

Fall 9-1-2010

Introduction

Erik Luna

Marianne Wade

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>

Recommended Citation

Erik Luna and Marianne Wade, *Introduction*, 67 Wash. & Lee L. Rev. (2010),
<https://scholarlycommons.law.wlu.edu/wlulr/vol67/iss4/3>

This Article is brought to you for free and open access by the Washington and Lee Law Review at Washington & Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington & Lee University School of Law Scholarly Commons. For more information, please contact lawref@wlu.edu.

Introduction

Erik Luna*

Marianne Wade**

Today, American prosecutors exercise enormous discretion in a sequence of decisions—from initial case acceptance or declination, to charging and plea bargaining, to pre-trial and trial strategy, to sentencing upon conviction—often without meaningful internal or external review. In many jurisdictions, the prosecution effectively makes the law, enforces it against particular individuals, adjudicates their guilt, and sets their punishment. For all intents and purposes, prosecutors *are* the criminal justice system through their awesome, deeply problematic powers.

American scholars have periodically examined the role of prosecutors in other nations, especially in Germany and France, seeking to improve the much maligned U.S. system. In recent years, however, reflection has turned from expressed admiration of ideal systems of the past to discussing the similarities and differences among various foreign nations and the United States. At the same time, some European researchers have renounced the conventional wisdom on the public prosecutor (i.e., an uninteresting bureaucrat with little discretion) and have begun to study the ways in which prosecution services run their respective criminal justice systems.

Across Europe, the prosecutor plays a far broader role in the criminal process and exercises far greater discretion than assumed in the literature. Alongside traditional powers to control police investigations, modern European prosecutors dispose of cases, sway court decisions, and even impose convictions with a high degree of independence. Statistical analysis demonstrates that no European system can cope with increasing caseloads through the traditional, court-centered approach. Instead, these systems are relying heavily upon alternative proceedings, including plea bargaining or its functional equivalents, with prosecutors exercising decisive authority in case dispositions.

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

** Senior Researcher, Max Planck Institute for Foreign and International Criminal Law, Freiburg, Germany.

This new understanding suggests a potential convergence on both sides of the Atlantic: The *de facto* (if not *de jure*) power of prosecutors to adjudicate cases in most matters passing through the criminal process. This signifies a turning point for European nations, challenging long-held tenets of law. But the points of comparison go beyond issues of case-ending powers, with a broader analysis taking into consideration, *inter alia*, the interaction between prosecutors and police officers; the non-legal influences on prosecutorial decision-making; the role of prosecutors in the gathering and exclusion of evidence; the policy-making function of prosecution services; the mechanisms of prosecutorial accountability; and the prosecution of specific case categories (e.g., terrorism) and in specialized jurisdictions (e.g., international criminal tribunals).

These issues inspired our collaboration, driven by a shared belief that valuable lessons for all systems can be gleaned from a transnational assessment of the reality and impact of prosecutorial power. Our studies have found significant parallels in the types of decisions made by prosecutors and the procedures available to them in the United States and Europe—and just as importantly, critical distinctions in the context and consequences of these decisions. The role of prosecutors, emerging in a new period of resource scarcity, represents a paradigm shift in criminal justice systems with a significant legal and social impact, which, in turn, affects perceptions of legitimacy. The comparative examination of issues arising from these experiences provides the opportunity for innovative reflection on the future of public prosecution.

On April 1–2, 2010, Washington and Lee University School of Law hosted a groundbreaking scholarly workshop that brought together leading scholars in the United States and Europe to discuss prosecutorial power from a transnational perspective.¹ During the event, the participants presented papers and received feedback in a lively, interactive forum. Some of these papers are provided in the present symposium, and others will be published in an edited volume. Collectively, these works do not provide definitive conclusions but instead mark the beginning of what we hope will be a fruitful transnational dialogue.

1. The event was sponsored by the Frances Lewis Law Center and the Transnational Law Institute, with logistical support provided by the Max Planck Institute for Foreign and International Criminal Law and the Alexander von Humboldt Foundation.