Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical*

could in theory offer additional constraint and guidance for prosecutorial power.<sup>105</sup> But once again, the operative phrase is "in theory," as ethical challenges to prosecutors—much less challenges resulting in a positive finding or sanctions—are extraordinarily rare.<sup>106</sup>

The budgets for state prosecutors' offices confuse the picture somewhat, because some local prosecutors rely on a mix of state and local funds, which dilutes the power of local control.<sup>107</sup> But the ultimate political authority for spending that budget rests with the chief prosecutor who answers only to the local voters.<sup>108</sup> The local District Attorney does not report up to any statewide hierarchy (such as the state Attorney General or Department of Public Safety) when setting priorities and practices of the office, although the District Attorney may need to be attentive to legislative policy and funding priorities.<sup>109</sup>

The bureaucratic controls so ubiquitous in the civil law system are harder to find in the United States. There is typically no regularized or substantial training at the start of a prosecutor's career.<sup>110</sup> Use of general written guidelines is sporadic. Even strong internal policies do not create

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*Prosecutors*, 36 HOFSTRA L. REV. 275, 292 (2007) (discussing the bar licenses of prosecutors, and the bar authorities' frequent failure to recommend serious punishment for prosecutorial violations).

105. See *id.* at 310 (stating that the ABA should review and revise the Model Rules of Professional Conduct to adequately govern prosecutorial function and behavior).

106. See Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1593, 1596 (2003) (describing the small number of provisions within the Model Rules of Professional Conduct that address troublesome prosecutorial conduct); Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure To "Do Justice"*, 76 FORDHAM L. REV. 1337, 1371 (2007) ("Although civil suits against a prosecutor are rare, they are most likely in an extremely problematic case. . . ."); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 749 (2001) (examining the defendants' lack of ability in pursuing an action against the prosecutors).

107. See *Direct Expenditure by Level of Government, 1982–2006*, BUREAU OF JUSTICE STATISTICS, <http://bjs.ojp.usdoj.gov/content/glance/expgov.cfm> (last visited Nov. 17, 2010) (plotting the direct expenditure on criminal justice by level of government between the years of 1986 and 2006) (on file with the Washington and Lee Law Review).

108. See PERRY, *supra* note 81, at 1–4 (discussing the role of the elected prosecutor's budgetary discretion).

109. See Candace McCoy, *Prosecution*, in THE HANDBOOK OF CRIME AND PUNISHMENT 457, 458 (Michael H. Tonry ed., 1998) (discussing prosecutors' complete control over policy and the indirect weight of political links); Jack B. Weinstein, *Some Ethical and Political Problems of a Government Attorney*, 18 ME. L. REV. 155, 168 (1966) (discussing New York district attorneys' independence from state control).

110. See Jacoby, *Discretionary Power*, *supra* note 42, at 27 (finding that prosecutors were shaped by their electorate and acted mainly for themselves).

enforceable rights.<sup>111</sup> Most prosecutor offices do not ask their attorneys to record any reasons for their decisions.<sup>112</sup> Prosecutors' offices in the U.S. have no habit of regular reviews or audits outside a few priority categories.<sup>113</sup>

Thus, on first cut, the responses in the United States and in the civil law tradition seem quite different.

#### IV. Two Symmetrical Failures

While the responses to the accountability gap in the United States and in the civil law world follow different paths, upon reflection these two lines of response have a great deal in common. Indeed, the common ground between the two systems is growing larger over time.

Prosecutors in the United States are moving in the direction of more internal bureaucratic controls over the choices of line prosecutors, but have not yet created enough internal accountability. Prosecutors elsewhere in the world are searching for methods to account for popular views and priorities in the enforcement of the criminal law. A mix of internal and external controls, aiming for a blend of expertise and popular input, is becoming a shared aspiration for those who structure the work of criminal prosecutors around the world.

Unfortunately, criminal justice systems in many countries also share similar disappointing results. Forces in both the United States approach and in the civil law approach to prosecutor accountability are exposing the inadequacies of the two traditional strategies, spurring prosecutors around

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111. 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, 1344–46 (1993) (stating that internal policies are informal and provide no guarantees of consistency with respect to similar cases); Ellen S. Podgor, *Department of Justice Guidelines: Balancing "Discretionary Justice,"* 13 CORNELL J.L. & PUB. POL'Y 167, 185 (2004) (concluding that courts view these policies as internal to departments and that enforcing these policies would exceed their constitutional authority); Alissa Pollitz Worden, *Policymaking by Prosecutors: The Uses of Discretion in Regulating Plea Bargaining*, 73 JUDICATURE 335, 336 (1990) (describing the prevalence of internal office policies).

112. One exception is the federal system. See Michael Edmund O'Neill, *Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predicative Factors*, 41 AM. CRIM. L. REV. 1439, 1463 (2004) ("[T]he instrument the Department of Justice provides to Assistant United States Attorneys to record their reasons for declining a matter, forces prosecutors to select only the most significant reasons for declination.").

113. See Ronald F. Wright, *Proceedings of the Working Group on Systems and Culture*, 31 CARDOZO L. REV. 1961, 2007 (2010) (explaining the need for greater review).



the world to continue their search for a stable blend of expertise and popular input.

*A. Popular Input into Prosecutor Choices in the Civilian World*

In the civil law world, the combination of economical criminal codes, the principle of legality, and internal standards and internal review are designed to produce a neutral prosecutor.<sup>114</sup> Some scholars and practitioners recognize, however, that the prosecutor does not actually function as an objective quasi-judicial officer.<sup>115</sup> Particularly in systems that must deal with a high volume of cases, the individual prosecutor makes choices that are not internally consistent, and are difficult for their superiors to monitor or control.<sup>116</sup> For instance, the prosecutors in Japan who face such intense scrutiny for their decisions in the cases that they charge do not keep statistics for their declinations.<sup>117</sup>

When faced with larger numbers of arrests and potential charges, prosecutors in many nations look to sources other than the criminal code itself to set priorities and to select cases for summary disposition. These extra-legal sources include interactions between top-level prosecutors and the leaders of other criminal justice institutions; they also include efforts by prosecutors to track the current priorities of citizens.

*1. Public Input at the Ministerial Level*

Prosecutors with supervisory power make choices about how to prioritize the various requirements of the criminal code, exercising what is unmistakably the power to set criminal enforcement policy. Whatever one might conclude about the power of a bureaucracy to hold line prosecutors

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114. See Davis, *supra* note 104, at 276, 283 (describing the economical results of civil law codes, and the institutional devices that impose legal restraint on prosecutors).

115. See Abraham S. Goldstein & Martin Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany*, 87 YALE L.J. 240, 269 (1977) (describing the continental prosecutorial systems as objective only in theory).

116. See *id.* at 281 (describing how an often overwhelming workload undermines the ideal of impartial monitoring).

117. See Christopher Lewis, *The Evolving Role of the English Crown Prosecution Service*, in *THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVES* (Erik Luna & Marianne Wade eds., forthcoming 2011) (explaining how Japanese prosecutors can only send a case to court if they feel it can be proved beyond reasonable doubt) (on file with the Washington and Lee Review).

accountable, the system offers nothing to promote accountability for prosecutors at the top of the organization. Small-scale accountability for the line prosecutor at the case level is not sufficient. How then, might one give the higher-level prosecutors reason to stay in line with the criminal law and current public enforcement priorities?

One answer lies in the interaction between the leaders of the prosecutorial service and the top officials responsible for criminal justice and domestic policy. The leadership of the prosecutorial service in many countries answers to the Ministry of Justice, an agency often led by an elected official.<sup>118</sup> When line prosecutors start to feel the stresses of a high-volume system and make choices that noticeably affect government spending, elected ministers are more likely to notice their work.<sup>119</sup> As the topics addressed in general guidelines multiply, questions can arise about the basis for the policy choices built into the guidelines. Sometimes the legislature steps in to create guidance about charging, quite distinct from its role in defining substantive crimes in the code. For instance, the Italian Parliament in 2008 enacted charging guidelines that emphasized the enforcement of selected crimes in the code, such as immigration, workplace injuries, organized crime, and terrorism.<sup>120</sup>

Whether the guidance comes from the Ministry of Justice or from the legislature, input about enforcement priorities arrives at the prosecutorial service from the top. The leadership takes directions from institutions that are themselves directly accountable to the voters.

## 2. Direct Popular Input for Line Prosecutors

The input about public enforcement values can also arrive from the bottom of the organization. Some European nations have begun to experiment with "community prosecution."<sup>121</sup> Based on the "community policing" model that has evolved over the last generation in the United States, community prosecution gathers public opinion about enforcement

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118. See, e.g., *id.* (describing the Ministry of Justice's role).

119. See Michele Caianello, *The Italian Public Prosecutor: An Inquisitorial Figure in Adversarial Proceedings*, in *THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVES* (Erik Luna & Marianne Wade eds., forthcoming 2011) (discussing political debates).

120. See *id.* (noting the legislative action).

121. See Heike Gramckow, *Community Prosecution in the United States and Its Relevance for Europe*, 5 *EUR. J. CRIM. POL'Y & RES.* 9, 20–22 (1995) (describing developments in Europe that influence the implementation of community prosecution and community policing).

practices, and emphasizes the prosecution of cases that will contribute the most to the public's sense of safety.<sup>122</sup>

Sometimes this collection of public sentiment occurs through the physical location of offices, spreading the prosecutors into different sectors of a city. In other situations, the philosophy leads to an emphasis on different crimes in various parts of the jurisdiction.<sup>123</sup> Some of the European experimentation with this model is visible in England, where the Crown Prosecution Service has used community impact statements, community involvement panels, scrutiny panels, and educational programs.<sup>124</sup>

Popular input into criminal justice also arrives through victim consultation. Many nations are revamping prosecutorial and judicial guidelines to stress the importance of consulting and deferring to the wishes of victims when possible. For instance, the European Commission has begun a consultation process to create minimum standards for the treatment of crime victims in criminal justice systems.<sup>125</sup>

The challenge in many parts of the civil law world is to loosen the prosecutorial hierarchy enough to allow different practices in different locations, promoting responsiveness to local variety in what citizens expect to promote public safety. This might require some changes to evaluation metrics for individual prosecutors. In Germany, for example, prosecutors are evaluated in part on the number of matters they close each year, and they receive more credit for a penal order than for a mediation. Even if a mediation could produce faster results that restore the community's sense of well-being and promote involvement of the victim, the prosecutor would still have reason to pursue the penal order.<sup>126</sup>

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122. See Kay Levine, *The New Prosecution*, 40 WAKE FOREST L. REV. 1125, 1145–47 (2005) (providing an overview of the community policing model and its connection to community prosecution).

123. See Gray, *supra* note 99, at 201 (“[C]ommunity prosecution takes various forms from location to location and prosecutor to prosecutor.”); Nugent & Rainville, *supra* note 99, at 28, 30 (discussing prosecutors’ increased interaction with citizens on different issues and within specific neighborhoods).

124. See Lewis, *supra* note 117 (explaining the community involvement).

125. See European Comm’n, *Public Consultations*, EUROPA (Aug. 6, 2010), [http://ec.europa.eu/justice/news/consulting\\_public/news\\_consulting\\_0053\\_en.htm](http://ec.europa.eu/justice/news/consulting_public/news_consulting_0053_en.htm) (last visited Oct. 6, 2010) (describing a European Union Public Consultation that will receive input for adoption of new directives on minimum standards for victims of crimes) (on file with the Washington and Lee Law Review).

126. See Marianne Wade, Address at the Washington and Lee Law Review Symposium: The European Public Prosecutor: The Logical Next Step? (Apr. 2, 2010) (discussing the matter).

In short, prosecutorial services outside the United States, which have traditionally relied on the expertise developed through internal bureaucratic controls, are now opening up several avenues for input from popular preferences.

### *B. Internal Controls in the United States*

In the United States, systems that relied historically on public input are now making room for more expertise enforced by bureaucratic hierarchy.<sup>127</sup> Internal controls that appeal to technical expertise and regular monitoring are joining forces with the traditional external and populist forms of accountability.

We have argued elsewhere that internal controls should receive more emphasis, by simple process of elimination: The external controls are even less likely to close the accountability gap.<sup>128</sup> But in this Article, we point out two long-term trends that tilt the field in favor of internal bureaucratic controls. The growth in the size of the typical prosecutor's office, together with the arrival of data management tools in criminal justice systems, are both accelerating the trend in the United States towards more bureaucratic accountability.

#### *1. Growth in Prosecutor Office Size*

First, the typical prosecutor's office is growing larger. Between 1992 and 2005, the personnel employed in prosecutors' offices in state court systems went up from 57,000 to 78,000.<sup>129</sup> Most of this growth involved offices that serve larger populations (greater than 250,000), which require a larger number of attorneys and support staff.<sup>130</sup> The number of prosecutors'

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127. See Abraham S. Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009, 1021 (1974) (stating that the increased complexity of government has led the United States to adopt a mixed procedural approach, including the emergence of inquisitorial themes).

128. See Miller & Wright, *The Black*, *supra* note 56, at 196 (concluding that internal regulation could lead to a strengthened legal and administrative state); Ronald F. Wright & Marc L. Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 57-58 (2002) [hereinafter Wright & Miller, *The Screening*] (examining the internal responses to plea bargaining).

129. See PERRY, *supra* note 81, at 2 (stating that prosecutorial office workforces increased from 57,000 in 1992 to 78,000 in 2005).

130. See *id.* at 3 (providing the 2005 staff size for offices by the population size

offices serving populations of 250,000 or more moved from 214 to 255 between 1996 and 2005.<sup>131</sup>

Although prosecutors in the United States continue to work in a remarkably large number of small, independent offices with a median staff size of ten, the great majority of residents in the United States now live in jurisdictions that operate large, bureaucratic prosecutors' offices with a median staff size over 100.<sup>132</sup> The bureaucratization of American prosecutors is happening alongside the shift of the population from rural to urban and suburban areas.

The growth in the size of American prosecutor offices increases the demand for more active management from the top, and is slowly stifling the model of the line prosecutor as free agent. Electoral accountability is in reality supplemented by the articulation of internal office standards and the normalization of internal review structures. The largest prosecutor organizations in the United States are also the most frequent users of written guidelines and internal review mechanisms.<sup>133</sup> The trend toward larger offices will mean that more local offices will take organizational cues from larger operations, such as the Department of Justice.<sup>134</sup>

## 2. Data and Its Uses

Second, the arrival of data management tools in criminal justice systems is also accelerating the trend in the United States towards more bureaucratic accountability. Criminal law practitioners have been slower

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served); DEFRANCES & STEADMAN, *supra* note 83, at 1 (providing the 1996 staff size for offices by the population size served).

131. See PERRY, *supra* note 81, at 3 (stating the number of prosecutors offices serving populations of 250,000 or more to be 225 in 2005); DEFRANCES & STEADMAN, *supra* note 83, at 1 (stating the number of prosecutors offices serving populations of 250,000 or more to be 214 in 1996).

132. See PERRY, *supra* note 81, at 3 tbl.2 (stating that large to medium-sized population areas have prosecutors offices with staff sizes that are generally over 100).

133. *Id.* at tbl.9; see also Podgor, *supra* note 111, at 170–75 (describing the Department of Justice's guidelines).

134. The treatment of federal sentencing issues within the Department of Justice offers a vivid example of efforts to enforce more uniform outcomes among prosecutors in a large organization. See MILLER & WRIGHT, CRIMINAL, *supra* note 48, at 1129–44 (discussing prosecutorial guidelines in the executive branch); David Robinson, Jr., *The Decline and Potential Collapse of Federal Guideline Sentencing*, 74 WASH. U. L.Q. 881, 883–85 (1996) (discussing the Sentence Reform Act's enhanced effect on uniformity within the Department of Justice).

than civil litigators to embrace data management techniques,<sup>135</sup> presumably because of the disparity of resources available for civil and criminal litigation. Nevertheless, prosecutors at long last are taking better advantage of information technology.<sup>136</sup> The tracking of cases and the work of individual prosecutors through data management can now give chief prosecutors and the managers in their offices a clearer view of current practices.

Harry Connick, the District Attorney in New Orleans for over a quarter century, adapted an old management adage for use in the prosecutor's office in the 1970s, at the very start of computerized case management: "[I]f you can't measure it, you can't manage it."<sup>137</sup> For managing prosecutors, a greater ability to monitor policy changes in the office will expand their power to set coherent office policy and to monitor its implementation.

Data about case processing can have both internal and external effects for a prosecutor's office. Connick and other lead prosecutors use the data to manage attorneys within the organization. If two prosecutors who handle similar files in a single office accept cases for criminal charges at different rates from one another, dispose of cases at a slower or faster pace, or obtain remarkably different levels of conviction or sentences for defendants, the office leadership will want to know why.

Other lead prosecutors now use case data to shape the relationship between the office and the voters.<sup>138</sup> For example, Kitsap County, Washington (in the Seattle area) has developed fairly detailed policy statements and annual reports based on statistical insights.<sup>139</sup> The published

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135. See James S. Kakalik et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613, 620 n.7 (1998) (stating that civil litigation cases usually receive a high level of case management).

136. One source of expertise is the National District Attorneys' Association and its research arm, the American Prosecutors Research Institute. See Nat'l Dist. Attorneys Ass'n, *NDAA's Mission*, [http://ndaa.org/ndaa\\_mission.html](http://ndaa.org/ndaa_mission.html) (last visited Nov. 17, 2010) ("NDAA serves as a nationwide, interdisciplinary resource center for training, research, technical assistance, and publications reflecting the highest standards and cutting-edge practices of the prosecutorial profession.") (on file with the Washington and Lee Law Review).

137. See Wright & Miller, *The Screening*, *supra* note 128, at 65–66 (examining Harry Connick Sr.'s computerization of data management as District Attorney in New Orleans).

138. See Miller & Wright, *The Black*, *supra* note 56, at 165, 186 (discussing prosecutors' use of data management in political accountability and in providing public oversight).

139. See RUSSELL D. HAUGE, KITSAP CNTY. PROSECUTING ATTORNEY, MISSION STATEMENT AND STANDARDS AND GUIDELINES 3 (2007) [hereinafter HAUGE, MISSION], available at <http://www.kitsapgov.com/pros/StandardsGuidelines2007.pdf> (discussing the

policies do not simply restate generic considerations about factors that prosecutors should consider during charging and sentencing recommendations. They were first issued in 1995 and have been updated twice, most recently in 2007, to reflect current priorities of the office in light of available budgets and public values.<sup>140</sup>

The document prioritizes crime categories, and states explicitly that the office will devote relatively fewer resources to crimes and activities, such as "economic crime" and "confiscation of the fruits of drug crime" that appear toward the bottom of the priority list.<sup>141</sup> The charging policies explicitly state a less demanding standard for charging crimes against persons (evidence that "would justify conviction") than for charging crimes against property (evidence that makes conviction "probable").<sup>142</sup> These standards offer the public a realistic metric for judging the effectiveness of the office.

The Kitsap County office also produces and publishes annual reports on the performance of the office.<sup>143</sup> One report, for example, tracks the number of cases referred to the office each year between 1998 and 2008, including separate numbers reported for various categories of crime.<sup>144</sup> The report describes the office charging policy and compares the number of "reductions" to original charges that the office filed in various crime categories across three years.<sup>145</sup> It also tracks the number of diversions allowed by the office between 2004 and 2008.<sup>146</sup> The report closes with a list of positions eliminated and functions curtailed because of budget cuts imposed on the office.<sup>147</sup>

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office of the prosecutor's mission, goals, and regular reports to the public).

140. *See id.* at 1 (describing the establishment and implementation of the Kitsap County Standards and Guidelines).

141. *See id.* at 4 (listing "economic crime" and "confiscation of the fruits of the drug crime" as being allocated fewer prosecutorial resources).

142. *See id.* at 6 (describing the charging standards and guidelines for "crimes against persons" and "crimes against property/other crimes").

143. *See generally* RUSSELL D. HAUGE, KITSAP CTNY. PROSECUTING ATTORNEY, 2008 REPORT (2008) [hereinafter HAUGE, 2008], available at [http://www.kitsapgov.com/pros/2008\\_Report.pdf](http://www.kitsapgov.com/pros/2008_Report.pdf); RUSSELL D. HAUGE, KITSAP COUNTY PROSECUTING ATTORNEY, ANNUAL REPORT 2007 (2007) [hereinafter HAUGE, 2007], available at [http://www.kitsapgov.com/pros/2007\\_Annual\\_Report.pdf](http://www.kitsapgov.com/pros/2007_Annual_Report.pdf).

144. *See* HAUGE, 2008, *supra* note 143, at 4 (providing the number of referred cases grouped by various crime categories).

145. *See id.* at 5 (comparing the reductions to cases filed from 2006 to 2008).

146. *See id.* at 5–10 (describing the office's different diversion programs).

147. *See id.* at 14 (listing the office positions eliminated in 2008 and 2009).

As data management becomes more widely available in prosecutors' offices, Kitsap County may become the norm. Chief prosecutors will need an awareness of office performance as a whole—as reflected in statistics on crime in the community and enforcement and adjudication of criminal charges—rather than individual attorney performance in the highest-profile cases. The ability to explain office performance in terms of trends and wise use of limited budgets will prove essential in managing voter expectations.

Access to data about office trends could also promote greater consistency among offices in the same state. Richer data collection allows the residents of one county to compare the detailed output of their local prosecutor with the output of prosecutors in other counties in the state. Taxpayers at the local level might, on this basis, decide to increase or decrease their fiscal contributions to the local prosecutor's office. Similarly, the state attorney general's office, or other state officials with budget authority in the criminal justice area, might also raise questions about different outcomes in offices with comparable case inputs. While the local prosecutor ultimately decides on local priorities in enforcement, those who provide the funds to operate the office can expect some explanation and justification for those policies.

Promising strategies for shrinking the accountability deficit in the United States need not wait for prosecutors to decide for themselves to collect data and explain that data to the public. The law could affirmatively promote transparency. More transparent reporting of office operations becomes plausible for prosecutors' offices through improved case data management. If state law required the regular publication of reports from prosecutors, with certain standard metrics of office performance in the report, interest groups, such as neighborhood associations, victim advocacy organizations and civil liberties organizations would watch those reports closely. They would sound the alarm if a prosecutor were misusing resources or departing too dramatically from current voter priorities in the enforcement of criminal law.

State prosecution in the United States is decisively local now. We do not envision a merger of prosecutorial offices, but we do see more comparison among local offices, and movement toward statewide (and possibly regional and national) norms. In short, data will slowly drive out local variation among prosecutor offices and individual variation within offices. The availability of data and users of the data among different constituencies will provide the mechanism for accountable prosecutors. The accountability gap will shrink, not from improved external review, but from the inside, through strengthened bureaucratic accountability.



### V. Bold Responses to the Accountability Gap

The present moment in prosecutorial accountability brings to mind an earlier moment in criminal justice reform. By the early 1970s, sentencing law in the United States had been under attack for several decades.<sup>148</sup> Scholars, practitioners and legal reform groups had criticized the indeterminate sentencing system that fairly described the law in every state and in the federal system.<sup>149</sup> The critiques were sharp, but the criticism had not yet coalesced into a widespread call for fundamental reform, and the solutions to that point, such as criminal code reform, were too modest to answer the challenge.

Marvin Frankel changed all that. Frankel, a judge in the United States District Court for the Southern District of New York, published an expanded set of lectures in 1973 under the title *Criminal Sentences: Law Without Order*.<sup>150</sup> Frankel's book crystallized the critique of the existing sentencing regime. He rejected incremental changes to sentencing practices, and proposed new institutional arrangements that completely reshaped the role of legal rules in the selection of criminal sentences.<sup>151</sup> His approach transformed sentencing practices by reworking sentencing governance—the source and effects of sentencing rules.<sup>152</sup> Nearly four decades later, Frankel's ambitious agenda still guides much of the work in the field.<sup>153</sup>

A similar story can be told with the reform of American bail practices.<sup>154</sup> The inconsistency of American bail practice and the legal and

148. See, e.g., Norval Morris, *Towards Principled Sentencing*, 37 MD. L. REV. 267, 273–74 (1977) (noting criticisms of indeterminate sentencing).

149. See, e.g., *id.* at 267, 273–74, 276–79 (describing the disparities and inadequacies of indeterminate sentencing); Note, *Legislation—Indeterminate Sentence Laws—The Adolescence of Penocorrectional Legislation*, 50 HARV. L. REV. 677, 686 (1937) (criticizing the failings of legislation establishing indeterminate sentencing).

150. MARVIN FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 8–11, 21–25, 61–85 (1973) (criticizing broad sentencing discretion and institutions and proposing new forms of sentencing regulation).

151. See *id.* at 69–75, 118–24 (describing the effectiveness of newly tested sentencing institutions).

152. See *id.* at 105–18 (proposing new standards and procedures for establishing sentencing practices).

153. See KEVIN REITZ, *MODEL PENAL CODE, SENTENCING PROVISIONS REVISIONS, COMMENTARY* 22 (2010) (discussing the influence of sentencing commissions, a concept first proposed by Marvin Frankel in the 1970s).

154. See DANIEL J. FREED & PATRICIA M. WALD, *BAIL IN THE UNITED STATES* 17–21 (1964) (discussing inadequacies in the Federal System and across state and local

moral issues involved with the dominant use of money bail led to extensive commentary through the 1950s.<sup>155</sup> But it was radical experimentation that led to reform in the 1960s and beyond.<sup>156</sup>

Perhaps we have reached a similar point for the accountability deficit of prosecutors around the world: The problem has been noted for some time, but the interconnected nature of seemingly diverse problems has not been sufficiently appreciated. The theory and practice in response to the problem is at best incomplete. If so, decisive changes to institutions—that is, changes to charging *governance*—could make possible a new vision of the role for legal principles in assuring accountable prosecution of crime.

The answer is unlikely to take the form of guidelines imposed on the prosecutor's office by an expert commission, the vision that Frankel described for sentencing. Nor is it likely to take the path of increased judicial review, despite decades of calls for such a role from scholars and reformers. The fundamental puzzle here remains to be solved: How to bring accountability to prosecutorial decision-making while recognizing the complexity and variation in individual cases, the many pressures and demands on prosecutors, and the need to process huge numbers of cases.

We believe the most promising strategies will build on the transparency that becomes possible with improved case data management. In the United States, this transparency can break down the institutional barriers that keep local priorities hidden at higher levels of bureaucracies, and those that keep individual prosecutor practices hidden from organizational review.

In short, only a modest part of the answer to the accountability puzzle in the United States will come from external review. Instead, the primary driver will be from the inside, through strengthened bureaucratic accountability.<sup>157</sup> For this reason, prosecutorial services in other parts of the world are probably further along in their efforts to close the accountability deficit. The institutional traditions already in place accomplish the most important aspects of the work. The creation of

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jurisdictions).

155. See, e.g., Caleb Foote, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031, 1051, 1059 (1954) (evaluating the treatment of sample jail and bail cases and the efficacy of bail methods).

156. See FREED & WALD, *supra* note 154, at 57–91 (describing "alternatives to the bail system").

157. See Bibas, *Plea Bargaining*, *supra* note 49, at 2541–43 (examining the increasing accountability provided by internal prosecutorial supervision); Miller & Wright, *The Black*, *supra* note 56, at 133 (stating that internal regulation will lead to increased legitimacy and accountability within the prosecutorial administration).

external controls need only supplement the achievements of a functional prosecutorial bureaucracy.

In the United States, the hardest work remains ahead. Yet there are promising ideas and models already at hand. Scholarship and policy efforts about prosecutorial practices today such as those of Harry Connick in 1990's New Orleans and Russell Hauge in Kitsap County, Washington today might offer the momentum required to close the accountability gap.

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