PROSECUTOR KING

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Western philosophy has been characterized as "a series of footnotes to Plato."[1] At least as ancient are the analytical origins of discretion in a system of justice.[2] In honor of the inaugural edition of the *Stanford Journal of Criminal Law and Policy*, this Article considers discretion's Platonic persona in the form of the prosecutor, using as a rubric the proposed rulers of the *Republic*. On Plato and his most famous work, however, there is "an enormous and disapproving audience, dizzying ranks of ghosts overseeing and criticizing omissions and simplifications."[3] The watchmen include the day's "most brilliant linguists, scholars, philosophers, theologians and historians," who "do not take kindly to the garden to which they devoted their lives being trampled over by outsiders and infidels."[4]

With due deference and not a little trepidation, this Article proceeds as follows: Part I distills some relevant points in the *Republic* and analogizes Plato's model city to American criminal justice. Part II details the impressive powers of prosecutors, both in the United States and abroad, while Part III suggests that

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1. ALFRED NORTH WHITEHEAD, PROCESS AND REALITY 39 (1979).

2. *See, e.g.*, 1 *Kings* 3:16-28 (recounting King Solomon's splitting-the-baby judgment).

3. Simon Blackburn, *Voices of Reason*, THE GUARDIAN (Aug. 5, 2006, 6:28 AM), http://www.theguardian.com/books/2006/aug/05/shopping.plato, *archived at* http://perma.cc/QYQ4-5ELK; *see also* SIMON BLACKBURN, PLATO'S REPUBLIC: A BIOGRAPHY (2007).

4. Blackburn, *supra* note 3. For instance, in a review of Alan Bloom's translation and editing of the *Republic*, the great British philosopher Gilbert Ryle described Bloom—a distinguished American philosopher, classicist, and academician—as belonging to the "tribe of the commentators who are unphilosophers." Gilbert Ryle, *If Plato Only Knew*, N.Y. REV. OF BOOKS, Nov. 6, 1969. The review thrice employed the typographical convention "(*sic*)" to indicate disapproval of Bloom's "Interpretive (*sic*) Essay," which was "not a bit satisfactory." *Id*. Ryle wryly concluded, "The student should soon learn to prefer his *Republic* uninterpreted." *Id*. In a letter to the editors, Bloom shot back at Ryle's "frivolous review" as "unphilosophic, nay, dogmatic." Allan Bloom, Letter to the Editor, *Plato*, N.Y. REV. OF BOOKS, Apr. 9, 1970. "[Ryle] read me as sloppily as he reads Plato; texts are for him quarries from which he mines raw materials for his word games." *Id*.

a Platonic mindset and background helps distinguish European prosecutors from their American counterparts. Part IV outlines an antitotalitarian critique of the *Republic* and then cross-references the modern American failure to check prosecutorial power, the latter being a prime transatlantic difference among prosecutors.

I. KALLIPOLIS AND KRIMAPOLIS

Plato's *Republic* may well be the most famous book in Western philosophy and surely ranks among the handful of texts that have changed the world. "It is commonly regarded as the culminating achievement of Plato as a philosopher and writer," asserts theorist Simon Blackburn.[5] The book is "brilliantly poised between the questioning and inconclusive earlier dialogues and the less compelling cosmological speculations and doubts of the later ones."[6] Although the *Republic* may not have been a crowning technical achievement, classicist G.R.F. Ferrari says the work was, "without a doubt, Plato's epic."[7]

> In its scale, in its complexity, in the inexhaustible abundance of questions that it raises, both hermeneutic and more purely philosophic—above all, in its lissom gravity, the *Republic* is the one truly successful epic to which Plato stretched himself in his lifetime. Do not remind me of the *Laws* in this connection. The *Laws* does not stand to the *Republic* as *Odyssey* to *Iliad*; it stands to the *Republic* as *Finnegans Wake* to *Ulysses*. The *Republic* is Plato's philosophic *Iliad* and *Odyssey* combined.[8]

It can be said that the *Republic* is mainly an exploration of human motivation and psychology more generally, with an aside about politics. Through the book's ostensible narrator (Socrates), Plato sketches a utopia—either in the sense of an ideal place (*eutopia*) or perhaps an impossible place (*outopia*, nowhere)[9]—involving, among other things, a class-divided society and rule by "philosopher kings." It is the second concept that interests me here as a metaphor for prosecutorial power.

A. *Plato's Republic and the Philosopher King*

In his *Republic*, Plato seeks to address the nature of justice as revealed through dialogue among several interlocutors and their teacher Socrates, the recurring lead of Plato's writings.[10] For an individual, the cause of injustice is a

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5. Blackburn, *supra* note 3.

6. *Id*.

7. G.R.F. Ferrari, *Editor's Introduction* to THE CAMBRIDGE COMPANION TO PLATO'S REPUBLIC xv, xvi (G.R.F. Ferrari ed., 2007).

8. *Id*.

9. *See infra* notes 258-261 and accompanying text (discussing nonliteral interpretation of the *Republic*).

10. PLATO, THE REPUBLIC OF PLATO (Allan Bloom trans., 2d ed. 1991) (c. 360 B.C.E.). All pinpoint citations reference Stephanus pagination.

divided mind that makes him unable to act and renders him "an enemy both to himself and to just men."[11] Justice within the individual requires harmony in the tripartite psyche or "soul"—an astute, calculating part, which strives for knowledge; a spirited part, which pursues glory; and an irrational part, which, among other things, seeks to fulfill certain appetites—where each part plays a specified role.[12] The calculating part should rule, "since it is wise and has forethought about all of the soul,"[13] tempering the audacity of the spirited part and the desires of the irrational part, and thereby leading the individual to act justly.[14] To sort out the ethical issues, an analogy is drawn between the just individual and a just polity known as Kallipolis (Greek for "beautiful city").[15] In creating this model, Plato attempts to bridge the realms of ethics and politics, with the latter providing support for the former. But subsequent commentators would look upon the *Republic*'s "city in speech,"[16] not merely as a rhetorical tool for discovering justice in the individual, but as a contribution to political theory in its own right.

According to Plato, internal strife debilitates a polity, as it does a person's psyche, so the goal of politics must be creating harmony among the inhabitants. A just city will avoid the tension caused by too much wealth or too much poverty, for instance, and it would only be large enough to ensure a stable union.[17] Like each of the mind's parts, the citizens of Kallipolis will play their proper roles, performing a function for which their abilities are distinctively tailored and thereby serving the needs of others without such talents.[18] Most importantly, the populace will follow the city's sociopolitical arrangements regarding who rules and who is ruled.[19] Like the mind, the city has a tripartite structure. The bulk of the citizenry falls within a producer class that provides goods and services for themselves and others. Above the workmen are two classes of guardians: the courageous auxiliaries who are professional soldiers and the city's law enforcers, and the wise rulers who possess the essential knowledge to govern the city well. Kallipolis achieves justice when each class minds its own business and fulfills its designated purpose.[20] Indeed, the city must maintain a strict division of functions, not massive movement and "[m]eddling among the classes," which would be "the greatest harm for the city and would most correctly be called extreme evil-doing."[21]

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11. *Id*. bk. I, at 352a.
12. *Cf. id*. bk. IV, at 436b-444e.
13. *Id*. bk. IV, at 441e.
14. *See id*. bk. IV, at 443d-e.
15. *See id*. bk. VII, at 527c. Also transliterated as Callipolis.
16. *Id*. bk. II, at 369a, c.
17. *See id*. bk. IV, at 421d-422a, 423b.
18. *See id*. bk. II, at 369b-370c, 374c.
19. *See id*. bk. IV, at 431e-432a.
20. *See id*. bk. IV, at 433a-434c.
21. *Id*. bk. IV, at 434c.

Existing forms of government were defective because their rulers could not appreciate the idea or form of the *good* as the ultimate object of knowledge. Invariably, the polities suffered conflict among citizens who wanted to rule as a means of obtaining glory or wealth. In Kallipolis, by contrast, reason is supreme and embodied in a particular type of ruler: *the philosopher king*. Until philosophers rule as kings or those now called kings philosophize, there will be "no rest from ills for the cities . . . nor I think for human kind."[22] As described in the *Republic*, the philosopher king is superior in all virtuous aspects. He "isn't a lover of money, or illiberal, or a boaster, or a coward"[23]; instead, he is "by nature a rememberer, a good learner, magnificent, charming, and a friend and kinsman of truth, justice, courage, and moderation."[24]

Most of all, he stands as the personification of reason, which allows him to make the best decisions for the state. Philosopher kings are "lovers of the sight of the truth,"[25] who bear knowledge rather than mere opinion and thus transcend the superficial to appreciate an objectively knowable reality.[26] While others reside in a metaphorical cave, where the truth is perceived as "nothing other than the shadows of artificial things,"[27] the philosopher king has been forced to the surface and over time acclimates to the sunlight so as to grasp reality. His movement from the shadowy cave to the light above ground symbolizes the philosopher king's intellectual development to perceive the truth and obtain knowledge of the good.

The philosopher king is selected for his wisdom and willingness only to do what is advantageous for the city. He receives a rigorous education—with an emphasis on math, science, and dialectical inquiry—and is frequently tested to ensure that he makes the correct choices.[28] He then undergoes years of practical training in politics, preparing him to rule the city.[29] "[T]hose who have been preserved throughout and are in every way best at everything, both in deed and in knowledge, must at last be led to the end."[30] The philosopher king, having been specially selected, educated, tested, and trained in practice, and who "comes through untainted, must be appointed ruler of the city and guardian."[31]

In sketching Kallipolis and its rulers, Plato provides an account of how to organize a just polity but says relatively little about how the city will be ruled in terms of particular laws and policies. Plato apparently has no need for a theory of just action, so long as the actors themselves have a virtuous character that

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22. *Id*. bk. V, at 473d.

23. *Id*. bk. VI, at 486b.

24. *Id*. bk. VI, at 487a.

25. *Id*. bk. V, at 475e.

26. *See id*. bk. V, at 476-77.

27. *Id*. bk. VI, at 515c.

28. *See id*. bk. VII, at 521d-35a.

29. *See id*. bk. VII, at 539e-540c.

30. *Id*. bk. VII, at 540a. According to Socrates, a philosopher king would be age 50 when he assumed the role. *See id*.

31. *Id*. bk. III, at 413e-414a.

necessarily leads them to act justly. The philosopher kings can be trusted to act justly because of their unflagging dedication to the city, their education and training, and their desire for knowledge and pursuit of the truth. Evidence of their bona fides comes from the fact that philosophers must be compelled to rule. Forced "down into the cave again," the philosopher king "drudges in politics and rules for the city's sake, not as though he were doing a thing that is fine, but one that is necessary."[32] For Plato, the problem of politics revolves around a single overarching question—*who should rule?*—and the answer is society's wisest, embodied in the philosopher king. The city will be maximally just because it empowers the right kind of ruler.

B. *City of Judgment*

Many concepts and metaphors have been applied to criminal justice. As "stable, valued, recurring patterns of behavior," criminal justice fits the definition of an *institution*.[33] It is also a *system*—a set of interrelated, interacting, and interdependent parts, which are nonetheless organized into a unified entity.[34] More specifically, criminal justice may be framed as a *bureaucracy* bearing some of the good, and much of the bad, that accompanies modernity's distinctive style of governance.[35] Aspects of American criminal justice have a Weberian sensibility in their commitment to rationality and concomitant reliance on expertise. "Bureaucratic administration means fundamentally the exercise of control on the basis of knowledge,"[36] Max Weber wrote. "This is the feature of it which makes it specifically rational,"[37] by which Weber was referring to the instrumental rationality of achieving predetermined goals in the most efficient and effective manner. This "ideal type" of authority depends on the expertise of officials, who were selected based on examinations and qualifications such as higher education and specialized training. The experts would discern the best way to achieve the entity's objectives.

Weberian rationality and bureaucracy can be seen as a descendant or modern iteration of Plato's theory of governance.[38] "Making political decisions—decisions in the interests of the state—requires judgment and skill. It should, Plato urges, be left to the experts."[39] The *Republic* teaches that difficult questions should not be answered by pure majoritarian decisionmaking, where reason can be trumped by popular passions (like the execution of Socrates!). Plato

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32. *Id*. bk. VII, at 539e, 540b.

33. SAMUEL P. HUNTINGTON, POLITICAL ORDER IN CHANGING SOCIETIES 12 (1968).

34. *See* Erik Luna, *System Failure*, 42 AM. CRIM. L. REV. 1201, 1204-06 (2005).

35. *See* Erik Luna, *Rage Against the Machine*, 97 MINN. L. REV. 2245 (2013).

36. MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 339 (Talcott Parsons ed., Talcott Parsons & A.M. Henderson trans., rev. ed. 1964).

37. *Id*.

38. *But see* Luna, *supra* note 35, at 2258 (discussing Weber's profound skepticism of bureaucratic mechanization).

39. JONATHAN WOLFF, AN INTRODUCTION TO POLITICAL PHILOSOPHY 67 (2d ed. 2006).

was no fan of democracy, for sure, but even classical theorists sympathetic to broader participation in government affairs recognized a superior role for elites and experts.[40] To this day, some contemporary institutions are haunted by the tyranny of the majority, which neo-Platonists would claim to be intemperate and short-sighted, as well as inefficient and lacking the knowledge and experience necessary to deal with the problems of specialized fields. For government to work, state institutions must moderate the unvarnished opinion of the masses, or so it is argued, even ignoring the *vox populi* when necessary for the general welfare.[41] Among the most important of these institutions is the complex, multifaceted structure known as a criminal justice system—a Krimapolis[42] to Plato's Kallipolis—distinguishing itself from all other areas of law through the official condemnation and denial of liberty that flow from it processes.

Like other systems of governance, a criminal justice system is composed of discernable actors or organs: the police, prosecutors, defense attorneys, judges, etc. These entities serve their individual functions but still interrelate with each other to form an identifiable whole with certain emergent properties, not the least of which is the power to deprive an individual of liberty or even life itself. Relevant information flows through a system—as do the individuals who are progressively labeled "suspects," "defendants," and, finally, "convicts" or "inmates"—all as the result of a sequence of decisions made by these actors. Most of the judgments are discretionary in nature. The concept of *discretion* may be understood as the power to choose between two or more courses of conduct. It is the residual area allowed for subjective judgment after taking into consideration any effective constraints. A criminal justice actor thus has discretion when the margins of his authority provide latitude to choose freely how to act (or not act). As such, discretion is "like the hole of a doughnut," Ronald Dworkin said,

40. *See* SUSAN GORDON, MONTESQUIEU: THE FRENCH PHILOSOPHER WHO SHAPED MODERN GOVERNMENT 86-87 (2006); Gregory R. Johnson, *The First Founding Father: Aristotle on Freedom and Popular Government*, *in* LIBERTY AND DEMOCRACY 29, 49 (Tibor R. Machan ed., 2002).

41. This is not necessarily inconsistent with democracy. In fact, one could imagine a system in which statesmen were committed to doing what was right, which usually, but not always, corresponded with the positions of the populace. To complete the circle of democratic accountability, a statesman or stateswoman should have to stand reelection or replacement by, for instance, term limits.

42. *See, e.g.*, *Definition: κρίμα*, GREEK DICTIONARY, http://www.teknia.com/greek-dictionary/krima, *archived at* http://perma.cc/WRM4-VNLR (last visited Sept. 6, 2014) (word "krima," transliteration of ancient Greek *κρίμα*, means judgment, as in condemnation of wrong or the decision one passes on the faults of others); *Definition: πόλις*, *id.*, https://www.teknia.com/greek-dictionary/polis, *archived at* http://perma.cc/8GQC-7HTL (last visited Sept. 6, 2014) (transliterated "polis" (*πόλις*) means city or city-state); *see also* Allan Bloom, *Interpretive Essay* for PLATO, THE REPUBLIC OF PLATO 408 (Allan Bloom trans., 2d ed. 1991) (c. 360 B.C.E.) (discussing the term "polis"); Michael Bakaoukas, *The Conceptualisation of "Crime" in Classical Greek Antiquity* (2005), http://www.erces.com/journal/articles/archives/volume2/v02/v02.htm, *archived at* http://perma.cc/5K63-R24S.

which "does not exist except as an area left open by a surrounding belt of restriction."[43]

Discretion in the criminal process does reside with nonprofessional decisionmakers—crime victims, percipient witnesses, and lay jurors—but the long-term trend in America and elsewhere has been toward professionalization of criminal justice.[44] The real power belongs to those actors variously described as "regulars," "insiders," and "repeat players"—law enforcement agents, prosecutors, defense attorneys, trial judges, probation officers, and others—who entirely dominate the criminal process.[45] Consistent with the Platonic tradition and its embodiment in modern bureaucratic governance, the insiders of criminal justice presumably enjoy a special knowledge that allows them to fulfill overarching public policies through their individual case decisions.

The insiders are aware of the official law establishing substantive crimes and punishments, as well as the complicated legal rules governing the criminal process from investigation to incarceration. They also have access to the information concerning a particular crime and criminal, including police reports, witness statements, forensic analysis, prior case files, and so on. Most of all, the insiders understand the practical workings of criminal justice in their jurisdiction—the law-on-the-streets for police intervention that diverges from the law-on-the-books,[46] for example, and the norms of case negotiation that provide "going rates" for a given offense in terms of plea bargains and sentences.[47] By comparison, the general public understands very little about crime and the criminal process, and what it does know can be drastically distorted.[48] Even for those issues of criminal justice that have become part of popular culture, there is a disconnect between the rules of official conduct understood by the public, often through mass-media accounts, and the decision rules recognized by professionals and enforced in court.[49]

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43. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 31 (1977).

44. *See, e.g.*, LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 29, 251, 391 (1993).

45. *See, e.g.*, STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE 15–20, 30–34 (2012).

46. *See, e.g.*, Frank Remington, *LaFave on Arrest and the Three Decades That Have Followed*, 1993 U. ILL. L. REV. 315, 320-21 (1993) (describing the "administrative law of criminal justice"); James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC MONTHLY (Mar. 1982), http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/2/, *archived at* http://perma.cc/FSB4-A5Y6 (referring to the "informal but widely understood rules" of police conduct).

47. *See, e.g.*, MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT 187-89 (1992) (describing how plea bargaining in American lower courts involves established sentences and minor negotiation).

48. *See, e.g.*, Luna, *supra* note 35, at 2248-49; Erik Luna, *Criminal Justice and the Public Imagination*, 7 OHIO ST. J. CRIM. L. 71, 81-83 (2009).

49. *See* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984); Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466 (1996).

A Platonic-style partition between governing and governed classes can be seen in the social distance between criminal justice professionals and ordinary citizens. The repeat players have their own special dialect that makes professional communications virtually unintelligible to those outside the system.[50] The criminal justice system also follows deep-seated presumptions about language—for instance, in assessing the voluntariness of a suspect's consent to a police search—which are often problematic, if not mistaken, and almost always support the government. "[T]he system is willing to ask serious questions about how understandable language is so long as the answers do not threaten important legal institutions."[51] The use of technical language, so far removed from colloquial speech and ordinary writing, helps distinguish the professional from the lay citizen and effectively serves as a form of linguistic exclusion. But the separation is also physical. Key decisions such as plea agreements are reached outside of public view, in phone calls between prosecutor and defense attorney, behind the closed doors of a conference room, or in hushed conversations in courtroom hallways. Even public proceedings tend to be sparsely attended events, most of which memorialize decisions reached elsewhere by the professionals themselves.

The role of the accused in his own case tends to be quite limited due in large part to the complexity of the criminal process and the (typically accurate) belief that the professionals know best. For the vast majority of proceedings, including those with dispositive case outcomes, there is no participatory part for victims, witnesses, community members, or other citizens.[52] Moreover, the public does not observe the implementation of sentences, with corporal punishments (except death) having been eliminated and deprivations of liberty occurring behind the walls of jails and prisons.[53] Run entirely by professionals, the criminal justice system is either nonexistent or peripheral to the lives of most Americans, who rarely find themselves in courtrooms, prosecutors' offices, police departments, correctional facilities, or any other building associated

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50. *See, e.g.*, Erik Luna, *Gridland: An Allegorical Critique of Federal Sentencing*, 96 J. CRIM. L. & CRIMINOLOGY 25, 38 n.74 (2005) (providing example of an incomprehensible sentencing statement).

51. LAWRENCE M. SOLAN & PETER M. TIERSMA, SPEAKING OF CRIME: THE LANGUAGE OF CRIMINAL JUSTICE 27 (2005).

52. *But see, e.g.*, State v. Casey, 44 P.3d 756, 757-58 (Utah 2002) (finding prosecutor's nonconsultative plea bargaining and failure to hear testimony from victim and his mother violated victim's rights under state constitutional provision).

53. As Foucault noted, punishment has "become the most hidden part of the penal process." As a result,

> it leaves the domain of more or less everyday perception and enters that of abstract consciousness . . . . [J]ustice no longer takes public responsibility for the violence that is bound up with its practice. . . . [I]t is the conviction itself that marks the offender with the unequivocally negative sign: the publicity has shifted to the trial, and to the sentence; the execution itself is [entrusted] to others, under the seal of secrecy.

MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 9-10 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977). For the history behind the movement in America, see, for example, BIBAS, *supra* note 45, at 20-23; FRIEDMAN, *supra* note 44, at 77-82.

with crime and punishment. As a result, the space increases between the ruling class of criminal justice and those it governs.

In the United States, several actors might vie for the throne of the criminal justice system's Platonic-style monarchy. Badge-wearing law enforcement officials—FBI agents, city police officers, county sheriffs, and so on—stand out in terms of physicality.[54] As one expert put it, "The police are to government as the edge is to the knife."[55] Law enforcement agencies represent the state's coercive powers in peacetime, with the police clothed in authority to carry out searches and seizures, to conduct arrests and interrogations, and to employ physical—even lethal—force. In turn, the American judiciary may act as "a bevy of Platonic Guardians,"[56] to use Learned Hand's memorable phrase, due to the purported tendency of judges to assume a sort of super-legislative power through constitutional review. Aside from the judiciary's long-held status as "supreme in the exposition of the law of the Constitution,"[57] many pretrial and all trial decisions in the criminal justice system carry the sanction of a judge or at least provide the occasion for his scrutiny. And formally, no man is ever convicted and sentenced in the United States without a judicial signature.

Police and judges are thus indispensible players in the institutional chain that makes up the criminal justice system.[58] As a practical matter, however, their powers pale in comparison to those of American prosecutors. The extent of prosecutorial authority has only recently received the attention it deserves,[59] but the dangers posed are hardly new. At a prosecutors conference in 1940, then-Attorney General Robert Jackson suggested that "assembled in this room is one of the most powerful peace-time forces known to our country."[60]

> The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous . . . . While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst.[61]

This concern remains despite the intervening decades. The current arrangement has all the makings of tyranny, at times a petty one but always with the state's license.

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54. The prison guard is another criminal justice actor (in)famous for his physicality.

55. DAVID H. BAYLEY, PATTERNS OF POLICING: A COMPARATIVE INTERNATIONAL ANALYSIS 189 (1985).

56. LEARNED HAND, THE BILL OF RIGHTS 73 (1958).

57. Cooper v. Aaron, 358 U.S. 1, 18 (1958) (describing the principle as expounded in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)).

58. Defense attorneys have great power as well, particularly when they encourage their clients to take plea deals. Things would be very different, of course, in a universe where prosecutors suffered from extreme caseloads but defense counsel were so numerous and well resourced that they could try every case. As one reviewer put it to me, it "takes two to tango." Even so, the prosecutor always dances lead (and always calls the tune, etc.).

59. *See infra* notes 215-232 and accompanying text.

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

61. *Id.*

II. THE PROSECUTORIAL REIGN

A. *The American Prosecutor*

Although the number and diversity of prosecutors' offices across the United States make difficult any particularized description, American prosecutors[62] do share core discretionary powers that they use to rule the criminal justice system.[63] Popularly associated with the drama of trial, prosecutors exert influence and bear responsibilities that are far broader than formal court proceedings. Their discretionary decisions both determine specific case outcomes and set system-wide responses to the problems of criminal justice. Prosecutors provide the indispensible link between police investigation and courtroom adjudication, with the power to impact every decision along the way.

When viewed from a functional rather than formal perspective, prosecutorial power tends to defy the traditional division among government's three primary roles as lawmaker, law enforcer, and case adjudicator. Practice demonstrates a concentration of authority in a single office, where prosecutors not only *execute* the law in the conventional sense, but also effectively *adjudicate* matters by their decisions in individual cases. From another vantage point, prosecutors may even *legislate* criminal law, setting the penal code's effective scope over an entire caseload through collective decisionmaking of varying levels of coordination.

To be sure, prosecutors exercise formidable powers in the traditional setting of criminal investigation and trial. They are supported in gathering evidence by a cadre of Platonic-style auxiliaries: badge-wearing, gun-toting investigators working for either an affiliated law enforcement agency or the prosecutor's office itself, as well as teams of forensic science analysts from government crime labs. In conducting criminal investigations, prosecutors may also have the option of using a grand jury,[64] with its ominous subpoena power and an entirely one-sided process shorn of any real judicial oversight.[65] When it comes to bringing charges, prosecutors alone select the crimes to be alleged

62. As used here, the term "prosecutor" refers to those officials authorized to bring criminal charges against an alleged offender and to represent the government in a subsequent criminal case against the accused (e.g., a district attorney and his subordinates).

63. Potential points of consistency include: a common penal code, sentencing scheme, and rules of evidence and procedure; an attorney general's office that handles the bulk of all criminal appeals; a statewide prosecutors' association that coordinates lobbying efforts and other group endeavors; the reality of tight budgets supplemented by earmarked funds to prosecute particular crimes or to support special projects; and, of course, the shared boundaries of the state and national constitutions. *See* Ronald F. Wright, *Persistent Localism in the Prosecutor Services of North Carolina*, 41 CRIME & JUST. 211, 223-36 (2012).

64. Once considered a defense right or protection, indictment by grand jury is required for criminal charges in most federal cases. *See* U.S. CONST. amend. V. Today, however, few would argue that it is anything but a prosecutorial tool to secure testimony under oath and other evidence.

65. *See, e.g.*, Erik Luna, *The Katz Jury*, 41 U.C. DAVIS L. REV. 839, 866-67 (2008).

and the number of counts.[66] They also have substantial discretion to try co-defendants together or separately;[67] and for multivenue offenses, prosecutors can select the location (and, at times, the order) of trial across all affected jurisdictions.[68]

As for trial strategy, prosecutors decide what evidence to present against the accused with little if any impact from suppression motions.[69] They can even grant immunity from prosecution and thereby both free a witness-participant of criminal responsibility and force him to testify at trial.[70] Prosecutors can also shape the finder of fact by exercising peremptory challenges in jury trials.[71] More generally, the mere imprimatur of the state can lend weight to prosecution evidence and arguments. The primary legal checks are the burdens of proof to charge and convict—probable cause and proof beyond a reasonable doubt, respectively—along with the obligations of pretrial and trial procedure (e.g., discovery and notice of witnesses). But in practice, "if a prosecutor wants to bring charges against someone, the prosecutor will be able to do so," and "an experienced prosecutor can in all reality sit down at the onset of a typical case and fairly accurately plan and predict the outcome of the

66. United States v. Armstrong, 517 U.S. 456, 464-67 (1996) (describing prosecutorial discretion in charging and the hurdles for a viable selective prosecution claim).

67. *See* FED. R. CRIM. P. 8(b).

68. *See* 18 U.S.C. § 3237(a) (2014). One example is the sequencing of prosecutions against "D.C. Sniper" John Allan Muhammad. *See News Conference on Virginia Charges Against Muhammad*, CNN (Nov. 8, 2002, 10:02 AM), http://transcripts.cnn.com/TRANSCRIPTS/0211/08/se.01.html, *archived at* http://perma.cc/TVA8-KSR6.

69. *See, e.g.*, Craig D. Uchida & Timothy S. Bynum, *Search Warrants, Motions to Suppress and "Lost Cases": The Effects of the Exclusionary Rule in Seven Jurisdictions*, 81 J. CRIM. L. & CRIMINOLOGY 1034, 1044-47, 1064-66 (1991) (summarizing studies and finding a low rate of success for suppression motions); *see also* Laurence A. Benner & Charles T. Samarkos, *Searching for Narcotics in San Diego: Preliminary Findings from the San Diego Search Warrant Project*, 36 CAL. W. L. REV. 221, 264 (2000) (finding that narcotics charges "filed in connection with the execution of a search warrant" resulted in conviction 100 percent of the time).

70. It is actually better than this for the prosecutor, since he can just offer "use and derivative-use" immunity rather than "transactional" immunity, thereby reserving the right to prosecute the witness-participant on independent evidence. *See* Kastigar v. United States, 406 U.S. 441 (1972) (use and derivative-use immunity); Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472 (1972) (same).

71. As a doctrinal matter, the government is prohibited from using peremptory challenges to eliminate jurors due to their race, ethnicity, or gender, but the prosecution need only come up with a neutral explanation that a trial judge finds credible, though not necessarily one "that is persuasive, or even plausible." Purkett v. Elem, 514 U.S. 765, 768 (1995); *see also* Miller-El v. Cockrell, 537 U.S. 322, 339 (2003) ("[T]he issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible.").

case."[72] Ultimately, the process frustrates few cases brought with adversarial vigor.[73]

The vast majority of cases do not go to trial, however.[74] The real-world machinery of criminal justice relies heavily on early fact-finding by prosecutors, who effectively adjudicate most matters moving through the criminal justice system. What has been described as "prosecutorial adjudication"[75] refers to a functional, rather than formal, understanding of case resolution. The prosecutor determines the defendant's guilt, the amount of punishment, or both. When formalized into action, the prosecutor's decision effectively determines the case outcome, either because external approval is not required or it is granted as a matter of course. As Máximo Langer has noted, the notion of prosecutorial adjudication "does not suppose that the adjudicator makes a decision after a hearing or any of the basic rights that we may normatively associate with fair adjudication."[76] But once independent analysis and court authorization are removed from the definition, and focus is placed on the consequences of decisionmaking, prosecutorial adjudication is no less real and effective than adjudication by a judge.

Sometimes the decisions result in de jure quasi-adjudication[77]—not official adjudication, but an act that still dictates legal consequences. American prosecutors have the unreviewable power to decline cases outright and to drop charges after a proceeding has begun. No other entity can overturn these decisions and demand that a case be brought or that charges be maintained if the prosecutor has declined the case.[78] Ronald Wright and Marc Miller have estimated that, as a rule of thumb, 25–50% of all cases referred to prosecutors

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72. Hans P. Sinha, *Prosecutorial Ethics: The Charging Decision*, 41 PROSECUTOR 32, 33 (2007).

73. *See, e.g.*, Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413, 1418 n.18 (2010).

74. *See* STEVEN W. PERRY & DUREN BANKS, BUREAU OF JUSTICE STATISTICS, PROSECUTORS IN STATE COURTS, 2007—STATISTICAL TABLES 2 (2011), *available at* http://www.bjs.gov/content/pub/pdf/psc07st.pdf, *archived at* http://perma.cc/DVH5-BE62 ("Felony cases adjudicated through jury verdicts were rare across state prosecutors' offices, accounting for an average of 3 percent of all felony case dispositions and 2 percent of dispositions litigated by offices serving 1 million or more residents."); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 87-91 (2005) (similar for federal prosecutions).

75. *See* Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure,* 33 AM. J. CRIM. L. 223, 248 (2006); Luna & Wade, *supra* note 73, at 1486.

76. Langer, *supra* note 75, at 243 n.72.

77. Apologies for the mixed, and somewhat oxymoronic, legal Latin.

78. *See, e.g.*, Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375, 381-82 (2d Cir. 1973); *see also* Newman v. United States, 382 F.2d 479, 480 (D.C. Cir. 1967) (then-Judge Warren Burger opining: "Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought.").

are declined for prosecution.[79] Although many of these cases are declined upfront, some may involve pretrial diversion, where charges are dismissed only after the suspect performs some task or participates in a program.[80] Either way, prosecutors single-handedly remove cases from the criminal justice system.[81] Under many determinate sentencing schemes, prosecutors also have the power to set punishment upon conviction. Once a defendant is convicted of a crime carrying a mandatory minimum sentence, for example, the prosecutor's opinion about the punishment floor is dispositive regardless of the court's belief that the case merits a lesser sentence.[82] In both instances, the prosecutorial adjudication is decisive and binding, free from another entity's approval or any meaningful form of external review.

American prosecutors have the power of de facto quasi-adjudication too, best exemplified by plea bargaining. Prosecutors can choose to engage in negotiations as well as the terms of an acceptable agreement, which typically involves a defendant pleading guilty in exchange for reduced charges or lesser punishment. Nothing in the American criminal justice system prevents a prosecutor from offering a deep sentencing discount to entice a guilty plea, even where the evidence may be insufficient to convict at trial.[83] Likewise, there are virtually no limitations on bargaining over charges, to the point that an agreement does not have to reflect the actual case facts (or at least those espoused by the defendant).[84] Most of all, a plea is not rendered involuntary by the threat of harsher punishment upon conviction at trial.[85] Indeed, there are very few limits

79. Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 75 (2002) [hereinafter Wright & Miller, *The Tradeoff*]. Declination rates vary widely across jurisdictions and among crime categories; to the extent the information is made public, the reasons for declining cases vary widely as well. *See, e.g.*, Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1717-20 (2010); Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 130-31 (2008) [hereinafter, Miller & Wright, *The Black Box*]; Michael Edmund O'Neill, *Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predictive Factors*, 41 AM. CRIM. L. REV. 1439, 1440 (2004); Michael Edmund O'Neill, *When Prosecutors Don't: Trends in Federal Prosecutorial Declinations*, 79 NOTRE DAME L. REV. 221, 251 (2003); Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 758 (2003).

80. *See* 4 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 13.1(d) (3d ed. 2009).

81. Of course, a prosecutor might decline a case because of insufficient proof of a suspect's guilt or the existence of some legal barrier to conviction, such as a constitutional violation by the police. But in other cases, prosecutors abstain from filing charges despite the likelihood of obtaining convictions. *See* Wright & Miller, *The Tradeoff*, *supra* note 79, at 108.

82. *See infra* note 305 and accompanying text.

83. *See, e.g.*, Jenia Iontcheva Turner, *Prosecutors and Bargaining in Weak Cases: A Comparative View*, *in* THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE 102, 103-06 (Erik Luna & Marianne L. Wade eds., 2012).

84. *See* North Carolina v. Alford, 400 U.S. 25, 37 (1970).

85. *See* Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978); JENIA IONTCHEVA TURNER, PLEA BARGAINING ACROSS BORDERS 41-42 (2009).

on the concessions a prosecutor can offer in exchange for a defendant's plea,[86] and the restrictions that do exist have nothing to do with the size of a sentencing discount or the proportionality of punishment to an offender's culpability.[87] The defendant may decline a plea offer, of course, and the judge can reject a guilty plea as being involuntary or lacking a basis in fact.[88] But with more than 90 percent of all cases resolved by plea bargain,[89] the vast majority of defendants take these deals, and judges nearly always give their consent after cursory review.[90] In these situations, prosecutors are the adjudicators in effect, requiring the formal agreement of others but almost always getting their way.

The reign of prosecutors in American criminal justice attests to the unambiguous triumph of plea bargaining. Even when lawmakers attempted to preclude plea bargains and judges refused to sign off on trial-evading techniques, prosecutors found ways to negotiate pleas in a sort of "underground resistance movement."[91] In George Fisher's words, plea bargaining emerged as an "almost primordial instinct of the prosecutorial soul," with its eventual success the result of efforts by the repeat players who benefited most from the practice.[92] With more than nine out of every ten cases resolved by guilty plea, one can argue that plea bargaining is not just an accepted part of the American criminal justice system—*it is the system*.

A few commentators have come to terms with the modern prosecutor-dominated scheme. The distinguished scholar and federal judge Gerard Lynch may have been the first to use the term prosecutorial adjudication in contesting the traditional assumption of a trial-focused prosecutor.[93] Rather than being one of many players in the "largely vestigial" trial process, the prosecutor is

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86. *See, e.g.*, Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1155-56 (2008). *See generally* Dominick R. Vetri, Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865 (1964).

87. *See generally* 5 LAFAVE ET AL., *supra* note 80, ch. 21.

88. *See* FED. R. CRIM. P. 11(b).

89. *See* SEAN ROSENMERKEL ET AL., BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 2006—STATISTICAL TABLES 1 (2009); U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS tbl. 5.35.2010 (2011); U.S. DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS 2, 59 (2004). Of course, the crime for which the offender is convicted and sentenced under a given plea agreement may be a more accurate assessment of the defendant's culpability. Regardless, most plea bargains result in defendants being convicted of less serious offenses and receiving reduced punishments than the law might otherwise dictate.

90. *See, e.g.*, Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 199-200, 202-14 (2006) (discussing lack of judicial participation in America and the problems it produces).

91. GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 86 (2003).

92. *Id.* at 2, 23.

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

"the key decisionmaker" by acting as "the central adjudicator of facts" as well as the "arbiter of most legal issues and of the appropriate sentence to be imposed."[94]

> The prosecutor does not sit, in this process, as a neutral fact-finder adjudicating between adversarial parties, nor as a representative of one interest negotiating on an equal footing with an adversary, but as an inquisitor seeking the "correct" outcome. Defendants influence the decision by submitting their arguments and evidence to the decision-maker, who can give these arguments such weight as she thinks they deserve.[95]

In certain cases, the prosecutor may adjudicate between the opposing positions presented by the police and the defense. There may even be a later "appellate" stage of review where a supervising prosecutor adjudicates a disagreement between the line prosecutor and the defense.[96] The formal judicial process serves as a final avenue of review for a defendant unsatisfied with the "lower court" adjudication by the prosecutor.[97] Up to that point, however, the prosecution exercises unilateral authority to investigate, charge, plea bargain, or otherwise dispose of a case, subject to no more than perfunctory review.[98] But Judge Lynch argues that the upshot should not be "dismissed as arbitrary," "intrinsically unfair," or "beyond the pale of civilization."[99] Instead, it is simply "a different process for resolving a social dispute" than the formal model of trial adjudication, which "has long been discarded in practice, and has little hope of ever being revived."[100] Prosecutorial adjudication should be recognized as "a genuine procedural system, with a particular logic of its own," replacing a trial-centered approach that had "become too expensive, contentious, and inefficient to be restored, at least given present levels of criminal conduct and judicial resources."[101]

This description of prosecutorial adjudication has been lauded as "brilliant"[102] and "path-breaking."[103] Among the many insights of Judge Lynch's account is his suggestion that the American criminal justice system has become a hybrid process that is now more like the criminal justice systems of continental Europe, with the American prosecutor serving a European-style judicial role

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94. Gerard E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading Off?*, 55 STAN. L. REV. 1399, 1404 (2003) [hereinafter Lynch, *Screening*]; *see also* Lynch, *Administrative System*, *supra* note 93, at 2135.

95. Lynch, *Administrative System*, *supra* note 93, at 2135.

96. *See id*. at 2128.

97. *See id*. at 2135.

98. *See id*. at 2125; *see also infra* notes 301-303 and accompanying text.

99. *See* Lynch, *Administrative System*, *supra* note 93, at 2124-25, 2129; Lynch, *Screening*, *supra* note 94, at 1405.

100. Lynch, *Administrative System*, *supra* note 93, at 2135, 2141.

101. *Id*. at 2141-42.

102. William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 818 n.208 (2006).

103. Langer, *supra* note 75, at 251.

as investigator, fact-finder, and assessor of guilt and punishment.[104] In the United States, some experts and commentators have come to admire the approaches to criminal justice adopted in other countries, where the systems are deemed "more rational, more effective, and even more careful to avoid conviction of the innocent, thanks to the dominance of professional judges with a mandate for finding the truth, the reduced importance of manipulative defense counsel, and—particularly importantly—the absence of plea bargaining."[105] What these admirers "simply fail to realize," Lynch retorted, is "that the United States is one of those countries."[106]

B. *The European Prosecutor*

In making this argument, Judge Lynch alluded to a longstanding American interest in comparative criminal justice and especially the European prosecutor. For well over a century, legal commentators have discussed the areas of harmony and division between the Anglo-American "common law" systems, which adopted "accusatorial" and "adversarial" approaches to adjudication; and the "civil law" or "continental law" systems of European nations such as France and Germany, which used "inquisitorial" methods of adjudication.[107] Some works praised continental criminal justice and its law enforcement, with a few scholars going further in arguing that American criminal justice could be improved by looking abroad consistent with the "better solutions" instinct of comparative law.[108] Perhaps the most intriguing debate concerned the civil-law tenet of strictly limited prosecutorial discretion, based on the so-called "legality principle" and its corollary of mandatory (or compulsory) prosecution, which requires prosecutors to proceed in all cases where evidence supported criminal charges. Some believed many of the troubles associated with the American prosecutor might be remedied through the type of restraints placed upon his European counterpart, with a continental-style rule of mandatory prosecution thereby taming prosecutorial discretion in the United States.[109]

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104. *See* Lynch, *Administrative System*, *supra* note 93, at 2124-25.

105. *Id*. at 2117-18.

106. *Id*. at 2143.

107. For an excellent review and analysis, see Máximo Langer, *The Long Shadow of the Adversarial and Inquisitorial Categories, in* HANDBOOK OF CRIMINAL LAW (Markus Dubber & Tatjana Höernle eds., forthcoming 2014).

108. *See, e.g.*, Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 CAL. L. REV. 539 (1990) [hereinafter Frase, *Comparative Criminal Justice*]; Richard S. Frase & Thomas Weigend, *German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?*, 18 B.C. INT'L & COMP. L. REV. 317 (1995); Gerhard O. W. Mueller, *Lessons of Comparative Criminal Procedure*, 15 AM. U. L. REV. 341 (1966); Rudolf B. Schlesinger, *Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience*, 26 BUFF. L. REV. 361 (1977).

109. *See, e.g.*, KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 194-95 (1969); Joachim Hermann, *The German Prosecutor*, *in* DISCRETIONARY JUSTICE IN EUROPE AND AMERICA (Kenneth Culp Davis ed., 1976); Hans-Heinrich Jescheck, *Discre-*

Other European nations, including England and the Netherlands, have relied upon a different principle—"expediency" or "opportunity"—which provides discretion in prosecutorial decisionmaking.[110] Even systems based on the legality principle have long recognized exceptions to mandatory prosecution. Historically, the German prosecutor could forego a misdemeanor case when the guilt of the defendant was minor and the public interest would not be served by conducting a trial.[111] Nonetheless, proponents of continental criminal justice maintained that compulsory prosecution was the rule and that American-style plea bargaining remained verboten. Prosecutorial discretion might be further limited by judicial oversight. In France, the *juge d'instruction* (examining or investigating magistrate) controlled the focus and reach of the pretrial phase of the criminal process, with the magistrate expected to fully investigate the matter and prepare a comprehensive documentary record or "dossier." If he concluded that a crime had occurred and a particular individual was the perpetrator, the case would proceed to trial with the dossier as the evidentiary centerpiece. If the *juge* reached a contrary conclusion, the case was closed without further action.[112]

The purported adversarial-inquisitorial divide inspired a now-classic debate of comparative criminal justice,[113] where "the result look[ed] to be a stalemate."[114] In recent years, however, a number of scholars have "discovered" the

tionary Powers of the Prosecuting Attorney in West Germany, 18 AM. J. COMP. L. 508 (1970); John H. Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439 (1974); Robert Vouin, *The Role of the Prosecutor in French Criminal Trials*, 18 AM. J. COMP. L. 483 (1970). Another prominent comparativist, Mirjan Damaška, maintained that the actual limit on prosecutorial discretion in Europe comes from internal organizational structures and norms—hierarchical, centralized supervision of the prosecutorial corps and a professional emphasis on consistent, uniform decisionmaking. *See* Mirjan Damaška, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480 (1975).

110. In England, the classic statement on prosecutorial discretion was made in 1951 by Lord Hartley Shawcross, the British Attorney General: "It has never been the rule in this country—I hope it never will be—that suspected criminal offences must automatically be the subject of prosecution." CROWN PROSECUTION SERVICE, THE CODE FOR CROWN PROSECUTORS § 4.10 (2010).

111. *See* STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE] § 153 (Ger.).

112. *See, e.g.*, JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA 129-31 (3d ed. 2007); *see also* LLOYD L. WEINREB, DENIAL OF JUSTICE (1977) (advocating, among other things, the institution of an American examining judge to investigate crime and consider charges).

113. *See* Abraham S. Goldstein & Martin Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany*, 87 YALE L.J. 240 (1977); John H. Langbein & Lloyd L. Weinreb, *Continental Criminal Procedure: "Myth" and Reality*, 87 YALE L.J. 1549, 1550 (1978); *see also* Abraham S. Goldstein & Martin Marcus, *Comment on Continental Criminal Procedure*, 87 YALE L.J. 1570 (1978).

114. Thomas Weigend, *Continental Cures for American Ailments: European Criminal Procedure as a Model for Law Reform*, 2 CRIME & JUST. 381, 418 (1980). For more recent work in this area, see TURNER, *supra* note 85; Markus Dirk Dubber, *American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure*, 49 STAN. L. REV. 547

changing prosecutorial role in Europe,[115] due in part to the compilation of criminal justice data.[116] This included information concerning prosecutorial decisionmaking, which indicated a trend toward case dispositions by prosecutors. A subsequent investigation led by Jörg-Martin Jehle and Marianne Wade sought to deal with issues of comparability of statistical and legal information regarding European prosecutors.[117] Despite the historical diversity of the systems examined, the Jehle-Wade study showed a surprising level of similarity in prosecutorial powers. In many countries, prosecutors have a number of case-disposition options coupled with powers to control investigations, influence court decisions, and even obtain convictions with a degree of independence. The dispositions bear different labels and retain unique facets within each system, but the basic methods have so much in common that they can be grouped together.[118]

For example, prosecutors may drop (i.e., decline) a case without any further consequence—despite the fact that the suspect is thought to be guilty and sufficient evidence exists to take the case to court—with the drop allowing executive capital to be spent on more pressing matters.[119] Prosecutors may also condition a case drop on the suspect performing a given task or accepting the

(1997); Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L.J. 1 (2004).

115. *See* COPING WITH OVERLOADED CRIMINAL JUSTICE SYSTEMS: THE RISE OF PROSECUTORIAL POWER ACROSS EUROPE (Jörg-Martin Jehle & Marianne Wade eds., 2005); TASKS AND POWERS OF THE PROSECUTION SERVICES IN THE EU MEMBER STATES I (Peter J.P. Tak ed., 2004); TASKS AND POWERS OF THE PROSECUTION SERVICES IN THE EU MEMBER STATES II (Peter J.P. Tak ed., 2005); THE ROLE OF THE PUBLIC PROSECUTOR IN THE EUROPEAN CRIMINAL JUSTICE SYSTEMS (Tom Vander Beken & Michael Kilchling eds., 2000); Cyrille Finjaut et al., *Special Issue: The Future of the Public Prosecutor's Office in the European Union*, 8 EUR. J. OF CRIME, CRIM. L. & CRIM. JUST. 149 (2000); *cf.* SAMUEL WALKER, TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE 6–11 (1993) (describing similar recognition of discretion after the 1956 American Bar Foundation Survey of the Administration of Criminal Justice).

116. *See* EUROPEAN SOURCEBOOK OF CRIME AND CRIMINAL JUSTICE STATISTICS (1st ed. 1999).

117. *See* COPING WITH OVERLOADED CRIMINAL JUSTICE SYSTEMS, *supra* note 115. The comparison focused upon six different countries that represent the diversity of European systems: England and Wales, France, Germany, the Netherlands, Poland, and Sweden.

118. The following is drawn from Luna & Wade, *supra* note 73.

119. *See* CROWN PROSECUTION SERVICE, CODE FOR CROWN PROSECUTORS §§ 4.10 *et seq*. (7th ed. 2013) (Eng.); CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] art. 40-1, 40-3 (Fr.); STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE] § 153 (Ger.); WETBOEK VAN STRAFVORDERING [Sv] [CODE OF CRIMINAL PROCEDURE] arts. 167-II, 242-II (Neth.); RÄTTEGÅNGSBALKEN [RB] [CODE OF JUDICIAL PROCEDURE] 23:4a (Swed.). Typically, prosecutors use public interest drops to deal with first-time offenders who have committed minor crimes, such as petty theft and marijuana possession. The decision is recorded in an internal register—often accessible to the police—informing future prosecutors that this individual does not have an entirely unblemished background. The government will inform the suspect that the case has been dropped in spite of his being considered guilty, but he cannot appeal the decision even though the information will be noted in law enforcement records.

imposition of a consequence. Until the individual fulfills the assigned condition, the drop does not become legally binding and the prosecutor may bring the case to court if the suspect fails to meet his obligations.[120] Another option, the "penal order," typically involves a court judgment but one instigated by the prosecution and so strongly based on information provided by the government—and, most importantly, so rarely rejected by the court—that it is properly considered a prosecutorial disposition. Unless the accused objects, a penal order results in a conviction, sentence, and criminal record.[121] Still another type of disposition involves the prosecution and defense reaching an agreement on conviction and sentence. During an abbreviated hearing, the parties may present selected evidence in support of the negotiated case-settlement, leading to a court decision on the defendant's guilt and punishment.[122]

The available data on these types of dispositions reveal that across Europe prosecutors play a far broader role in the criminal process and exercise far greater discretion than assumed in the literature.[123] In the bastions of the civil law tradition, the French and German justice systems, only a fraction of all criminal cases result in traditional trials.[124] Today in Germany—once depicted as the "land without plea bargaining"[125] ruled by the *Legalitätsprinzip* (legality principle)—the scope of the *Opportunitätsprinzip* and prosecutorial discretion

120. *See* CROWN PROSECUTION SERVICE, *supra* note 119, § 7.1–7.4 (Eng.); C. PR. PÉN., *supra* note 119, arts. 41-1 to -3, 389, 706-72 (Fr.); STPO, *supra* note 119, § 153a (Ger.); WETBOEK VAN STRAFRECHT [Sr] [CRIMINAL CODE] art. 74c (Neth.); KODEKS POSTĘPOWANIA KARNEGO [K.P.K.] [CODE OF CRIMINAL PROCEDURE] art. 67 (Pol.). Conditional disposals are typically used to divert routine criminal cases out of the criminal justice system, particularly unremarkable instances of marijuana possession, traffic offenses, minor property crimes, lesser acts of violence (except in Sweden), petty theft and marijuana possession (except in Germany). *See* Marianne Wade, *The Power to Decide*, *in* COPING WITH OVERLOADED CRIMINAL JUSTICE SYSTEMS, *supra* note 115, at 71. The most frequent condition is the payment of a fine, although community service, addiction treatment, and mediation are also possible. The suspect is not formally considered guilty but is regarded as acquiescing to the prosecutorial presumption of guilt, which is noted in an internal record.

121. *See* C. PR. PÉN., *supra* note 119, arts. 524 to 528-2 (Fr.); STPO, *supra* note 119, §§ 407-12 (Ger.); Sv, *supra* note 119, art. 257 (Neth.); K.P.K., *supra* note 120, arts. 500-02 (Pol.); RB, *supra* note 119, 48:1-12 (Swed.). In practice, sanctions are limited to fines or, in a small number of cases, suspended short-term sentences. Although penal orders are available for recidivists and can be employed for more serious offenses than those dealt with by conditional disposals, they are typically used for minor acts of violence, low-level property crimes, petty theft, marijuana possession, and even traffic offenses.

122. *See* Criminal Justice Act, 2003, c. 44, sch. 3 (Eng.); C. PR. PÉN., *supra* note 119, arts. 495-7 to -16 (Fr.); STPO, *supra* note 119, § 257c (Ger.); K.P.K., *supra* note 120, arts. 335, 387 (Pol.). The process is available for serious offenses (e.g., Polish crimes carrying up to ten years imprisonment), with the defendant receiving a criminal record and possibly a term of incarceration.

123. *See* COPING WITH OVERLOADED CRIMINAL JUSTICE SYSTEMS, *supra* note 115; Luna & Wade, *supra* note 73, at 1454-57, 1532.

124. *See* Luna & Wade, *supra* note 73, at 1532 (9.7 percent in 2006 for France and 12.3 percent in 2007 for Germany).

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

has increased dramatically through various case resolutions short of a traditional trial.[126] In France, the world-famous investigating magistrate, formerly hailed as the nation's most powerful individual, is now marginalized in the process and often wholly replaced by the *procureur*.[127] Even in countries such as Poland and Sweden, which do hold a significant number of full-fledged trials, most cases are still resolved using alternative, prosecutor-led mechanisms.[128]

These and other developments bring us back to the notion of prosecutorial adjudication. Until now, the working premise was that trial judges remained the manager of case resolutions—particularly those carrying the prospect of criminal conviction—rather than the prosecutor à la the discretionary decisionmaking of the American district attorney. As it turns out, Judge Lynch was right about a surface movement between the adversarial and inquisitorial approaches, although the movement's direction was not quite as he suggested. The American prosecutor is not modeling the continental European prosecutor; instead, the European prosecutor is beginning to look like his American counterpart, with the de facto and sometimes de jure authority to adjudicate cases.

The range of options available to European prosecutors bears some resemblance to those exercised by American prosecutors. Both groups decline or drop a substantial number of cases, either for evidentiary reasons or on public interest grounds. European conditional disposals appear broadly comparable to American diversion schemes, terminating cases without imposing convictions provided the defendant fulfills the prescribed requirements. The European penal order is rather exceptional, but proceedings in low-level American courts often become so standardized, with specific crimes correlated with an accepted going rate, that the plea agreements reached may effectively mirror penal orders. Although there are critical differences between American plea bargains and European negotiated case-settlements, they do have enough in common as to be treated as members of the same species. For those resolutions that require court approval, prosecutors virtually lead the judicial hand in signing the orders.

In the "triumphal march" of these so-called "consensual procedures,"[129] the penal order stands as the archetype of prosecutorial adjudication in civil law

126. *See* Shawn Boyne, *Is the Journey from the In-Box to the Out-Box a Straight Line? The Drive for Efficiency and the Prosecution of Low-Level Criminality in Germany*, *in* THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE, *supra* note 83, at 37, 40-41.

127. *See* Jacqueline Hodgson, *Guilty Pleas and the Changing Role of the Prosecutor in French Criminal Justice*, *in* THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE, *supra* note 83, at 116, 132 (noting that the *juge d'instruction* was involved in only 4 percent of all cases in 2009).

128. *See* Luna & Wade, *supra* note 73, at 1532 (listing trials in Poland and Sweden as 34 percent and 43 percent of all cases, respectively).

129. Stephen C. Thaman, *The Penal Order: Prosecutorial Sentencing as a Model for Criminal Justice Reform?*, *in* THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE, *supra* note 83, at 156 [hereinafter Thaman, *The Penal Order*]; *see also* WORLD PLEA BARGAINING: CONSENSUAL PROCEDURES AND THE AVOIDANCE OF FULL CRIMINAL TRIAL (Stephen C. Thaman ed., 2010).

systems and is now a staple in many nations for dealing with less serious and moderately serious crimes. In particular, the German penal order (*Strafbefehl*) has been influential across Europe and has served as a model for other nations.[130] In its conventional form, a penal order is requested by the prosecution through a standardized document containing a brief summary and a suggested punishment, accompanied by the government's case file. Based upon the written information, the court either accepts the prosecution's request or rejects it outright—a judge may only refuse to issue the penal order and cannot modify its terms—where a denial triggers the traditional process and a full trial. In practice, however, court approval is often pro forma, the prosecutor acting as a veritable "judge before the judge."[131] When issued, a penal order advises the accused of the proposed judgment and the resulting punishment, as well as the time period in which he may formally object and thereby receive a standard trial. If the accused objects within the stipulated period—seven days in Poland,[132] for instance, and two weeks in Germany[133]—the case usually proceeds to trial. But if he does not object, a conviction ensues and the punishment is imposed.

In an elegant comparative piece, Stephen Thaman describes the penal order as "the most 'inquisitorial' of all consensual procedural forms," "where the same executive official can investigate the case, draft the accusatory pleading, and determine guilt, while scarcely even invoking the jurisdiction of the judicial branch."[134] A few European criminal justice systems have adopted penal orders that provide for prosecutorial adjudication in a literal sense, with prosecutors replacing judges by finding guilt and imposing punishment directly upon suspects. The penal orders used in Sweden (*strafföreläggande*) and in the Netherlands (*strafbeschikking*) remove the court from the process, providing the prosecution with full de jure authority to convict and sentence.[135] The Swedish penal order is restricted to crimes punishable by fine and itself can only result in a fine.[136] In 2007, the Netherlands adopted a nearly identical device to replace a standardized form of prosecutorial adjudication known as a "transaction" (*transaktie*). Like the Swedish version, the Dutch penal order can impose a conviction without any court involvement. But the *strafbeschikking* is available for offenses that carry a statutory prison sentence of six years or less, thereby covering the vast majority of crimes in the Netherlands. The *strafbes-*

130. For instance, the German penal order served as a model for Croatia. *See* ZAKON O KRIVICNOM POSTUPKU [CRIMINAL PROCEDURE ACT] arts. 465-69 (Croat.).

131. *See, e.g.*, Thomas Weigend, *A Judge by Another Name? Comparative Perspectives on the Role of the Public Prosecutor*, *in* THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE, *supra* note 83, at 377; Luna & Wade, *supra* note 73, at 1427 & n.63.

132. *See* K.P.K., *supra* note 120, art. 506 § 1 (Pol.).

133. *See* STPO, *supra* note 119, § 410 (Ger.).

134. Thaman, *The Penal Order*, *supra* note 129, at 174.

135. *See* Sv, *supra* note 119, art. 257 (Neth.); RB, *supra* note 119, 23:4a (Swed.).

136. *See* Josef Zila, *Prosecutorial Powers and Policy Making in Sweden and the Other Nordic Countries*, *in* THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE, *supra* note 83, at 235, 244-47.

chikking could represent a seminal moment for prosecutorial power, given Dutch influence on European policy debates of criminal justice issues.[137]

Today, however, the most discussed form of prosecutorial adjudication is the plea bargain or negotiated settlement, which has been "the signature development on the European continent."[138] Although negotiated settlements have been around for quite some time, public recognition and official authorization of the processes are relatively new phenomena in European criminal justice systems. As it turns out, German practitioners had been covertly engaged in negotiated case-settlements since the early 1970s.[139] Eventually, the Federal Court of Justice approved the practice and urged German lawmakers to enact guidelines for plea bargaining.[140] In 2009, the German legislature (*Bundestag*) finally authorized plea bargaining under certain circumstances,[141] and last year Germany's separate Federal Constitutional Court signed off on the legislation.[142]

Negotiated case settlements also exist in England and Wales, which is unsurprising for Europe's bastion of common law, party-led adversarialism. But like German practitioners, British lawyers were careful to deny the existence of plea bargaining, even in the face of very high rates of guilty pleas before the courts. A decade ago, Parliament finally provided express statutory recognition of plea bargaining.[143] In recent years, nearly two-thirds of all cases before Crown Courts and about three-quarters of all cases before Magistrates' Courts have been resolved by guilty plea.[144] Although the specifics in Germany, England and Wales, and other European countries (e.g., France, Italy, Poland, and

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137. *See, e.g.*, Michael Tonry & Catrien Bijleveld, *Crime, Criminal Justice, and Criminology in the Netherlands*, 35 CRIME & JUST. 1, 1-2, 24, 26-27 (2007).

138. Weigend, *supra* note 131, at 387; *see also* Thomas Weigend, *The Decay of the Inquisitorial Ideal: Plea Bargaining Invades German Criminal Procedure*, *in* CRIME, PROCEDURE AND EVIDENCE IN A COMPARATIVE AND INTERNATIONAL CONTEXT: ESSAYS IN HONOUR OF PROFESSOR MIRJAN DAMAŠKA 39 (John Jackson et al. eds., 2008).

139. *See* Dubber, *supra* note 114, at 549-50.

140. *See* Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 3, 2005, 50 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN [BGHSt] 40, 2005 (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice] Aug. 28, 1997, 43 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN [BGHSt] 195, 1997 (Ger.).

141. *See* Bundesministerium der Justiz, Bundestag verabschiedet Gesetzentwurf zur Verständigung in Strafverfahren (May 28, 2009) (press release of the German Federal Ministry discussing new law); Deutscher Bundestag: Entwurf eines Gesetzes zur Regelung der Verständigung im Strafverfahren, Drucksachen 16/12310 (Mar. 18, 2009) (Ger.), *available at* http://dip21.bundestag.de/dip21/btd/16/123/1612310.pdf, *archived at* http://perma.cc/4XXZ-4PPR (official justification for new law).

142. *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 19, 2013, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1058, 2013 (Ger.).

143. *See* Criminal Justice Act, 2003, c. 44, sch. 3 (Eng.). Likewise, negotiated case settlements are relatively recent legislative introductions in France (2004 for the *composition pénale*) and Poland (1997 for the *skazania bez rozprawy*).

144. *See* Oren Gazal-Ayal & Limor Riza, *Plea Bargaining and Prosecution*, *in* CRIMINAL LAW AND ECONOMICS 145, 148 (Nuno Garoupa ed., 2009).

Spain)[145] may differ, they all share the same basic feature—a reduced sentence for the defendant in exchange for his not contesting the prosecution case—as well as an overarching consequence: increased power of the prosecutor.

III. PLATONISM AND THE PROSECUTOR

The foregoing suggests a convergence of power in both the United States and Europe, where prosecutors rule criminal justice not only as law enforcer but also as effective case adjudicator. They preside over systems dominated by professionals whose expertise allegedly allows them to make the best decisions for the public good, through a non-public process that excludes or minimizes participation by the governed. Are these rulers akin to philosopher kings? As an initial matter, the systemic convergence itself does not appear to be driven by Platonic considerations of expertise, nor does it necessarily stem from an accord on fundamental principles or the intentional synthesis of legal traditions. Rather, the many forms of prosecutorial power in the United States and Europe seem to be driven by caseload pressures.

An untold number of crimes are committed each year in the United States and result in millions of arrests,[146] which must be disposed of by fewer than 40,000 prosecutors in the federal and state systems.[147] In large district

145. *See* Arts. 444–48 COSTITUZIONE [COST.] (It.); C. PR. PÉN., *supra* note 119, art. 495-7-11 (Fr.); K.P.K., *supra* note 120, arts. 335, 387 (Pol.); LEY DE ENJUICIAMIENTO CRIMINAL [L.E. CRIM.] arts. 655, 688, 689 (Spain).

146. In 2012, nearly 9 million property crimes and more than 1.2 million crimes of violence were known to law enforcement. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE tbl. 3.106.2012, *available at* http://www.albany.edu/sourcebook/pdf/t31062012.pdf, *archived at* http://perma.cc/5FT7-5R5U. In general, fewer than half of such crimes are ever reported. *See, e.g.*, *id.* tbl. 3.33.2008, *available at* http://www.albany.edu/sourcebook/pdf/t3332008.pdf, *archived at* http://perma.cc/75Q9-QVVM. There were more than 1.6 million arrests for property crime and over a half million arrests for violent crime in 2012. *See* FBI, CRIME IN THE UNITED STATES 2012: PERSONS ARRESTED, *available at* http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/persons-arrested/persons-arrested, *archived at* http://perma.cc/482R-CR72. This does not include the millions of Americans who engage each day in "victimless" criminal activity, such as gambling, consensual (but illegal) sexual activity, and, most of all, drug offenses. *See, e.g.*, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE tbl. 3.88 (more than 8 percent of those surveyed reported using illegal drugs in the past 30 days), *available at* http://www.albany.edu/sourcebook/pdf/t388.pdf, *archived at* http://perma.cc/VCE3-AWQ3. Such crimes are far less likely to be reported than offenses with obvious victims, meaning that arrests will tend to result from proactive law enforcement. Still, there were more than 1.5 million arrests for drug abuse violations in 2012, more than 80 percent of which were for possession. *See* FBI, *supra*. Overall, there were about 12.2 million arrests in 2012. *Id.*

147. *See, e.g.*, MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS, FEDERAL JUSTICE STATISTICS, 2010, at 11 (2013), *available at* http://www.bjs.gov/content/pub/pdf/fjs10.pdf, *archived at* http://perma.cc/62UQ-MERH (noting 6,075 full-time equivalent (FTE) attorneys in U.S. Attorneys' offices in 2010); STEVEN W. PERRY & DUREN BANKS, BUREAU OF JUSTICE STATISTICS, PROSECUTORS IN STATE COURTS, 2007 – STATISTICAL TABLES 2 (2011), *available*

attorneys' offices, each prosecutor can have an average caseload of ten felonies per month, which would generate an impossible docket if each case were resolved by trial. A misdemeanor caseload may be many times larger, sometimes exceeding 1000 cases per year.[148] Needless to say, there is not enough time or resources to try all of these cases. The same is true in much of Europe, where prosecutors also face caseloads sometimes above 1000 cases per year.[149] "It is a well-established fact that German criminal trial courts are unacceptably and unreasonably overloaded," two legal scholars recently noted.[150]

> The German Federal Constitutional Court—*Bundesverfassungsgericht*, BVerfG—and the Federal Supreme Court of Justice—*Bundesgerichtshof*, BGH—frankly admit this fact. Even those legal scholars who are critical towards trial courts emphasize such overloading. This overloading is aggravated in the context of austerity measures . . . . The Higher District Courts—*Landgerichte*, LG—are typically severely affected by such austerity measures, while the Lower District Courts—*Amtsgerichte*, AG—are affected brutally.[151]

Resource constraints necessarily hamper German trial-level prosecutors in their ability to conduct a full-fledged search for the truth. And in the quest for efficiency, trial-related processes have been short-circuited.[152] Unsurprisingly, those systems that feature rather elaborate trial procedures, such as Germany and France, tend to employ full trials in a minority of cases. By contrast, nations employing full trial proceedings in a large proportion of cases use speedier formats, which prosecutors profoundly influence, if not essentially predetermine.[153]

The trends in law and practice discussed above may intimate a blurring of lines historically drawn by legal traditions, but they do not represent a genuine confluence among criminal justice systems. At best, they indicate a shallow convergence on the power of prosecutors to adjudicate cases. The most important transatlantic insight comes from key differences among prosecutors,

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at http://www.bjs.gov/content/pub/pdf/psc07st.pdf, *archived at* http://perma.cc/8T2Y-32ES (reporting "25,000 FTE assistant prosecutors employed in 2007" in state systems).

148. *See* Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 270-74 (2011); *see also* 1 LAFAVE ET AL., *supra* note 80, § 1.10(c); PERRY & BANKS, *supra* note 147, at 2 ("In 2007, prosecuting attorneys in offices in districts with 100,000 to 249,999 residents closed an average of 121 felony cases each. The average caseload per prosecuting attorney across all full-time offices was 94 felony cases."). *But see* Josh Bowers, *Physician, Heal Thyself: Discretion and the Problem of Excessive Prosecutorial Caseloads*, 106 NW. U. L. REV. COLLOQUY 143, 143-45 (2011) (questioning prosecutorial caseload numbers).

149. *See* Boyne, *supra* note 126, at 45.

150. Volker Krey & Oliver Windgätter, *The Untenable Situation of German Criminal Law: Against Quantitative Overloading, Qualitative Overcharging and the Overexpansion of Criminal Justice*, 13 GERM. L.J. 579, 579 (2012).

151. *Id*. at 579-80.

152. *See generally* Boyne, *supra* note 126.

153. For instance, full trials in the Netherlands are based on written submissions—live witnesses are rarely heard and even complicated cases take only a few hours—with the court ultimately relying upon the dossier arranged by the prosecutor. *See* PETER J.P. TAK, THE DUTCH CRIMINAL JUSTICE SYSTEM 100-04 (2008).

some of which correspond to the *Republic*'s fundamental political inquiry—*who shall wield power*?—and the features that supposedly qualify the rulers to wield that power. Here the analogy of the philosopher/prosecutor king both holds and falls apart in interesting ways.

A. *Europe's Aristo-bureaucratic Prosecutor*

The European prosecutor has changed substantially in recent decades. As Professor Weigend put it, "the ancient cliché that on the continent the prosecutor sits back and reads a novel during the trial, only to get up at the very end to give a short speech demanding strict punishment, no longer holds true."[154] The European prosecutor exerts a heavy influence on the court's decisionmaking through the documents assembled in the dossier, as well as by the presentation of evidence and cross-examination of witnesses, and the prosecutor's tone-setting summary of the evidence and request for sentence.[155] Still, in the modern "reformed" inquisitorial process, finding the truth remains the primary objective, albeit with some accommodation for "the interest of individuals to keep certain (or all) information private."[156] Even if "truth-seeking is not the ultimate purpose of the criminal process, the process' goal of conflict resolution cannot be reached by a disposition (openly) based on a fictional version of facts."[157]

The European prosecutor has a distant resemblance to Plato's aristocrat, "a man of whom we rightly assert that he is both good and just."[158] According to Professor Bloom, "Plato intended his works essentially for the intelligent and industrious few, a natural aristocracy determined neither by birth nor wealth."[159] The continental European legal tradition displays a vision of bureaucracy with Platonic features, where the prosecution's role is that of nonpartisan public service charged with complete objectivity in the pursuit of the truth. The customary understanding of prosecutors as impartial truth-seekers is based on a foundational belief in the existence of a material truth that can be determined by dispassionate fact-finding. Law is a science under this view, the product of rational decisionmaking that can establish the truth and ascertain appropriate outcomes through logical, balanced analysis. The scientific approach to the continental criminal process thus assumes that every case has a correct solution that can be achieved through the discovery of the truth.[160]

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154. Weigend, *supra* note 131, at 388.

155. *See id*. at 388-89.

156. Thomas Weigend, *Is the Criminal Process About Truth?: A German Perspective*, 26 HARV. J.L. & PUB. POL'Y 157, 172 (2003).

157. *Id*.

158. PLATO, *supra* note 10, bk. VIII, at 544e.

159. Bloom, *supra* note 42, at xviii.

160. *See, e.g*., Markus Dirk Dubber, *The Promise of German Criminal Law: A Science of Crime and Punishment*, 6 GER. L.J. 1049 (2005).

The idea of law as a science would strike most American jurists as fanciful, at least since legal realism's devastation of pseudoscientific claims for formalistic analysis.[161] Continental prosecutors are supposed to be detached "guardians of the law"—German prosecutors have even been described as "the most objective civil servants in the world"[162]—yet actual practice may be far less romantic. Such concerns have been brought to light by Shawn Boyne, whose rich ethnographic work shows that, despite legal efforts to limit prosecutorial discretion, "the organizational culture of the prosecution, rather than the law decisively shapes how prosecutors exercise discretion."[163] In some cases, for instance, German prosecutors may have different interpretations of their duty to be objective fact-finders, as they participate in a "relational dance" between themselves and the trial judge.[164] In the end, however, Professor Boyne notes that the way in which German prosecutors "wrestle with the truth at trial" helps demonstrate "their commitment to serve as objective fact-finders."[165]

This dedication to objectivity is part of the European prosecutorial mindset and serves as an organizational norm, consistent with a conception of the legal system as a rational instrument applied scientifically in order to discover the truth and achieve just outcomes. All of this affects a prosecutor's view of his function and appropriate practices within a criminal justice system. Across Europe, the scientific conception is core to the education and professional training of prosecutors, who become career civil servants often associated with the judicial function and largely insulated from political pressure. In fact, European prosecutors and judges may be trained together and participate in the same professional groups and programs. The selection process for prosecutors can be quite rigorous, requiring strong examination results, multiple interviews, psychological tests, and background checks, with the criteria often focusing on traditional judicial qualities in the exercise of judgment. In turn, training programs can be highly supervised, multiyear affairs involving theoretical and practical work in courts, prosecutors' offices, and the private bar. The common preparation of judges and prosecutors—and, in some countries, their shared status as members of the judiciary—underscores the expectation of an objective prosecutorial function in discovering the truth and reacting appropriately to it.

How far prosecutors live up to such ideals is unclear, but the set and setting strongly affects the way in which European prosecutors perceive their role and work. What is more, new prosecutors are on a dedicated career track and will

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161. *See, e.g.*, Luna, *supra* note 50, at 89-92. This does not mean that arguments cannot be made for certain types of formalism. *See, e.g.*, Richard H. Pildes, *Forms of Formalism*, 66 U. CHI. L. REV. 607 (1999).

162. *See* Shawn Marie Boyne, *Uncertainty and the Search for Truth at Trial: Defining Prosecutorial "Objectivity" in German Sexual Assault Cases*, 67 WASH. & LEE L. REV. 1287, 1289 (2010) (quoting Claus Roxin); Weigend, *supra* note 131, at 382.

163. SHAWN MARIE BOYNE, THE GERMAN PROSECUTION SERVICE: GUARDIANS OF THE LAW? 233 (2014).

164. *See id.* at 15; Boyne, *supra* note 162, at 1351.

165. Boyne, *supra* note 162, at 1354.

usually remain prosecutors for the rest of their working lives.[166] As members of a professional civil service, prosecutors see themselves as long-term occupants of a work environment that stresses professional ethics. The legal culture, the education and training, and the expectations placed upon prosecutors all shape their self-perception and practice. In continental systems, these factors contribute to a particular profile: prosecutors as judicial professionals.[167]

Among other things, European prosecutors do not face election and have no immediate accountability to the general public. Instead, restraint is provided internally. Prosecution services bind themselves through institutional structures, with written guidelines, regular reviews, and other bureaucratic controls seeking to channel discretion. Prosecutors are expected to abide by guidelines issued within the service hierarchy, and senior prosecutors are expected to review the decisionmaking of their junior colleagues. When necessary, supervisors may issue case-specific instructions to their subordinates or even substitute prosecutors under their supervision. As such, decisions are necessarily made within a hierarchical system, often directed by written policies and guidelines, with the cases subject to collegial review and discussion, both formal and informal.

Guidelines might be issued for any number of decisions throughout the criminal process, though they have become particularly important in deciding whether to bring a case to court, to propose a case resolution without a full trial, to recommend a particular sentence, or to decline prosecution altogether. The Netherlands provides the fullest expression of prosecutorial guidelines as a form of law.[168] Dutch prosecutors are constrained by the Minister of Justice's criminal law policies, which are formulated in consultation with a body of senior prosecutors. This so-called "College of Prosecutors General" implements the policy choices by issuing guidelines on various aspects of prosecutorial decisionmaking, all intended to limit arbitrary judgments and disparities in outcomes. For instance, the power to waive prosecution is channeled by a lengthy instruction on the rationales for non-prosecution.[169] Likewise, sentencing recommendations are driven by a highly detailed point system that sets both the potential case ending and the type of punishment.[170] If a suspect amasses a cer-

166. In some systems, lateral career movement may be between the public prosecution service and the sitting judiciary (i.e., trial court judges), which further demonstrates the shared judicial perspective.

167. As a practical matter, attorneys with the Crown Prosecution Service appear to fit this mold as well, despite the British legal system's abidance by a separation of powers principle. *See generally* HOUSE OF COMMONS CONSTITUTIONAL AFFAIRS COMMITTEE, CONSTITUTIONAL ROLE OF THE ATTORNEY GENERAL (2007), *available at* http://www.publications.parliament.uk/pa/cm200607/cmselect/cmconst/306/306.pdf, *archived at* http://perma.cc/58JG-82MJ.

168. *See, e.g.*, Peter J. P. Tak, *The Dutch Prosecutor: A Prosecuting and Sentencing Officer*, *in* THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE, *supra* note 83, at 135, 139, 144-46.

169. *See, e.g.*, *id.* at 147-48.

170. *See, e.g.*, *id.* at 145-46; Luna & Wade, *supra* note 73, at 1478, 1480.

tain number of points, the case must be brought to court, or if the amount falls within certain boundaries the prosecutor must use a conditional disposal. A suspect can even insist upon a particular outcome when his point score calls for that resolution. Any deviation from the prescribed disposition requires a Dutch prosecutor to give detailed, written reasoning for his decision, which will be reviewed by his superiors.

Overall, the patterns of decisionmaking across Europe seem to suggest that formal and informal office structures, along with education, training, culture, and role perception, place significant restraints on a prosecutor's use of discretionary authority. Most importantly, the growing prevalence of prosecutorial discretion has not been associated with abusive decisionmaking, with the professional culture and judicial mindset of European prosecutors precluding or tempering the potential for ad hoc or ad hominem decisionmaking. Among other things, there is no indication that European prosecutors threaten harsher consequences to facilitate agreement or invoke them when plea bargaining fails. Case settlements may be restricted to misdemeanors and less serious felonies; bargaining over charges may be barred or stringently controlled; and sentencing discounts may be limited to a fraction of the sentence (e.g., one-third reduction in England and Wales and in Italy).[171] Unlike the practice of American plea bargaining, moreover, European prosecutors may face constraints in their ability to engage in confession bargaining. For instance, German prosecutors must wait until the main proceeding in the district court to formalize the defendant's admission of guilt, and any deal must reflect the state of the evidence collected in the case.

More generally, Europe as a whole recoils from expanded criminal liability or threats of harsher punishment as a means of providing prosecutors with greater leverage in the criminal process.[172] As an example, the *Code of Crown Prosecutors* explicitly prohibits British prosecutors from acting "solely for the purpose of obtaining a conviction," filing "more charges than are necessary just to encourage a defendant to plead guilty to a few," and bringing "a more serious charge just to encourage a defendant to plead guilty to a less serious one."[173] In addition, British prosecutors may "only accept the defendant's plea if they think the court is able to pass a sentence that matches the seriousness of the offending," and they "must never accept a guilty plea just because it is convenient."[174] Unlike prosecution guidelines in the United States, however, the *Code of Crown Prosecutors* is legally binding on British prosecutors and has become a sort of "third arm of Anglo-Saxon law."[175]

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171. *See, e.g.*, Thaman, *The Penal Order*, *supra* note 129, at 164-66.

172. *See, e.g.*, Nick Vamos, *Please Don't Call It "Plea Bargaining,"* 2009 CRIM. L. REV. 617.

173. CROWN PROSECUTION SERVICE, *supra* note 119, §§ 2.4, 6.3.

174. *Id.* § 9.2; *see also id.* §§ 4.4, 4.5, 6.1, 6.4.

175. Chris Lewis, *The Evolving Role of the English Crown Prosecution Service*, *in* THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE, *supra* note 83, at 214, 220; *see also* Andrew

B. *America's Timocratic Prosecutor*

On the foregoing issues, the American prosecutor stands in stark contrast to his European counterpart. While the continental milieu may inspire the type of commitment to truth-seeking envisioned for the *Republic*'s philosopher kings, the environment of the American prosecutor seems more consistent with the regimes Plato deemed deviant. Perhaps most apt is the timocracy, a form of government in which the rulers' dominant motive is ambition.[176] The regime is run by "spirited" men distinctive in their "love of victories and of honors."[177] The rulers are "naturally more directed to war than to peace; in holding the wiles and stratagems of war in honor; and in spending all its time making war."[178] The timocrat is "a lover . . . of the hunt," basing his claim to rule "on warlike deeds and everything connected with war."[179] As a metaphor for a belligerent approach to law, timocracy is an apt descriptor of the uniquely adversarial approach to criminal justice in the United States, ruled as it is by a victory-oriented prosecution.

To be sure, the American prosecutor is described as an "administrator of justice" or "minister of justice,"[180] with the Supreme Court famously proclaiming that a prosecutor's interest is that "justice shall be done."[181] And undoubtedly, the prosecutorial function is affected by the vindication of rights and the pursuit of public welfare. In fact, it is hard to imagine any prosecutor stating that his decisions were influenced by something other than backward-looking justice or forward-looking crime reduction. These ideas and their application in individual cases are necessarily viewed through a particular lens, however. Both chief and line prosecutors are players in America's highly competitive enterprise of law enforcement. They share similar goals as the police, and, in a critical sense, they are members of the same "team."[182]

Rather than non-partisan "umpires,"[183] prosecutors are participants in America's unique form of adversarialism, where the belligerence can foster an

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Sanders, *England and Wales, in* THE ROLE OF THE PUBLIC PROSECUTOR, *supra* note 115, at 65.

176. *See* PLATO, *supra* note 10, bk. VIII, at 545a-b.

177. *Id*. bk. VIII, at 548c.

178. *Id*. bk. VIII, at 547e-548a.

179. *Id*. bk. VIII, at 549a.

180. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION § 3-1.2 (3d ed., 1993); ABA, MODEL RULES OF PROFESSIONAL CONDUCT R. 3.8 cmt. 1 (2008). The term "minister of justice" is shorthand for the more impartial role played by continental prosecutors and their position as representatives of the public interest. Ironically, however, the Minister of Justice in European nations is a politician and member of the executive branch and thus not necessarily associated with impartiality at all.

181. Berger v. United States, 295 U.S. 78, 88 (1938).

182. Lynch, *Administrative System*, *supra* note 93, at 2128.

183. *See, e.g*., *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (then-Supreme Court nominee John Roberts stating that "it's my job to call

ends-justify-the-means mentality. As advocates in a sometimes brutally partisan process, the prosecutor's role does not always seem oriented toward finding the truth—that's the job of the trial court. Instead, prosecutors marshal evidence and arguments in support of a conviction and sentence.[184] The criminal justice system assumes that the truth will be uncovered and justice achieved through a contest between adversaries, the prosecution versus the defense, as the judge and jury sift through opposing stories. In this process, prosecutorial decisionmaking can be influenced by incentive structures saddled with agency costs.[185]

Chief prosecutors are elected officials who are responsive to their constituencies and local priorities, and mindful of public reaction to prominent cases or, for that matter, any media coverage of their offices. Some may aspire to higher political office or a judgeship; many others see their post as a long-term career; but all recognize that they are politically accountable to the electorate. Of course, incumbents do not always run in contested elections, and they tend to win when opposed.[186] But if chief prosecutors do face challengers, the campaigns may invoke various rhetorical claims that implicate office performance measures—case backlogs and processing time, plea bargaining statistics, aggregate sentences, and most notorious of all, conviction rates. The actual impact of such measures remains to be determined. For some, the idea that elected prosecutors seek to maximize convictions is too simplistic, based largely on anecdotes and theoretical models. At the same time, statistics such as conviction rates remain one of the few recognized yardsticks of office performance. The pressure to maximize one's stats may be "an inescapable environmental constraint,"[187] which, in turn, is related to the American political process.

Deputy prosecutors work within a somewhat similar incentive structure. In the adversarial system, case outcomes can be very personal for prosecutors, who see convictions as "wins" and acquittals as "losses" that reflect their abilities as advocates. In addition to gaining prestige within an office and legal community, prosecutors with the highest conviction and sentencing statistics may be in the best position for promotion and higher compensation within the

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balls and strikes"). On Chief Justice Robert's statement, see Charles Fried, *Balls and Strikes*, 61 EMORY L.J. 641 (2012).

184. *See, e.g.*, David T. Johnson, *The Organization of Prosecution and the Possibility of Order*, 32 LAW & SOC'Y REV. 247, 262-64 (1998).

185. *See, e.g.*, Erik Luna & Marianne L. Wade, *Looking Back and at the Challenges Ahead*, *in* THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE, *supra* note 83, at 424, 433 n.33.

186. *See* Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 592-93 (2009).

187. Daniel C. Richman, Old Chief v. United States*: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939, 967 (1997); *see also* Eric Rasmusen et al., *Convictions Versus Conviction Rates: The Prosecutor's Choice*, 11 AM. L. & ECON. REV. 47 (2009) (using statistical analyses to determine that prosecutors are motivated by gaining votes and finding that elected prosecutors have higher conviction rates).

office or to make a lateral move to a better-paying job in the private sector.[188] As mentioned, heavy criminal dockets and limited time and resources have a profound impact on decisionmaking. Prosecutors who are unable (or unwilling) to try every case they are assigned can resolve the bulk of their caseloads by plea bargains, which amount to convictions.

Overall, role conceptions and decisionmaking structures may engender among American prosecutors a conviction mentality and proclivity toward harsh punishment, at least in response to a defendant's intransigence toward plea bargaining. Pursuant to the myth that they are mere litigants, prosecutors may tend to undertake their adjudicative role, not in the spirit of truth-seeking and balanced justice, but instead as a partisan in an adversarial contest. With this mindset, American prosecutorial adjudication—by means of a one-sided plea-bargaining process, for instance, bereft of the fundamental safeguards expected of courtroom adjudication—thrives without a hint of cognitive dissonance.

In general, American prosecutors tend to have enormous autonomy in their decisionmaking, with relatively weak supervision and no regularized reviews of the discretion exercised in individual cases. Autonomous decisionmaking tends to be viewed positively as a form of delegated trust, from the citizenry to the chief prosecutor, and from that elected official to his deputy prosecutors. Such discretion may be considered an appealing part of the job, perhaps an expression of robust American individualism. This also comports with the nation's ideological commitment to local control and decentralized decisionmaking, given that the vast majority of district attorneys, county and city attorneys, and other chief prosecutors are elected officials of jurisdictions that cover particular political communities.[189] Their accountability extends only to that constituency—not to any formal, hierarchical, statewide or national bureaucracy—with the values and expectations of the electorate fluctuating across communities.

Compared to their European counterparts, American prosecutors have made little if any attempt to limit their own discretionary powers through institutional hierarcy and office discipline. Any internal control of prosecutorial

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188. *See, e.g.*, Edward L. Glaeser et al., *What Do Prosecutors Maximize?: An Analysis of the Federalization of Drug Crimes*, 2 AM. L. & ECON. REV. 259, 263-65 (2000) (describing various motivating factors for prosecutors to gain convictions and finding that "federal attorneys are likely to accept cases with higher career returns and with higher social returns"); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 134-35 (2004) ("Prosecutors with the highest conviction rates (and, thus, reputations as the best performers) stand the greatest chance for advancement internally.").

189. The principal exception is the U.S. Attorney—the chief federal prosecutor in a given geographic area known as a "district"—who is appointed by the President and confirmed by the Senate. Like their state counterparts, however, federal prosecutors have substantial autonomy in their decisionmaking and can concentrate their efforts on issues of local or regional importance. *See* Debra Livingston, *Prosecution: United States Attorneys*, *in* 3 ENCYCLOPEDIA OF CRIME AND JUSTICE 1254, 1256 (Joshua Dressler ed., 2d ed. 2002).

discretion may be rather informal, the aggregate of office culture, unwritten norms or rules, common methods or well-understood customs, casual advice or appraisal of senior prosecutors, and so on. To be sure, an office might disseminate policies regarding certain aspects of prosecutorial decisionmaking; a few states have even pressed for prosecution guidelines by statute or judicial decision.[190] The prevalence of such written guidelines is unknown, but it is clear that not every office promulgates standards for the exercise of discretion.[191] Those that do may keep their guidelines confidential or may couch the rules in "noncommittal pablum-language,"[192] subject to various qualifications and exceptions. Most importantly, the judiciary has refused to bind prosecutors to their own rules,[193] and the failure to abide by office guidelines rarely results in internal sanctions.[194] As a matter of fact, discipline against American prosecutors for any kind of misconduct is an infrequent occurrence.[195]

As a matter of education and training, American prosecutors are not prepared to be impartial adjudicators in the judicial mold. At times, it is not altogether clear that young prosecutors are particularly well prepared for an adversarial role either, given that they "do not have specialized university training and do not undergo lengthy professional training."[196] The quantity and quality of job training varies by office, but it still tends to be "rudimentary"[197] when compared to the concerted, multiyear approaches taken in Europe. The Ameri-

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190. *See* Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010 (2005).

191. *See, e.g.*, ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 85 (2001) (noting that prosecutors often "decide the fates of defendants rapidly and intuitively, without obligatory coordinating guidelines and without any institutionalized requirement to explain and compare their decisions in a reviewable manner"); Johnson, *supra* note 184, at 268 (noting that in "large American prosecution offices, one usually finds an office manual or handbook of some sort, but 'in most instances it is difficult to say that these materials set forth prosecutorial policy'").

192. Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1389 (2009); *see also* DAVID BURNHAM, ABOVE THE LAW: SECRET DEALS, POLITICAL FIXES, AND OTHER MISADVENTURES OF THE U.S. DEPARTMENT OF JUSTICE 46 (1996) ("Many of the broad policy determinations and specific determinations of the Justice Department . . . are permeated with profound contradictions and politics in a way that is only barely understood by the public.").

193. *See* United States v. Caceres, 440 U.S. 741, 743-44, 749-55 (1979) (violation of internal agency regulations is nonlitigable in criminal cases); Ellen S. Podgor, *Prosecution Guidelines in the United States*, *in* THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE, *supra* note 83, at 9, 16-18.

194. *See* Podgor, *supra* note 193, at 18-19; Ellen S. Podgor, *Department of Justice Guidelines: Balancing "Discretionary Justice,"* 13 CORNELL J. L. & PUB. POL'Y 167, 170-75, 185-89 (2004); Michael S. Ross, *Thinking Outside the Box: How the Enforcement of Ethical Rules Can Minimize the Dangers of Prosecutorial Leniency and Immunity Deals*, 23 CARDOZO L. REV. 875, 890 (2002).

195. *See, e.g.*, Luna & Wade, *supra* note 73, at 1419-20 n.22.

196. Michael Tonry, *Prosecutors and Politics in Comparative Perspective*, 41 CRIME & JUST. 1, 17 (2012).

197. Frase, *Comparative Criminal Justice*, *supra* note 108, at 562-63.

can law school remains the principal source of preparation for future prosecutors, who may receive a clinical experience in addition to taking classes that almost inevitably relate to legal adversarialism. In fact, a primary route to becoming a prosecutor is to work as an intern at a district attorney's office during law school or immediately after graduation.[198] Training may involve an instruction program of a few days, for instance, or simply shadowing an experienced prosecutor for a short period of time.[199] "We have little real notion of what mix of backgrounds, credentials, advancement patterns, skills, and temperaments works well to produce effective prosecutors under the traditional adversarial model," Judge Lynch noted, "and still less whether the same blend functions as well where the prosecutor increasingly serves a quasi-judicial role."[200]

All told, prosecutors may rule American criminal justice, but their kingdom is hardly utopian, let alone Platonic. While the European prosecutor works within an ethos of truth-seeking, the American prosecutor is an active participant in an adversarial process, where, in the U.S. sports tradition,[201] winning isn't everything—it's the only (or at least primary) thing. And in contrast to the extensive, judicially oriented preparation in Europe, the education and training of prospective prosecutors in the United States hardly seems like the one imagined for Plato's philosopher kings.[202]

C. *Platonic Lies and Possible Reforms*

Interestingly, however, both American prosecutors and many of their European colleagues participate in a "noble lie" of the kind forwarded by Plato, "one of those lies that come into being in case of need . . . to persuade, in the best case, even the rulers, but if not them, the rest of the city."[203] In the *Republic*, a false tale is spun to convince the people to accept their position in society and to harden their ties to the city. A type of lie also helps maintain the modern prosecutor's position and belief in the traditional system of justice. In the United States, devotees to the adversarial creed often cannot even admit that prosecutors adjudicate individual cases and make law over the run of all cases. "Because American lawyers have a large investment in the myth of the adversarial system," Judge Lynch argued, "it is hard for us even to see this

198. *See, e.g.*, Marc L. Miller & Samantha Caplinger, *Prosecution in Arizona: Practical Problems, Prosecutorial Accountability, and Local Solutions*, 44 CRIME & JUST. 265, 272 (2012); Wright, *supra* note 63, at 253-54.

199. *See, e.g.*, Wright, *supra* note 63, at 230, 254.

200. Lynch, *Administrative System*, *supra* note 93, at 2150.

201. *See, e.g.*, Steven J. Overman, *"Winning Isn't Everything. It's the Only Thing": The Origin, Attributions and Influence of a Famous Football Quote*, 2 FOOTBALL STUD. 77 (1999).

202. *Cf.* PLATO, *supra* note 10, bk. VI, at 491b-493c.

203. PLATO, *supra* note 10, bk. III, at 414b-c.

administrative system of punishment, let alone to approve of it."[204] To acknowledge their powers would threaten a system premised on prosecutors being executives and law enforcers, not adjudicators of particular cases or lawmakers through aggregate decisionmaking.

Some European systems have likewise preserved orthodox interpretations of the legality principle only by denying the existence of prosecutorial power. Discretion has a very bad name in some continental European nations, implying negative concepts such as arbitrariness, abuse of power, and inequality; and prosecutorial adjudication is a challenge to any procedural system strictly adhering to the doctrine of mandatory prosecution and court adjudication of cases. Even if it is a myth, however, mandatory prosecution might be seen as a necessary fiction in some countries in order to maintain prosecutorial independence from the political process and to protect prosecutors from charges of arbitrary decisionmaking. As a result, some European scholars, criminal justice actors, and entire legal systems have continued to deny or downplay discretion, even if the practice on the ground is to the contrary.

But the myths that sustain the prosecutor kings of the United States and Europe are dramatically different from the noble lie of Plato's philosopher kings. While the people of Kallipolis are led to believe that the guardian class must rule, criminal justice systems on both sides of the Atlantic deny that the prosecutor does in fact rule. Prosecutors thus reign over their respective systems without acknowledging their sovereignty.

There is every reason to dislike Plato's concept of the noble lie in general and to reject the *Republic*'s example as political propaganda entrenching the status quo and buttressing a caste system. Indeed, one is left to wonder how serious Plato is about philosopher kings being lovers of truth when they are parties to such a cynical myth. Of relevance here, however, the *Republic* did not claim that the guardians' power and responsibility should be hidden; besides, it is not clear how people would accept the reign of the philosopher king who does not himself recognize his own power. The same may well be true about the prosecutors in the United States and Europe. As Thomas Weigend has argued, "The myth of prosecutorial objectivity in the inquisitorial system, as well as the myth of the prosecutor's role as just one party among others in the adversarial system, tends to camouflage the prosecutor's true status as a chief decisionmaker, thus shielding him from personal responsibility."[205]

Professor Weigend opined that it was important "to recognize the prosecutor as what he has become—a powerful officer equal to the judge."[206] Certainly, being candid about the ruler's power is not inconsistent with the Platonic model; it might even be essential to the public's acceptance of such power and

204. Lynch, *Administrative System*, *supra* note 93, at 2135.

205. Weigend, *supra* note 131, at 389; *see also* Michele Caianiello, *The Italian Public Prosecutor: An Inquisitorial Figure in Adversarial Proceedings?*, *in* THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE, *supra* note 83, at 250, 256.

206. Weigend, *supra* note 131, at 391.

perhaps obligatory for leaders who supposedly love the truth. Regardless, transparency and truthfulness comport with modern principles of liberal governance. All decent criminal processes are concerned about honesty and openness. Adversarial pressures and excesses aside, the pursuit of truth presents a primary, commonly understood goal of the American trial process.[207] Truth-seeking appears to be a cross-cultural criterion of legitimacy for a legal system, to the point that justice is considered largely unachievable without a commitment to the truth.[208] In addition to being a well-established norm of American public law, transparency is also a background assumption of representative democracy. Open government is widely regarded as a necessary condition to effectively monitor and assess official actions, and it provides an important basis for trust between citizen and state.[209] Exceptions exist, but they prove the rule rather than defy it.[210]

Beyond some sort of public recognition of the full extent of prosecutorial power, it has been suggested that the prosecutor's adjudicative role should be formalized in one way or another. Given prosecutors' "far-reaching responsibility for policy and sentencing decisions, it might be appropriate to grant them equal status with judges," Professor Weigend proposed.[211] This would not be unfathomable in continental European systems, many of which already consider prosecutors to be part of the judiciary. As Weigend noted, the more difficult question is whether prosecutors qua judges should also be personally independent in the sense of lacking supervision over their decisionmaking.[212]

In the United States, the idea of prosecutors being made formal members of the judiciary is a nonstarter under the constitutional doctrine of separation of powers. Rather than restructuring the status of prosecutors, however, it is conceivable that American prosecutors might adopt the accouterments of modern administrative law. Richard Bierschbach and Stephanos Bibas have highlighted that both administrative agencies and criminal law enforcement "operate under massive statutory delegations of power" and "make thousands of value-laden decisions every day," which "greatly affect regulated parties, communities, and the general public."[213] But while discretion in civil and criminal justice raise similar issues of accountability and legitimacy, "criminal law has not kept pace."[214]

Different reform options might be laid along various continua; here, imagine on one end "softer" solutions that are less intrusive upon a system's opera-

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207. *See, e.g.*, 1 LAFAVE ET AL., *supra* note 80, § 1.5(b).

208. *See, e.g.*, Weigend, *supra* note 156, at 172. This is as it should be. *See, e.g.*, Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107 (2000).

209. *See, e.g.*, Luna, *supra* note 208, at 1154-55.

210. *See id.* at 1165.

211. Weigend, *supra* note 131, at 390.

212. *See id.* at 390-91.

213. Richard A. Bierschbach & Stephanos Bibas, *Notice-and-Comment Sentencing*, 97 MINN. L. REV. 1, 20 (2012).

214. *Id.*

tions and less resource intensive, running to "harder," more intrusive and expensive options on the other end. Toward the softer side, Professors Miller and Wright have advocated a variety of techniques to increase transparency in criminal prosecution, such as reliance on data management systems to deal with burgeoning caseloads and the use of websites to provide information to the public.[215] For instance, Miller and Wright identified the pursuit of functional transparency in "an emerging experiment among American prosecutors who use websites and annual reports to describe for constituents and other observers the patterns of decisions in their offices."[216] Scholarship of a similar ilk has been penned by Rachel Barkow, Professors Bibas and Bierschbach, and, some years ago, the present author.[217] Of course, the changes would only provide an opportunity for increased accountability, not its guarantee.

The same can be said of efforts aimed at affecting the perspective of American prosecutors. A few years ago, Marianne Wade and I suggested reform efforts could focus on law schools as the cradle of prosecutors and, for that matter, all lawyers and judges.[218] Among other things, we mentioned that a more dynamic skills training and clinical education, involving both future prosecutors and future defense attorneys, could help challenge the excesses of American adversarialism. A well-crafted program might trigger a sense of empathy and reciprocity, perhaps coupled with an educated conscience panged by principles of fairness. One can envision sophisticated combinations of externships and clinic-related coursework, permitting students to discuss their views and experiences with the "other side,"[219] complemented by role-reversal exercises in a classroom setting, all with the goal of establishing a basis for mutual understanding and respect. Students could also be encouraged to act as "savvy participant-observers"[220] in their prosecution placements, using the opportunity

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215. *See* Marc L. Miller & Ronald F. Wright, *Reporting for Duty: The Universal Prosecutorial Accountability Puzzle and an Experimental Transparency Alternative*, *in* THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE, *supra* note 83, at 392 [hereinafter Miller & Wright, *Reporting for Duty*]; Ronald F. Wright & Marc L. Miller, *The Worldwide Accountability Deficit for Prosecutors*, 67 WASH. & LEE L. REV. 1587 (2010); *see also* Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 STAN. L. REV. 1409 (2003); Miller & Wright, *The Black Box*, *supra* note 79.

216. Miller & Wright, *Reporting for Duty*, *supra* note 215, at 392.

217. *See* Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869 (2009); Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959 (2009); Bierschbach & Bibas, *supra* note 213; Erik Luna, *Principled Enforcement of Penal Codes*, 4 BUFF. CRIM. L. REV. 515 (2000); Luna, *supra* note 208.

218. *See* Luna & Wade, *supra* note 73, at 1513-32.

219. As a matter of generally accepted principles, law school clinics tend to address ethics concerns upfront, sometimes by institutional arrangements. One practice, for instance, is to obtain a local prosecutor to serve as a co-teacher and assurance against conflicts of interests in discussing pending cases or internal office issues, reading internship-related classwork, and assigning grades.

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

to study the criminal justice system and the prosecutor's role within it, and comparing how different prosecutors exercise their discretion.

Another pedagogical move would incorporate comparative or transnational law. Although "globalization" has become a buzzword in legal education, the inclusion of transnational law within the law school curriculum makes a great deal of sense from a pedagogical perspective.[221] The hope is that a transnational understanding could over time help moderate the distinctly American form of adversarialism and its impact on the prosecutorial function. An exploration of European prosecutors—their quasi-judicial role perception and obligation to impartially pursue the truth, seeking just outcomes rather than certain convictions and tough sentences—might be instructive for American prosecutors-to-be.[222] If nothing else, those who study criminal justice abroad profit from a new perspective of their home criminal justice system and the potential reasons to modify or sustain the current approach.[223] After all, it is hard to know the charms and warts of one's own system without considering the alternatives.[224]

Other suggestions take more direct aim at the purported causes of prosecutorial dysfunction. One option, proposed separately by Tracey Meares and Stephanos Bibas,[225] takes up prosecutorial self-regulation by rewarding prosecutors based on performance indicators other than convictions and sentences. Another proposal by Professors Wright and Miller involved implementing office policies to encourage thorough, upfront case screening over plea bargaining later in the process.[226] Still other alternatives drew upon the civil law tradition. For example, Michael Tonry has argued for the professionalization of prosecutors as career civil servants, specially trained and appointed based on merit, along the lines of the European model.

> Career officials are more likely than politically selected officials to decide individual cases on the merits of their distinctive circumstances and to consider policy proposals from long-term perspectives of whether they will improve the quality of justice or the effectiveness of administration. Commitment to abstract principles of justice is part of the professionalism and professional self-

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221. Legal education in Europe went through a similar transformation. *See generally Special Double Issue: The Promises and Perils of Transnationalizing Legal Education*, 10 GER. L.J. 629 (2009).

222. For articles discussing the incorporation of transnational materials into criminal justice classes, see *Transnational Legal Education*, 56 J. LEGAL EDUC. 430 (2006).

223. *See, e.g.*, Stephen C. Thaman, *A Comparative Approach to Teaching Criminal Procedure and its Application to the Post-Investigative Stage*, 56 J. LEGAL EDUC. 459, 463 (2006).

224. *See, e.g.*, Andrew Huxley, *Golden Yoke, Silken Text*, 106 YALE L.J. 1885, 1896-99 (1997) (book review); Giovanni Sartori, *Comparing and Miscomparing*, 3 J. THEORETICAL POL. 243, 245 (1991).

225. *See* Stephanos Bibas, *Rewarding Prosecutors for Performance*, 6 OHIO ST. J. CRIM. L. 441 (2009); Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851 (1995).

226. *See* Wright & Miller, *The Tradeoff*, *supra* note 79.

> esteem of career officials, and buffers individual decisions and policy choices from raw emotions and officials' self-interest.[227]

Likewise, George Thomas forwarded the idea of "criminal law specialists" who both prosecute and defend criminal defendants, roughly akin to the British system prior to the introduction of the Crown Prosecution Service. Unlike the ethos of prosecutorial domination and defense dismay that currently exists in the United States, the pool of specialists would face the exact same pressures, possibilities, and pitfalls, thereby providing a basis for mutual understanding and respect.

> The district attorney and her assistants would draw from the pool to prosecute, and the chief public defender and his assistants would draw from the pool to defend. We have instantly equalized case loads for criminal law specialists. We have also reduced the built-in stresses and strains of seeing the world from only one perspective. Specialists will no longer view defense requests for exculpatory evidence as a mere annoyance and, instead, will be much more willing to cooperate with defense discovery.[228]

Alternatively, reform efforts might try to formalize the dispositive process of most criminal cases: plea bargaining. Along these lines, Judge Lynch mentioned an approach that would concede the administrative law-nature of criminal justice and then demand that the system meet administrative-law standards.

> If prosecutors are deciding what cases to bring and not bring, let them declare the standards by which they make those decisions. If prosecutors are going to give specific content to vague prohibitions, let them write regulations identifying in advance the conduct they intend to attack under the statutes. If prosecutors are really the all-but-final arbiters of guilt, let them proceed with formal hearings, and let the system of internal appeals to supervisory authority be regularized and defined. And of course, let us have judicial review of prosecutorial decisions, not (or not only) by a risky and arbitrary appeal to a de novo jury trial, but by regular review of the reasonableness of plea offers, at the request both of defendants and of victims or other public advocates.[229]

Similarly, Professor Thaman's assessment of consensual procedures led him to ponder a general penal-order process for dealing with all types of cases and crimes.[230] After a sort of mini-trial, where the defendant has the opportunity to present and contest evidence and to make arguments for acquittal and mitigation, the prosecutor would propose a judgment describing the relevant behaviors, their qualification as a crime, and the sentence that should be imposed. "Here, the prosecutor becomes the 'lower court of justice' in all cases, not just the misdemeanors and infractions to which penal orders are usually limited," Thaman suggested.[231] The defendant could reject the prosecutor's proposal and

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227. MICHAEL TONRY, THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE 207-08 (2004).

228. George C. Thomas III, *When Lawyers Fail Innocent Defendants: Exorcising the Ghosts That Haunt the Criminal Justice Systems*, 2008 UTAH L. REV. 25, 45-46.

229. Lynch, *Administrative System*, *supra* note 93, at 2143.

230. *See* Thaman, *The Penal Order*, *supra* note 129, at 173-75.

231. *Id*. at 175.

appeal to the "higher" (ordinary) courts for a traditional trial, with the additional procedural guarantees helping to diminish some of the existing concerns about prosecutorial adjudication. This image is not unlike Judge Lynch's sketch. But the question remains whether the formalization of the practice with more trappings of due process would actually ameliorate the problems of allegedly consensual case resolutions on either side of the Atlantic.[232]

IV. THE OPEN SOCIETY AND ITS PROSECUTORS

Ultimately, the American and European prosecutors stand as kings of their respective criminal justice systems. Like Learned Hand, I find it "most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not."[233] If I must pick, I'll take the prosecutor kings whose mindset is most oriented toward the truth rather than victory. But in all honesty, I would rather there be no unchecked authority—whether exercised by old-school philosophers or modern-day lawyers—and I suspect this intuition is shared by others concerned about the concentration and distribution of power in criminal justice.

A. *The Anti-Totalitarian Critique*

The *Republic* is not only one of the most famous books in the literary canon of Western civilization, it has also inspired more commentary than virtually any other classical work. The criticism can be withering, however, at times leaving one to wonder how Plato's tract had such an impact among philosophers and dilettantes alike. His account of human nature seems far-fetched to many, being both too optimistic about the wisdom and motivation of the ruling class, and too pessimistic about the driving forces behind the behavior of ordinary people. According to Plato (in the voice of Socrates), the average citizen must rely upon the elite to make important decisions because "he isn't capable of ruling the beasts in himself, but only of serving them, and is capable of learning only the things that flatter them."[234]

This assumption is belied by, among other things, the asceticism associated with members and descendants of the modern working class and the successful

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232. Judge Lynch concludes that it would not: "Such a formal change would both underprotect defendants and overregulate prosecutors, depriving us of both the moral force of the formal due process model and the flexibility of the de facto administrative process that exists in tension with it." Lynch, *Administrative System*, *supra* note 93, at 2144. Likewise, Professor Thaman noted that the 2004 meeting of the German Lawyer's Association pondered the use of a penal-order-type procedure in all criminal cases. The idea provoked heated debate, and any "final decision will probably have to await the promulgation of a new German Code of Criminal Procedure to replace the current one, which dates from 1877." Thaman, *The Penal Order*, *supra* note 129, at 175.

233. HAND, *supra* note 56, at 73.

234. PLATO, *supra* note 10, bk. IX, at 590c.

leaders who rose from their ranks.[235] The unduly cynical view of the commoner is matched by an unduly rosy picture of philosophers as necessarily wise, and the ruling class as more judicious and morally upstanding than the hoi polloi. "A fact notorious among philosophers is that loving the truth is compatible with being wrong about almost anything," one classicist reiterated.[236] In his critique of Platonic theory, philosopher Karl Popper expressed similar doubts about the purported wisdom of society's governors: "I am inclined to think that rulers have rarely been above the average, either morally or intellectually, and often below it."[237] More generally, Plato's theory has no obvious connection to traditional conceptions of justice, which often involve rights and duties in relation to others.

As noted earlier, Plato suggests that an entity, whether it is an individual psyche or an entire city, will act justly so long as its parts perform their assigned tasks. What he is really prescribing, however, is some sort of psychological wellbeing for the individual and the promise of orderliness in a polity, neither of which inevitably produces just actions. "Intelligence, courage, and self-control are . . . *prima facie* compatible with a variety of vulgar injustices and evil-doing," one twentieth-century scholar wrote regarding the disconnect between balance and justice in the *Republic*. "[T]he most that can be said on behalf of Plato's argument is that crimes and evils could not be done by a Platonically just man in a foolish, unintelligent, cowardly, or uncontrolled way."[238] The same can be said of a polity, of course, as well-organized societies can be extraordinarily unjust (think twentieth-century fascist Europe). The techniques espoused in the *Republic* were[239] and still are distasteful to most people (e.g., familial and sexual communalism),[240] and at times its proposals appall the advocates of modern liberalism (e.g., eugenics and political censorship).[241]

Experience shows that there are no assurances that a ruler will be wise and just. As a philosophical matter, "one of the strongest objections to the possibility of Plato's Kallipolis is that the wisdom required of its rulers is inhumanly

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235. Abraham Lincoln comes to mind as the great American model. Modern presidents have also come from modest backgrounds, including Dwight Eisenhower, Richard Nixon, Jimmy Carter, Ronald Reagan, Bill Clinton, and Barack Obama.

236. Donald R. Morrison, *The Utopian Character of Plato's Ideal City*, *in* CAMBRIDGE COMPANION TO PLATO'S REPUBLIC, *supra* note 7, at 232, 238.

237. 1 K.R. POPPER, THE OPEN SOCIETY AND ITS ENEMIES 108 (1945).

238. David Sachs, *A Fallacy in Plato's Republic*, 72 PHIL. REV. 141, 154-55 (1963).

239. Socrates admits that his proposals were unconventional and would "drown me in laughter and ill repute." PLATO, *supra* note 10, bk. V, at 473c. *See also* ARISTOTLE, POLITICS bk. 2.1-.5 (Benjamin Jowett trans., 1946) (c. 350 B.C.E.) (critiquing Plato's theories in the *Republic*), *available at* http://classics.mit.edu/Aristotle/politics.html, *archived at* http://perma.cc/B9NF-3YEB; PLATO, *supra* note 10, bk. V, at 450c, 452a.

240. *See, e.g.*, PLATO, *supra* note 10, bk. IV, at 423e-424a; bk. V, at 449b-d, 457c-d, 462c-464d.

241. *See, e.g.*, *id.* bk. II, at 377b-381e; bk. III, at 410a; bk. IV, at 386b-392d; bk. V, at 458d-460b; bk. X, at 595a-b, 606e-607a.

great."[242] After all, if Plato-qua-Socrates promotes abominable policies—at least by current standards and perhaps those of antiquity—why should we believe that some lesser mortal would necessarily have access to the truth and be devoid of selfish interests so as to rule as a just philosopher king? Plato's most famous student recognized the dangers in the *Republic*'s political theory, including the concentration of power in one class "where the same persons always rule."[243] Instead, Aristotle advocated as the best type of state one that is bound by rules and not by rulers, and where law is deemed superior to the dictates of any official.[244] At a level of generalization, the rule of law means freedom from arbitrary and tyrannical rule through restraints on state power, where legitimate forms of government work "by fixed and established laws."[245] From its founding, the United States has endorsed this understanding of the rule of law.[246]

Historically, despotism was government in which a single person directs everything by his own will.[247] According to Popper, Plato's writings offered a roadmap for despotic regimes, as well as providing the theoretical origins of a "closed society," which seeks to arrest change and any challenges to the status quo of class division and related customs. In a closed society, "institutions, including its castes, are sacrosanct," Popper wrote, and "[a]t least to its ruling members, slavery, caste, and class rule are 'natural' in the sense of being unquestionable."[248] Moreover, "[t]he State is the Law, the moral law as well as the juridical law."[249] Success through the empowerment and expansion of the state overrules all else. "[R]ight is what serves the might of the state," which is only judged by history. "This is the theory of Plato," Popper said, "it is the theory of modern totalitarianism."[250] Certainly, the *Republic* contains chilling

242. Morrison, *supra* note 236, at 241; *see also* 1 POPPER, *supra* note 237, at 106.

243. ARISTOTLE, *supra* note 239, bk. 2.5.

244. *See id*. bk. 3.16 ("[R]ule of the law . . . is preferable to that of any individual."); ARISTOTLE, THE NICOMACHEAN ETHICS bk. 5.6 (W.D. Ross ed., 1998) (c. 350 B.C.E.) ("[J]ustice exists only between men whose mutual relations are governed by law . . . . This is why we do not allow a man to rule, but rational principle, because a man behaves thus in his own interests and becomes a tyrant."). Though to be clear, much of Aristotelian theory is incompatible with modern conceptions of equality and liberalism more generally.

245. MONTESQUIEU, THE SPIRIT OF LAWS, bk. 2, ch. 1 (Thomas Nugent trans., 1914) (1748), *available at* http://www.constitution.org/cm/sol.txt, *archived at* http://perma.cc/VEK6-NUSA.

246. *See, e.g*., Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men.").

247. *See, e.g*., MONTESQUIEU, *supra* note 245, bk. 2, ch. 1; THE FEDERALIST NO. 47, at 249 (Madison) (Gideon ed., George W. Carey & James McClellan eds., 2001) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.").

248. 1 POPPER, *supra* note 237, at 153-54.

249. 2 *id*. at 62.

250. *Id*.

rhetoric for believers of individualism.[251] Among other things, the notion that there is no "higher, or better, or more *scientific* principle"[252] than unchallenged collective and coordinated action must have chafed Popper, whose life's work involved the philosophical study of science and whose legacy includes falsifiability as a tenet of scientific inquiry.[253]

In writing on political theory and forms of government, Popper couldn't help but be inspired by the events transpiring in Europe. Born in Vienna, he emigrated for an academic post in New Zealand in 1937, when fascism had taken hold of powerful governments and was spilling over by force and doctrine to other European nations. Plato's vision of Kallipolis, and of "law" in its more brutal manifestations, might offer cover for such unjustifiable regimes. Popper saw in the *Republic* an intellectual blueprint for authoritarianism, or at least a primary reference for post-Enlightenment scholars such as Marx. Plato's theory of justice was "a conscious attempt to get the better of the equalitarian, individualistic, and protectionist tendencies of his time, and to re-establish the claims of tribalism by developing a totalitarian moral theory."[254] The class division and prerogatives were needed for state stability and thereby constituted the quintessence of Platonic justice.

For Popper, justice instrumentalized as state stability was "only too similar to the modern totalitarian definition: right is whatever is useful to the might of my nation."[255] Plato insisted that happiness could only be achieved by "justice," understood as "keeping one's place."

> The ruler must find happiness in ruling, the warrior in warring; and, we may infer, the slave in slaving. Apart from that, Plato says frequently that what he is aiming at is neither the happiness of individuals nor that of any particular class in the state, but only the happiness of the whole, and this . . . is nothing but the outcome of that rule of justice which [is] totalitarian in character.[256]

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251. In making this argument, Popper scrutinized other works by Plato, including the *Laws*, from which Popper drew the following quote:

> The greatest principle is that nobody, whether male or female, should ever be without a leader. Nor should the mind of anybody be habituated to letting him do anything at all on his own initiative, neither out of zeal, nor even playfully. But in war as well as in the midst of peace—to his leader he shall direct his eye, and follow him faithfully. And even in the smallest matters he should stand under leadership. . . . In a word, he should teach his soul, by long habit, never to dream of acting independently, and in fact to become utterly incapable of it.

1 *id*. at 90 (quoting PLATO, LAWS bk. XII, at 942a-c). Immediately preceding this quote, however, Plato was speaking of military organization, which adds some ambiguity for interpretation. *See* PLATO, LAWS bk. XII, at 942a (Benjamin Jowett trans., 1892) (c. 360 B.C.E.), *available at* http://classics.mit.edu/Plato/laws.12.xii.html, *archived at* http://perma.cc/79CZ-ZFRP. The hermeneutic problems generalize and multiply by translation. *Cf*. Richard Polt, *Review Article: Recent Translations of the Republic*, 30 TEACHING PHIL. 453 (2007).

252. PLATO, *supra* note 251, bk. XII, at 942c-d (emphasis added).

253. "There is no more to science than its method," said astronomer Hermann Bondi, "and there is no more to its method than Popper has said." BRYAN MAGEE, POPPER 9 (1971).

254. 1 POPPER, *supra* note 237, at 105.

255. *Id*.

256. *Id*. at 149.

In a system where the individual serves the state and not the other way around, "the individual is nothing but a cog" and "ethics is nothing but the study of how to fit him into the whole."[257] From this vantage point, Kallipolis looks less like an idyllic city than home of a leviathan.

When published in 1945, *The Open Society and Its Enemies* was considered provocative, even scandalous by some classicists, and the ensuing scholarship challenged many of Popper's interpretations and resulting claims.[258] One overarching counter-theory argues that the *Republic* cannot be interpreted literally as political program. Socrates's articulation of a just city was so extreme and unattractive that it could not possibly be taken seriously. Some contend that this was Plato's precise purpose: the absurdity of such a polity would lead us to recognize the dystopian danger of political idealism.[259] "The biggest joke of all . . . is the proposal for the philosophical ruler," one scholar claimed. "Socrates realizes that this proposal is likely to drown him in a wave of laughter."[260] Kallipolis was utopian, not in the sense of ideal, but as unrealizable.[261]

The text indicates otherwise at times,[262] but regardless of interpretation and authorial intent, the *Republic*'s political message has been taken seriously as an argument against pure democracy and in favor of a style of aristocratic rule. Some of Plato's pupils went on to establish tyrannical regimes, though his influence can also be traced to far more recent forms of authoritarianism.[263] Popper was of the conviction that Plato's vestiges included a lingering confusion in political philosophy by formulating the problem of politics as "'Who should rule?' or 'Whose will should be supreme?'"[264] If these are the questions, then "it is hard to avoid some such reply as 'the best' or 'the wisest' or 'the born ruler' or 'he who masters the art of ruling.'"[265]

This is the wrong question from the perspective of an institutional designer for an "open society," one that "sets free the critical powers of man" and ac-

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257. *Id*. at 94.

258. *See generally* PLATO, POPPER, AND POLITICS: SOME CONTRIBUTIONS TO A MODERN CONTROVERSY (Renford Bambrough ed., 1967).

259. *See* Leo Strauss, *On Plato's Republic*, *in* THE CITY AND MAN 50 (1964); *see also* Bloom, *supra* note 42, at 409-11.

260. Arlene Saxonhouse, *Comedy in Callipolis: Animal Imagery in the Republic*, 72 AM. POL. SCI. REV. 881, 889-90 (1978).

261. *See supra* note 9 and accompanying text.

262. Socrates repeatedly suggested that his just city could exist. *See, e.g.*, PLATO, *supra* note 10, bk. V, at 450c-d, 456b-c, 473c; bk. VI, at 499b-d; bk. VII, at 540d-e; *see also* George Klosko, *The Straussian Interpretation of Plato's Republic*, 7 HIST. OF POL. THOUGHT 275 (1986).

263. *See, e.g.*, 1 POPPER, *supra* note 237, at 90-91, 120, 149, 167-68; 2 *id*. at 29. "We should not mince words: in so far as Plato has a legacy in politics, it includes theocracy or rule by priests, militarism, nationalism, hierarchy, illiberalism, totalitarianism, and the complete disdain of the economic structures of society, born in his case of privileged slave-ownership." BLACKBURN, *supra* note 3, at 15-16.

264. 1 POPPER, *supra* note 237, at 106.

265. *Id*.; *see also id*. at 105.

cepts class struggle and competition for status among society's members.[266] The designer would ask questions such as "*How much* power is wielded?" and "*How* is the power wielded?" and, ultimately, "*How can we so organize political institutions that bad or incompetent rulers can be prevented from doing too much damage*?"[267] For Popper, a major part of the answer implicated democratic processes, which provide nonviolent, regularized means to replace poor leaders.[268] He did not favor democracy for its vindication of political rights, but instead because it was the least worst way to forestall tyranny. Popper gave particular emphasis to "institutional control of the rulers by balancing their powers against other powers," describing as "madness" society's reliance on "the faint hope that we shall be successful in obtaining excellent, or even competent rulers."[269]

These arguments ring of *Federalist No. 51*, where James Madison reflected that "[i]f men were angels, no government would be necessary," and "[i]f angels were to govern men, neither external nor internal controls on government would be necessary."[270] In instituting a government "administered by men over men," however, "experience has taught mankind the necessity of auxiliary precautions,"[271] including the arrangement of government offices as checks and balances against one another.

> [T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government.

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266. *Id*. at 1, 153.

267. *Id*. at 107 (emphasis in original); 2 *id*. at 151 (emphasis in original).

268. By contrast, Plato had a very low opinion of democracy. *See* PLATO, *supra* note 10, bk. VIII, at 555c-564a. Some of this was understandable, Plato having witnessed Socrates's demise at the hands of ostensibly democratic institutions. Along these lines, Professor Pettit describes the fallacy of

> associating democracy exclusively with the rule of the collective people: the rule of the people en masse; in a word, people power. If the role of democracy is to empower all and only the common, recognizable interests of people then a very bad way of pursuing that role will be to give over control of anything unconstrained, majority rule. Polybius distinguished between "democratia" and "ocholocratia"—other ancient writers used the terms differently—and it is not fanciful to associate "democratia" in usage with the rule of the people operating under constitutional procedure and "ochlocratia" with the rule of the people when majority feeling or opinion can automatically prevail, in the way that it does in a mob.

Philip Pettit, *Democracy, Electoral and Contestatory*, *in* DESIGNING DEMOCRATIC INSTITUTIONS 139-40 (Ian Shapiro & Stephen Macedo eds., 2000).

269. 1 POPPER, *supra* note 237, at 108; *see also* 2 POPPER at 151.

270. THE FEDERALIST NO. 51, at 267, 269 (James Madison) (Gideon ed., George W. Carey & James McClellan eds., 2001).

271. *Id*. at 268-69.

> But what is government itself, but the greatest of all reflections on human nature?[272]

The daunting task is to "first enable the government to control the governed; and in the next place oblige it to control itself."[273] The latter had been achieved by "distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other that the private interest of every individual may be a sentinel over the public rights."[274] Earlier, in *Federalist No. 47*, Madison had advocated a balanced government with some sharing of powers among the legislative, executive, and judicial branches.[275] This did not violate the principle of separated powers, however, as the overlap was part of a scheme of checks and balances. By contrast,

> where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted. This would have been the case . . . if the king, who is the sole executive magistrate, had possessed also the complete legislative power, or the supreme administration of justice; or if the entire legislative body had possessed the supreme judiciary, or the supreme executive authority.[276]

This description bears some resemblance to the effective power of American prosecutors today. As a matter of U.S. constitutional law, the separation of powers doctrine means that "the legislature cannot exercise either executive or judicial power; the executive cannot exercise either legislative or judicial power; the judiciary cannot exercise either executive or legislative power."[277] What such dogmatism means in particular situations is not always obvious, but it can be said the doctrine is violated when one branch assumes a role constitutionally assigned to another branch, or when it interferes with the performance of another branch's duties under the Constitution.[278] Although some decisions are more consistent with a flexible approach,[279] the Supreme Court has declared that the separation of powers is a structural safeguard that establishes prophylactically "high walls and clear distinctions."[280] Most of all, the separation of powers is an anti-tyranny device intended to protect the individual, who may

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272. *Id.* at 269.

273. *Id.*

274. *Id.*

275. *See* THE FEDERALIST NO. 47, at 249 (Madison) (Gideon ed., George W. Carey & James McClellan eds., 2001).

276. *Id.* at 251.

277. Springer v. Gov't of the Phil. Islands, 277 U.S. 189, 201-02 (1928); *see also* Hampton & Co. v. United States, 276 U. S. 394, 406 (1928).

278. *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 691 (1988); INS v. Chada, 462 U.S. 919, 963 (1983) (Powell, J., concurring); Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 443 (1977); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587-89 (1952).

279. *See, e.g.*, Mistretta v. United States, 488 U.S. 361 (1989).

280. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 239 (1995).

object when "the constitutional structure of our Government that protects individual liberty is compromised."[281]

B. *Unchecked Power in Criminal Justice*

Separation of powers and checks and balances are like the rule of law, as Michael Oakshott described it, which "bakes no bread" and "is unable to distribute loaves or fishes (it has none)."[282] The doctrines do no substantive or social justice by themselves. But the rule of law "remains the most civilized and least burdensome conception of the state yet to be devised."[283] Likewise, separated powers and institutional checks can prompt rival structures to evaluate and impact the scope of another entity's decisionmaking. In theory, for instance, the legislative and judicial branches might serve as a counterweight to the executive's prosecutorial powers. In particular, lawmakers and judges might narrow the scope of the criminal justice system and seek to regulate the playing field in which prosecutorial adjudication takes place.

Maybe legislation could limit the grounds for coercive enforcement by enacting criminal statutes in only the most compelling circumstances and by repealing ineffective or counterproductive laws. Statutory drafters might also be very specific in the coverage of a particular provision, making clear the situations in which the law applies. In turn, the judicial branch might strike down or narrowly interpret vague criminal statutes and refuse to allow the application of penal provisions suffering from desuetude.[284] Judicial review might freely entertain claims of prosecutorial overreaching in the plea bargaining process, and strike down punishments after trial that are disproportionate given the crime and the criminal. As a result, the Dworkinian doughnut[285]—the residual area of prosecutorial discretion and thus the ring in which prosecutorial adjudication occurs—could be relatively small.

But given the population and modern scope of criminal law in the United States, and thus the number of offenses committed—which are dealt with by whatever resources are made available by taxpayers and their legislatures—full enforcement is considered untenable in the real world.[286] Lawmakers and judges have done little to constrain this power and instead have supplemented or acquiesced to prosecutorial authority. The phenomenon of "overcriminalization" can be seen in the continual expansion of the criminal

281. Bond v. United States, 131 S. Ct. 2355, 2365 (2011).

282. Michael Oakeshott, *The Rule of Law*, *in* ON HISTORY AND OTHER ESSAYS 119, 164 (1983).

283. *Id*.

284. *See, e.g.*, William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 34-38 (1996).

285. *See supra* note 43 and accompanying text.

286. *See, e.g.*, Luna, *supra* note 217, at 535.

justice system,[287] some of which involves the creation of novel crimes without moral or empirical justification and regardless of statutory redundancy or jurisdictional limitations. But the real power behind prosecutorial adjudication is harsh punishments and heightened enforcement, sometimes pursuant to broad constructions of culpability principles. A familiar account of U.S. criminal justice, consonant with various sociological theories and the measured impact of sensational crime stories,[288] describes new offenses and tougher sentences as political means to placate constituents and prepare the ground for reelection campaigns.[289] As a result, some legislatures have become "offense factories."[290]

Nowadays, it can be said that everyone is a (potential) criminal, a point which has been raised for years by American jurists and scholars.[291] "[M]ost people think of criminals as bad people, who deserve punishment, while not realizing that they are criminals themselves."[292] Accordingly, prosecutorial decisionmaking takes place within a Dworkinian doughnut encircling us all. In wielding their discretion, prosecutors not only enforce the criminal code in the traditional sense and adjudicate cases in a nontraditional sense, but they also

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287. *See, e.g.*, Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703 (2005).

288. *See, e.g.*, TONRY, *supra* note 227, ch. 4; Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397 (2006).

289. Professor Kadish nicely summed up the typical cycle of "creeping and foolish" overcriminalization as follows:

> Some dramatic crimes or series of crimes are given conspicuous media coverage, producing what is perceived, and often is, widespread public anxiety. Seeking to make political hay, some legislator proposes a new law to make this or that a major felony or to raise the penalty or otherwise tighten the screws. Since other legislators know well that no one can lose voter popularity for seeming to be tough on crime, the legislation sails through in a breeze. That the chances of the legislation working to reduce crime are exceedingly low, and in some cases the chances of it doing harm are very high, scarcely seems to be a relevant issue.

Sanford H. Kadish, *Comment: The Folly of Overfederalization*, 46 HASTINGS L.J. 1247, 1248-49 (1994).

290. Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 HASTINGS L.J. 633, 634 (2005).

291. *See, e.g.*, Jackson, *supra* note 60, at 5 ("With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone."); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 511 (2001) (predicting that, absent major changes, "we are likely to come ever closer to a world in which the law on the books makes everyone a felon").

292. Alex Kozinski & Misha Tseytlin, *You're (Probably) a Federal Criminal*, *in* IN THE NAME OF JUSTICE 43, 44 (Timothy Lynch ed., 2009); *see also* GO DIRECTLY TO JAIL: THE CRIMINALIZATION OF ALMOST EVERYTHING (Gene Healy ed., 2004); HARVEY SILVERGLATE, THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT (2011); Harlan Reynolds, *Ham Sandwich Nation: Due Process When Everything Is a Crime*, 113 COLUM. L. REV. SIDEBAR, 102 (2013); Michelle Alexander, *I'm a Criminal and So Are You*, CNN OPINION (May 19, 2010, 10:01 AM), http://www.cnn.com/2010/OPINION/05/18/alexander.who.am.i/, *archived at* http://perma.cc/YFK3-46H4.

create a critical form of public policy that determines the fate of countless individuals yet largely goes unnoticed by the populace.[293] To the extent that discretion exercised over an entire docket produces relatively standardized outcomes, prosecutorial authority begins to look like a form of lawmaking.

Consider, for instance, the treatment of low-level, run-of-the-mill cases in misdemeanor courtrooms. With misdemeanor prosecutors required to handle thousands of cases per year, sheer volume becomes dispositive and efficiency trumps all else.[294] Entire categories of cases may receive routine treatment, such that one can anticipate with a degree of certainty the terms of resolution based on past practices and courthouse norms (i.e., going rates). Prosecutorial discretion here is mostly exercised at a wholesale level. By declining a case, a prosecutor is refusing to apply the penal code to a given suspect; and by plea bargaining, a prosecutor is refusing to apply the most serious crime and the toughest punishment otherwise applicable to a given defendant. If over time these decisions collectively form a discernible pattern—treating some conduct as noncriminal, and treating other conduct as not quite as criminal as it could be—prosecutors can be seen as doing more than adjudicating cases in the style of a judge. They are effectively amending the penal code as a sort of third legislative chamber.[295]

For its part, the American judiciary has done little to check the power of prosecutors. Outside a few topics loosely associated with substantive crimes—for example, freedom of expression, rights related to procreation and sexuality, and the death penalty[296]—the courts have abandoned the field of constitutional criminal law.[297] Absent an affirmative, case-specific showing of invidious discrimination based on race or religion, for instance, courts will not question the prosecution's decision to charge a given person; nor will they balk at the selection of charges from among the applicable statutes, or when charges are subsequently added or dropped.[298] In recent times, the U.S. Supreme Court has

293. *See generally* Erik Luna, *Prosecutorial Decriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 785 (2012).

294. As my colleague J.D. King poignantly notes, a misdemeanor defendant's case "might command the scrutiny of a police officer for a couple of hours, a prosecutor for a couple of minutes, and a judge for a couple of moments." John D. King, *Procedural Justice, Collateral Consequences, and the Adjudication of Misdemeanors in the United States*, *in* THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE, *supra* note 83, at 20, 20-21.

295. Or a second chamber in the unicameral legislative system of Nebraska.

296. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003) (striking down crime involving homosexual sodomy); Texas v. Johnson, 491 U.S. 397 (1989) (striking down crime of flag burning); Roe v. Wade, 410 U.S. 113 (1973) (striking down criminal abortion law); Furman v. Georgia, 408 U.S. 238 (1972) (striking down capital punishment and imposing effective prohibition until Gregg v. Georgia, 428 U.S. 153 (1976)).

297. Even the exceptions have been effectively cabined by subsequent decisions. *Compare* Robinson v. California, 370 U.S. 660 (1962) (unconstitutional to punish status of addiction), *with* Powell v. Texas, 392 U.S. 514 (1968) (constitutional to punish act of being drunk in public).

298. *See, e.g.*, United States v. Armstrong, 517 U.S. 456, 464 (1996); Wade v. United States, 504 U.S. 181, 186-87 (1992); McCleskey v. Kemp, 481 U.S. 279, 292-93, 306-07

found unconstitutionally vague only one statute that did not touch upon areas of special protection (e.g., speech).[299] And over the past three decades, the Court has invalidated only one adult defendant's prison sentence as violating the Eighth Amendment ban on cruel and unusual punishment.[300]

As for plea bargains, a judge must find that a defendant's guilty plea is voluntary and based in fact.[301] But the in-court process tends to be pro forma, the factual review is usually superficial, and, most importantly, a plea is not rendered involuntary by the threat of harsher punishment upon conviction at trial.[302] As a result, judges are highly unlikely to impede plea negotiations and the ensuing agreements.[303] Discretion percolates through the system in other ways as well. Although often understood as positive grants of authority by statute and by administrative or judicial rule, discretion might also include the power to act or not act in a given way, or toward a class of people, or with a particular motivation, in spite of apparent constraints to the contrary. In the absence of meaningful review, an actor can be officially barred from making decisions based on certain criteria—race or ethnicity, for instance—and yet still do so *sub silentio*.[304] But whatever the reason, the courts have not been a significant constraining force on prosecutorial adjudication.

(1987); Wayte v. United States, 470 U.S. 598, 607 (1985); United States v. Batchelder, 442 U.S. 114, 123-24 (1979); Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978); Oyler v. Boles, 368 U.S. 448, 456 (1962).

299. *See* City of Chicago v. Morales, 527 U.S. 41 (1999).

300. *See* Solem v. Helm, 463 U.S. 277 (1983) (striking down nonviolent recidivist's sentence of life imprisonment without the possibility of parole); *see also* Miller v. Alabama, 132 S. Ct. 2455 (2012) (striking down mandatory sentence of life imprisonment without the possibility of parole for juvenile homicide offenders); Graham v. Florida, 560 U.S. 48 (2010) (same for juvenile offenders who did not commit homicide). *But see* Ewing v. California, 538 U.S. 11 (2003); Lockyer v. Andrade, 538 U.S. 63 (2003); Harmelin v. Michigan, 501 U.S. 957 (1991); Rummel v. Estelle, 445 U.S. 263 (1980). It should be noted, however, that Supreme Court decisions on the Sixth Amendment jury trial right have limited judicial fact-finding for purposes of punishment and resulted in the invalidation of key aspects of sentencing guidelines in the federal and state systems. *See, e.g.*, United States v. Booker, 543 U.S. 220 (2005); Blakely v. Washington, 542 U.S. 296 (2004).

301. *See, e.g.*, FED. R. CRIM. P. 11. A court may vacate a plea when the prosecutor fails to abide by the terms of the agreement. *See, e.g.*, Santobello v. New York, 404 U.S. 257, 262-63 (1971).

302. *See, e.g.*, *Bordenkircher*, 434 U.S. 357; TURNER, *supra* note 85, at 41-42.

303. *See, e.g.*, Turner, *supra* note 90, at 199-200, 202-14 (discussing lack of judicial participation in the United States and the problems it produces). A court can accept a guilty plea even though the defendant contests the underlying factual basis. *See* North Carolina v. Alford, 400 U.S. 25 (1970).

304. *See, e.g.*, Whren v. United States, 517 U.S. 806 (1996) (refusing to invalidate a traffic stop as a pretextual investigation); United States v. Armstrong, 517 U.S. 456 (1996) (refusing to order discovery concerning racially disproportionate charging); McCleskey v. Kemp, 481 U.S. 279 (1987) (upholding death penalty despite statistical evidence of racial discrimination). On occasion, the forbidden decisions are not so silent. *See, e.g.*, Calhoun v. United States, 133 S. Ct. 1136 (2013) (Sotomayor, J., statement respecting denial of certiorari) (discussing racially charged witness questioning, which was impermissible but escaped review because the issue was not pressed on appeal). Moreover, even in areas ostensibly subject to review, such as the validity of searches and seizures or the voluntariness of confes-

Furthermore, overcriminalization helps explain the intimidating, outcome-determinate power exercised by American prosecutors. Unforgiving sentencing provisions, such as mandatory minimum sentences and anti-recidivist statutes (e.g., "three strikes and you're out"), can make plea bargaining an entirely one-sided affair where prosecutors are the sole judges of crime and punishment.[305] Although defendants may refuse to plead guilty, most accept a prosecutor's offer in order to dodge more serious charges and harsher punishments at trial, as well as to avoid the resources, time, and uncertainty that the full court process entails. After perfunctory review, courts usually approve these agreements even when it is evident that the defendant was pressured to accept a deal due to the vast discrepancy in consequences under the plea agreement versus those that would ensue if the case had gone to trial and resulted in a conviction. In this way, strategic charging and plea bargaining practices allow the prosecutor to exercise effective adjudicative discretion—not quite a racketeering-style "offer he can't refuse,"[306] but enough pressure that the vast majority of defendants accept the deals.

To this day, there is a genuine question as to the propriety of threatening more serious charges and harsher punishment against those who do not plead guilty.[307] From one perspective, unregulated retaliatory charging imposes a sort of "trial tax"[308] on defendants who exercise their constitutional rights to trial by jury, proof beyond a reasonable doubt, and other trial-related guarantees—the tax being a penalty, usually additional charges and undoubtedly extra prison time, for exercising one's constitutional rights. If there were an "unconstitutional conditions" doctrine, this practice would surely be covered.[309] Plea bar-

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sions, the courts have formulated a number of doctrinal strategies to restrict judicial oversight of executive action. *See, e.g.*, Steiker, *supra* note 49. As procedural limitations are whittled away, the area of executive discretion necessarily expands to include these judicially unobjectionable policing techniques.

305. *See* Langer, *supra* note 75, at 224–26.

306. *See* THE GODFATHER (Paramount Pictures 1972).

307. *See, e.g.*, Darryl K. Brown, *American Prosecutors' Powers and Obligations in the Era of Plea Bargaining*, *in* THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE, *supra* note 83, at 200; William T. Pizzi, *A Perfect Storm: Prosecutorial Discretion in the United States*, *in* THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE, *supra* note 83, at 189.

308. *See, e.g.*, STEVE BOGIRA, COURTROOM 302: A YEAR BEHIND THE SCENES IN AN AMERICAN CRIMINAL COURTHOUSE 38, 83 (2005). Maximum leverage might be obtained through a process known as "charge stacking" (or "count stacking"), whereby the government divides up a single criminal episode into multiple crimes, each carrying its own sentence that can then be stacked, one on top of the other, to produce heavier punishment. *See, e.g.*, Luna, *supra* note 287, at 723-24; Stuntz, *supra* note 291, at 519-20. This practice seems particularly troubling when the government procures further crimes through its own actions, as when law enforcement arranges a number of controlled drug buys in order to achieve a lengthy sentence. *See, e.g.*, United States v. Angelos, 345 F. Supp. 2d 1227, 1253 (D. Utah 2004).

309. As far as I can tell, there is no unconstitutional conditions doctrine for plea bargaining. *See supra* notes 83-87 and 301-303 and accompany text. Whether there should be such a doctrine is a different question. *See generally* Lynn A. Baker, *The Prices of Rights: Toward a Positive Theory of Unconstitutional Conditions*, 75 CORNELL L. REV. 1185 (1990);

gaining also generates concerns of seemingly unjustifiable disparity, with offenders of similar culpability receiving dissimilar sentences (or worse yet, the less culpable offender receiving the stiffer punishment).[310] This might result from a virtual dash to the prosecutor's office, for instance, where the defendant who pleads first—often the one with the savviest and most experienced defense counsel—avoids the most serious charges and a long sentence.

For such reasons, it is not uncommon for defendants to be threatened with or actually face charges and punishment out of proportion to their moral blameworthiness.[311] Arguably more perverse, prosecutors have an incentive to

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Robert L. Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321 (1935); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989); Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (With Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593 (1990); Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960).

310. Part of the problem is arbitrariness, with discretion exercised in a capricious manner in a particular case and, over the entirety of all cases, producing results lacking a morally justifiable pattern. Such an approach is characterized less by reasoned decisionmaking than the luck of the draw. Even more disconcerting is the possibility that plea bargains can vary due to extralegal characteristics, especially morally (and legally) impermissible factors such as race, ethnicity, and class. *See* Erik Luna, *Mortal Luck*, *in* DISCRETIONARY CRIMINAL JUSTICE IN A COMPARATIVE PERSPECTIVE (Michele Caianiello et al. eds., forthcoming). Although there is "surprisingly little research" on the topic, what does exist suggests that extralegal factors such as race can affect reductions in charges and sentences. Vanessa A. Edkins, *Defense Attorney Plea Recommendations and Client Race: Does Zealous Representation Apply Equally to All?*, 35 LAW & HUM. BEHAV. 413, 413 (2011); *see, e.g.*, Amy Farrell, *Measuring Judicial and Prosecutorial Discretion: Sex and Race Disparities in Departures from Federal Sentencing Guidelines*, 6 JUST. RES. & POL'Y 45 (2004); Brian D. Johnson, *Racial and Ethnic Disparities in Sentencing Departures Across Modes of Conviction*, 41 CRIMINOLOGY 449 (2003); Anne Morrison Piehl & Shawn Bushway, *Measuring and Explaining Charge Bargaining*, 23 J. QUANTITATIVE CRIMINOLOGY 105 (2007); Jeffery T. Ulmer & Mindy S. Bradley, *Variation in Trial Penalties Among Serious Violent Offenses*, 44 CRIMINOLOGY 631 (2006); *see also* Douglas Savitsky, *Is Plea Bargaining a Rational Choice? Plea Bargaining as an Engine of Racial Stratification and Overcrowding in the United States Prison System*, 24 RATIONALITY & SOC'Y 131 (2012). Although dated, an investigative report on plea bargaining practices in almost 700,000 cases concluded that "[a]t virtually every stage of pretrial negotiation, whites are more successful than non-whites." Christopher H. Schmitt, *Plea Bargaining Favors Whites as Blacks, Hispanics Pay Price*, SAN JOSE MERCURY NEWS, Dec. 8, 1991, at 1A. More recent, albeit anecdotal, accounts suggest bias in plea bargaining. *See, e.g.*, JAMES E. JOHNSON, ET AL., BRENNAN CENTER FOR JUSTICE, RACIAL DISPARITIES IN FEDERAL PROSECUTIONS 11 (2010); *Black Judge Rejects Plea Deal for 'White Boy,'* MSNBC.COM (Oct. 6, 2010, 12:10 PM), http://www.nbcnews.com/id/39536917/ns/us_news-life/t/black-judge-rejects-plea-deal-white-boy/, *archived at* http://perma.cc/WZB9-RCA3. One reader of an earlier draft questioned whether prosecutors are dealing with conduct or instead people, that is, adjudicating cases and decriminalizing conduct based on the race, gender, socio-economic status, etc., of suspects and victims. *Cf.* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

311. Plea bargaining can also generate undue leniency for criminals who committed very serious crimes. For instance, an investigative report revealed that in at least 120 homicide cases over a six-year period, prosecutors in Dallas, Texas, struck deals that resulted in the defendants receiving probation. *See* Brooks Egerton & Reese Dunklin, *Texas Killers Walk on "Misdemeanor Murders,"* DALL. MORNING NEWS, Nov. 11, 2007, at A1, *available*

extract guilty pleas in cases involving weak evidence of guilt, conceivably wringing guilty pleas from the factually innocent.[312] There are few limits on the concessions a prosecutor can offer in exchange for a defendant's guilty plea, and those restrictions that do exist have nothing to do with the size of a sentencing discount or the proportionality of a sentence to the defendant's culpability.

The consequences of American prosecutorial power and the underlying incentive structure in an overcriminalized system can be quite serious. From a macro view, prosecutorial decisionmaking has contributed to an orgy of punishment. The United States leads the world in criminal justice detainees in jails and prisons, both in absolute numbers (more than 2.2 million detainees) and as a proportion of the national population (716 detainees per 100,000 people).[313] Although it maintains only 5 percent of the world's total population, the United States houses almost a quarter of all people held in penal institutions around the globe. From the mid-1920s to the mid-1970s, the prison population ratio hovered around 100 inmates in state and federal prisons per 100,000

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at http://www.dallasnews.com/investigations/headlines/20071111-texas-killers-walk-on-misdemeanor-murders_.ece, *archived at* http://perma.cc/WE6F-B5F4. In some cases, the evidence was weak or the defendant had a potentially viable self-defense claim; in many cases, however, the problem was sympathy, as defense counsel had made their clients seem more sympathetic than the victims. Even one of the defendants who received probation later conceded that "I should have went to prison," because "I deserved it." *Id*.; *see also* Turner, *supra* note 83, at 106 (discussing investigation); *Unequal Justice: Murderers on Probation*, DALL. MORNING NEWS, http://res.dallasnews.com/graphics/unequal/ (last visited Sept. 29, 2014), *archived at* http://perma.cc/EV4L-RRWG.

312. In an important study, Professor Wright describes how the accumulation of power by federal prosecutors through severe sentencing laws has resulted in a dramatic shift from trials to plea bargains and the near extinction of acquittals. *See* Wright, *supra* note 74. As a result, some defendants who might have been acquitted at trial are now convicted by plea bargaining, which diminishes the chances of discovering the truth through the trial process and, in exceptional cases, may increase the possibility of wrongful convictions. Moreover, the DNA revolution in exonerating the wrongfully convicted has shown that defendants have pleaded guilty to crimes they did not commit. *See* Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 74 (2008); Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 524, 536 (2005). The extent of wrongful convictions by plea bargain is subject to ongoing debate. *See* Bowers, *supra* note 86, at 1170-78 (2007); Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1 (2013); Oren Gazal-Ayal & Avishalom Tor, *The Innocence Effect*, 62 DUKE L.J. 339 (2012). Perhaps just as likely, or even more so, is an innocent defendant convicted at trial based on fabricated testimony by informants who are cooperating with the prosecution in order to secure a favorable plea deal or dismissal of their own charges. *See, e.g.*, CENTER FOR WRONGFUL CONVICTIONS, THE SNITCH SYSTEM (2004), *available at* http://www.innocenceproject.org/docs/SnitchSystemBooklet.pdf, *archived at* http://perma.cc/P8BU-T6Q3; ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE (2009); INNOCENCE PROJECT, *Understand the Causes: Informants*, http://www.innocenceproject.org/understand/Snitches-Informants.php (last visited Sept. 29, 2014), *archived at* http://perma.cc/NFH7-N4MW.

313. *See* INTERNATIONAL CENTRE FOR PRISON STUDIES, WORLD PRISON POPULATION LIST 3 (10th ed. 2013).

resident population, with a low of 79 in 1925 to a high of 137 in 1939. Over the past four decades, however, the rate has quintupled to around 500 prison inmates per 100,000 people.[314] Although any number of factors might have explained America's punitiveness and the sharp increase in imprisonment, recent work by John Pfaff demonstrates that the key cause is prosecutorial decisionmaking and, in particular, the willingness of prosecutors to file felony charges.[315] Since 1994, crime rates have fallen, arrests per crime have generally been flat or falling, and prison admissions per felony case and time served have been flat—but felony case filings by prosecutors have skyrocketed. Professor Pfaff's analysis thus suggests that prosecutorial punitiveness (rather than, e.g., aggressive policing) is behind America's punishment binge.

By comparison, criminal justice issues in Europe are less influenced by raw politics.[316] Legal experts and practitioners help shape European policy toward progressive approaches, such as decriminalization and diversion, rather than following populist calls for punitiveness.[317] After reading several American works, including one of my articles, Spanish law school dean and criminal justice scholar Fernando Molina declared that "most of the overcriminalization questions that arise in the United States are completely unknown to us. They are not a cause of concern to us not because we haven't thought about them, but because we have already solved those problems."[318] The most disturbing displays of overcriminalization, especially the sheer breadth of penal codes, are largely unheard of in Europe. Unlike the American state of affairs, European criminal provisions have remained relatively stable, concepts like vicarious liability and guilt without a culpable mental state are generally rejected, and imprisonment is used only as the *ultima ratio* (the last resort).[319]

In terms of comparative sentencing analysis, Europe is far less likely to incarcerate individuals than the United States.[320] Measured as the number of jail

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314. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE tbls. 6.28.2012, 6.29.2012 (2013), *available at* http://www.albany.edu/sourcebook/tost_6.html, *archived at* http://perma.cc/4KWC-74S5.

315. See John F. Pfaff, The Causes of Growth in Prison Admissions and Populations (Jan. 23, 2012) (working paper), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1990508, *archived at* http://perma.cc/K5QG-LHCQ.

316. *See, e.g.*, TONRY, *supra* note 227; JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 199 (2003).

317. *See, e.g.*, Wade, *supra* note 120, at 5-6, 19, 24-25.

318. Fernando Molina, *A Comparison Between Continental European and Anglo-American Approaches to Overcriminalization and Some Remarks on How to Deal with It*, 14 NEW CRIM. L. REV. 123, 124 (2011). *But see, e.g.*, Krey & Windgätter, *supra* note 150.

319. *See* Markus Dirk Dubber, *Theories of Crime and Punishment in German Criminal Law*, 53 AM. J. COMP. L. 679, 692 (2005).

320. Comparative sentencing analysis raises various problems. When it comes to imprisonment, for example, a high rate of custodial sentencing may not accurately reflect the punitiveness of a given system, since the average sentence length may be quite short or the procedural norm may be case dismissal and pretrial diversion in all but the most serious cases. There is also a question of penal "bite," that is, the comparable severity of sentences. *See,*

and prison detainees per 100,000 national inhabitants, Scandinavia has the lowest imprisonment rates in northern Europe (e.g., 58 in Finland), the former Soviet states tend to have the highest rates (e.g., 217 in Poland and 335 in Belarus), and other European nations fall somewhere in between (e.g., 98 in France).[321] As just mentioned, the United States is the global incarceration leader at more than 700 detainees per 100,000 inhabitants, with further statistical analysis suggesting that American penal policies are the most punitive among Western nations.[322]

Even though important changes are occurring across Europe, there is a great deal of reluctance to adopt practices that seem to undermine the legitimacy of criminal justice. Despite an increase in negotiated case settlements, for instance, most European professionals are aghast at plea bargaining practices reported in the United States. Many Americans are dismayed as well. Overcriminalization is now recognized as a serious problem not just by academics but also by prominent jurists, former high-ranking government officials, and organizations from across the political spectrum.[323] As for the phenomenon of prosecutorial adjudication, Justice Anthony Kennedy expressed the view of many jurists when he described as "misguided" the "transfer of sentencing discretion from a judge to an Assistant U.S. Attorney, often not much older than the defendant."[324]

> Often these attorneys try in good faith to be fair in the exercise of discretion. The policy, nonetheless, gives the decision to an assistant prosecutor not trained in the exercise of discretion and takes discretion from the trial judge. The trial judge is the one actor in the system most experienced with exercising discretion in a transparent, open, and reasoned way. Most of the sentencing discretion should be with the judge, not the prosecutors.[325]

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e.g., ANDREW VON HIRSCH, CENSURE AND SANCTIONS 59-63 (1993). No one could claim with a straight face that being sentenced to Norway's Halden Prison is comparable to incarceration at, say, the Louisiana State Penitentiary (a.k.a. Angola or the "Alcatraz of the South"). Another interesting issue concerns inter-subjective comparisons of given sentences. *See, e.g.*, Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182 (2009). Suffice it to say these issues do not favor American corrections.

321. *See* INTERNATIONAL CENTRE FOR PRISON STUDIES, WORLD PRISON POPULATION LIST, *supra* note 313, at 5-6; *see also* Roy Walmsley, *Trends in World Prison Population*, *in* INTERNATIONAL STATISTICS ON CRIME AND JUSTICE 153 (Stefan Harrendorf, Markku Heiskanen & Steven Malby eds., 2010).

322. *See, e.g.*, Erik Luna, *Sentencing*, *in* OXFORD HANDBOOK ON CRIMINAL LAW 964, 976-79 (Markus Dubber & Tatjana Hoernle eds., 2014) (summarizing analysis).

323. *See* Gary Fields & John R. Emshwiller, *As Criminal Laws Proliferate, More Ensnared*, WALL ST. J., July 23, 2011, at A1; Adam Liptak, *Right and Left Join to Take on U.S. in Criminal Justice Cases*, N.Y. TIMES, Nov. 24, 2009, at A1; *Reining in Overcriminalization: Assessing the Problem, Proposing Solutions: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. (2010).

324. Anthony M. Kennedy, *Speech at the American Bar Association Annual Meeting* (Aug. 9, 2003), *available at* http://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp_08-09-03, *archived at* http://perma.cc/SDX7-WAE8.

325. *Id.*

Whether or not he would describe it this way, Justice Kennedy's argument is one of separated powers and core functions. In a figurative sense, and maybe more literally in capital cases,[326] the prosecutor has become judge, jury, and executioner. Needless to say, this situation is inconsistent with a robust understanding of the separation of powers doctrine and the principle of checks and balances as structural protections against tyranny.

CONCLUSION

Plato might have enjoyed a final irony, the product of moral psychology informing his political theory. In Europe, prosecutors are among the criminal justice professionals who have helped avoid overcriminalization.[327] Their interests and allegiances lie with the profession, even the fleshless doctrine, consistent with the Platonic desideratum of arresting change. European prosecutors are personally invested in maintaining the criminal justice system's current structure. But they are not the problem: American prosecutors are.

For example, in a short-lived opinion declaring the federal sentencing process unconstitutional, a U.S. district court judge wrote that the Justice Department was

> so addicted to plea bargaining to leverage its law enforcement resources to an overwhelming conviction rate that the focus of our entire criminal justice system has shifted far away from trials and juries and adjudication to a massive system of sentence bargaining that is heavily rigged against the accused citizen.[328]

The modern prosecutor's stance toward plea bargaining does not always lean toward justice—that is, unless prosecutors are assumed to be Platonic in their decisionmaking, or the achievement of the decisionmaker's own self-interest is deemed justice itself. Consistent with the American judiciary's reluctance to interfere with prosecutorial discretion, however, the district judge's ruling was reversed on appeal.[329]

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326. *See, e.g.*, Luna, *supra* note 310. *See generally* Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305 (locus classicus of capital punishment critiques).

327. *See, e.g.*, Wade, *supra* note 120, at 27-28.

328. United States v. Green, 346 F. Supp. 2d 259, 265 (D. Mass. 2004).

329. *See* United States v. Pacheco, 434 F.3d 106 (1st Cir. 2006); United States v. Yeje-Cabrera, 430 F.3d 1 (1st Cir. 2005). The *Yeje-Cabrera* court abstracted the law as follows:

> The fact that the defendant who pleads gets a benefit over those who go to trial and are convicted is a necessary artifact of any plea bargaining regime. The law long ago determined there was nothing unconstitutional or illegal about any burden on trial rights caused by such a differential. While confronting a defendant with the risk of more severe punishment clearly may have a discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable—and permissible—attribute of any legitimate system which tolerates and encourages the negotiation of pleas. The Supreme Court has unequivocally recognize[d] the constitutional propriety of extending leniency in exchange for a plea of guilty and of not extending leniency to those who have not demonstrated those attributes on which leniency is based. [A]fter trial, the factors that may have indicated leniency as consideration for the guilty plea are no longer present. It is clear that [t]he fact that those who plead generally receive more lenient treatment, or at least a government recommendation of

Professor Stuntz taught us that a "deeper politics, a politics of institutional competition and cooperation, *always* pushes toward broader liability rules, and toward harsher sentences as well."[330] American prosecutors and their organizations have even lobbied lawmakers in favor of new crimes and tougher sentences.[331] In the words of a former Justice Department official, "it is not surprising that the federal agency charged with preventing, solving, and punishing federal crimes is not aggressively attempting to shrink the federal code." [332] More crimes and harsher punishments allow for quicker and cheaper convictions via plea bargaining. If that fails, prosecutors need only make good on their promise to crush the defendant at trial in the timocratic style of a Spartan, or at least an interested party to an adversarial contest. Those who oppose this model, however, will have to address both the skewed internal dynamics of modern prosecution and the vast external arena in which prosecutors rule today.

> more lenient treatment than co-defendants who go to trial, does not in and of itself constitute an unconstitutional burden on one's right to go to trial and prove [one's] case.

Yeje-Cabrera, 430 F.3d at 25 (alterations in original, citations and internal quotation marks omitted).

330. Stuntz, *Pathological Politics*, *supra* note 291, at 510.

331. *See, e.g.*, Barkow, *supra* note 217, at 880. For an example in the death penalty context, see Ben Winslow, *Shurtleff Urges Activism over Death Penalty Appeals*, DESERET NEWS (Feb. 24, 2009, 1:39 PM), http://www.deseretnews.com/article/705287106/Shurtleff-urges-activism-over-death-penalty-appeals.html, *archived at* http://perma.cc/4YEZ-8PZB.

332. RACHEL BRAND, HERITAGE FOUND., MAKING IT A FEDERAL CASE: AN INSIDE VIEW OF THE PRESSURES TO FEDERALIZE CRIME 1-2 (2008), *available at* www.heritage.org/Research/LegalIssues/lm30.cfm, *archived at* http://perma.cc/W432-YZVP.