

The Black Box

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INTRODUCTION

A society that holds, as we do, to belief in law, cannot regard with unconcern the fact that prosecuting agencies can exercise so large an influence on dispositions that involve the penal sanction, *without reference to any norms but those that they may create for themselves . . .* [To] a large extent *we have, in this important sense, abandoned law.*

Herbert Wechsler (1962)¹

Herbert Wechsler was wrong. Wechsler, the architect of the Model Penal Code, described prosecutorial discretion as the antithesis of law. Moreover, this was an idea with consequences, since he built his elegant substantive criminal code on the hope that the code could replace some of this discretion with more law. While acknowledging that some amount of discretion may be essential to the prosecutorial function, he asserted that “its existence cannot be accepted as a substitute for sufficient law.”²

In the half-century since Wechsler wrote these words, scholars have magnified his concerns about prosecutorial discretion. Many scholars have expressed particular concerns about racial, gender, and other nefarious grounds for prosecution, often framing their concerns in the language of “selective prosecution.”³ Another group of scholars has worried about “overcriminalization”—pointing to the increased range of choices available to prosecutors to respond to particular behavior and to the wider range of behavior subject to criminal charges as criminal codes have become bloated with new crimes.⁴ A third group has noted how changes in sentencing law, such as the use of sentencing guidelines and “three strikes” laws, have

1. Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1102 (1962) (emphasis added), *quoted in* FRANK W. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 151 (1970).

2. *Id.*; *see also* KENNETH CULP DAVIS, DISCRETIONARY JUSTICE, at vi (1969) (“Writers about law and government characteristically recognize the role of discretion and explore all around the perimeter of it but seldom try to penetrate it.”).

3. *See, e.g.*, DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK 16 (2002); SAMUEL WALKER, CASSIA SPOHN & MIRIAM DELONE, THE COLOR OF JUSTICE: RACE, ETHNICITY, AND CRIME IN AMERICA 166 (Sabra Horne ed., 3d ed. 2004); Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of Armstrong*, 73 CHI-KENT L. REV. 605 *passim* (1998).

4. *See, e.g.*, Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 753–56 (2005); Donald Dripps, *Overcriminalization, Discretion, Waiver: A Survey of Possible Exit Strategies*, 109 PENN ST. L. REV. 1155, 1156 (2005); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 523–29 (2001). *But see* Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 225–33 (2007) (detailing a study of crime legislation in three states indicating that legislatures repeal criminal legislation in some settings). In addition to the increased number of overlapping crimes within jurisdictions, a greater proportion of cases, notably including many drug and gun cases, are covered by overlapping codes of different jurisdictions (especially state and federal criminal codes).

increased the size and certainty of the consequences that flow from a prosecutor's charging choices.⁵

For those who see discretion as the opposite of law, its dominance in the prosecutor's office has ripple effects throughout the criminal justice system. The prosecutor's discretionary power overwhelms any efforts to improve the law elsewhere in the criminal process—in definitions of crimes, in limits on police power, in trials, or in judicial sentencing decisions.

Scholars' responses to a criminal justice world where what counts as law means so little have featured a call for greater *external* legal regulation. In particular, scholars have called for judges to review prosecutorial charging and plea-bargaining decisions, in the hope that judges can limit and legitimize the choices that prosecutors make.⁶ The judicial-oversight project, however, has failed, even for the subset of prosecutor decisions that are based on improper bias.⁷

Some scholars, recognizing this conspicuous absence of judicial oversight, have called for legislative review of prosecutorial decisions through hearings and standardized reports.⁸ Legislative control of prosecutors' choices also might occur through more targeted drafting of substantive criminal codes. But legislators, like judges, have never answered the calls for external regulation of the prosecutor's office, and the political

5. Sentencing laws now offer prosecutors finer controls over sentencing outcomes, effectively granting them the power to reverse-engineer the combination of charges and convictions to produce the desired sanctions. See Terence D. Miethe, *Charging and Plea Bargaining Practices Under Determinate Sentencing: An Investigation of the Hydraulic Displacement of Discretion*, 78 J. CRIM. L. & CRIMINOLOGY 155, 155–59 (1987) (rejecting the “hydraulic effect” caused by sentencing guidelines); Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1212 (2004) (using “trial distortion” as a way to explain plea-negotiation practices); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 83 (2005) (critiquing the federal sentencing system).

6. See, e.g., GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA-BARGAINING IN AMERICA 111–36 (2003) (suggesting that judges' exploding civil caseloads, reliance on impartial and reliable probation officers, and maintenance of control over sentencing power has enabled them to accept prosecutors' bargaining methods); William J. Stuntz, *Bordenkircher v. Hayes: The Rise of Plea Bargaining and the Decline of the Rule of Law* 29–34 (Harvard Law Sch. Pub. Law & Legal Theory Research Paper Series, Working Paper No. 120, 2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=854284 (arguing that prosecutors have too much power in plea bargaining).

7. See *infra* Part II.A (explaining that bias in the system is a product of more than just prosecution decisions). For an account of the limited and failed efforts by judges to regulate the criminal charges available to prosecutors, see Ronald J. Allen & Ethan A. Hastert, *From Winship to Apprendi to Booker: Constitutional Command or Constitutional Blunder?*, 58 STAN. L. REV. 195, 195–98 (2005).

8. See, e.g., Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 61–62 (1998) (arguing that the use and publication of racial-impact studies would advance responsible prosecutorial discretion).

dynamics of American criminal justice make it very unlikely that they will do so in the future.⁹

This Article explores the power of *internal* regulation—efforts within the executive branch, and within individual prosecutors’ offices, to control and legitimize prosecutorial discretion—to succeed where external regulation has failed. Our thesis is simple but profound. We believe that the internal office policies and practices of thoughtful chief prosecutors can produce the predictable and consistent choices, respectful of statutory and doctrinal constraints, that lawyers expect from traditional legal regulation. Indeed, we believe that internal regulation can deliver even more than advocates of external regulation could hope to achieve.¹⁰

To test whether internal regulation is realistic, we must look inside the black box: the inner workings of prosecutors’ offices. The very lack of external regulation makes such a view difficult, since the absence of controlling statutes or case law makes it possible for prosecutors to do their daily work without explaining their choices to the public.

An unusual alignment of the stars allows us to peer into the black box, enabling us to watch prosecutorial decisionmaking at work in the prosecutors’ offices in a few major American cities. Our first and most comprehensive view inside the black box comes from the New Orleans District Attorney’s Office.¹¹ District Attorney Harry Connick, who ran the office from 1973 to 2002, instructed his attorneys to keep an unusually rich computerized record of their prosecutorial choices and reasoning, and he used the data for internal administrative purposes. The database recorded the history of each case as it moved through the office, and prosecutors indicated the reasons for their decisions at each turn in the road.

Additional insights about internal regulation of prosecutors come from Milwaukee, Charlotte, and San Diego, three cities participating in an innovative prosecutor-management project of the Vera Institute of Justice.¹²

9. See Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 723–29 (2005) (explaining legislators’ and judges’ roles in the trend towards criminalization); Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 HASTINGS L.J. 633, 645–49 (2005) (explaining why American criminal codes need reform and why key players in the criminal justice system oppose such reform).

10. Other scholars—all relatively recent arrivals on the scene—have begun to discuss the prospects for internal regulation of prosecutorial choices, suggesting that this internal approach could become dominant over the next generation. See generally Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CAL. L. REV. 323 (2004) (exploring the possibility of using a cost-benefit analysis in criminal enforcement); Michael M. O’Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407 (2008) (arguing for procedural reform in plea bargaining).

11. To be precise, it is the Office of the District Attorney for Orleans Parish.

12. See *infra* Part II.B.2 (discussing the Vera Institute). For an overview of the “Prosecution and Racial Justice Project” of the Vera Institute in New York, see Vera Inst. of Justice, *Prosecution and Racial Justice*, <http://www.vera.org/otherwork/prj.html> (last visited Oct. 14, 2008).

Each of these cities has generated summary data that allow us to reconstruct the reasoning of line prosecutors at key moments in processing criminal cases. The long-delayed arrival of the information age to prosecutors' offices allows us, at last, to understand more about the internal regulatory forces within those offices.

The first phase in our analysis of the internal regulation of prosecutorial power looked at the *outcomes* produced when chief prosecutors insist on a principled screening of cases.¹³ In this Article, we get behind the outcomes to look at the *reasons* for those decisions. In particular, we focus on the explanations that prosecutors give for declinations, which are the decisions by prosecutors *not* to prosecute alleged crimes that police officers present to the office.¹⁴ Declinations epitomize the black box: they remain hidden from all traditional legal review and test the capacity of our preferred strategy of internal regulation. What image do these declinations create of the day-to-day work of criminal prosecutors—reasoned judgments according to law or random choices according to individual predilection?

Knowing the end of the story will not ruin the telling of this fascinating tale: we find that declinations in New Orleans, Milwaukee, and elsewhere reveal an internal legal order at work. The standardized reasons that prosecutors give for their choices do not reveal much about the quality of their work in any given case, and their declarations lack the depth of reasoning that one might find in a judicial opinion. These brief statements of reasons, however, shed meaningful light on the work of prosecutors once we start to notice the patterns of reasons across many cases and in different crime categories.

13. Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 30–36 (2002) [hereinafter Wright & Miller, *Screening/Bargaining Tradeoff*]; see also Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 STAN. L. REV. 1409, 1409–17 (2003) [hereinafter Wright & Miller, *Honesty & Opacity*] (positing that practices in New Orleans and elsewhere demonstrated, in our view, that prosecutors could restrict plea bargaining without dramatically increasing the trial rate if they applied what we called “hard” screening practices).

For constructive engagement from other scholars with our first installment in this project, see Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 955–59 (2006); Brown, *supra* note 10, at 331; Gerard E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading Off?*, 55 STAN. L. REV. 1399, 1399–1408 (2003); Daniel Richman, *Institutional Coordination and Sentencing Reform*, 84 TEX. L. REV. 2055, 2057–65 (2006); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 813 (2006).

14. See DAVIS, *supra* note 2, at 188. Davis states:

Viewed in broad perspective, the American legal system seems to be shot through with many excessive and uncontrolled discretionary powers but the one that stands out above all others is the power to prosecute or not to prosecute. The affirmative power to prosecute is enormous, but the negative power to withhold prosecution may be even greater, because it is less protected against abuse.

Id.

The recorded reasons show the influence of substantive and procedural legal doctrines, the policy priorities of supervisors, and the evidentiary hurdles of proving criminal charges—all sources that one would expect to dominate in a system that respects the rule of law. Moreover, these patterned reasons reflect something more than individual prosecutors predicting legal outcomes and operating in the shadow of the law: they show prosecutors responding to social norms and living up to group expectations about what it means to *be* a prosecutor in that particular office.

This internal legal and social order in the prosecutor's office tells us something important and little noted about the interaction between law and "social norms." While many legal scholars have analyzed how social norms can override legal rules within private social and commercial groups,¹⁵ legal scholars have not yet traced the distinctive ways that social norms operate *within* government bodies such as prosecutors' offices. In the setting of an urban prosecutor's office, the idealized group portrait of a prosecuting attorney draws on complex sources. Some content derives from the substantive criminal law, the declared priorities of the elected chief prosecutor, and from other legal sources; resource limits and courtroom "working group" expectations create other aspects of the social norms.

Social norms within the prosecutor's office are distinctive because they are more pliable and more susceptible to deliberate changes than the social norms that operate elsewhere. Reform plans matter for these social norms. While scholars have missed the importance of internal regulation, reform-minded chief prosecutors have not.

This Article proceeds in four steps. In Part I, we describe four distinct sources for the internal regulations visibly at work in New Orleans. Some internal regulations reflect procedural constraints, including constitutional criminal procedure, where prosecutors decline cases if they believe that the police violated the search-and-seizure rules or other investigation constraints. This "executive exclusion" function can both predict courts' ultimate reaction to these cases and add new dimensions to the procedural requirements that courts might impose.

A second source of internal regulation comes from the substantive criminal law itself, a set of doctrines that many scholars and practitioners assumed, ironically, to be irrelevant during the sorting of cases in the prosecutor's office. Third, some internal regulations derive from practical problems of proof and evidence, particularly when prosecutors account for the preferences of victims. Fourth, prosecutors account for various regularized office policies, illustrated in New Orleans by an explicit hostility to plea bargains. Together these four kinds of reasons offer the

15. See generally ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991); ERIC A. POSNER, LAW AND SOCIAL NORMS (2000) (studying the relationship between legal regulation and social norms).

predictability and rationality—and perhaps even a measure of democratic responsiveness—of more familiar external legal rules and procedures. Legitimate legal and policy sources seem to matter, even within a black box that remains mostly impervious to external regulation.

In Part II, we move from stated reasons to potential unstated reasons, especially systematic racial bias in prosecutorial decisionmaking. Do the prosecutors' declared reasons, which reflect the influence of legitimate legal sources, actually obscure a more troubling set of race-based reasons for declining cases? Sometimes it appears so. Data that are now available in many prosecutorial offices show how prosecutors exacerbate the racial patterns found in some of the cases that they inherit from the police.

The same data management that reveals such disparities, however, also holds the key to addressing the disparities through internal regulation. Chief prosecutors and managers can use case data to explore possible reasons for racial disparities and to change office practices deliberately when they can find no compelling explanation for suspicious outcomes. When an office tracks outcomes and reasons in high-volume systems, managers can accomplish more through internal regulation than decades of futile external regulation have accomplished when it comes to racial disparities.

The final two parts of the Article take a more theoretical turn. In Part III, we discuss a causal mechanism that explains how internal regulation works, highlighting the distinction between “subjective” and “objective” views of discretion. The objective view of discretion is the view of Wechsler. From a vantage point outside the black box, the objective view emphasizes the many dramatic choices that discretionary power allows and treats the absence of traditional external legal regulation as the antithesis of law. The subjective view of discretion is the view from inside the black box, the way a prosecutor (or any other executive actor) tends to describe the job at hand. From this insider's view, the realistic available choices appear much narrower and more grounded than the “objective view” that critics suggest. From this vantage point, decisions are best described as reasoned rather than random and guided by law and legitimate policy in ways not perceived from the outside.

This divide between subjective and objective views of discretion has thus far been absent from the literature on prosecutorial power and on discretion in law more generally.¹⁶ For us, the subjective experience of discretion helps to clarify the types of constraints that external observers miss. It explains why “reasoned discretion” should be treated as a meaningful legal category, rather than a legal oxymoron as Wechsler might have it.

16. The earliest glimmers are visible in the larger literature on administrative discretion. See generally Edward L. Rubin, *Discretion and Its Discontents*, 72 CHI.-KENT L. REV. 1299 (1997).

We believe that the subjective perspective on discretion best captures the interaction between legal influences and social norms inside the prosecutor's office. In Part IV, we depict prosecutorial constraints as a hybrid of these two parents: classic sources of external positive law (such as constitutional provisions, legislation, or written court opinions) on the one hand and the "social norms" that replace or supplement the law within some coherent social groups on the other hand.

The internal norms of prosecutors differ from other social norms recognized and studied by legal scholars because they grow and operate within a government organization. We explain why norms within government organizations are more susceptible to design changes than social norms in public and private groups. Social norms within government agencies are also distinctive because they take hold among legally trained actors whose own professional values and practices tell them to respect legal limits. Government actors create and follow these norms not only because they anticipate enforcement of the law, but because their socialization leads them to value consistent and rational resolution of problems.

Our conclusion that internal norms function like law, however, is no positivist paean to the wisdom of prosecutors. The concerns for legitimacy and democratic accountability that pervade the modern administrative state are equally relevant here. In the closing pages of this Article, therefore, we sketch elements that make internal regulation of prosecutors more or less praiseworthy as law. The key virtues, we conclude, are visible through the conceptual frame of transparency. Internal regulations deserve respect when they expose the prosecutor's black box to scrutiny and accountability.

I. REASONS THAT REVEAL THE INTERNAL REGULATION OF PROSECUTORS

In the post-apocalyptic world of *Bartertown* in the classically awful *Mad Max* films, if you "bust a deal" you must "face the wheel"¹⁷—a random roulette wheel method for picking criminal sentences. American prosecutors do not, thankfully, take their cues from the inflexible and arbitrary legal system of *Bartertown*. Prosecutors sometimes accept the charges that the police recommend to them, while at other times they file different charges or decline to file charges at all. Whatever choices they make, the prosecutors have their reasons.

Declination, however, is viewed as the height of prosecutorial discretion—much like the randomness embodied in the *Bartertown* justice wheel—because prosecutors do not have to state their reasons in open court or in any other setting outside their own offices. Indeed, in some jurisdictions the prosecutors may not have to record their reasons anywhere or explain their reasons to anyone, even to themselves.

17. *MAD MAX BEYOND THUNDERDOME* (Warner Bros. Pictures 1985).

Some prosecutors' offices, however, do require individual prosecutors to declare reasons for declining to file charges in a case. Some offices even expect the prosecutor to *record* those reasons, either for all crimes or for selected categories of crimes. For many years, the office routines in New Orleans called for prosecutors to declare a reason (and only one reason) for any decision to decline prosecution of a single charge or a group of charges that the police recommended. The screening prosecutors chose their reasons from a standardized office list and recorded their reasons in computerized format, allowing managers to monitor each prosecutor's work.

The database from New Orleans is remarkable for several reasons. Most importantly, the list of possible declination reasons is detailed, offering many different menu options. In addition, the screening attorneys recorded their reasons at the time of the decisions, and managers used the reasons for personnel evaluations and policy discussions on a routine basis.

Granted, one must take these numbers with a grain of salt. The selected reasons might not reflect the actual reasons that motivated screening attorneys. Nevertheless, we are cautiously optimistic about the power of this data to help reconstruct the thinking of prosecutors during their declination decisions. The data was collected for purposes of internal management rather than a public explanation for prosecutor choices. The volume of cases in the system forced screening attorneys to make their choices quickly. While managers routinely used the data to evaluate the timeliness of an attorney's work and to make sure that a single prosecutor did not decline charges at an unusually high or low rate, aggregate data about the most common reasons invoked for particular crimes was not routinely available to the screeners. In other words, there were no routine reports suggesting the "right answer" for explaining a declination for a given criminal charge. For these reasons, we believe that the data reasonably reflect the screening attorney's most prominent reason for declination in a given case.¹⁸

The ability to reconstruct declination reasons allows us to address a series of questions. Do the reasons that drive declinations simply reflect the

18. The reality of declination choices involves multiple reasons, and in some cases, pretextual reasons. We explore such possibilities in Part II.

There are some serious limitations to the data. Most importantly, the list of reasons does not contain a clear category to reflect that a particular type of offense should be declined simply because such crimes receive a low priority from an office with limited resources. There is no category for "resources" or some similar reason. Cf. Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 263-64 (1980) (showing that office policy explained roughly one-third of declinations); Michael Edmund O'Neill, *Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predictive Factors*, 41 AM. CRIM. L. REV. 1439, 1459-60 (2004) (observing that two major reasons for declinations in federal court included policy, at 17%, and resources, at 5%). Neither does the list of reasons include any clear category to capture the impact of defendant characteristics such as age, family hardship, or the like.

personal values or preferences of individual prosecutors, or do social forces constrain the choices available to them? And if the reasons do derive from social forces, are those forces internal or external to the office? Are they legal or extra-legal? Do the budgetary and bureaucratic realities of the office tell most of the story, or do the substantive constraints of the criminal law and the procedural constraints of the adversarial trial process drive the reasons?

We believe that prosecutors' reasons most often derive from legitimate (and primarily legal) sources. Some declination decisions of line prosecutors reflect *procedural or proof* requirements. Prosecutors recognize from the outset that they are unlikely to find enough admissible evidence to prove each element of the crime, although they might sometimes disapprove a case even if it is provable at trial. Other declinations reflect *substantive criminal law* doctrines and the larger purposes of the criminal law, reminding us that prosecutors routinely slot certain types of conduct into a familiar set of criminal charges based on shared judgments about wrongful conduct, even if the language of the criminal code might allow a broader palette of choices for an individual prosecutor. Finally, some declinations show the impact of the *enforcement priorities* of the elected chief prosecutor or the state legislature, changing the relative importance of various crimes as public priorities shift.

A first glance at the reasons prosecutors gave over the years for declining cases produces a familiar list. For all crimes and all years in the database (covering 1988–1999),¹⁹ we found three big categories that account for over 80% of the cases. As Table 1 shows, prosecutors explained that 38% of the charges they declined to prosecute were not necessary because they were “prosecuting on other charges.” Various evidentiary flaws in the charges accounted for 26% of the declinations,²⁰ while concerns about the

19. For the entire period we study here, Harry Connick served as the District Attorney for Orleans Parish. Connick retired in 2002, and Eddie Jordan was elected as his successor. During Jordan's years in office, Hurricane Katrina devastated records, facilities, and everything else about criminal justice in the city. See Christopher Drew, *In New Orleans, Rust in the Wheels of Justice*, N.Y. TIMES, Nov. 21, 2006, at A1 (reporting on the effects of missing evidence after Katrina). After years of community discontent about crime and management of the District Attorney's office, Jordan resigned in October 2007. The interim District Attorney, Keva Landrum-Johnson, was elected judge in 2008; five other candidates ran for District Attorney. See Laura Maggi, *Events Raise Stakes in DA Race*, TIMES-PICAYUNE (New Orleans, La.), July 12, 2008 (reporting on the changes in the District Attorney's office post-Katrina); *New Orleans Murder Rate on the Rise Again*, MSNBC.COM, Aug. 18, 2005, <http://www.msnbc.msn.com/id/8999837> (stating that the post-Katrina murder rate rose again after falling from a mid-1990s peak, contrary to the downward trend in other cities, and discussing a study by the New Orleans Police Foundation which found that 42% of serious crime cases from 2002 to 2004 were declined for prosecution).

20. The reasons grouped into this category include “testimony insufficient to prove crime,” “insufficient nexus,” “analytical results insufficient,” “unlawful search no warrant,” “no

victim of the crime explained 18% of the charges declined.²¹ This general breakdown of reasons roughly tracks the reasons for declination uncovered in the handful of earlier empirical studies on the topic.²²

**Table 1: Most Common Reasons for Declination of Charges,
New Orleans 1988–1999**

Reason	Declinations	% of All Charges Declined
Prosecuting other charge	85,091	37.8%
Victim refuses to prosecute	28,010	12.5%
Testimony insufficient to prove crime	23,606	10.5%
Not suitable for prosecution	21,961	9.8%
Insufficient nexus	15,291	6.8%
Victim no show/unlocatable	13,510	6.0%
Analytical results insufficient	4,621	2.1%
Unlawful search/no warrant	4,120	1.8%
Aggregated charges	3,923	1.7%
No corroboration of evidence	2,996	1.3%
Good defense	2,535	1.1%
Duplication	2,042	0.9%
Physical evidence insufficient	1,958	0.9%
No probable cause for arrest	1,956	0.9%
Prescribed	1,732	0.8%
Other evidence problems	1,707	0.8%
Witness refuses to cooperate	1,209	0.5%
Other due-process problems	1,011	0.5%

But this generic list of reasons falls short of establishing our more ambitious claim that prosecutors by and large decline cases based on legitimate and legal reasons, reflecting the rigors of proof at trial, the mens

corroboration of evidence,” “good defense,” “physical evidence insufficient,” “no probable cause for arrest,” and “other evidence problems.”

21. The reasons included in this category are “victim refuses to prosecute,” and “victim no show, unlocatable.”

22. The three most important studies here are, in chronological order, VERA INST. OF JUSTICE, FELONY ARRESTS: THEIR PROSECUTION AND DISPOSITION IN NEW YORK CITY’S COURTS (1977); Frase, *supra* note 18; and O’Neill, *supra* note 18. O’Neill found that 17% of federal declinations were based on policy reasons, 48% were based on evidentiary reasons, 20% were based on the suspect’s status, and 5% were based on resources. *Id.* at 1459.

rea doctrines of the substantive criminal law, and the priorities announced in legislation or office policy for selecting among crimes. The patterns that make the case for this stronger claim of prosecutorial legality are not found in the aggregate. Instead, a closer look at particular crimes is necessary to show that one can predict, based on such legitimate concerns, which declination reasons will occur most often with different substantive crimes.

A. REASONS OF PROCEDURE: EXECUTIVE EXCLUSION

Many scholars have observed that our criminal justice system today is more administrative than adversarial.²³ Because of high rates of guilty pleas, we no longer count on trials in many cases to assess the evidence or to prevent convictions of the innocent. Instead, these quality control functions have moved out of the courtroom and into the prosecutor's office: the meaningful screening of cases now may be prosecutorial rather than judicial.

This reliance on prosecutors for quality control could lead to a troubling under-enforcement of procedural limits. Prosecutors who rarely face trial might ignore or discount problems with the investigation or the potential difficulties of proof at trial, and defense counsel might not put those flawed judgments to the test. The level of sentence discounts that the prosecutors offer for guilty pleas might convince defendants to give up viable defenses,²⁴ and standardized appeal waivers could block appellate review in most cases.²⁵

Nevertheless, procedural limits on investigations do affect prosecutor choices outside the courtroom, at least in some places and to some extent. The reasons that New Orleans prosecutors gave for their declinations confirm that the quality of evidence figured heavily into their thinking. Prosecutors used evidentiary reasons to explain more than 40% of the dropped charges (excluding those explained by the reason of "prosecuting other charge" from the base).²⁶

23. See, e.g., Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117, 2123 (1998) ("The substantive evaluation of the evidence and assessment of the defendant's responsibility is not made in court at all, but within the executive branch, in the office of the prosecutor."); Stuntz, *supra* note 4, at 572 ("Whether prosecutors sort well determines whether the system allocates punishment well, or even decently. . . . The prime mechanism by which undeserving defendants are cleared, or let off with only nominal punishment, is the prosecutor's screening process.").

24. See Wright, *supra* note 5, at 85, 109 (noting that the difference between a potential sentence at trial and a sentence with a guilty plea could push defendants toward the deal even if they have a strong defense).

25. See generally Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 *DUKE L.J.* 209 (2005) (providing an empirical analysis of appeal waivers).

26. After removing those charges declined because the office was pursuing other criminal charges, the adjusted totals for the evidentiary categories look like this: testimony insufficient, 16.9%; insufficient nexus, 10.9%; analytical results insufficient, 3.3%; unlawful search/no

Because these evidentiary reasons are so specific, it appears that they are not generic boilerplate that prosecutors could invoke, more or less randomly, to justify declination in any case. The evidentiary reasons include “testimony insufficient” to prove the crime, “insufficient nexus” between the defendant and the evidence, insufficient “analytical results” from lab testing, “unlawful search” based on lack of a warrant, “no corroboration” of questionable evidence, “no probable cause for arrest,” or (most intriguing) a “good defense.” The catch-all category of “other evidence problems” only accounts for 1.22% of the adjusted total charges declined.²⁷

Two of these evidentiary reasons show especially clearly the influence of external procedural limits in the prosecutor’s declination choices. The categories for search-and-seizure violations—“unlawful search, no warrant” and “no probable cause for arrest”—add up to 4.35% of the adjusted total of declined charges. In these cases, prosecutors who review the files might anticipate that a defense lawyer down the road would file a motion to exclude key evidence, that the judge could grant the motion, and that the government would have to dismiss the charges. To avoid this wasted effort, the prosecutor simply declines the case from the start.

This “executive exclusionary rule” is no trivial afterthought to the constitutional exclusionary rule that judges invoke during pretrial rulings to exclude evidence. In terms of sheer volume, executive exclusion appears to be more important than judicial exclusion.²⁸ For instance, the New Orleans data show at least 6112 declinations by prosecutors based on search-and-seizure reasons, compared to 723 dismissals of charges after judges granted motions to suppress evidence due to improper searches or seizures.²⁹

While most of the attention in empirical work centers on judicial exclusion,³⁰ executive exclusion deserves sustained study whenever

warrant, 3.0%; no corroboration, 2.1%; good defense, 1.8%; physical evidence insufficient, 1.4%; no probable cause for arrest, 1.4%; other evidence problems, 1.2%. These categories total 42% of the adjusted pool of declined charges.

27. These “adjusted” totals of charges declined are reasonably consistent with O’Neill’s findings for the federal system, where the largest category for declination was evidentiary reasons, accounting for 48% of declinations. See O’Neill, *supra* note 18, at 1459 (showing reasons for declination by category).

28. Most studies of judicial exclusions estimate that judges exclude evidence in something between 0.3% and 1.3% of felony arrests. See Thomas Davies, *A Hard Look at What We Know (and Still Need to Learn) About the “Costs” of the Exclusionary Rule: The NIJ Study and Other Studies of “Lost” Arrests*, 1983 AM. B. FOUND. RES. J. 611, 659–68 (discussing several studies on the exclusion of evidence for felony arrests); L. Timothy Perrin et al., *If It’s Broken, Fix It: Moving Beyond the Exclusionary Rule*, 83 IOWA L. REV. 669, 684–91 (1998) (detailing several empirical studies of the exclusionary rule).

29. The figures in the text indicate the number of charges declined and dismissed. The number of *defendants* whose cases were dismissed after successful motions to suppress evidence was 627. Judges granted a motion to suppress for 7.3% of all such motions resolved.

30. The literature measuring the impact of the exclusionary rule recognized the separate contribution of prosecutors in the early studies, but then dropped the point. In cities other

researchers ask about the effects of the exclusionary rule. High levels of executive exclusion (relative to judicial exclusions) might reveal serious tensions or lack of coordination between the police department and the prosecutor's office. If the police do not endorse the prosecutors' view of the search-and-seizure rules, the prosecutors will reject their recommendations more often. By the same token, a lower percentage of executive exclusion could show better training of police officers or better coordination between the police and the prosecutors.

A lower percentage of executive exclusion, compared to judicial exclusions, could also show that prosecutors do not apply the same search-and-seizure standards as the judges in that jurisdiction. One can imagine that prosecutors might screen out only the clear-cut cases, leaving the closer calls for the judges to decide.

When the percentage of prosecutor exclusions climbs much higher than judicial exclusions, however, it could reveal various other prosecutor attitudes about the search-and-seizure rules. Prosecutors could enforce search-and-seizure doctrine more stringently than judges in selected areas to promote training of police officers on recurring problem areas. Executive exclusion also might reflect something more than a prediction about the judge's likely decision on a future motion to exclude evidence: it could grow out of principled allegiance to constitutional ideals that the prosecutor, like the judge, swears to uphold.

The breakdown between the two leading search-and-seizure categories offers one clue indicating that prosecutors apply search-and-seizure law differently than judicial doctrine would suggest.³¹ Prosecutors in New Orleans distinguished sharply between warranted and unwarranted searches. Unwarranted searches produced 2.95% of the charges declined, while "unlawful search with warrant" only produced 0.03% of the declinations, roughly 100 unwarranted cases declined for every warranted case declined.

Constitutional doctrine instructs judges to use the same standards for

than New Orleans, estimates of the impact of exclusion within the prosecutor's office fluctuate widely. See generally U.S. GEN. ACCOUNTING OFFICE, *IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL CRIMINAL PROSECUTIONS* (1979) (analyzing thirty-eight U.S. Attorney offices for two months in 1978 and finding that 0.4% of all cases presented were declined because of search-and-seizure problems); NAT'L INST. OF JUSTICE, *THE EFFECTS OF THE EXCLUSIONARY RULE: A STUDY IN CALIFORNIA 10-11* (1982) (analyzing felony arrests that were rejected for prosecution in California cities and finding that from 1976 to 1979, statewide search-and-seizure problems accounted for 4.8% of declinations but 8.5% in San Diego).

31. Other exclusionary rule categories included "no probable cause for arrest" at 1.4%, "other due process problems" at 0.72%, and "inadmissible confession by defendant" at 0.04%. Cf. 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, 1058, 1064 (1991) (analyzing all warrants filed during a six-month period in 1984 and 1985 in seven cities and finding that only 1 of 1748 warrants was rejected by magistrates and that motions to suppress were granted and cases were dismissed in 1.5% of all warrant cases).

reviewing warranted and unwarranted searches.³² The gap between prosecutor exclusions of warranted and unwarranted searches reflects in part the far larger total number of warranted searches, but that difference probably does not fill the entire gap.³³ It may be that prosecutors were reluctant to give up on cases when officers invested enough effort to obtain a warrant, or that the errors in warranted searches were more subtle than errors in unwarranted searches. Perhaps prosecutors figured that judges themselves should correct any judicial errors in warrants.

Judicial doctrine also declares that search-and-seizure protections, with very few exceptions, do not vary by the type of crime. In theory, judges should rule the same on a motion to suppress crucial evidence in a murder case or a drug-possession case.³⁴ This does not appear to be true for prosecutors; the effects of executive exclusion fell most heavily on just those crimes one might have predicted. For drug-possession charges, prosecutors based 18.69% of their declinations on exclusionary-rule grounds. For drug-manufacturing-and-distribution charges, such problems produced 5.86% of declinations. These are very substantial levels of exclusion, above what others have found for judicial exclusion in drug cases in other cities.³⁵

For more serious crimes, however, exclusionary-rule grounds almost disappear from the list of reasons to decline.³⁶ In aggravated battery cases, 0.21% of the declinations were based on exclusionary-rule reasons, and in first-degree murder cases the number was an impressive 0.00%. In part, the difference between drug cases and more serious crimes results from the different investigative techniques and types of evidence common in the different crime categories. The police are likely to find evidence of a

32. Although the standard of proof (reasonableness) remains the same for warranted and unwarranted searches, the burden of proof (both the burden of production and the burden of persuasion) is different for warranted and unwarranted searches. The government carries the burden for unwarranted searches, while the defendant carries the burden for warranted searches. See *State v. Fauria*, 393 So. 2d 688, 689 (La. 1981); 6 WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 11.2(b) (4th ed. 2004).

33. While there are many barriers to determining the total number of searches in a jurisdiction and the proportion of those searches that are based on search warrants, one study estimated that less than one-sixth of searches are warranted. See Ramona Lampley & Cassandra Rich, *An Empirical Study of Search and Seizure in a Mid-Sized American Town* 5 (Wake Forest Law Review Working Paper, 2003), available at <http://lawreview.law.wfu.edu/documents/working.2003.lampley.rich.pdf> (reporting that 42 of 272 reported searches in a three-month period were based on search warrants).

34. See 6 LAFAVE, *supra* note 32, § 11.2(b). But see *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984) (holding that exigent circumstances were not present “when the underlying offense for which there is probable cause to arrest is relatively minor”).

35. See *Davies*, *supra* note 28, at 622 (summarizing studies showing that exclusion occurred in the range of 3–5% in drug and weapons cases). See generally Perrin et al., *supra* note 28 (reviewing previous empirical studies of the exclusionary rule).

36. Studies in other jurisdictions have found a similar but less-pronounced difference. See sources cited *supra* note 35.

possession crime in a protected place, and physical evidence is especially important in drug cases where there is rarely a victim or other lay witness to testify. But part of the difference could also reflect a greater reluctance by prosecutors to credit search-and-seizure problems in more serious crimes, and perhaps a realistic prediction that courts will hesitate to exclude evidence in the most serious cases, despite what the doctrine says.

The larger point here is that many declination choices are shaped by *legal* norms that control criminal investigations, not just the personal whims of prosecutors or an inscrutable set of priorities among cases. Judges announce Fourth Amendment rules and enforce them through pretrial motions to exclude evidence. Police departments contribute their own part to the enforcement of these legal norms, through training, field behavior of officers, and internal evaluation of cases before filing preliminary charges or sending recommendations to a prosecutor.³⁷ Finally, prosecutors also shape the enforcement of search-and-seizure rules. Together with police training officials, officers in the field, police supervisors who evaluate case files, defense attorneys, and judges, prosecutors contribute to a multi-faceted evaluation of investigative work.

B. REASONS OF SUBSTANCE: THE CRIMINAL LAW

Criminal justice scholars despair when they think of criminal codes. These codes seem promising and relevant at first glance, as first-year law students spend untold hours puzzling over the elements commonly found in crimes and the importance of the *mens rea* that attaches to those elements. Their teachers assure them that *mens rea* and wrongful acts deserve all this attention, forming the philosophical foundation of the criminal law.

Once those students leave their introductory courses, however, *mens rea* and crime elements practically disappear from view. *Mens rea* and criminal acts do not matter very often in courses on criminal procedure, where students supposedly study the investigation and assembly of proof in criminal matters. In legal practice, criminal attorneys spend much of their time arguing about the appropriate sentence after a guilty plea, not the best fit between the likely facts and the most apt code section. The absence of solid proof for a criminal act, or for *mens rea*, becomes a relevant bargaining chip rather than an outright barrier to conviction: even a remote chance that a jury will find the necessary act and mental state will convince some defendants to plead guilty, particularly if the discount offered is steep enough. The real action in criminal practice happens at sentencing, and

37. See generally MARC L. MILLER & RONALD F. WRIGHT, *CRIMINAL PROCEDURES: CASES, STATUTES, AND EXECUTIVE MATERIALS* 886–90 (3d ed. 2007) (reprinting police-department screening policies); Corey Fleming Hirokawa, Comment, *Making the “Law of the Land” the Law on the Street: How Police Academies Teach Evolving Fourth Amendment Law*, 49 *EMORY L.J.* 295 (2000) (describing the teaching of procedure in police academies).

there the defendant's mental state stays on the periphery—note how little the federal sentencing guidelines discuss mens rea.³⁸

What explains the practical disappearance of mens rea and the definition of criminal acts? The answer is built into the criminal codes themselves; they contain the seeds of their own irrelevance. When a prosecutor faces difficulty proving one crime, the code is likely to offer some other charging option that authorizes a similar range of sentences. If the alternative charge calls for lower punishment levels, the prosecutor might split the conduct into two distinct counts, opening up the higher options once again.³⁹ Alternatively, the prosecutor might choose a different system altogether, allowing the federal system (or the federal and state systems in tandem) to produce a punishment range when an initial serious state crime seems out of reach.⁴⁰

A given set of provable facts could lead, in Louisiana as in every other state, to several different criminal charges. When these different criminal charges produce disparate sentences, prosecutors effectively control the criminal sanction through their screening choices. William Stuntz puts it this way:

[C]riminal law does not drive criminal punishment. It would be closer to the truth to say that criminal punishment drives criminal law. The definition of crimes and defenses . . . empower[s] prosecutors, who are the criminal justice system's real lawmakers. Anyone who reads criminal codes in search of a picture of what conduct leads to a prison term, or who reads sentencing rules in order to discover how severely different sorts of crimes are punished, will be seriously misled.⁴¹

So there is plenty of reason to despair over criminal codes. The New Orleans database, however, reveals that the substantive criminal law does exercise some meaningful control over the prosecutor's choice of charges.

38. See, e.g., U.S. SENTENCING COMM'N, SENTENCING GUIDELINES MANUAL § 2B1.1 (2008) (showing that the majority of sentences in fraud cases are attributed to the amount of loss); see also Jack B. Weinstein & Fred A. Bernstein, *The Denigration of Mens Rea in Drug Sentencing*, 7 FED. SENT'G REP. 121, 121 (1994) (“[I]n the guidelines era, mens rea has been all but eliminated from the sentencing of drug offenders.”).

39. The prosecutor's discretion to subdivide conduct into separate counts and the judge's discretion to consider the extra counts when selecting a sentence present enormous issues that have just begun to attract the attention they deserve. See generally Michael L. Seigel & Christopher Slobogin, *Prosecuting Martha: Federal Prosecutorial Power and the Need for a Law of Counts*, 109 PENN ST. L. REV. 1107 (2005) (describing the prosecutorial decisions in the Martha Stewart case).

40. Double-jeopardy rules would not prevent this outcome, in light of the dual-sovereign exception. *Bartkus v. Illinois*, 359 U.S. 121, 134–35 (1959).

41. Stuntz, *supra* note 4, at 506–07.

The elements of the available offenses allow us to anticipate the reasons that prosecutors give for declining to file charges.

We can see the influence of the substantive criminal law in declinations for homicide cases—an appropriate starting point for our inquiry, given that criminal-law teachers traditionally treat homicide crimes as the ideal case study for the role of mens rea. Various homicide crimes share a common criminal act (causing the death of another person) but alter the mens rea, which results in huge effects on the level of punishment.

Table 2: Reasons for Declining Homicide Charges, New Orleans 1988–1999

REASONS	1st-Degree Murder	1st-Degree Attempted	2d-Degree Murder	Lesser Homicides
Prosecuting other charge	43%	52%	27%	14%
Witness refuses to cooperate	9%	1%	7%	1%
Testimony insufficient	9%	11%	6%	18%
Not suitable for prosecution	6%	4%	20%	20%
Insufficient nexus	3%	2%	2%	3%
Victim or witness no show	6%	9%	8%	2%
No corroboration	6%	2%	2%	2%
Good defense	4%	1%	5%	13%
Witness unbelievable	5%	1%	1%	0%
Total Charges Declined	1,324	3,203	321	229
% Recommended Charges Declined	51%	73%	17%	24%

As Table 2 shows, the reasons for declining charges shift in predictable ways for homicide offenses. For first-degree murder, an exceptionally high proportion of charges were declined because the prosecutor was “prosecuting other charges” (presumably lesser homicide charges).⁴² Perhaps these discounts were necessary because the initial charges reflected some wishful thinking by investigating officers in these high-stakes crimes. The relatively high *total* percentage of charges declined for first-degree murder (51%) also shows a serious gap between the hopes of the investigating officers and the valuation of the screening attorney.⁴³

42. The lesser charge prosecuted instead of attempted murder was aggravated assault or some other form of assault.

43. The differences between the percentages in the cells in Table 2 are statistically significant. Using the chi-square test of significance, the observed chi-square value is 797.29, while the critical value of chi-square for $df = 24$ and $p = 0.01$ is 42.98, so the value of p is below 0.01.

Still, any set of facts that begins at the top of the scale as a recommendation for first-degree murder is serious enough to result in at least some homicide charge. It is not surprising, therefore, that other reasons for declinations of first-degree murder appear less often.

At the lower end of the scale—second-degree murder and lesser homicides, which include manslaughter, negligent homicide, and vehicular homicide—prosecutors did not give up easily. They declined relatively low percentages of the recommendations in these categories (17% for second-degree murder and 24% for lesser homicides). For the small absolute number of these charges declined, however, the prosecutors chose reasons with some finality. The prosecutors indicated either a lack of sufficient proof even for these lowest levels of mens rea or a decision that no criminal sanction was warranted. For instance, a large proportion of the declined cases for these two categories (as compared to other homicide crimes) were “not suitable for prosecution.” This reflects the screening prosecutor’s judgment that the civil justice system holds the best response to these least culpable deaths.

The reasons for declining lesser homicide charges also concentrate on a legal problem specific to those cases. The unusually high number of “good defense” reasons (13%) reflects the fact that many manslaughter deaths involve fights, leading to claims of self-defense and provocation.⁴⁴

Similar observations about the relevance of the criminal code hold true as we move from homicide crimes, where the important variable is mens rea, to theft crimes, where the key variable is the criminal act. For the least serious form of theft crimes under the Louisiana code, possession of stolen property, prosecutors explained 19% of their declinations by declaring that the testimony was “insufficient.”⁴⁵ For the more serious form of the crime, theft, prosecutors invoked the same reason less than half as often, for 7% of the declined charges.⁴⁶

This difference in the use of reasons tracks a distinction in the law—the definition of the criminal acts for the two different forms of theft crimes. The more serious criminal act, “taking of anything of value which belongs to another,” allows a more straightforward proof than the “possession” required for the lesser crime. A witness’s simple account of actions that the police initially charge as theft usually is adequate to prove the criminal act of

44. The “lesser homicides” in Table 2 are vehicular homicide, negligent homicide, and manslaughter. We combined these columns because the separate crimes produced several expected frequencies lower than five.

45. Prosecutors declined 68% (35,304 out of 52,010) of the police recommendations to charge under Louisiana’s “illegal possession” statute, LA. REV. STAT. ANN. § 14:69 (2007). Nearly half of those (45%) were declined because the defendant was prosecuted for other charges.

46. Of the 18,376 charges declined under Louisiana’s theft statute, LA. REV. STAT. ANN. § 14:67 (2007), 47% were declined because the defendant was prosecuted for other charges. Overall, prosecutors declined 52% of the police recommendations under this code provision.

“taking.” On the other hand, a witness’s account of the location of stolen goods and the defendant’s actions may not suffice to show possession. A more subtle criminal-act element for the lesser possession crime, therefore, leads prosecutors to decline these cases more often based on “insufficient” testimony.

For both homicide and theft declinations, then, these are law-based judgments.⁴⁷ It is easy to picture prosecutors making their declinations in homicide or theft cases with the code book and case digest in hand. A combination of legal reasoning and predictions about the likely views of juries produces a pattern of reasons. Because they fit roughly with law-based expectations, the reasons that screening prosecutors gave to their supervisors—who paid particularly close attention to homicide cases—appear to be based on good-faith judgments about the proper meaning of the substantive criminal law.

C. REASONS OF PROOF: VICTIMS AND PRIOR RELATIONSHIPS

In a study of the New York City criminal courts twenty-five years ago, it came to light that the relationships between victims and defendants play a dominant role in criminal justice processing. The Vera Institute’s study of felony arrests showed very high numbers of cases involving a prior relationship between the defendant and the victim, not only in assaults and homicides, but also in some property crimes. A prior relationship existed in more than half of all felonies involving victims, including 83% of rape cases, 69% of felony assaults, 36% of robberies, and even 35% of burglaries.⁴⁸ Cases involving prior relationships were more likely than other cases to drop out of the criminal system; for instance, felony assaults that involved a prior relationship led to a conviction in 46% of the cases, compared to 71% of the assaults involving no prior relationship.⁴⁹ Interviews with prosecutors and judges confirmed the causal link; the prior relationships between the defendant and the victim provided one of the two most important factors

47. Cf. Frank O. Bowman III & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 IOWA L. REV. 1043, 1069 (2001) (explaining that lower drug sentences during the 1990s were likely the result of line prosecutors’ disapproval of the most severe available sentences); Kathleen F. Brickey, *Charging Practices in Hazardous Waste Crime Prosecutions*, 62 OHIO ST. L.J. 1077, 1100–06 (2001) (observing that prosecutors in environmental-crime cases tend to charge cases that emphasize knowledgeable actors, despite the potential reach of statutory language to cover more technical violations); George A. Thomas III, *Discretion and Criminal Law: The Good, The Bad, and the Mundane*, 109 PENN ST. L. REV. 1043, 1048–49 (2005) (stating that prosecutors who fail to pursue the guilty are “substituting their judgment of what the law prohibits or at least using their own judgment to decide which offenders are worth pursuing”).

48. See VERA INST. OF JUSTICE, *supra* note 22, at 19 (explaining the correlation between felonies and prior relationships).

49. *Id.* at 28.

(along with the defendant's prior record) in their decisions to reduce or dismiss charges.⁵⁰

Legal scholars forget the impact of victim relationships too often, but the New Orleans data certainly show it at work. Overall, 30% of declinations are attributed to victims who "refuse to cooperate" or those who are "no shows."⁵¹ Recall from Table 1 that "witness" problems are far less common than "victim" problems, cutting across all crimes except homicide cases.⁵²

The views and actions of a victim matter for several reasons. When the victim of an alleged crime does not cooperate, it presents proof problems for the prosecutor. Such problems can be overcome, but winning such a case requires extra training and effort by the police and prosecutors. The relationship between the victim and the defendant also might affect the relative importance that prosecutors put on a case.

As Table 3 indicates, these victim issues operate visibly in rape and other sexual-assault crimes. For aggravated rape, the "victim refuses to cooperate" and "victim no show" reasons accounted for a relatively low 29% of the declinations. For the less serious crime of forcible rape, those two categories explained a larger number of declinations: 44% of the cases.⁵³ First-degree sexual battery, another intermediate form of sexual violence, also showed one of the stronger impacts from the victim-related reasons at 34%. For the least serious forms of sexual battery ("other sexual battery"), the influence of these two victim categories dropped back down to 23%.

50. *Id.* at 19, 135–37.

51. Compare these results with O'Neill, *supra* note 18, at 1439, which does not show any category for victim reasons and attributes only 3% of all declinations to "witness problems," which may include victims.

52. Prosecutors might have applied these terms sloppily at times. Note in Table 2 that "victim" refusal to cooperate was an important reason explaining dismissal of second-degree-murder charges.

53. The differences among the percentages in Table 3 are statistically significant, using the chi-square test for significance. The observed chi-square value is 163.73, while the critical value of chi-square for $df = 20$ and $p = 0.01$ is 37.57, so the value of p is below 0.01.

Table 3: Reasons for Declining Rape and Other Sexual Assault Charges, New Orleans 1988–1999

REASONS	Aggravated Rape	Forcible Rape	Simple Rape	1st-Degree Sexual Battery	Other Sexual Battery
Prosecuting other charge	30%	18%	35%	37%	56%
Victim refuses to cooperate	18%	30%	24%	24%	15%
No corroboration	12%	16%	7%	7%	6%
Victim no show	11%	14%	6%	10%	8%
Testimony insufficient	8%	5%	5%	13%	6%
Not suitable for prosecution	4%	5%	9%	3%	4%
Total Charges Declined	1,034	419	96	395	266
% Recommended Charges Declined	48%	39%	61%	50%	45%

What might explain these patterns? It appears that the serious nature of an aggravated rape leaves victims with little doubt about whether to cooperate. In the mid-range of seriousness, however, victim behavior leads to more declinations. According to prosecutors, more victims in these intermediate cases (forcible rape, simple rape, and first-degree sexual assault) tend not to cooperate or show up to meetings or hearings. Perhaps the victims do not believe that the hardships of coming forward are worthwhile. Then the pattern reverses again for the least serious sexual-assault charges, with concerns about victims becoming less prominent as reasons to decline the charge. In these lesser sexual-assault cases, the media coverage and other burdensome aspects of the criminal process might become less severe for the victims.

The influence of victims in rape charges also shows up in two other categories: “prosecuting other charge” and “not suitable for prosecution.” The percentages in the “prosecuting other charge” category remain high across all the categories, even the least severe sexual assaults. Meanwhile, the “not suitable” category—covering those cases that the office determines are not worthwhile for prosecution compared to other possible uses of limited office resources—stays low even for the least serious versions of the crime. It appears that prosecutors were reluctant to tell victims of these devastating crimes that their complaints were not a good use of the prosecutor’s time. They likely found it more palatable, or more justifiable, to assure the victims

that the prosecutor would file at least some criminal charge, even though a sexual-assault charge was not sustainable.

These victim-related declinations offer one leading example of a broader legal basis for prosecutor decisions: proof problems. Prosecutors who decline cases because of victim troubles do not act on personal whims or a personalized set of priorities. Instead, they are responding to the fundamental legal requirement that the government must prove its case beyond a reasonable doubt.⁵⁴ The fact that prosecutors invoke victim-related reasons more often to explain sexual-assault declinations than for other crimes is predictable, at least for anyone with experience in criminal justice.

Perhaps the screening attorneys and trial attorneys in New Orleans could do more to overcome victim troubles, or perhaps they were doing all that one could reasonably expect. The summary data do not throw any light on how well the prosecutors handled the issue. The pattern of reasons, however, does reveal that prosecutors framed the correct issue, however well or poorly they might have handled it. They appear to have made their declinations based on legitimate questions about assembling the legally required proof beyond a reasonable doubt.

D. REASONS OF POLICY: RESOURCE LIMITS

As we have seen, legal rules leave their mark on prosecutor declinations, even where the law, strictly speaking, might not block a prosecution. Prosecutors extend the power of criminal-procedure rules as they evaluate the work of the police officers who assemble the case files. They acknowledge the power of *mens rea* and crime elements at the time of charging, even though these building blocks of the criminal law have less practical impact from that point forward. The evidentiary challenges of assembling proof for a possible trial mean that the views of victims play a pivotal role in charging for certain crimes.

But the limits of legal doctrine do not exhaust the influences on declination choices. Prosecutors who make resource trade-offs inevitably must prioritize crimes, and those priorities will not always turn on their chances of obtaining a successful prosecution. Priorities get set for reasons other than money. Even if the prosecutor's office had an unlimited budget, attorneys would not choose to prosecute every legally sustainable case that the police recommend. Chief prosecutors, who must face the voters every few years, understand that some legally valid applications of the criminal law would be political suicide. Current public opinion constantly rewrites the terms of a criminal code drafted by legislatures over many decades.⁵⁵

54. *In re Winship*, 397 U.S. 358, 358 (1970).

55. *See* O'Neill, *supra* note 18, at 1452 (indicating that in federal courts, prosecutors are less likely to decline matters designated as national priorities).

Given these resource and political restraints, chief prosecutors often set office policies designed to keep the declinations of individual attorneys in line with their own priorities. These policies might put a higher priority on some crimes, or they might emphasize charges against certain offenders (say, repeat offenders).⁵⁶ Alternatively, the charging policies might prioritize a process value, such as limits on charge movement and restrictions on plea bargaining. As our earlier research on the New Orleans office explained, policies linked charging decisions with an effort to inspire public confidence through limits on plea bargaining.⁵⁷

Case-level data also allow us to trace the effects in the trenches of a change of office policy from the top. We explore here a deliberate change in policy for one group of crimes—those relating to domestic assault. The domestic-violence context reveals some limits on the power of supervisors in the prosecutor's office to change longstanding practices.

In the mid-1990s, Connick's office started to treat domestic-violence cases as a higher priority for criminal prosecution. In this regard, Connick was responding, like other prosecutors around the country, to a set of social and political forces that pushed these crimes into a higher priority.⁵⁸ The shift in priorities happened without any meaningful amendments to the state criminal code⁵⁹ or serious changes in available funding for enforcement. Under the new policy, prosecutors were discouraged from declining or dismissing domestic-violence cases. A screening attorney or trial attorney who wanted to dismiss charges in these cases was required to complete a special form explaining the decision. In theory, victims who initially refused to cooperate would receive a telephone call or a visit, along with special encouragement to proceed with the case.⁶⁰

56. See *id.* at 1465 (stating that in federal courts, prosecutors are more likely to invoke policy reasons for declination of regulatory public-order offenses and evidentiary reasons for violent property crimes).

57. Our research is enumerated in two articles, cited in *supra* note 13.

58. See MATTHEW J. HICKMAN & BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, LOCAL POLICE DEPARTMENTS 1999, at 19 (2001), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/lpd99.pdf> (explaining that more than 90% of police departments have policies dealing with domestic violence and over 75% have policies encouraging arrests in at least some domestic-violence situations); Robert C. Davis, Barbara E. Smith & Bruce Taylor, *Increasing the Proportion of Domestic Violence Arrests That Are Prosecuted: A Natural Experiment in Milwaukee*, 2 CRIMINOLOGY & PUB. POL'Y 263, 266–67 (2003) (discussing policy changes in Milwaukee that led prosecutors to screen domestic-violence cases more stringently).

59. The City of New Orleans, however, did pass a domestic-violence ordinance in 1994. Katy Reckdahl, *Why Doesn't She Leave? Once Dismissed as "Family Trouble," Domestic Violence Is Now Recognized as an Epidemic*, GAMBIT WKLY. (New Orleans, La.), June 11, 2002, at 19, available at http://www.bestofneworleans.com/dispatch/2002-06-11/cover_story.html. Typically, the City Attorney prosecutes ordinance violations, while the District Attorney prosecutes felonies and a few high-priority misdemeanors.

60. Interview with Camille Buras, First Assistant, Dist. Attorney's Office, New Orleans, La. (Jan. 1995). Camille Buras is now a district-court judge in Orleans Parish.

Did the new policy affect the number of declinations in domestic-violence cases? Under the Louisiana criminal code, most domestic-violence charges would be prosecuted as simple battery.⁶¹ Any effect of these policies on declination rates, however was only fleeting. The yearly declination rates for simple battery appear in Table 4.

Table 4: Declinations of Simple Battery Charges, New Orleans 1988–1999

Year	Total Recommended Charges	Percent Declined	Percent of Declinations Based on Victim Refusal to Cooperate
1989	1,377	45	19
1990	1,203	48	26
1991	797	71	31
1992	1,086	48	32
1993	1,149	43	35
1994	1,501	37	57
1995	1,977	45	50
1996	1,720	45	51
1997	1,781	41	45
1998	1,643	47	49
Total Period	16,123	46	51

For simple battery, one would expect the special efforts of the prosecutor's office to pay off by bringing down the total number of declinations. The percentage of declinations strayed from the overall average of 46% in only two years: declinations moved up to 71% in 1991, and they dipped to 37% in 1994.⁶² Perhaps the 1994 rate reflected the temporary effects of the new District Attorney's policy, along with a citywide emphasis on the issue at that time.⁶³ In 1994, soon after Congress passed the Violence Against Women Act, newly elected Mayor Marc Morial appointed a Domestic Violence Task Force in New Orleans.⁶⁴

Whatever happened in the 1994 simple-battery cases, however, did not continue into 1995 when the declination rate returned to 45%.⁶⁵ With the benefit of hindsight, it seems clear now that the District Attorney's office policy changed without the full organizational support of the police and the courts. Only in 1999 did the judges organize a special Domestic Violence Monitoring Court, placing more emphasis on the use of protective orders. It

61. LA. REV. STAT. ANN. § 14:35 (2007).

62. Reckdahl, *supra* note 59.

63. *Id.*

64. *Id.*

65. *See id.* (noting the impact of the Domestic Violence Task Force).

also took some time for changed priorities to percolate through the police department.⁶⁶

The data on reasons add depth to the story of an office policy that struggled to take effect. An office that urges victims to press charges might be expected to rely less often on the “victim refuses to cooperate” reason for a declination. The use of the “uncooperative victim” reason for declination, however, actually increased after the mid-1990s policy change in Connick’s office. In 1992, 32% of the declinations in simple-battery cases were based on a victim’s refusal to cooperate, but starting in 1994, the numbers remained higher, typically near 50%.⁶⁷

If victim-based reasons became more important over time, which reasons became less important? The proportion of simple-battery cases that prosecutors declined as “not suitable for prosecution” went down during the decade, from 29% in 1991 to 5% in 1998. Perhaps the “not suitable” category reflects most clearly the office policies and priorities in an area, and screening attorneys would hesitate to signal so clearly that they were failing to follow a declared priority for the office.

The reasons numbers also show a drop in the “other evidence problems” category, from 13% in 1991 to 0% in 1998. This likely reflects efforts by the prosecutors to train police to build domestic-violence cases without relying exclusively on the victim’s testimony. While screening prosecutors stopped invoking office policy as frequently during the 1990s as a reason to decline domestic-violence cases, the stubborn reality of hard-to-prove cases forced them to continue declining some charges. They invoked reasons to emphasize that the choice rested with the victim and not the prosecutor.

A second common context for assault crimes also reveals office policies and priorities at work. Many assault charges in New Orleans, as in other cities, grow out of altercations between defendants and police officers. Officers who investigate other alleged crimes could add a charge of “resisting an officer” or “battery of a police officer” if the suspect physically

66. *See id.* (walking through the procedures of the Domestic Violence Monitoring Court); Katy Reckdahl, *Beaten and Blamed: One Local Woman Struggles with Both Abuse and an Arrest Record*, GAMBIT WKLY. (New Orleans, La.), June 18, 2002, at 9, available at http://www.bestofneworleans.com/dispatch/2002-06-18/news_feat.html (documenting one woman’s struggle with an abusive husband and an unhelpful police department); Katy Reckdahl, *Called to the Scene: Police Have Not Always Been Considered Advocates for Battered Women*, GAMBIT WKLY. (New Orleans, La.), June 25, 2002, at 9, available at http://www.bestofneworleans.com/dispatch/2002-06-25/news_feat.html (discussing the positive impact of the New Orleans Police Department’s pilot project training police to act as advocates for battered women). In this regard, Connick could be faulted for a failure to lead other units of the criminal justice system. *See* Richman, *supra* note 13, at 2057–65 (discussing the consequences of a lack of coordination between the District Attorney’s office and the police).

67. Smaller increases occurred for the “victim no show” reason, which moved from 11% in 1991 (64 of 566) up to 20% in 1998 (152 of 774).

resists arrest.⁶⁸ The more serious version of the offense, battery of a police officer, was refused at a lower rate (27%) than any of the other assault crimes. This suggests that the New Orleans District Attorney's Office placed a high priority on these clear-cut cases of violence against police officers, probably to maintain stronger relationships between the office and the city police department. On the other hand, the more commonly recommended lesser charge, "resisting an officer," was declined at one of the higher rates for this group of crimes, 49%. The amorphous legal description of the criminal act involved here—resistance—left more room for the prosecutor's office policies to drive the outcomes.⁶⁹ Table 5 shows the reasons that prosecutors gave for dismissing assault cases from 1989 to 1999.⁷⁰

Table 5: Reasons for Declining Assault Charges, New Orleans 1988–1999

REASONS	Aggravated Battery	2d-Degree Battery	Simple Battery	Aggravated Assault	Battery of Police Officer	Resisting an Officer
Prosecuting other charge	16%	32%	20%	22%	54%	52%
Victim refuses to cooperate	41%	31%	42%	38%	6%	4%
Testimony insufficient	4%	6%	2%	5%	9%	10%
Not suitable for prosecution	6%	8%	15%	5%	14%	20%
Victim no show, unlocatable	25%	16%	14%	22%	3%	2%
Total Charges Declined	8,288	793	7,438	4,644	2,290	9,004
% Recommended Charges Declined	54%	42%	46%	44%	27%	49%

The reasons connected with these declinations of police-assault charges tell us something about the mindset of screening attorneys and about office policy. For the charge of battery of a police officer, the victim of the crime is the police officer himself or herself, so victim-related reasons are not likely to create any basis for declining charges. The number of victim problems remained lower for the police-assault crimes than for other assault crimes.

68. See LA. REV. STAT. ANN. §§ 14:34.2 (2007) (battery of a police officer), 14:108 (2004) (resisting an officer).

69. See MILLER & WRIGHT, *supra* note 37, at 11–16 (tracking judicial regulation of police efforts to enforce civility in police–citizen interactions).

70. The differences among the percentages in Table 4 are statistically significant, using the chi-square test for significance. The observed chi-square value is 9909, while the critical value of chi-square for $df = 20$ and $p = 0.01$ is 37.57, so the value of p is below 0.01.

On the other hand, several of the reasons that prosecutors invoked in these cases reveal their efforts to educate the police, perhaps holding the officers to a higher standard than other victims of crime. The testimony necessary to prove these charges would come directly from an officer who observed the crime first-hand. Thus, any critique of the testimony produced in these cases would directly refute the police officer's efforts. Interestingly, "testimony insufficient" explained 9% of the declinations in battery-of-officer charges, and 10% of the declinations of resisting-an-officer charges. Prosecutors used this reason less frequently for the other (nonpolice) assault charges.

More vivid evidence of office priorities appears in the "not suitable for prosecution" reason. This was the single largest reason that screening attorneys declined charges for battery of a police officer or for resisting an officer; screeners used this reason more frequently for police-assault crimes than for any other assault crime. By invoking this reason, prosecutors declared that even when legally sufficient evidence was available to support the charges, it was not suitable to use limited system resources to prosecute these charges.

E. SUMMARY: THE LEGAL FOUNDATIONS OF REASONED DISCRETION

The New Orleans data could support dozens of additional examples, but we will not belabor the point. These snapshots of prosecutors at work reveal that exercises of prosecutorial discretion are not the antithesis of law. Instead, these declinations and the reasons prosecutors attach to them embody the law of criminal justice.

The origins of the legal constraints on declinations are both internal and external. They are external for the extreme cases, those charges when the courts ultimately would dismiss a charge. Perhaps the evidence does not establish the mens rea or the criminal element necessary to satisfy the statutory definition of the crime; perhaps the police clearly violated constitutional rules to obtain the key evidence, and the courts would ultimately exclude it. In such cases, the prosecutor translates the legal judgments of other institutions—legislatures that create criminal codes and courts that enforce procedural and substantive requirements—into a prosecutorial decision to refuse charges.

For other cases, the constraints are simultaneously internal and legal. They are internal, in the sense that oversight from other legal bodies does not compel the result. Put another way, in some cases the prosecutor declines to file charges even though the case might ultimately result in a legally valid conviction.⁷¹

71. Cf. Malcolm M. Feeley, *Two Models of the Criminal Justice System: An Organizational Perspective*, 7 *LAW & SOC'Y REV.* 407, 408–09 (1973) (noting that a system of criminal justice is

Yet at the same time—and here is the paradox from the point of view of a Herbert Wechsler—the constraints are legal. The prosecutor declines some charges in an effort to interpret the criminal law faithfully, even when there is no reason to believe that some other interpreter stands ready to overturn the prosecutor's choice. The screening attorney values consistency and the efficiency that comes from routinely matching certain facts to a particular criminal code section. The chief prosecutor sets priorities among all the available criminal charges to reflect the current values of the legislature and the local public. The inspiration for the declination comes from the substantive criminal code, or from procedural limits on investigative techniques and on the proof required at trial, or from democratically declared priorities among crimes. For some cases, the prosecutor is the only enforcer of these legal limits. Still, prosecutors offer reasons for their declinations that suggest they respect these limits, even when nobody can effectively force them to do so.

II. RACE AND UNSTATED REASONS

In Part I, we considered the lessons that one might draw from the stated reasons of screening attorneys when they decline to file charges. Those stated reasons, as we have seen, link in identifiable ways to various legal sources. Skeptics, however, might wonder if stated reasons really tell us anything. The reasons that screening attorneys record for internal management use might indeed portray hard-working attorneys who consider legitimate legal factors before making wise and reasoned choices. But is that not always the case when employees describe their own work for their bosses?

If the stated reasons of screening attorneys do not truly portray their motives for declining cases, what might be their unstated reasons? There are several unsavory possibilities here. Arbitrary prosecution can take many forms, and the worst-case scenarios involve race, gender, class, and other invidious criteria. Perhaps prosecutors allow such factors to affect their choices, either consciously or unconsciously, and later rationalize those choices by recording more palatable and legally relevant reasons.

In this Part, we consider how a regime of stated reasons can address arbitrary prosecutorial choices, even when those stated reasons do not explicitly reveal the arbitrariness. We employ race as one especially toxic example of an arbitrary motive for prosecution, but these insights about race could extend to other unstated arbitrary grounds.

Race leaves its mark on criminal justice outcomes: any casual stroll around a busy criminal courtroom on a busy weekday should be convincing on this score. Prosecutors are only one potential source of these racial

both a set of highly formalized rules and also an organization with no incentives and sanctions to enforce the norms).

disparities; such disparities could also derive from the community itself, the police, the courts, defense counsel, corrections authorities, parole boards, legislative bodies who fund criminal justice agencies or define crimes, and many others.

The source of the disparities, however, matters less than the power to change them. Evidence from a few American cities suggests that prosecutors can use their power of internal regulation to identify and respond positively to race and class disparities. Internal regulation can change troubling outcomes without any proof of fault, intent, or causation—the barriers that often block effective external regulation.

A. *WHENCE CRIMINAL JUSTICE BIAS?*

While nobody doubts that criminal adjudication falls more heavily on some people (young males, particularly African Americans and Latinos) than on others, there are competing theories to explain the outcomes. The disproportionate results could derive from a number of points in the system.

Part of the pattern results from the behavior of people in the community. For instance, young African-American males commit homicides at a rate higher than their portion of the population, and that translates into arrests, prosecutions, convictions, and sentences at higher rates than the rest of the population.⁷²

When the police begin to investigate possible crimes, they can tilt the racial imbalance. The department's leadership might allocate officers in places—designated without much careful thought as “high-crime” neighborhoods—where they are most likely to witness the crimes that young minority males commit.⁷³ Meanwhile, crimes in other quarters of the city go unnoticed. Departmental methods of evaluating officers (for instance, rewarding officers for the number of drug arrests they make) could also make a difference.⁷⁴ The department might train officers to investigate clues that lead most often to the arrest of young minority males, such as techniques that direct special scrutiny to young men who drive expensive cars (those whose crime is “driving while black”) because this effort is

72. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2005 STATISTICAL TABLES 62 tbl.48 (2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cvus05.pdf>; CALLIE RENNISON, VIOLENT VICTIMIZATION AND RACE, 1993–1998, at 10 (2001). This is not true for every crime. For drug offenses in particular, sales and possession cut fairly evenly across racial groups, but the drug crimes that police and attorneys investigate and prosecute are the ones that minority defendants commit. See MICHAEL TONRY, MALIGN NEGLECT 104–15 (1995).

73. See, e.g., Tracey L. Meares, *Place and Crime*, 73 CHI-KENT L. REV. 669, 672–77 (1998) (discussing the connection between physical location and crime, and arguing that law-enforcement policies need to change to take into account this connection).

74. See BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, UNDERSTANDING COMMUNITY POLICING: A FRAMEWORK FOR ACTION 37 (1994) (noting that performance evaluations can be a valuable tool for facilitating change).

thought to be an efficient way to catch drug dealers.⁷⁵ And finally, the bias of individual police officers might play a part. An officer who is more inclined to view a young minority male as “dangerous” would not likely turn down a chance to arrest the suspect when probable cause is present.

Once the police complete their work, prosecutors could contribute to the imbalance themselves—or counteract the effects of police work. As they sort through the files that the police deliver to them, prosecutors must select which cases to decline to prosecute, which cases to charge at some level below the recommended charges of the police, and which cases to charge at or above the recommended levels. In disposing of the cases after filing, prosecutors reach plea agreements in some cases by reducing charges and in other cases by recommending light sentences. They also choose which cases to dismiss outright. At every point along the way, prosecutors could shift the racial mix of the defendants.⁷⁶

Judges might contribute in their own ways. Particularly in lower-level felonies and serious misdemeanors, judges can influence the defendants’ decisions of whether to waive defense counsel.⁷⁷ For jury trials, their evidentiary and procedural rulings might produce acquittals for some defendants and not for others. For bench trials, the judge determines who is convicted of the most serious charge, of lesser charges, or acquitted entirely.

The judge’s real influence appears at sentencing. Particularly in a discretionary and indeterminate sentencing system, the judge’s general impression of the defendant—not tethered to specific legal or factual findings—can add or subtract years from a sentence.⁷⁸ These impressions can shape the conditions that the judge places on probation and thus change the odds that a probationer will violate the conditions and return to

75. See generally PETER VERNIERO, INTERIM REPORT OF THE STATE POLICE REVIEW TEAM REGARDING ALLEGATIONS OF RACIAL PROFILING (1999); Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651 (2002) (providing empirical evidence of racial profiling in Maryland); David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265 (1999) (discussing how the law encourages the crime of “driving while black” because of the belief that it catches criminals).

76. See, e.g., ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 5 (2007) (discussing the prosecutor’s role in the disparate treatment of defendants); Cassia Spohn, John Gruhl & Susan Welch, *The Impact of the Ethnicity and Gender of Defendants on the Decision to Reject or Dismiss Felony Charges*, 25 CRIMINOLOGY 175, 177 (1987) (noting that prosecutors dismiss up to one-half of their cases in many states).

77. See Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461, 503 (2007) (encouraging judges to assess the necessity of counsel at the outset of cases); Ronald F. Wright & Wayne A. Logan, *The Political Economy of Application Fees for Indigent Criminal Defense*, 47 WM. & MARY L. REV. 2045, 2077–78 (2006) (discussing the increasing amount of waivers because of application fees).

78. See generally Rodney L. Engen & Sara Steen, *The Power to Punish: Discretion and Sentencing Reform in the War on Drugs*, 105 AM. J. SOC. 1357 (2000) (examining the amount of discretion possessed by judges as a result of determinate and intermediate sentencing).

prison. Finally, probation and corrections officials can also contribute to the impact of the criminal justice system on different races and classes of defendants.

One crude measure of the separate impact of prosecutors would track the racial composition of the pool of defendants for a given crime at the entry and exit points: the race of defendants presented for charges by the police as they enter the prosecutor's office and the race of defendants that prosecutors actually charged as the cases go out into the courts.

The data from New Orleans make such a measurement possible. For all crimes combined, the racial makeup of the defendants entering and exiting the prosecutorial pipeline were virtually identical: 12.2% of the defendants that police referred for prosecution were white and 85.6% of those defendants were black, while 12.1% of the defendants actually charged were white and 85.7% were black.⁷⁹

The aggregate numbers, however, obscure some interesting shifts in the racial composition of defendants for some particular crimes. Table 6 presents crimes in descending order of volume for outgoing charges and highlights the largest race differentials.

79. Overall, the population in New Orleans in 2000 (before Hurricane Katrina changed the demographic mix along with the rest of the landscape) was 67.3% black and 28.1% white. Census Bureau, State & County Quick Facts: New Orleans, La., <http://quickfacts.census.gov/qfd/states/22/2255000.html> (last visited Sept. 9, 2008).

Table 6: Net Prosecutor Impact on Racial Composition of Defendant Pool for High-Volume Crimes, New Orleans 1988–1999

Crime	Incoming Police Referrals			Outgoing Prosecutor Charges			Net Prosecutor Impact	
	White %	Black %	Total Charges	White %	Black %	Total Charges	White %	Black %
Illegal Poss. Stolen Things	7.3	90.7	24,056	9.0	89.0	12,398	1.7	-1.7
Drug Manuf., Distribution	3.7	95.2	24,822	3.6	95.6	11,056	-0.1	0.4
Drug Possession	7.7	91.6	46,560	10.2	89.0	9,839	2.5	-2.6
Resisting an Officer	9.2	89.0	18,463	9.0	89.2	9,004	-0.2	0.2
Aggravated Battery	7.8	90.4	15,339	7.4	91.0	8,288	-0.4	0.6
Drug Para. Transaction	21.0	78.3	8,825	19.0	80.4	7,762	-2.0	2.1
Simple Battery	9.4	88.3	16,123	8.3	88.6	7,438	-1.1	0.3
Theft A	23.1	74.5	11,944	21.9	76.1	6,655	-1.2	1.6
Theft C	12.1	86.6	11,233	14.2	84.3	5,703	2.1	-2.3
Theft B	16.4	82.1	11,251	20.5	78.3	5,487	4.1	-3.8
Simple Burglary	10.6	86.8	14,646	11.7	85.7	5,254	1.1	-1.1
Trespass	8.6	88.1	8,528	8.3	87.6	5,000	-0.3	-0.5
Aggravated Assault	10.6	87.7	10,451	8.6	89.7	4,644	-2.0	2.0
Armed Robbery	3.2	95.2	15,179	3.8	95.4	4,614	0.6	0.2
Flight from Officer	5.8	92.9	6,166	5.9	93.1	4,151	0.1	0.2
Damage to Property	19.5	78.5	6,980	16.3	82.0	3,809	-3.2	3.5
Forgery	25.9	72.6	15,994	27.3	71.8	3,546	1.4	-0.8
Attempted Murder	5.6	92.6	4,394	5.6	92.9	3,203	-0.0	0.3
Disturbing Peace	12.0	85.1	4,585	10.9	85.5	2,662	-1.1	0.4
Conv. Person w/ Weapon	3.3	96.1	6,712	4.5	95.1	2,491	1.2	-1.0

Note that prosecutors increased the percentage of white defendants in the pool roughly as often as they increased the percentage of black defendants. In nine of the twenty high-volume crimes listed here (those with a positive number in the “white %” column for net prosecutor impact), prosecutors *reduced* the racial imbalance in the pool that they received from the police.⁸⁰ Most of the crimes reflecting the larger prosecutor impact

80. The differences between the percentage of white defendants prosecuted and the percentage of white defendants presented by the police were significant for most of the crimes listed in Table 6, using the z test of significance. The exceptions were drug manufacturing and distribution, resisting an officer, aggravated battery, trespass, flight from an officer, and attempted murder. The z test is not ideal in this setting because it treats the pool of police cases

(those highlighted with an increase of at least 2%) involved property or drug offenses rather than crimes of personal violence. For the most serious violent offenses on this high-volume list, such as armed robbery or attempted murder, the prosecutors likely felt a stronger obligation to file charges as the police recommended. The seriousness of the alleged offense overwhelmed any considerations about racial imbalances or the defendant's social background.

The data allow us to quantify, in a rough sense, the contribution of prosecutors to racial imbalance versus the contribution of other criminal justice actors. The data also show that it is crucial to move beyond the aggregate level. While numbers tracking the operation of "criminal justice" on the whole may not show racial disparities worthy of comment or concern, the picture looks different once we break down the numbers by crime, or by class of crime, or by subgroups of prosecutors in an office, or by other subcategories. Important questions about consistent and principled prosecutorial choices come to light only after "drilling down" into the numbers. We now turn to the different potential responses of prosecutors to such data-driven insights about declinations.

B. WHITHER CRIMINAL JUSTICE BIAS?

We believe that prosecutors' offices with particular structures—relatively centralized offices, with management directives enforced by data monitoring and a requirement that line prosecutors record their reasons for choices—create useful tools for responding to racial imbalances in the system. The experience of several prosecutors' offices around the country that use data systems actively as management tools to address racial disparity offer a glimpse of the possibilities. These internal office practices, when combined with the tools of external regulation, hold far more promise than external positive law acting alone.

1. External Regulation

For many decades, critics of the prosecutor's contribution to racial injustice have turned to constitutional doctrine, enforced by the courts, as the leading remedy. The straightforward idea is that "selective prosecution"

as the population value rather than a sample that is subject to selection bias. Nevertheless, the *z* test addresses in a rough sense what prosecutors do with the raw materials presented to them.

For a similar analysis of the relative contributions of police and prosecutors, see Devon J. Green & Megan S. Shafer, Note, *The Faces Within: An Examination of the Disparate Treatment of Minority Youth Throughout the North Carolina Juvenile Justice System*, 40 WAKE FOREST L. REV. 727, 733 (2005) (discussing how black juveniles were "referred" into the system by citizens and police officers at a higher rate than white juveniles, but noting that prosecutors did not meaningfully change those demographics when they decided which cases to "petition" into the juvenile-adjudication system).

based on race or gender violates the Equal Protection Clause of the Fourteenth Amendment.

Long experience, however, should make us wonder about the actual value of external regulation.⁸¹ Three quick judicial reference points illustrate the problem. The first is *Yick Wo v. Hopkins*,⁸² the 1886 font of the selective-prosecution doctrine. The key insight from this case is found in its date: it is, to our knowledge, the last time that the Supreme Court actually overturned a conviction based on a selective-prosecution claim.

Our second reference point is *United States v. Armstrong*.⁸³ When criminal defendants claim that the government's "selective enforcement" of a law violates the Equal Protection Clause, courts ask the defendant to address several issues. First, the defendant must show that others similarly situated were treated differently (for instance, the police did not arrest someone in a different group, despite a viable case against the person). Second, the defendant must show that the disparate treatment between the groups is legally significant (for instance, different treatment of racial or gender groups). Finally (and this is the most difficult showing), a defendant must demonstrate that the government agents intentionally discriminated against the group—that is, they chose the target *because of* the group membership, and not *in spite of* the group membership. *Armstrong* created daunting hurdles for such claims: the case involved the preliminary question of whether defendants could even pursue discovery to make these showings. *Armstrong* lost, and it is difficult to imagine a realistic winning claim, even at the discovery stage.⁸⁴

The third is a case from Georgia, *Stephens v. State*.⁸⁵ The defendant challenged his life imprisonment, which was based on his second conviction for the sale of a controlled substance.⁸⁶ The judge imposed the penalty under a mandatory sentencing provision, and *Stephens* claimed that

81. See Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1355–58 (2008) (describing reasons for primary reliance on the judiciary to enforce norms of fairness in the administrative state).

82. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). New scholarship by Professor Gabriel (Jack) Chin suggests that legal scholars have fundamentally misconceived *Yick Wo* (and legal casebook editors have improperly edited it in constitutional law and criminal procedure) for 120 years, and that its true meaning turns on the Treaty Clause, not concerns for equal protection. See Gabriel J. Chin, *Unexplainable on Grounds of Race: Doubts About Yick Wo*, 2008 U. ILL. L. REV. (forthcoming), available at www.ssrn.com/abstract=1075563.

83. *United States v. Armstrong*, 517 U.S. 456 (1996).

84. See Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 42–50 (1998) (reviewing the difficulties of successful judicial challenges to exercises of prosecutorial discretion); McAdams, *supra* note 3, at 605 (explaining that an equal-protection claim is almost impossible to win because prosecutors control almost all of the information).

85. *Stephens v. State*, 456 S.E.2d 560 (Ga. 1995).

86. *Id.* at 560.

Georgia authorities applied the law in a way that discriminated on the basis of race.⁸⁷ In Hall County, for example, fourteen of the fourteen people serving sentences under this statute were black. The law was used to impose a life term on 202 out of 1107 eligible black defendants between 1990 and 1994, and only 1 out of 167 eligible white defendants. Despite these whopping imbalances, Stephens lost his equal-protection claims (both the federal and the state versions).⁸⁸

This sample of cases illustrates, we think, how timidly the judiciary responds to even the most compelling evidence of systematic bias.⁸⁹ Perhaps this is a necessary evil, since the implications would be enormous if courts were to intervene in similar situations more often. The inability of courts to respond to systematic problems is no reason, however, to ignore them.

2. Internal Regulation

What are the prospects that internal regulation of prosecutors' choices might begin to heal the racial imbalance in criminal justice? We are optimistic that a highly structured and monitored office environment, with a leadership committed to recording and reviewing the reasons for major choices, could address this problem despite the absence of external controls.⁹⁰ At the very least, we argue that the internal strategy in such an office environment would have a more positive effect on racial imbalance than we have seen after many decades of relying too heavily on external regulation through constitutional litigation.

While those who worry about selective prosecution focus on the intentional individual bias of the line prosecutor,⁹¹ internal regulation allows us to broaden the frame of reference and ask about systemic bias. The

87. *Id.*

88. Initially, the Georgia Supreme Court struck down the statute, but it reversed its position weeks later after a rehearing. Trisha Renaud, *DA's, Defenders Joined on Drug Bill: Quiet Coalition Devised Repeal of Mandatory-Life Provision*, FULTON COUNTY DAILY REP. (Atlanta, Ga.), Mar. 22, 1996, at 1. Interestingly, the Georgia legislature amended this mandatory sentencing provision in response to the *Stephens* decision. *Id.* The revised statute expanded the sentencing options available to the judge after a conviction for violation of this statute and broadened its coverage to include second convictions for sale of methamphetamines. *Id.*; GA. CODE ANN. § 16-13-30(d) (Westlaw through 2008 Sess.).

89. See Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 435 (1992) ("One of the most disturbing developments in criminal justice over the last two decades has been the judiciary's failure to provide clear standards that would place some rational limits on the prosecutor's discretion.")

90. Cf. Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893, 919-36 (2000) (comparing judicial, legislative, and internal executive role in controlling federalization of criminal law).

91. Constitutional litigation requires a showing that a state actor intentionally caused a racial disparity. See *Washington v. Davis*, 426 U.S. 229, 239 (1976) (explaining that the central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official-conduct discrimination on the basis of race).

key virtue of shifting the frame from the individual to the system is that intent, blame, and causation all drop out of the picture. Managers who use disaggregated data about the outcomes and reasons invoked in their offices never have to declare who is to blame for racial disparities. Internal regulation simply asks if the racial disparity is present, whether it is a necessary by-product of other important goals, and whether the prosecutor has the power to change the disparity. Internal regulation can look forward for change strategies rather than looking backward for moral blame and legal responsibility.⁹²

The ability to act without assigning individual blame can operate at different levels of ambition. We dub these the “Do-No-Harm” strategy and the “Policy Leader” strategy.

The “Do-No-Harm” Strategy. A prosecutor might resolve, at least initially, that her office will not contribute to any racial imbalance beyond what the police deliver to the office for each relevant subgroup of defendants. The choice of subgroups calls for some careful thought, but the work of sentencing commissions in many jurisdictions offers a template for acceptable categories. The prosecutor might group defendants by the crime charged (or by groups of related crimes) and perhaps by the prior criminal record level of the defendants.⁹³

When supervisors in a prosecutor’s office break down defendants into the relevant subgroups by crime and prior record, they can determine whether one race within that category is charged more often than defendants of another race. When prosecutors discover such an imbalance at the declination stage, the racial distinctions should trigger further careful inquiry.

Data-management systems make such a diagnosis possible.⁹⁴ An intriguing project of the Vera Institute, known as the Prosecution and Racial Justice Project, works with prosecutors in several major cities to identify subgroups of cases where prosecutors change the racial balance of cases presented to the office. The chief prosecutors now working with the Vera

92. See Steven Alan Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. PA. L. REV. 1365, 1437 (1987) (discussing the idea that objectifying presumptions “encourages consistency because the prospect of public explication they raise spurs rational decisionmaking, and because the justifications they require exposes the considerations that affect the challenged action to judicial as well as public scrutiny”).

93. See generally NORA DEMLEITNER ET AL., *SENTENCING LAW AND POLICY: CASES, STATUTES, AND GUIDELINES* (2d ed. 2007) (describing typical guideline categories of crimes and criminal record).

94. See Lynn D. Lu, *Prosecutorial Discretion and Racial Disparities in Federal Sentencing: Some Views of Former U.S. Attorneys*, 19 FED. SENT’G REP. 192, 200 (2007) (“As an internal office management tool, the U.S. Attorney should collect and analyze quantitative and qualitative data on the race and ethnicity of the defendant and victim at each stage of prosecution.”).

Project include the district attorneys in Milwaukee, Charlotte, and San Diego.⁹⁵

One vivid example of the project at work occurred in Milwaukee. Prosecutors and consultants from Vera programmed existing data systems to produce reports that showed declination rates for many different crimes. In the aggregate, these data reports showed no particular cause for alarm. Prosecutors declined the charges that police recommended at the same rates for white and nonwhite defendants: they declined to prosecute 31% of the cases both for white and nonwhite defendants. When the reports looked separately at felony and misdemeanor charges, the same racial parity held true.⁹⁶

When the reports broke down the declinations into smaller crime categories and smaller time periods, however, more worrisome patterns appeared. The eighteen-month period of data collection for the Milwaukee pilot project coincided with the first few months in office for the newly elected district attorney, who reorganized the office along geographical lines to allow prosecutors in different sectors of the city to respond to the priorities and concerns of the people in their respective areas.⁹⁷ The data reports showed that over the course of the eighteen-month study period, the percentage of declined cases that involved white defendants rose more quickly than declinations that involved nonwhite defendants.⁹⁸ The reason for such a trend over time was not clear to managers in the office, but it became a topic of ongoing discussion and awareness from that point forward.

More concrete results flowed from the data reports broken down by type of crime. The reports showed racial differences in the declinations for

95. See Vera Inst. of Justice, *supra* note 12 (explaining the project). We must disclose that both of us serve on the Advisory Board to the Prosecution and Racial Justice Project. All board members travel to periodic meetings in New York and in the cities with cooperating prosecutors' offices; board members receive a modest honorarium.

96. Prosecutors declined misdemeanors for 30% of the cases recommended against defendants of both races. For felonies, prosecutors declined 34% of cases against white defendants and 33% of cases against non-white defendants. Donald Stemen & Elizabeth Farid, Presentation at Program-Wide Meeting of Prosecution and Racial Justice Project in New York City (Oct. 5, 2007) (on file with the Iowa Law Review) [hereinafter Vera Presentation].

97. See Tony Anderson, *Ripple Effect: Milwaukee County District Attorney Restructures Department*, Wis. L.J., May 7, 2007, available at http://www.accessmylibrary.com/coms2/summary_0286-32401030_ITM (discussing changes by the new District Attorney); Derrick Nunnally, *DA Reflects on Year of Change, Challenge*, MILWAUKEE J. SENTINEL, Dec. 26, 2007, at B1, available at <http://www.jsonline.com/story/index.aspx?id=700438> (same); Derrick Nunnally, *New DA Starts by Remodeling*, MILWAUKEE J. SENTINEL, Sept. 5, 2007, at B1, available at <http://www.jsonline.com/story/index.aspx?id=657103> (same); Interview with Milwaukee County Dist. Attorney John Chisholm, in New York City, N.Y. (Oct. 5, 2007) (same).

98. The trend line for white defendants moved from about 29% to more than 40%. For non-white defendants, the trend line moved up more modestly, from about 33% to about 37%. Vera Presentation, *supra* note 96.

certain crimes. For instance, prosecutors declined property charges against nonwhites more often than they declined property charges against whites. They also declined drug charges and public order charges against whites more often.⁹⁹

This finding led to deeper inquiry. Breaking down the offense categories into even smaller subunits, the data showed which particular crimes reflected the racial differences. Experienced prosecutors then reviewed a sample of the smallest subcategory's files to determine whether some legitimate prosecutorial objective could explain the racial disparity. In some cases, the review of larger files uncovered important facts that the electronic summary files did not capture: for instance, the value of the property that was stolen or destroyed seemed to explain the different declination rates in property cases that were filed in different sectors of the city, with a corresponding differential impact on races.¹⁰⁰

On the other hand, closer inquiry for some crime categories revealed no obvious race-neutral justification for the pattern of declinations. When supervisors in Milwaukee received more fine-grained data about the racial differences for declinations in drug cases, they were able to diagnose marijuana-possession cases as one major source of the differences. These cases were dismissed against white defendants more often than black defendants.¹⁰¹ Spot checks of the complete case files, along with informal conversations among the prosecutors in the office, revealed the dynamic at work. Less-experienced prosecutors, who made the declination decision in the largest number of these cases, considered them to be fairly serious crimes. More-experienced prosecutors, who had dealt with a larger range of crimes, considered the marijuana-possession cases to be a waste of time, only rarely worthy of prosecution.¹⁰²

The discovery of chaotic decisions on the declination of marijuana-possession cases prompted the District Attorney to take action. He arranged for more explicit training of younger assistants about marijuana-possession cases and placed them in the context of other more important crimes.¹⁰³ Note that such training could take place without explaining why the differences in experience levels among attorneys in the office produced differential racial results. The point was to show that charging was haphazard and that the results were not acceptable. Without any dispiriting hunt for racists in the office, prosecutors in Milwaukee identified a racial

99. *Id.*

100. *Id.*

101. *Id.*

102. See Interview with John Chisholm, *supra* note 97 (discussing this phenomenon); see also Bree Nordenson, *Partner Profile: Milwaukee DA Focuses on Reducing Racial Disparities*, JUST 'CAUSE (Vera Inst. of Justice, New York, N.Y.), Spring 2008, at 1 (explaining how the District Attorney dealt with racial-disparity problems).

103. See sources cited *supra* note 102 (detailing the District Attorney's actions).

disparity in charging, inquired closer to learn that no race-neutral objectives were at work, and took concrete steps to change the pattern of charges in the future. The limited reach of constitutional doctrine under the Equal Protection Clause was not relevant to this exercise of internal regulation.

As these examples from Milwaukee show, a well-functioning data-management system in a prosecutor's office allows a manager to run reports for sub-areas of crimes. Based on these reports, managers can note racial patterns in particular crime areas, diagnose the point in the office process where the racial gap appears, and then consult reasons listed to get a sharper picture of what might be creating the pattern. The objective is not to find some individual line prosecutor who is intentionally or unintentionally biased. Instead, the manager aims to uncover practices built into the system—into the articulated and unspoken priorities and habits of the office—that turn out to have a racial impact.

Once the internal inquiries identify a practice with previously unappreciated racial impact, the best response is not automatic. The chief prosecutor might shift office priorities or habits. Yet there will also be times when some legitimate law-enforcement value drives the chief prosecutor to continue the practice even though it contributes to racial imbalance. When the prosecutor holds onto a practice that carries undesirable side effects, the self-awareness that results from an internal inquiry can pay dividends. Flagging the racial impact of a policy encourages more careful usage in the future and promotes ongoing political accountability for the choice.¹⁰⁴

The "Policy Leader" Strategy. While data reports allow some prosecutors to "do no harm," contributing no racial disparities beyond those that the office inherits from other actors, in some cities this might not suffice. When prosecutors operate in a system with deep racial imbalances already at work, the prosecutor might need to push back against problems that originate outside the office.

In a targeted version of this strategy, the chief prosecutor might push back against apparent racial discrimination from other criminal justice actors in settings where there is specific evidence on point. For instance, a prosecutor might know about traffic stop numbers that the local police publish, showing some suspicious patterns.¹⁰⁵ In this setting, the chief

104. See DAVIS, *supra* note 76, at 188–93 (discussing racial-impact statements for prosecutorial work, particularly the Vera Project). Political conditions in a given community might give some prosecutors greater incentives than others to open their office practices to data-based scrutiny. In particular, newly elected prosecutors might prove more willing to scrutinize their predecessors' actions or the early tentative results of their own reorganizations. This seems to describe the political landscape in Milwaukee.

105. See DEBORAH RAMIREZ, JACK MCDEVITT & AMY FERRELL, A RESOURCE GUIDE ON RACIAL PROFILING DATA COLLECTION SYSTEMS: PROMISING PRACTICES AND LESSONS LEARNED 43–52 (2000) (making recommendations for traffic-stop data-collection systems); N.C. State Bureau of Investigation, Traffic Stop Statistics, <http://trafficstops.ncsbi.gov/> (last visited Oct. 16, 2008)

prosecutor might tell line prosecutors to look especially hard at drug trafficking cases that originate with a traffic stop.

The prosecutor controls more than just the charging and disposition of cases recommended for criminal adjudication. The chief prosecutor takes a leadership role in the community on all matters related to crime control. In this policy leadership role, the prosecutor might use the data about sources of racial disparities to convince others to take action. Perhaps the prosecutor could approach legislators and ask them to change a mandatory penalty provision because it has unanticipated racial effects. Or maybe the prosecutor could approach the local police agencies to propose new training or procedures or allocation of resources.¹⁰⁶ Similarly, a prosecutor might raise questions about the allocation of police resources in a city.

The prosecutor is the one actor with the best information (visible through well-designed data systems) to diagnose possible racial trouble spots. The prosecutor is also the one actor with the influence to create systemwide change, because many criminal justice actors—legislators, police chiefs, mayors, associations of business owners—have reasons to follow the prosecutor's lead.¹⁰⁷

III. OBJECTIVE AND SUBJECTIVE DISCRETION

Observations from New Orleans, Milwaukee, and other cities give us reason to believe that internal regulation works. As we have seen, the use of reasons for different crimes shows the influence of explicit office policies and priorities, the constraints of criminal-procedure rules, and the influence of the substantive criminal law. In a relatively centralized and transparent prosecutor's office, internal regulation might also uncover and address harmful unstated reasons for prosecutorial decisions, such as race-based assumptions. When prosecutors build data systems that force everyone in the office to state reasons for the record and to monitor trends in discretionary

(explaining a North Carolina statute requiring the state to collect and maintain statistics on traffic stops).

106. See generally Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749 (2003) (modeling the prosecutor-agent relationship in the federal system as a game of mutual dependence and monitoring).

107. Does a lead prosecutor have any incentive to pursue any of these leadership strategies? In a jurisdiction where the majority of voters are members of racial minority groups, the answer is clearly yes. The incentives on prosecutors depend critically on the role of elections and information. See Ronald F. Wright & Marc L. Miller, *Dead Wrong*, 2008 UTAH L. REV. 89, 95–96 (discussing the dynamics of prosecutor elections). Candidates and reporters during election campaigns for district attorneys concentrate too much attention on conviction rates and case backlogs. What if our reporters routinely wrote stories about the racial impact of office structures, and asked for data from the office (or the courts) to explore the questions themselves? What if they asked about efforts by the prosecutor to offer feedback and training to the police, or to lobby for legislation?

choices, regulation from within the black box accomplishes more than regulation from courts or legislatures.¹⁰⁸

But these observations do not tell us *how* internal regulation works. In the remainder of this Article, we explore the causal mechanisms—the methods that translate various legal and social values into a consistent, predictable, and enforceable order.

The advantage of internal regulation over external regulation does not happen just because it derives from a friendly insider source. There is also an important psychological and experiential component of discretion that explains the impact of internal regulation. In this section, we explore two views of discretion, with attention to the perspective of the actor holding the discretion. In particular, we draw a distinction between objective and subjective views of executive discretion. Internal regulation is more likely to have an effect because it accounts for the subjective view of discretion.

The objective account of discretion is familiar, a staple of administrative law and various positivist theories of law. This concept of discretion looks for enforceable legal standards that executive-branch actors must follow. The law sets outer boundaries, but any choice falling within those boundaries is something distinct from law—call it discretion—because there is “no law to apply.”¹⁰⁹ This is Herbert Wechsler’s definition of discretion, casting it as the opposite of law.¹¹⁰ Expectations amount to legal rules only when government institutions ultimately could impose them on an unwilling actor. Or as Holmes put it:

If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.¹¹¹

Under this objective account of discretion, prosecutors encounter very few legal limits in their work. They have plentiful charging options within

108. For an analogous debate about possible internal and external methods to promote consistent and principled decisions, see generally Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007) (stating that more training promotes greater consistency); Margaret H. Taylor, *Refugee Roulette in an Administrative Law Context: The Déjà Vu of Decisional Disparities in Agency Adjudication*, 60 STAN. L. REV. 475 (2007) (stating that supervisory oversight can promote consistency and accuracy within agencies).

109. See *Webster v. Doe*, 486 U.S. 592, 592 (1988) (holding that a court has no meaningful standard to apply when a statute is drawn in broad terms).

110. See Wechsler, *supra* note 1, at 1102 (“[I]t is quite clear that [the] existence [of discretion] cannot be accepted as a substitute for a sufficient law”); see also Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904, 931 (1962) (noting that oversight for discretion of police and prosecutors is necessary because administration of criminal law “is not sui generis, but another administrative agency which requires its own administrative law”).

111. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

the generous criminal codes in the United States, and pursue personal priorities without any fear that some other institutional actor will enforce a boundary. In such a world, prosecutors can overcharge and create substantial plea-trial differentials to force guilty pleas; all such choices fall within their discretion, immune from effective legal sanctions.¹¹²

The subjective (or internal or experiential) perspective on discretion, in its idealized form, is the polar opposite of these objective claims.¹¹³ Public actors—those who allegedly wield the discretionary sword—often assert that they actually hold little or no discretion. They claim that the choices that the law theoretically leaves open are misleading and overstate what is realistically available.

Rejecting the image of broad freedom within wide boundaries, executive-branch actors feel obliged to justify their choices based on public-regarding reasons.¹¹⁴ They feel bound to remain consistent and to offer equal treatment to all members of the public. Actors often assert that they are aware of the risks of bias and work consciously to eliminate it.

Such obligations mark the weakness of discretion as public officials experience it from the inside. This subjective perspective on the exercise of discretion explains much about the prosecutors' offices in the cities we have studied and much about judging, policing, and the exercise of discretion throughout the administrative state.¹¹⁵

112. See James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1545 (1981). Vorenberg states:

Self-imposed limits on discretion . . . are likely to be no stronger than the determination of the men and women who abide by them to limit their own discretion. Human nature being what it is, people rarely give up power voluntarily, and thus the capacity of self-regulation to remove prosecutorial abuse and arbitrariness from the criminal justice system is limited.

Id.

113. Our account of the subjective or internal experience of discretion draws on various "internal" accounts of obedience to law in jurisprudence. Cf. H.L.A. HART, *THE CONCEPT OF LAW* 90–91 (2d ed. 1994) (differentiating the internal from the external point of view); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 3–7, 24–26 (1990) (discussing internal reasons for why people obey the law). We apply these general internal accounts of law in the specialized setting of behavior by government officials rather than the public, and we use the concepts to explain the use of discretion (choices that officials make in zones not strictly governed by positive law) rather than compliance with law.

114. See, e.g., Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1544–45 (1988) (discussing public-regarding reasons behind legislation).

115. See M.P. Baumgartner, *The Myth of Discretion*, in *THE USES OF DISCRETION* 129, 130 (Keith Hawkins ed., 1992) (discussing the effects that the exercise of discretion has on the legal system and society); Richard Lempert, *Discretion in a Behavioral Perspective: The Case of a Public Housing Eviction Board*, in *THE USES OF DISCRETION*, *supra*, at 185, 186–87 ("If law is no guide, other social forces may be, and they may give rise to patterns of behavior that look, and in a sociological sense are, more rule-bound than behavior that is in theory rigorously structured by law."); David Millon, *Objectivity and Democracy*, 67 N.Y.U. L. REV. 1, 6, 11–12 (1992) (discussing conventionalist legal theory and claiming that practices and understandings "shared within the

This subjective view of discretion hides as much as it reveals. While this vantage point throws light on the full range of values that constrain public officials, it also prevents officials from appreciating what they could do. Perhaps even more troubling, the subjective view of discretion prevents some public actors from seeing what they have actually done.

A few examples can flesh out this portrait of subjective discretion. The first involves a federal prosecutor and the federal sentencing guidelines, a system with above-average data capability. Jay McCloskey, the U.S. Attorney for the District of Maine, asserted at a conference—and then again in the printed version of his relatively brief talk—that his office rarely approved departures from the federal sentencing guidelines:

Let me start out by saying that in the District of Maine, where I have been United States Attorney for seven years and an Assistant U.S. Attorney for thirteen years, that we do, in fact, meet the standards of the Guidelines and rarely deviate from the strictures of the Guidelines as found in this little brown book. At least in the District of Maine, there are exceptions, but there are relatively few.¹¹⁶

The only problem with this story was the facts. When told that the statistics from his district reported prosecutor-driven departures from the federal guidelines that put the district in the middle of the national pack, McCloskey's first response was to speculate that the data must be wrong. When confronted with details from the data, McCloskey paused. He then explained, at some length, that what appeared to be "deviations from the rules" were in fact nothing of the sort. On a long second thought, he explained that a combination of immigration and gun issues produced a large number of cases consistently and appropriately handled through prosecutorial (substantial assistance) departures or by judicial departures that the U.S. Attorney's Office found to be reasonable. Because these judgments were sound, in McCloskey's view, they did not seem like "departures" at all.

The second example comes from parole practices in California. At a 2006 conference devoted to the question of "back-end sentencing,"¹¹⁷ the

legal profession limit the law's interpretive potential by providing sufficiently clear and stable criteria to facilitate objective analysis of legal problems"); Rubin, *supra* note 16, at 1299–1300 (discussing the dominating impact of self-perceived norms about discretion in the German banking system).

116. Jay McCloskey, *Panel Remarks, Sentencing Guidelines: Where We Are and How We Got Here*, 44 ST. LOUIS U. L.J. 385, 391 (2000).

117. The Stanford Criminal Justice Center organized the conference. Stanford Law School, Back-End Sentencing: Strategic Responses to Technical Violations of Parole and New Crime Among Parolees, <http://www.law.stanford.edu/calendar/details/54/Back-EndSentencingAStrategicResponsestoTechnicalViolationsofParoleandNewCrimeAmongParolees/> (last visited Oct. 16, 2008) (follow "Related Information and Recordings" link for conference recordings).

central case study was parole revocation in California, where every offender is automatically placed under parole supervision after release. The critics of parole administration in California assailed the massive discretion of parole authorities to revoke an offender's parole. Parole supervision—unlike sentencing, release, and parole-eligibility criteria—remains largely untouched by the reform movement toward a system of guidelines. The critics suggested that unwise and inconsistent use of the parole revocation powers were partly to blame for the state's resource and policy crisis.

Several career parole officers with extensive experience, both in line and supervisory positions, were present at the conference. They listened to the criticisms and agreed with the general concerns expressed about the wisdom and expense of current revocation policies. But then they offered a powerful and detailed description of the legal, institutional, and political constraints that governed parole revocation. Some of the limits on their parole choices grew out of perceived social and political norms, not positive law. In the end, they asserted that parole-administration decisions were consistent and left little discretion to either the agency or the line officers. From their perspective, both the procedures and outcomes were reasoned and consistent, even if the policies were misguided. They were speaking from a subjective perspective internal to their institution.¹¹⁸

One of the authors, Marc Miller, attended the conference and personally observed and participated in the proceedings.

118. This subjective experience of discretion is not limited to executive-branch actors. Another recent discussion at the Stanford Criminal Justice Center focused on the possible role of judicial discretion in a future California sentencing reform. *See* Stanford Law School, A New Proposal for Sentencing Reform in California, <http://www.law.stanford.edu/calendar/details/77/ANewProposalforSentencingReforminCalifornia/> (last visited Oct. 16, 2008) (giving an overview of a recent conference that focused on the possible role of judicial discretion in future California sentencing reform). One of the authors, Marc Miller, attended this conference as well and had the following observations.

Several California trial and appellate judges were present, along with judges who had been active in sentencing reform in other leading state systems. One early presenter claimed that more discretion existed in the *current* California sentencing system than might at first appear. A sophisticated superior court judge from Southern California, a person with decades of experience in local and state criminal justice administration, responded that he had very little discretion. He then proceeded to explain that his discretion was sharply limited by mandatory sentences, by legal norms, and by political constraints since California judges are subject to electoral review. He then acknowledged that there were some questions, such as whether sentences for multiple offenses would be served consecutively or concurrently, that were left to his discretion. On further discussion from other judges, he and others acknowledged varying degrees of involvement in plea negotiations. Other California judges pointed out their very broad discretion with regard to misdemeanants, to the process of parole administration and parole revocation hearings, and to the terms and conditions of probation sentences.

By the time the discussion had ended, it was clear that California trial judges had very substantial sentencing discretion, even on the face of the formal law. But it was also true that the judges' self-perception allowed for very little discretion at all. The initial response of the judges in that meeting suggested how deep-seated the belief is that individual judgments are

These snapshots may seem like isolated anecdotes, which of course they are. But they are snapshots that are repeated over and over in our experience, whenever we discuss discretion with those who actually wield it.¹¹⁹ The difference between the objective (external) and subjective (internal) perspectives on discretion helps explain a commonly observed gap between discretion's critics and its executive defenders.

The psychological reality of subjective discretion does not insulate prosecutors from external criticism. Sometimes decisions that appear consistent and principled through the lens of subjective discretion are truly outrages, and the limits that insiders perceive are merely self-delusion or self-justification. On the other hand, there are times when decisions that appear arbitrary from an objective-discretion vantage point are actually reasoned and reflect a genuine effort by the prosecutor to make consistent choices in a setting where the prosecutor is accountable to others, even without the threat of enforceable legal claims.

The subjective (internal) version of discretion explains nicely our observations about the work of prosecutors in New Orleans, Milwaukee, and other cities. This perspective allows us to appreciate the high level of internal self-awareness that exists about standards in these offices. Such self-awareness flows from required data collection, statement of reasons, training, and reviews of personnel and policies that are tied to the data. This observation does not assume that the mostly young, short-term, and poorly compensated line prosecutors in these offices hold an extraordinary commitment to principled prosecution. Instead, the internal systems in such prosecutors' offices create everyday and case-by-case incentives to think through, act on, and explain cases in consistent terms.

Our distinction between the subjective and objective views should reorient scholarly critiques of discretion. For objective observers, a new appreciation for the subjective view can broaden the picture frame to include social, political, and institutional norms that do not find expression in positive sources of law. The subjective viewpoint helps objective critics to see the potential not only for ill (the usual perspective) but for good in the use of discretion. It also challenges critics to construct more nuanced

informed, rational, and consistent, and as a corollary, that the judge hardly exercised discretion at all.

119. For a similar observation about prosecutorial self-image, see David A. Sklansky, *Starr, Singleton, and the Prosecutor's Role*, 26 *FORDHAM URB. L.J.* 509, 532 (1999). Sklansky states:

[D]iscretionary decisions can nonetheless be reasoned Prosecutors understand it, too. They do not and could not decide whom to charge, for example, in the same way they choose what to order for dinner. They think about it, they argue about it, and sometimes—although not often enough—they write policies about it.

Id.

theories of executive behavior that explain how that behavior can remain consistent with basic legal values.

The presence of a subjective view of discretion also helps explain the great potential of internal regulation as a complement to external regulation of prosecutors. Internal regulation operates with more keen awareness of the full range of functional limits on prosecutors. It harnesses the prosecutor's aspirations for consistency and fairness, and amplifies the healthy limits that would remain unheard when prosecutors encounter external regulation.

Finally, the distinction between subjective and objective discretion also should change the current uses of discretion. For actors operating within the subjective framework, the objective view places on them the burden of publicly articulating those norms, rules, and procedures that make them perceive so little discretion.¹²⁰ The distinction fairly asks internal actors to be more self-aware and more open about their standards and their decisions. We now examine how openness in prosecution contributes to an effective regime of internal regulation.

IV. INTERNAL REGULATION AND TRANSPARENCY

Professor Robert Ellickson went to Shasta County, California in the 1980s to test the Coase Theorem.¹²¹ Shasta seemed like a perfect setting to test the theorem, which assumed that in a world of zero transaction costs, different liability rules would produce identical behavior, regardless of the legal starting point. Coase had illustrated his Nobel Prize-winning idea with an extended discussion of ranchers and farmers.¹²² In Shasta County, two different liability rules were applied for farmers and ranchers in two different parts of the county. As Ellickson explained, some parts of Shasta County had "open range" rules that created liability for those farmers who did not fence in their crops, while other parts lived under "closed range" rules that created liability for ranchers who did not successfully fence in their cattle.¹²³

Ellickson ultimately learned little about the Coase Theorem. The test he envisioned would have compared the behavior of otherwise-similar people in light of the two different legal rules. But the people he studied did not even know the relevant rules, nor did they use the legal process in which those rules might have applied. Some scholars might have left Shasta County at

120. See Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 840 ("[Prosecutors have not] undertaken the task of identifying workable norms for the array of discretionary decisions that their offices make each day.").

121. See generally Ronald H. Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960) (setting out Coase's theorem in detail).

122. *Id.*

123. See ELLICKSON, *supra* note 15, at 44–48 (discussing the legal significance of the distinction between open-range and closed-range rules in Shasta County trespass disputes).

that point, continuing the search elsewhere for another real-world test of the Coase Theorem. But having found a wall barring the original path to his study, Ellickson realized the wall itself was fascinating, and he stayed in Shasta County to describe that wall. Ellickson researched and wrote about how “people frequently resolve their disputes in cooperative fashion without paying any attention to the laws that apply to those disputes.”¹²⁴ Social norms among farmers and ranchers, not local legal rules and procedures, were central to settling disputes that arose from harm to cattle and to crops.

Ellickson’s book brought new attention to ideas that sociologists had developed across the decades about the relationship between social norms and legal regimes.¹²⁵ He framed the idea in economic terms: social norms can order the behavior of people in some group settings more “efficiently” than formally developed rules of law.¹²⁶ Ellickson compared legal institutions to other more decentralized methods for creating social order within groups; he also explored the mechanisms for creating such social norms. In the end, however, Ellickson’s work tells us more about alternatives to law than about the law itself.

Some of the social-norms literature followed Ellickson in treating legal rules and legal institutions as irrelevant, a force for social order that some groups ignore in favor of other norms that they spontaneously develop for themselves. For instance, Lisa Bernstein has analyzed how social norms and procedures evolve within certain highly insular or traditional industries, such as the cotton trade and the diamond trade.¹²⁷

Other social-norms scholars depict the interaction between legal rules and social norms.¹²⁸ Some studies show how social norms can determine the practical effects of a proposed law—in some cases impeding the enforcement of law and in other cases strengthening the legal rule.¹²⁹

124. *Id.* at vii.

125. See generally, e.g., ROBERT E. PARK & ERNEST W. BURGESS, INTRODUCTION TO THE SCIENCE OF SOCIOLOGY (1924); Tracy L. Meares & Dan M. Kahan, *Law and (Norms of) Order in the Inner City*, 32 LAW & SOC’Y REV. 805 (1998) (identifying assumptions and strands of modern social-norms scholarship related to crime and cities).

126. See generally Sheila Vera Flynn, *A Complex Portrayal of Social Norms and the Expressive Function of Law*, 36 UWLA L. REV. 145 (2005) (discussing the intersection of law and social norms); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997) (surveying the impact of Ellickson’s work); Lior Jacob Strahilevitz, *Social Norms from Close-Knit Groups to Loose-Knit Groups*, 70 U. CHI. L. REV. 359 (2003) (illustrating how Ellickson’s theory relates to “off the ranch” groups).

127. See Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1724–25 (2001); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 115–17 (1992).

128. For a theoretical examination of this interaction, see generally Yoshinobu Zasu, *Sanctions by Social Norms and the Law: Substitutes or Complements?*, 36 J. LEGAL STUD. 379 (2007).

129. For an example of such a study in an environmental context, see Michael P. Vandenberg, *Beyond Elegance: A Testable Typology of Social Norms in Corporate Environmental*

Sometimes the causation is reversed: the declaration of a new public value, to be enforced by a new legal rule, can itself shape the norms that operate among private groups.¹³⁰ Some scholars describe how the existing law serves as a reference point for parties as they create alternative norms.¹³¹

Taken together, these accounts dwell on the interaction between legal rules and social norms once the legal rules are established and begin to operate among nongovernmental social groups.¹³² Legal institutions use social norms, but those social norms operate outside the governmental agency in society at large.

What has not yet emerged—and what the study of district attorneys' offices can illuminate—is the distinctiveness of social norms *within* executive-branch agencies.¹³³ This study highlights one role of social norms within agencies, which is the potential of such norms to regularize the discretionary choices of those agencies.¹³⁴ Just as public-choice theory applied the tools of

Compliance, 22 STAN. ENVTL. L.J. 55, 62–63 (2003). A wonderful article by Lior Strahilevitz explores the creation of norms and norm violation with regard to carpool and environmentally-friendly-vehicle lanes in California. See Lior Jacob Strahilevitz, *How Changes in Property Regimes Influence Social Norms: Commodifying California's Carpool Lanes*, 75 IND. L.J. 1231, 1274 (2000) (discussing motorists who move aside in favor of faster vehicles).

130. See Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2033–36 (1996) (noting that legal rules can affect social norms regarding cigarette smoking).

131. For example, Eric Posner depicts legal rules as a reference point for parties as they create reputations. Individuals signal their willingness to comply with inconvenient legal rules to show their more general interest in cooperation. See generally POSNER, *supra* note 15.

132. See Richard A. Posner, *Social Norms and the Law: An Economic Approach*, 87 AM. ECON. REV. 365, 368 (May 1997) (“[L]aw both complements and substitutes for norms”). Richard McAdams summarizes the relationship this way: “Norms matter to legal analysis because (1) sometimes norms control individual behavior to the exclusion of law, (2) sometimes norms and law together influence behavior, and (3) sometimes norms and law influence each other.” McAdams, *supra* note 126, at 347.

133. For one discussion that takes the first few steps down this road, see Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117, 161–63 (2006). Criddle notes that a “fiduciary model” of administrative law “considers legal restraints to be just one strand in the intricate web of institutional relations, bureaucratic constraints, and social norms that influence agency behavior.” *Id.* at 161. Criddle discusses several sources of these extralegal constraints, but does not pursue the topic of how they might operate differently within governmental and non-governmental organizations. *Id.* at 161–62. See also Robert D. Cooter, *Three Effects of Social Norms on Law: Expression, Deterrence, and Internalization*, 79 OR. L. REV. 1, 2 (2000) (“State organizations suffer from agency problems that preclude effective motivation of people by formal means alone. Perhaps effective formal institutions depend on flourishing informal institutions.”).

134. We suspect that there are similar insights into the role of social norms within judicial and legislative bodies. While the focus of this Article is on executive-branch agencies, and indeed specifically one kind of executive-branch agency, the larger idea is that government institutions also operate, to varying but often very substantial ideas, more on the basis of norms than more obvious “legal” or at least “positive” (i.e., affirmative, explicit) legal authority. See Lawrence M. Friedman, *Judging the Judges: Some Remarks on the Way Judges Think and the Way Judges Act*, in NORMS AND THE LAW 139, 151 (John N. Drobak ed., 2006) (noting that the most influential factors in judicial decisionmaking are societal norms and values).

neo-classical microeconomics to the behavior of actors in legal institutions,¹³⁵ we believe that bureaucracies are governed by social norms.

Sociologists certainly have recognized how bureaucratic structures exert distinctive group pressures on individuals,¹³⁶ and socio-legal scholars have explored how organizational incentives shape the choices of government officials in many settings.¹³⁷ Some have focused on the interaction between the individual line prosecutor and the defense attorneys and other members of a “working group” in the courtroom.¹³⁸ The study of district attorneys’ offices takes this work a step further, offering new insights about the interaction between legal sources and group culture when they meet in a special type of organization: one whose personnel and very mission are devoted to the rule of law.

In particular, the social norms at work within legal institutions hold some distinctive features, setting them apart from the social norms that develop within close-knit private groups. Bureaucratic social norms interact more constantly with established legal rules. They are also more manipulable, for better or for worse. Agency heads, other institutions, and political and social forces can alter those norms in ways that are much more conscious and direct than one normally sees in the setting of private social groups.

135. *See generally* JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1962) (exploring the public-choice theory in the context of political decisionmaking). How could it be that twenty-five years after Ellickson started his work—and generations after sociologists started mapping the group cultures within bureaucracies—legal scholars and scholars in other disciplines have not pursued the distinctiveness of the law–norms interaction in the public bureaucracy setting? Our hypothesis turns on intellectual path dependence. Norms within agencies do not appear to “settle a dispute.” The birth of modern legal-social-norms scholarship among ranchers and cattlemen—and in opposition to formal legal rules and processes—has perhaps (and ironically) made it hard to see that the insights about the importance of social norms in understanding the power and limits of the law extend to legal institutions as well.

136. The impact of bureaucratic forms of organizations on society was a central concern of Max Weber, Emile Durkheim, and other giants of the field. *See* Max Weber, *Bureaucracy*, in *THE SOCIOLOGY OF ORGANIZATIONS: BASIC STUDIES* 7, 7–36 (Oscar Grusky & George A. Miller eds., 2d ed. 1981).

137. *See generally, e.g.*, MICHAEL LIPSKY, *STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES* (1980) (exploring the effect of public policies on the individuals in street-level bureaucracies, schools, police, welfare departments, lower courts, and other similar organizations); PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* (1983) (arguing that the remedies that the public tort system offers should be reformed to account for organizational dynamics).

138. *See generally* JAMES EISENSTEIN & HERBERT JACOB, *FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS* (1977) (discussing the interaction between work groups in the courtroom); JAMES EISENSTEIN ET AL., *THE CONTOURS OF JUSTICE: COMMUNITIES AND THEIR COURTS* (1988) (presenting an approach to understanding how criminal courts function); MILTON HEUMANN, *PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS* (1978) (discussing the adjustments of new prosecutors, defense attorneys, and judges in the plea-bargaining process).

A. NORMS WITHIN LEGAL INSTITUTIONS

We went to New Orleans to study prosecutorial discretion. What we learned was that discretion—including the essential decision to decline charges—adheres to a stable blend of values that come from a range of sources inside and outside the agency. Those different sources mix together in the New Orleans District Attorney's Office to create reasonably consistent and therefore predictable group behavior.

Two aspects of social norms within government agencies distinguish them from social norms operating in non-governmental social groups. First, norms within agencies come from a range of formal and informal sources, including the conscious creation of norms by senior executive-branch officials. Second, norms within agencies are subject to greater control by internal and external actors. Norms within legal organizations appear to function more like the controls of a machine and less like subtle beliefs and practices that can shift only in mysterious ways.

1. Norm Sources

The sources of the informal norms operating within a prosecutor's office are distinctive. Granted, individual prosecutors share with private actors the human desire to be esteemed,¹³⁹ or to hold a reputation for trustworthiness.¹⁴⁰ But which norms should a prosecutor observe to achieve these goals?

The norms that a prosecutor must follow should convince others that she is acting within a prescribed institutional role, the "tough but fair" prosecutor who performs an adversarial duty with a sense of restraint and proportion.¹⁴¹ Each local culture puts its own peculiar spin on the ideal prosecutorial role, but the broad elements are familiar across many jurisdictions in the United States. The components of these traditional role expectations come from sources that are both formal and informal, legal and extra-legal.

Some of the formal rules have legislative origins.¹⁴² Statutes define crimes and punishments and grant prosecutors the authority to initiate

139. See McAdams, *supra* note 126, at 355–58 (discussing the preference that most people have for esteem); Richard H. McAdams, *Conventions and Norms: Philosophical Aspects*, in 4 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES 2735, 2740–41 (Neil J. Smelser & Paul B. Baltes eds., 2001) (suggesting that behavioral patterns are shaped by a desire for approval from others).

140. See Posner, *supra* note 132, at 366 (discussing the development of norms through a desire for approval).

141. See generally Kay L. Levine, *The New Prosecution*, 40 WAKE FOREST L. REV. 1125 (2005) (tracing the impact of community prosecution objectives on the self-image of prosecutors).

142. See Criddle, *supra* note 133, at 161 ("Congress shapes the social norms surrounding agency identity not only through legislation, but also through formal and informal debate over

criminal charges. Statutes also grant certain investigative powers or procedural tools to prosecutors. The legislature appropriates the funds to hire prosecutors and sometimes directs those funds to particular enforcement priorities.¹⁴³ As we saw in Part I, such formal sources of law exert some influence beyond their literal terms. Prosecutors in their declinations seem to account for the substantive limits of the criminal law and the procedural limits on searches and seizures even when the law does not strictly compel a dismissal.

Judicial opinions also contribute to the norms that create the local versions of the prosecutor's role. Although more constrained today through sentencing guidelines than in other eras,¹⁴⁴ individual judges still enforce their own expectations about the proper behavior of prosecutors who enter their courtrooms.¹⁴⁵ Other actors in the local courtroom culture, including clerks and even defense attorneys, also generate some of the expectations about the prosecutor's ideal role as a contributor to an efficient working group.¹⁴⁶

Some components of the prosecutor's expected role also come from the top of the executive branch—including administrative regulations, budget allocations, and statewide training designed to create more uniform skills among prosecutors and to promote a common sense of identity. As well, a governor or attorney general might announce and highlight enforcement priorities that can shift prosecutor norms even without a change in budget or training.¹⁴⁷

But in the radically decentralized prosecutorial services of the United States,¹⁴⁸ it is the elected district attorney who contributes most powerfully to

pending legislation, formal congressional oversight of the administrative process, informal dialogue with agency administrators, and committee hearings on regulatory issues.”).

143. See Daniel C. Richman, “*Project Exile*” and the Allocation of Federal Law Enforcement Authority, 43 ARIZ. L. REV. 369, 390 (2001) (noting one such appropriation where federal funds went towards the intensification of records checks on guns).

144. See Engen & Steen, *supra* note 78, at 1357 (observing that sentencing guidelines restrict judicial discretion).

145. Observations about social norms almost certainly apply to courts. Consider the well-developed scholarship on influence of political appointment, judicial elections, and voter initiatives. See Kathryn Abrams, *Black Judges and Ascriptive Group Identification*, in NORMS AND THE LAW 208, 223–27 (John N. Drobak ed., 2006) (noting that judges identify with those who share their group membership).

146. See sources cited *supra* note 138 (discussing the interactions between different members of the courtroom working group); Michael M. O’Hear, *Plea Bargaining and Victims: From Consultation to Guidelines*, 91 MARQ. L. REV. 323, 323–26 (2007) (discussing how victims have an increasingly active role in influencing prosecutors).

147. See Levine, *supra* note 141, at 1132–44 (discussing California Governor Pete Wilson’s implementation of a broad social program for prosecutors that was intended to reduce statutory rape).

148. See STEPHEN W. PERRY, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PROSECUTORS IN STATE COURTS, 2005, at 1 (2006), available at <http://www.ojp.usdoj.gov/bjs/>

the norms that prosecutors pursue. Policy priorities in the office, such as a stepped-up interest in domestic-violence crimes, might not result from any actual change in the criminal law, but they palpably change the norms that define what prosecutors are expected to do.¹⁴⁹

The sum of these parts makes the line prosecutor something more than a litigant who operates “in the shadow of the law.” Public prosecutors who decide whether to decline charges, unlike plaintiffs’ attorneys who decide whether to bring civil cases, try to fit within a group identity, a role with nonlegal dimensions.¹⁵⁰ The question is not simply whether filing the case makes sense in light of the odds of success under the current law and the opportunity costs of filing one case over another. The line prosecutor must ask whether filing a particular case carries out the proper prosecutor’s role with all its legal dimensions. The line prosecutor must also consider the expectations of the locally elected prosecutor and the other prosecutors in the office, who decide how to juggle the demands of the judge and the courtroom working group, and every other component of the role.¹⁵¹ This is not an individual choice by a line prosecutor about the best way to fit into the “working group” of other attorneys and judges in the local courthouse; it is a collective decision by all the prosecutors in the office about how to remain true to the prosecutor’s job after accounting for the realities of local conditions.

The multiple sources of the norms that constrain prosecutors help to explain the divide between the objective and subjective views of discretion discussed in Part III. The view from outside the prosecutor’s office sees the legal constraints—or rather, the lack of legal constraints for some decisions. The subjective view of discretion registers more layers of constraint, particularly the expectations that flow from courtroom working groups and from expectations within the office about what it means to act like a prosecutor. Since norms are internalized and shared, the agent viewing

pub/pdf/psc05.pdf (stating that there are 2344 distinct prosecutorial offices in the state court systems in the United States). For an overview of the implications of this decentralization, see Ronald F. Wright & Marc L. Miller, *Country Report: United States of America*, in MAX PLANK INST., PROSECUTORIAL SERVICE FOR THE EUROPEAN UNION (forthcoming 2008).

149. The power of such office policies to produce identifiable results without any changes in the underlying legal authority of the prosecutor was the subject of the first phase of our study of New Orleans. See generally Wright & Miller, *Screening/Bargaining Tradeoff*, *supra* note 13; Wright & Miller, *Honest & Opacity*, *supra* note 13.

150. See Alex Geisinger, *A Group Identity Theory of Social Norms and Its Implications*, 78 TUL. L. REV. 605, 638 (2004) (stating that norm enforcement results from an individual’s identification with group).

151. See Leonard R. Mellon, Joan E. Jacoby & Marion A. Brewer, *The Prosecutor Constrained by His Environment: A New Look at Discretionary Justice in the United States*, 72 J. CRIM. L. & CRIMINOLOGY 52 (1981) (“The differences in prosecution policy are often mandated by environmental factors over which the individual prosecutor has no control.”).

discretion from the inside is most likely to appreciate the weight of organizational culture.

2. Norm Controls

The distinguishing features of norms within executive agencies include a greater capacity of legal institutions to establish and change norms. Social norms may be more subject to control and change for legal institutions and actors than for other social groups—even closely connected and defined social groups like the ranchers and farmers in Shasta County.

The mechanism for transmitting social norms among private groups can be evanescent. Bureaucracies, however, offer clear-cut paths for norms to follow: the hierarchies and rules of the bureaucracy are designed precisely to produce coherent group action. Executive-branch agents work within formal boundaries. They are trained and directed to do certain tasks or achieve certain goals, however general or specific. Executive-branch agencies of any size at all, in any jurisdiction, have internal organizational and command structures. While private social groups tend to depend on a “norms entrepreneur” to step forward and shift social norms,¹⁵² in government agencies the norms entrepreneurs are already designated. There is no need to await the right economic or sociological conditions for a change agent to appear.

The structure, function, and history of each agency determine the extent to which the agency can consciously create, impose, and change internal norms.¹⁵³ The scale of a prosecutor’s office matters tremendously in this regard. Think of the difficulty that the U.S. Attorney General has in shifting practices or changing the self-image of federal prosecutors scattered in ninety-three different U.S. Attorney’s offices around the country.¹⁵⁴ The elected prosecutors in local offices—even those in the largest urban offices—have more control over the office culture than the U.S. Attorney General because the number of attorneys in the organization remains smaller than in the federal prosecutorial structure.

152. See Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 909 (1996) (discussing the role of norm entrepreneurs).

153. The organizational control of norms distinguishes this account of the prosecutor’s work from the “working group” theory prominent in criminology accounts. The working group theory emphasizes the relationship between an individual prosecutor and the defense attorneys, judges, and other courtroom personnel who process large numbers of cases daily. See sources cited *supra* note 138 (discussing working groups).

154. See David Robinson, Jr., *The Decline and Collapse of Federal Guideline Sentencing*, 74 WASH. U. L.Q. 881, 888 (1996). The Department of Justice employs over 5000 Assistant U.S. Attorneys, not counting all the attorneys employed in the Criminal Division and other units based in Washington, D.C. Wright, *supra* note 5, at 120 n.116. The large number of attorneys within the Department of Justice reinforces a long tradition of office independence for the U.S. Attorneys. See Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1227–35 (2004) (describing the variation in practices among U.S. Attorneys’ offices).

The number of participants in the office culture is only one factor that determines the ability of leadership to shift group expectations. The number of office locations, the method of leadership selection, and the level of available funding are other straightforward contributors.¹⁵⁵

The points we make here about social norms within executive-branch agencies are all the more true of agencies, such as prosecutors' offices, where the critical decision-makers are lawyers. Lawyers add a layer of training and a world view that may make the incorporation of norms even more powerful and direct than for those executive-branch agencies with other kinds of training.¹⁵⁶ A key feature of legal training is a commitment to consistency and the justification of general rules in terms of public values rather than personal convenience. The lawyers who work as prosecutors are inclined by training to embrace a group identity, one that assures the actor of consistent and well-justified organizing principles when making troubling choices.¹⁵⁷

Because control over norms is so available in the setting of prosecutors' offices, we inevitably must ask how best to exercise that control. We now turn to methods of critiquing internal regulation in light of social norms insights.

155. See generally, e.g., JERRY L. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* (1983). Detailed accounts of the internal workings of executive and administrative agencies are rare. Sometimes, though, specific policy initiatives lead to public debate and then to scholarly critiques. For example, the debate over immigration prosecution and "fast-track" policies in federal border districts has been visible in public debates, federal policy, and scholarly commentary for a decade. See generally Alan D. Bersin & Judith S. Feigin, *The Rule of Law at the Margin: Reinventing Prosecution Policy in the Southern District of California*, 12 GEO. IMMIGR. L.J. 285 (1998); Alan D. Bersin, *Reinventing Immigration Law Enforcement in the Southern District of California*, 8 FED. SENT'G REP. 254 (1996); William Braniff, *Local Discretion, Prosecutorial Choices and the Sentencing Guidelines*, 5 FED. SENT'G REP. 309, 312 (1993); William Braniff, *Intra- and Extra-Guideline Prosecutorial Discretion*, 7 FED. SENT'G REP. 133 (1994); Robert H. Edmunds, *Guideline Sentencing and Department of Justice Policies Under the Reagan-Bush Administrations*, 6 FED. SENT'G REP. 306 (1994); Mary De Ming Fan, *Disciplining Criminal Justice: The Peril Amid the Promise of Numbers*, 26 YALE L. & POL'Y REV. 1 (2007). On occasion, an actor within an agency chronicles the behavior and decisions within the agency. For a famous, though dated, example, see HERBERT KAUFMAN, *THE FOREST RANGER: A STUDY IN ADMINISTRATIVE BEHAVIOR* (1960).

156. See Tanina Rostain, *Ethics Lost: Limitations of Current Approaches to Lawyer Regulation*, 71 S. CAL. L. REV. 1273, 1320 (1998) ("Regulators care about appearing fair and public-minded, even if their self-interest, more narrowly defined, pulls in a contrary direction. Social norms account for the fact that governmental agencies, despite the dire predictions of public choice theory, often resist capture."). The point may turn out to be that executive agencies with similar professional training and cultures will both incorporate norms from their fields or training and be susceptible to the norm creation and control in ways specific to the profession or training.

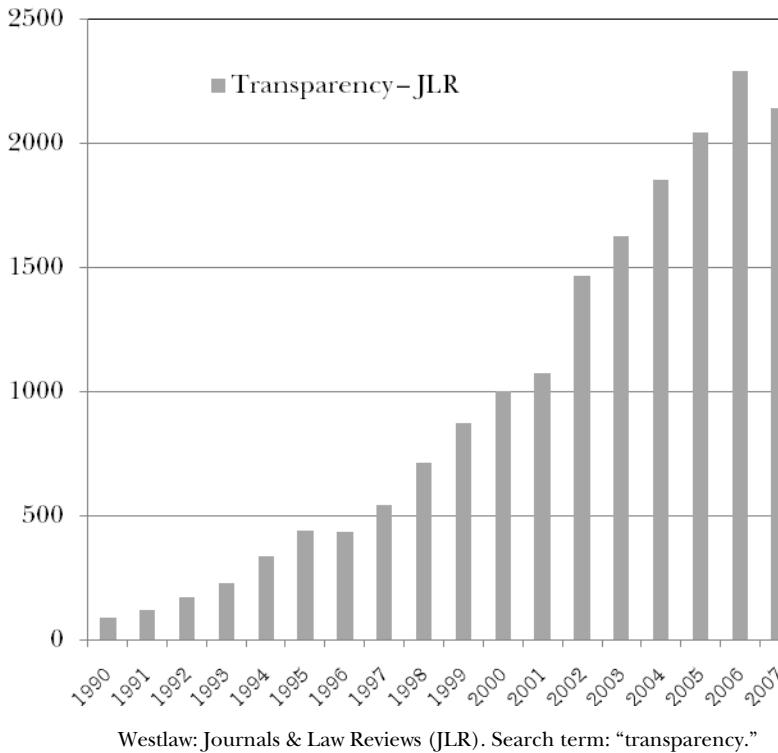
157. For a thoughtful essay on the shifting content of this group identity, see Edward Rubin, *What's Wrong with Langdell's Method, and What to Do About It*, 60 VAND. L. REV. 609, 619-21 (2007).

B. JUDGING INTERNAL NORMS

The data from New Orleans and the data-management practices from Milwaukee and elsewhere do not prove that all of the general principles guiding decisions in those offices were ideal—much less do they prove that any individual case decisions were ideal. Instead, the concept of internal norms that we develop here suggests that executive-branch decisionmaking *can* be principled and appealing. But how might we judge whether the internal regulation for a given office has in fact produced a principled and appealing set of practices? As a first rough measure of the wisdom and legitimacy of executive agency norms, we ask how much transparency they show.

Transparency is hot—it has emerged as an increasingly prevalent concept in legal scholarship over the past fifteen years. A search in the legal scholarship database in Westlaw reveals the growth trend in the use of this term.¹⁵⁸

158. A similar but lesser trend appears in popular discourse, as demonstrated by the appearance of the term transparency in *The New York Times*. No similar pattern appears in federal or state cases over the same period. For a discussion of the adjustments that one would ideally make to account for growth in the Westlaw news and scholarship databases over time, see generally Ronald F. Wright, *The Abruptness of Acton*, 36 CRIM. L. BULL. 401 (2000).

Table 7: Use of Term “Transparency” in Legal Scholarship, 1990–2007

For all of the passing references to transparency, however, there have been few substantial efforts to theorize what transparency might mean in different contexts, or what might be driving the increased use of the concept.¹⁵⁹ We hope to illuminate some of the forces that make transparency a growing concept in law reform and to describe how the concept can help us assess the quality of internal prosecutorial decisionmaking.

In our view, the idea of transparency is attracting so much attention because technology now offers a new approach to an old problem. The old

159. See generally Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885 (2006) (critiquing the incomplete conceptual framework offered by advocates of open-government laws); Adam M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA L. REV. 909 (2006) (presenting a method for evaluating judicial platforms in the information-access context and beyond); Judith Resnik, *In and Out of Sight, Site, and Cite* (Feb. 2, 2008) (unpublished manuscript, on file with the Iowa Law Review). Discussions of the costs and benefits of transparency in government decisionmaking have illuminated some more concrete issues. See, e.g., Marc L. Miller & Ronald F. Wright, *Secret Police and the Mysterious Case of the Missing Tort Claims*, 52 BUFF. L. REV. 757, 778–79 (2004) (discussing literature on sealed judgments).

problem is longstanding frustration with the legitimacy and accountability of the modern administrative state; the new technological environment is expanding access to data about government functions, which citizens and scholars can use to reveal and critique the way that governments work.

The frustration with the modern administrative state comes from failures that Franz Kafka would recognize.¹⁶⁰ Most decisions by government actors affecting individuals do not result in formal documents explaining those decisions, nor are they subject to any significant review. This is emphatically true in criminal justice systems, where most decisions by police officers and prosecutors regarding citizens go unreviewed and unexplained.¹⁶¹

Frustration with government action also extends to some areas where documents do exist, whether they appear in the daily course of government business (such as the arrest forms that officers fill out daily), or as the endpoint of formal review (such as judicial opinions, statements of reasons attached to agency rule-making, or pardon decisions by a chief executive or pardon board). Scholars and other consumers suspect that those documents do not reveal true or complete reasons behind the decisions.¹⁶²

Since access to existing documents does not satisfy the itch, fuller explanations for government action may also be necessary. The due-process revolution prompted the explanation of some important decisions by government officials about individuals.¹⁶³ But a newer understanding is

160. See generally FRANZ KAFKA, *THE TRIAL* (Breon Mitchell trans., Schocken Books 1998) (1937) (depicting the shortcomings of courts and the law through the experiences of the book's main character). See also *People v. Hobbs*, 873 P.2d 1246, 1263 (Cal. 1994) (Mosk, J., dissenting) (invoking Kafka to criticize a rule allowing courts to withhold all information supporting a search warrant as part of an informer's privilege).

161. See Bibas, *supra* note 13, at 912 (arguing that judges, prosecutors, and police as insiders are "professional repeat players who dominate criminal justice" and "control the levers of power").

162. Documents and text are not inherently as transparent as the proponents of "government in the sunshine" laws such as the Freedom of Information Act ("FOIA") once hoped. See generally Fenster, *supra* note 159; Marc L. Miller & Gregory Aplet, *Applying Legal Sunshine to the Hidden Regulation of Biological Control*, 35 *BIOLOGICAL CONTROL* 358 (2005) (noting huge delays in response to Freedom of Information Act requests, limiting the use of FOIA as a tool in active administrative policy-making); Bradley Pack, Note, *FOIA Frustration: Access to Government Records Under the Bush Administration*, 46 *ARIZ. L. REV.* 815 (2004) (arguing that the Bush administration has improperly invoked the national-security, law-enforcement, and critical-infrastructure exceptions to FOIA to deny valid requests); Laura Schenck, Note, *Freedom of Information Statutes: The Unfulfilled Legacy*, 48 *FED. COMM. L.J.* 371 (1996) (criticizing the exclusion of the legislative branch from federal and state freedom-of-information statutes).

163. See, e.g., Barkow, *supra* note 81, at 1336–39; Cynthia R. Farina, *On Misusing "Revolution" and "Reform": Procedural Due Process and the New Welfare Act*, 50 *ADMIN. L. REV.* 591, 601–18 (1998) (discussing the history of welfare benefits and how they came to be an entitlement through due process); David Super, *Are Rights Efficient? Challenging the Managerial Critique of Individual Rights*, 93 *CAL. L. REV.* 1051, 1053–61 (2005) (discussing individual rights and entitlements in our legal system).

emerging: an explanation for a single case might reveal less than the patterns of government decisionmaking. Patterns can reveal both intentional and unintentional bias, and the probable grounds for judgment.¹⁶⁴ Patterns of government behavior may also be useful in spotting “outlier” cases that appear to make sense on their own terms but are harder to explain in a larger information-rich context.¹⁶⁵

The irresistible force pushing toward greater transparency today is the capacity for technology, broadly construed, to lower the cost of collecting and distributing relevant information about government practices.¹⁶⁶ Once

164. See Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 95 CAL. L. REV. 63, 64 (2008) (describing insights to be drawn from studies of large groups of judicial opinions); see also Katherine Barnes, *Assessing the Counterfactual: The Efficacy of Drug Interdiction Absent Racial Profiling*, 54 DUKE L.J. 1089, 1119–40 (2005) (investigating the costs and benefits of racial profiling in the context of drug interdiction); Gross & Barnes, *supra* note 75, at 662–70. One interesting resource that is less well known than it should be is a joint project of scholars and former journalist David Burnham called TRAC (and its federal government focused arm, TRACFED). See generally David Burnham & Susan Long, *Tracking Judges*, 16 FED. SENT’G. REP. 26 (2003) (explaining TRAC and its purposes). TRACFED collects data from government databases, often through the painful process of FOIA requests, and then makes its data available to journalists and researchers with a powerful analytic interface. See Transactional Records Access Clearinghouse (TRAC), <http://trac.syr.edu> (last visited Oct. 16, 2008) (“Your source for comprehensive, independent, and nonpartisan information about federal enforcement, staffing, and spending.”); TRACFED, <http://tracfed.syr.edu> (last visited Oct. 16, 2008) (“A unique web-based service for understandable, authoritative, and complete information about the federal government—how it enforces the law, where it assigns its employees, and how it spends out money.”). TRAC also issues occasional reports on critical policy issues. See, e.g., TRAC Immigration, *Immigration Enforcement: The Rhetoric, The Reality* <http://trac.syr.edu/immigration/reports/178/> (last visited Oct. 16, 2008). But see generally Kevin Blackwell, *The Problem with TRAC*, 16 FED. SENT’G. REP. 31 (2003) (praising TRAC’s motive but questioning the quality of TRAC sentencing data).

165. Although the objective of such efforts to explain government action on an individual case level and through patterns of decisions is to promote greater legitimacy in government, the end point of these concerns about the modern administrative state is an even deeper jurisprudential malaise—a deficit in the democratic grounding and accountability of the work of modern governments. See generally Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461 (2003) (arguing that the effort to square the administrative with the constitutional structure has overlooked the concern for administrative arbitrariness); Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005) (analyzing the concept of constitutional legitimacy); David Markell, “Slack” in the Administrative State and Its Implications for Governance: *The Issue of Accountability*, 84 OR. L. REV. 1 (2005) (noting that the administrative state may be moving in the direction of less openness, transparency, and accountability, rather than more); Richard B. Stewart, *Madison’s Nightmare*, 57 U. CHI. L. REV. 335, 342 (1990) (arguing that the rise of the administrative state has led to a fractionalized bureaucracy that is counter to the principles that this country was founded on). That skepticism extends across the branches of government, with somewhat different concerns for each branch. See generally Judith Resnik & Lane Dilg, *Responding to a Democratic Deficit: Limiting the Powers and Term of the Chief Justice of the United States*, 154 U. PA. L. REV. 1575 (2006) (questioning the wisdom and constitutionality of the packet of powers now held by the Chief Justice of the Supreme Court).

166. See Stuart Minor Benjamin, *Evaluating E-Rulemaking: Public Participation and Political Institutions*, 55 DUKE L.J. 893, 936–37 (2006) (discussing how e-rulemaking makes agencies

it becomes feasible to collect and analyze case-level information about executive decisions, it is only a matter of time before one hears a call for “data-based” or “knowledge-driven” reforms.¹⁶⁷

This pressure to build policy based on data occurs in the area of sentencing reform and the movement toward “guidelines” or structured sentencing systems.¹⁶⁸ Another illustration appears in the call for “evidence-based reforms” of child-protective-services systems.¹⁶⁹ Or consider the response over the past decade to concerns about criminal-law-enforcement bias. Most police agencies keep no records about voluntary conversations with citizens and very limited records about stops. Litigation to challenge alleged “racial profiling” by the police has not found much success. Nevertheless, the dominant response to claims of systematic racial bias by police in stops and searches has been to collect data on stops and searches, especially car stops.¹⁷⁰ Both legislative and executive mandates rely on this data-driven strategy.¹⁷¹

more transparent); Kristin Madison, *Regulating Health Care Quality in an Information Age*, 40 U.C. DAVIS L. REV. 1577, 1579 (2007) (arguing that the Internet allows health-care providers to gather and disseminate information rapidly). There is a modest but emerging scholarly debate over whether the impact of technology on lowering information costs makes government more or less transparent. See Anne Balsamo, *Myths of Information: The Cultural Impact of New Information Technologies*, in THE INFORMATION REVOLUTION 225, 227–30 (Alan L. Porter & William H. Read eds., Ablex Publ'g Corp. 1998) (arguing that mass information does not encourage understanding if people do not reflect on the information); Jerry Brito, *Hack, Mash, & Peer: Crowdsourcing Government Transparency*, 9 COLUM. SCI. & TECH. L. REV. 119, 120 (2008) (observing that the information the government makes available is not easily accessed or searched).

167. See Paul W. Kahn, *Freedom, Autonomy, and the Cultural Study of Law*, 13 YALE J.L. & HUMAN. 141, 144–45 (2001) (discussing “knowledge-based” legal reforms); William H. Pryor, Jr., *Lessons of a Sentencing Reformer from the Deep South*, 105 COLUM. L. REV. 943, 955–56 (2005) (discussing “data-driven” sentencing reform).

168. See generally Steven L. Chanenson, *Sentencing and Data: The Not-So-Odd Couple*, 16 FED. SENT'G REP. 1 (2003) (arguing that data-backed sentencing guidelines reach positive results); Marc L. Miller, *A Map of Sentencing and a Compass for Judges: Sentencing Information Systems, Transparency, and the Next Generation of Reform*, 105 COLUM. L. REV. 1351 (2005) (noting that sentencing information systems will improve access to sentencing information); Marc L. Miller & Ronald F. Wright, *“The Wisdom We Have Lost”: Sentencing Information and Its Uses*, 58 STAN. L. REV. 361 (2005) (suggesting that Congress can improve sentencing by providing better information to more users); Marc L. Miller & Steven L. Chanenson, *Transparency in Sentencing Policy and Practice* (Apr. 15, 2008) (unpublished manuscript, on file with the Iowa Law Review).

169. See generally Marsha Garrison, *Reforming Child Protection: A Public Health Perspective*, 12 VA. J. SOC. POL'Y & L. 590 (2005) (calling for evidence-based reforms). Cf. Mark Geistfeld, *The Political Economy of Neocontractual Proposals for Products Liability Reform*, 72 TEX. L. REV. 803, 819–33 (1994) (calling for information-based reforms).

170. See PETER VERNIERO, INTERIM REPORT OF THE STATE POLICE REVIEW TEAM REGARDING ALLEGATIONS OF RACIAL PROFILING (1999), reprinted in MILLER & WRIGHT, *supra* note 37, at 87 (presenting data on traffic stops in New Jersey). See generally Barnes, *supra* note 164 (arguing that the race of the motorist is relevant to whether the police will search the motorist's car). Even basic data on police practices can be powerful, both analytically and politically. The effort

These are all examples of “internal” transparency—the use of data by people within government to operate systems and to set policy. Modern sentencing reforms in the federal system and in many state systems have relied mainly upon internal transparency efforts.¹⁷² All of the modern “structured” or “guideline” reforms are grounded on better knowledge, better rules, and better guidance for judges.

Increasingly, however, the data collected within government for administrative purposes greatly interests nongovernment actors—it offers “external” transparency. Sufficient information of reasonable reliability¹⁷³ can provide new channels for government oversight by the public.

An informed decision about justice-system data and transparency requires attention to a wider range of users and uses of data, both those within the system and those viewing it from the outside. The next generation of sentencing reform should make existing data more externally transparent and available to a wider range of such users and uses.¹⁷⁴

The assumption behind the collection and distribution of justice data, including highly detailed data sets, is not that all citizens will instantly flock to the bookstore and buy *Statistics for People Who (Think They) Hate Statistics*,¹⁷⁵

by the U.S. Department of Justice to suppress a report from the Bureau of Justice Statistics on racial bias in police stops, and ultimately the demotion of the head of the Bureau and the publication of the report, received wide coverage in the media. *See, e.g.*, MATTHEW R. DUROSE, ERICA L. SCHMITT & PATRICK A. LANGAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, CONTACTS BETWEEN POLICE AND THE PUBLIC: FINDINGS FROM THE 2002 NATIONAL SURVEY (2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cpp02.pdf> (the controversial report); Eric Lichtblau, *Profiling Report Leads to a Clash and a Demotion*, N.Y. TIMES, Aug. 24, 2005, at A1 (discussing the contention surrounding the report).

171. *See generally* David A. Harris, *The Reality of Racial Disparity in Criminal Justice: The Significance of Data Collection*, 66 LAW & CONTEMP. PROBS. 71 (2003) (analyzing data collected in police stops); Jay Rothman, *Identity and Conflict: Collaboratively Addressing Police-Community Conflict in Cincinnati, Ohio*, 22 OHIO ST. J. ON DISP. RESOL. 105, 125 n.28 (2006) (reporting on a court order to collect race data in Cincinnati after collaborative agreement between various parties failed); Kami C. Simmons, *The Politics of Policing: Ensuring Stakeholder Collaboration in the Federal Reform of Local Law Enforcement Agencies*, 98 J. CRIM. L. & CRIMINOLOGY 489 (2008) (arguing that the U.S. Department of Justice should adopt regulatory negotiation to ensure more participation among stakeholders).

172. *See generally* Miller & Chanenson, *supra* note 168 (detailing internal transparency efforts).

173. The information that is relevant to various policy questions is not self-defining, and what an agency collects and what an outsider wants may not match. Moreover there are huge issues of data collection, data quality, and cost. In the acronym made famous among computer programmers, this is the problem of GIGO—garbage in, garbage out.

174. *See* Miller & Wright, *supra* note 168, *passim* (arguing for more information to be available in sentencing); Miller, *supra* note 168, at 1351–59 (same).

175. NEIL J. SALKIND, STATISTICS FOR PEOPLE WHO (THINK THEY) HATE STATISTICS (3d ed. 2007).

or *The Cartoon Guide to Statistics*.¹⁷⁶ Instead, a small number of sophisticated or committed users of good data can make a world of difference. For example, for charging, plea, and sentencing decisions, it would often be in the interest of defense lawyers or family members to analyze information to assess whether judges and prosecutors are staying consistent with their own past behavior, with the behavior of their colleagues, and with larger legal and social norms.¹⁷⁷ There would also be institutional incentives to develop case-level and pattern-level expertise in good justice-system data. Newspapers and individual journalists would have market-based reasons and a comparative advantage over other papers and journalists if they have the expertise to evaluate this data.¹⁷⁸

1. Internal and External Transparency

Discussions of transparency tend to concentrate on those government actions that trigger disclosure duties. The concept is usually tied to public articulation of the rules and reasoning for government decisions and access to those explanations.¹⁷⁹ It is equally useful, however, to analyze different *uses* of transparency. Transparency in rules and reasoning can aim for effects that are internal to an executive-branch agency, or external.

An agency fully committed to internal transparency would identify decision points and mandate that agents explain and record the basis for judgments at each decision point. Records could take the form of text or numerical data, but they must accurately capture the nature of the decision. Internal transparency could increase with some combination of training, standard explanations, data storage, and supervisory review.

176. LARRY GONICK & WOOLLCOTT SMITH, *THE CARTOON GUIDE TO STATISTICS* (1993). We also do not assume that a data-rich government is merely a predicate condition for democracy, and schools must then create the correlative knowledge in society.

177. See Bibas, *supra* note 13, at 912–18 (describing roles for subgroups of the public in promoting transparency in criminal justice).

178. One dimension of the push towards greater collection and release of data about government behavior is the much lower cost of distributing and accessing information over the Internet. See Markell, *supra* note 165, at 8 (discussing the impact of the Toxic Release Inventory program). Technology not only lowers the cost of collecting and distributing information, it may also lower the cost of analyzing it.

179. Decisions are more transparent when they arrive with detailed reasoning and when they are sufficient to allow review and criticism of both individual decisions and patterns of decisions. We do not believe that the epitome of transparency is captured in judicial reasoning in individual cases, even when that reasoning is subject to formal challenge and review in appellate courts. The qualities that make different government decisions more or less transparent depend on the nature of the decision. A partial list of relevant factors includes whether a decision is a one-off, rare, or common decision; whether the decision is the product of extended assessment and complex procedures or is made without time and procedural guidance; and whether the impact of the decision extends over time and space, affecting few or many people or other institutions. We believe that despite its emerging popularity, the idea of transparency remains wildly undertheorized. See *supra* note 159 and accompanying text.

External transparency, on the other hand, fits more closely with popular ideas of “open” or “transparent government.”¹⁸⁰ The two general qualities we see in external transparency are public access to the products of internal transparency in decisionmaking and external review.

External transparency begins with the publication (release) of internal agency decisionmaking rules and procedures. Yet the published rules and procedures might prove irrelevant to the actual grounds for decision in some, most, or all cases. A more fulsome path to external transparency begins with the collection and release of sufficient information to test the agency’s reasoning—allowing an outsider to judge whether an agency actually does what the agency says it is doing.¹⁸¹

Explanation, oversight, review, and accountability are traditional concepts for the more formal decisions of administrative actors.¹⁸² But the attainment of those values have been unduly limited to explanation in the form of opinions or decision documents, oversight by courts, appellate judicial review (often limiting the scope of review in the interests of efficiency, institutional competence, and finality), and political review of a crystallized agency explanation for its final decision.¹⁸³

Internal executive practices can serve these same objectives. Internally, agencies can meet the goal of explanation through more detailed construction of guidelines and through standardized choices that explain as much about standard decisions as possible.¹⁸⁴ Depending on the nature of

180. See generally Jerry L. Mashaw, *Reasoned Administration: The European Union, the United States, and the Project of Democratic Governance*, 76 GEO. WASH. L. REV. 99 (2007) (discussing the right to reasons and the practice of administrative reason giving); Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 17 (2001) (discussing the relationship of law and reason). For an early discussion of the external form of transparency in government, see JEREMY BENTHAM, POLITICAL TACTICS 29–44 (Michael James, Cyprian Blamires & Catherine Pease-Watkin eds., Clarendon Press 1999) (1791).

181. See Bibas, *supra* note 13, at 961–64 (calling for routine disclosure of summary prosecutor office statistics on charging and dispositions).

182. See generally FOUNDATIONS OF ADMINISTRATIVE LAW (Peter H. Schuck ed., 2d ed. 2003) (discussing administrative law generally); Criddle, *supra* note 133 (outlining an interpretivist model of administrative law).

183. Indeed, the entire doctrine of administrative finality is designed to formalize our uses of external transparency. The doctrine forces an agency to declare its position from an authoritative source before a court may review the administrative action. The use of the legislative veto to control administrative action has made transparency in government more difficult. See *INS v. Chadha*, 462 U.S. 919 (1983) (striking down a legislative veto). Heavy reliance on appropriations bills as vehicles for substantive legislation and control of agencies create comparable challenges today.

184. Cf. Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 420–25 (analyzing the institutional conditions of prosecutorial misconduct).

the executive-branch decision, explanations might be captured in prose, on standard forms, or in numerical data.¹⁸⁵

Internal transparency can be built into bureaucratic habits in many ways. An agency's leadership can select certain key decisions made on the front lines of the organization and require supervisory approval. Data triggers can also alert agents and supervisors to decisions that fall outside of the norm. The relevant "norm" might be based on the body of work that an individual decisionmaker develops, or the norm could be based on the pooled decisions of similarly situated decisionmakers.

We recognize that process has costs—just think of the staff necessary to record many prosecutorial choices into a database. But it is also critical to recognize that process may produce savings. Businesses do not invest in worker training, education, record-keeping, analysis, and supervision to be inefficient. In government, as in business, investments in capturing and assessing executive-branch decisions can potentially lead to faster, better reasoned, and more consistent results.

Consider, for example, the implementation of detailed record-keeping and review in the New Orleans District Attorney's office—a practice that lasted for decades. NODA was no better funded than a typical district attorney's office. Yet Harry Connick and his staff decided that they could better achieve their goals by shifting significant resources—from a very tight budget—into record-keeping, recording, and reviewing. The managers in the offices in Milwaukee, Charlotte, and San Diego made similar calculations.

Just as administrative-law doctrines have left the concept of internal transparency underdeveloped, the concept of external transparency extends further than one might think. It goes far beyond the conception of formal review of agency decisionmaking or the simple availability of government decision documents, reflected in the various government-in-the-sunshine acts. External transparency encompasses not only case-level explanations, but also releases of internal policies, procedures and training materials.¹⁸⁶ It calls for agencies to release information about outcomes in a format that allows easy comparison and tests for consistency.

The users of external transparency extend beyond litigants in the courts. One important source of oversight can come from reporters who

185. There are serious challenges in executing this idea. One must consider whether to measure one or multiple factors at each decision point; if multiple factors, one must decide how to give weight to the different factors.

186. See generally Leslie Cory, *Looking at the Federal Sentencing Process One Judge at a Time, One Probation Officer at a Time*, 51 EMORY L.J. 379 (2002) (examining how judges and probation officers can influence sentencing outcomes); Hirokawa, *supra* note 37 (discussing the implementation of case-law requirements by police departments).

learn how to describe and assess the workings of bureaucracies.¹⁸⁷ Other external actors include legislative committees, scholars and students, and the many nongovernmental and nonmarket organizations that make up “civil society.”¹⁸⁸ To the extent that executive agencies collect data for internal administrative purposes, nongovernment actors may be able to obtain that data (through FOIA and its state analogs) and organize it in ways that allow lawyers and policy actors to judge the work of the agency as a whole and its individual decisionmakers.

One current example of a nongovernmental actor collecting and organizing detailed information about government decisionmaking is the Transaction Records Access Clearinghouse (“TRAC”).¹⁸⁹ TRAC uses public-records laws to obtain detailed information about executive and judicial decisionmaking. They go beyond collection to analysis. For instance, path-breaking reports by TRAC show enormous variations in immigration prosecution and portray radical differences in asylum decisions by immigration judges.¹⁹⁰

187. Many scholarly accounts of criminal justice offer a bleak view of the role of media, and this critique surely has some truth to it. See generally DAVIS, *supra* note 76 (stating that transparency and information about the prosecutor’s office is distorted through journalistic habit to promote sensational crime stories); 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) (arguing that commercial pressures determine the news media’s treatment of crime). Yet we do find hope in some prominent journalistic efforts to rise above reporting about single cases to describe the workings of a prosecutor’s office more generally. See Wright & Miller, *supra* note 107, at 90 (reflecting on *The Dallas Morning News* stories on homicide charging patterns over several years); *supra* note 164 (describing TRAC and TRACFED); *supra* note 170 (describing the Greenfeld controversy).

188. See generally JEAN L. COHEN & ANDREW ARATO, *CIVIL SOCIETY AND POLITICAL THEORY* (1992) (arguing that the concept of civil society in the West could lead to an expansion of civil rights); JOHN EHRENBERG, *CIVIL SOCIETY: THE CRITICAL HISTORY OF AN IDEA* (1999) (analyzing the evolving concept of civil society).

189. See *supra* note 164 (discussing TRAC). For an example of reliance on TRAC data in the terrorism context, see Robert M. Chesney, *Federal Prosecution of Terrorism-Related Offenses: Conviction and Sentencing Data in Light of the “Soft-Sentence” and “Data-Reliability” Critiques*, 11 LEWIS & CLARK L. REV. 851, 873–74 (2007) (examining two critiques of post-September 11 criminal prosecutions in terrorism-related cases).

190. See Ramji-Nogales et al., *supra* note 108, at 372–76 (finding disparities for granting asylum within particular asylum offices, immigration courts, and federal appeals courts and also between different geographic regions); TRAC Immigration, *Immigration Judges*, <http://trac.syr.edu/immigration/reports/160> (last visited Oct. 16, 2008) (reporting that for 208 immigration judges, denial of asylum rates ranged from a low of 10% to a high of 98%); see also Rachel L. Swarns, *Study Finds Disparities in Judges’ Asylum Rulings*, N.Y. TIMES, July 31, 2006, at A15 (reporting on a study that examined 297,240 immigration cases from 1995 to 2005 and found wide disparities in the rate at which judges granted asylum, with asylees’ nationalities and legal representation affecting grants or denials).

Institutions such as legislatures that are unlikely to review individual executive decisions¹⁹¹ can assess patterns and practices through hearings and reports. Legislatures can demand that executive agencies develop internal rules and procedures.¹⁹² Legislators may pursue their own interests in agency action or they might respond to the increasingly informed requests of their constituents. Ideally, external transparency could influence elections of executive-branch leaders and legislators, based on the performance of agencies.

2. Judging Transparency

The degree of transparency for agency decisions can range from totally opaque—think Kafka and a million of his contemporary cousins—to totally transparent. A totally transparent decision could be reproduced and assessed at every step. Few significant decisions by government, and especially those decisions involving individuals, should be totally opaque. Yet the nature of human judgment compels us to admit that no decision can ever be totally transparent. The framework we suggest treats transparency as a matter of degree, and views any move toward greater transparency as a presumptive virtue, while recognizing that some movements toward transparency have costs too high to pay.

We propose using transparency as a metric to evaluate the quality of internal regulation of executive agencies. Consider how transparency might help us evaluate the wisdom of prosecutorial declinations. Because such decisions are not subject to any traditional external legal review, these are the powers that Herbert Wechsler considered antithetical to the idea of

191. Exceptions to this general limitation involve legislative review of the most extraordinary executive decisions. See Paul Singer, *Showdown Brewing Over Presidential Papers*, ROLL CALL, Mar. 15, 2007 (discussing House and Senate efforts to overturn an executive order by President Bush that restricted the release of former presidents' papers and records); cf. MORTON ROSENBERG, CONG. RESEARCH SERV., CONGRESSIONAL INVESTIGATIONS OF THE DEPARTMENT OF JUSTICE, 1920–2007: HISTORY, LAW, AND PRACTICE 5–17 (2007), available at <http://www.fas.org/sgp/crs/misc/RL34197.pdf> (discussing congressional oversight of the U.S. Justice Department, from the Teapot Dome Scandal through investigation of the prosecutorial misconduct of Randall Weaver and Kevin Harris at Ruby Ridge, Idaho).

192. See Information Quality Act, Pub. L. No. 106-554, § 515, 114 Stat. 2763 (2000) (codified in 44 U.S.C. §§ 3504(d)(1), 3516 (2000)) (requiring the Office of Management and Budget to issue guidance to federal agencies to ensure “quality, objectivity, utility and integrity” of disseminated information and requiring those agencies to promulgate rules that complied with that guidance). Courts, too, can mandate executive rules or procedures. See generally Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010 (2005) (discussing the role of courts in prompting prosecutors to develop general rules for charging).

law.¹⁹³ What Wechsler missed was the power of transparency to promote effective ordering through internal regulation.

The United States Attorneys' offices have built one method to make declinations more externally transparent, thus making them more legitimate. Those offices have issued policies¹⁹⁴ to explain the declinations by line prosecutors.¹⁹⁵ Herbert Wechsler might say that because criminal defendants cannot enforce the declination policies in court, these policies abandon law in favor of mere assertions of trustworthiness. But by articulating relatively detailed standards, federal prosecutors open themselves to criticism from individual litigants, from the judges who try and sentence defendants, and from Congress, which provides both legal authority and annual funding for departmental operations. They offer a principled basis for a defense attorney to argue that the prosecutor should reconsider the decision to charge a client.

Similar efforts within prosecutors' offices have helped inoculate various laws, and the prosecutorial application of those laws, from external attack. For example in Florida, state prosecutors were accused of using a 1988 habitual-offender statute in an arbitrary and discriminatory manner.¹⁹⁶ Florida legislative committees asked for a study of prosecutorial use of the habitual-offender statute. A 1992 report concluded that the statute had been used in an unprincipled and racially biased fashion in much of the state.¹⁹⁷ In response, several state legislators planned to amend the habitual-offender law, restricting its reach to fewer possible defendants. To head off further legislative limits, the Florida Prosecuting Attorneys' Association (a voluntary professional organization) issued a statement in 1993 that announced specific criteria for prosecutors to use when applying the habitual-offender statute. The policy specified a subset of defendants who otherwise fell within the terms of the statute—based on various combinations of prior record and seriousness of offense—as the appropriate targets for use of the sentencing

193. See Wechsler, *supra* note 1, at 1102 (observing that “a society that holds, as we do, to belief in law cannot regard with unconcern the fact that . . . agencies can exercise so large an influence . . . without reference to any norms but those that they may create for themselves”).

194. See, e.g., U.S. ATTORNEYS' MANUAL § 9-2.031 (2006) (Dual Prosecution and Successive Prosecution Policy, or “Petite Policy”).

195. See *id.* § 9-162 (Federal Prosecution of Business Organizations); U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' WRITTEN GUIDELINES FOR THE DECLINATION OF ALLEGED VIOLATIONS OF FEDERAL CRIMINAL LAWS: A REPORT TO THE UNITED STATES CONGRESS (1979), reprinted in MILLER & WRIGHT, *supra* note 37, at 897. It is interesting to note that the promulgation of the declination policies came about from congressional concern about high federal declination rates. Other policies have been captured in the U.S. Attorneys' Manual—which is also available to the public—for many years.

196. FLA. STAT. § 775.084(4) (1988).

197. See ECON. & DEMOGRAPHIC RESEARCH DIV., JOINT LEGISLATIVE MGMT. COMM. OF THE FLA. LEGISLATURE, AN EMPIRICAL EXAMINATION OF THE APPLICATION OF FLORIDA'S HABITUAL OFFENDER STATUTE (1992) (on file with authors).

enhancement under this law. The association's statement called for any prosecutors who planned to depart from the limits of the policy while remaining within the bounds of the statute to "notify this Organization's President of such filings."¹⁹⁸ This is a successful (if partial) example of external transparency at work.

As we have detailed,¹⁹⁹ the New Orleans District Attorney's Office followed a path toward internal transparency. The office developed procedures—including training, staffing, promotion, case review, the creation of standardized decision categories, data collection, and data review—to make line prosecutors' decisions more transparent. On occasion, especially during election campaigns, the District Attorney used the aggregate statistics on declinations, trial rates, and convictions to explain and defend the toughness and fairness of the office as a whole.

The U.S. Attorneys' Offices (and other offices that release their internal policies and guidelines), the New Orleans District Attorney's Office, and the offices in Milwaukee and elsewhere that participate in the Vera Institute Project are more transparent than the norm for prosecutors' offices throughout the United States. But none of these prosecutors' offices offer a transparency ideal. Federal prosecutors have aggressively resisted efforts by defendants to obtain information about their declination practices, including information about the critical but hidden decisions that go into sorting cases between federal and state systems.²⁰⁰ The large FOIA exemptions for criminal-law-enforcement decisions,²⁰¹ together with judicial doctrine that sets a ridiculously high cross-bar for claimants to clear before they can obtain discovery about declination,²⁰² have made this legally possible. Social norms have not yet accumulated to change this secretive aspect of the prosecutor's self-image.²⁰³

198. See FLA. PROSECUTING ATTORNEYS' ASS'N, STATEMENT CONCERNING IMPLEMENTING OF HABITUAL OFFENDER LAWS (1993), reprinted in MILLER & WRIGHT, *supra* note 37, at 937.

199. See generally Wright & Miller, *Screening/Bargaining Tradeoff*, *supra* note 13; Wright & Miller, *Honesty & Opacity*, *supra* note 13; *supra* Part I.

200. See Michael M. O'Hear, *National Uniformity/Local Uniformity: Reconsidering the Use of Departures to Reduce Federal-State Sentencing Disparities*, 87 IOWA L. REV. 721, 732–35 (2002) (detailing prosecutorial forum shopping in regards to sentencing); Ronald F. Wright, *Federal or State? Sorting as a Sentencing Choice*, CRIM. JUST., Summer 2006, at 16, 19–20 (discussing prosecutor sorting).

201. 5 U.S.C. § 552(b)(7) (2000).

202. *United States v. Armstrong*, 517 U.S. 456 (1996), created such a high bar to discovery about declination, charging, and sorting information—even for claims of racial bias—that it may be set higher than all but the most exceptional defendant can cross, like a pole vault crossbar set for six meters. The world record is 6.14 meters. Only fifteen vaulters have cleared six meters or higher. See Jessica Halloran, *Rest Assured Hooker Will Improve Leaps and Bounds*, SYDNEY MORNING HERALD (Sydney, Austl.), Feb. 29, 2008, at 28 (reporting that Australian pole-vaulter Steve Hooker became the fifteenth member of the "six-meter club" in 2008).

203. The New Orleans District Attorney's Office had what may have been one of the most internally transparent systems in the country. But the existence of that system was largely

It is not clear in the abstract whether strong internal transparency or strong external transparency is more likely to achieve consistent and principled outcomes. But either kind of transparency in a district attorney's office is likely to produce better outcomes than the norm. Prosecutors on the whole earn low grades for any kind of transparency, internal or external.

An example of a transparency-focused criminal justice reform is the collection of stop-and-search data in response to the claim that police disproportionately stop African-American motorists—the alleged enforcement of the offense of “driving while black” or “DWB.”²⁰⁴ Some departments required officers to record standard data about each encounter. Others responded to these issues by requiring officers to video record their actual exchanges with drivers.²⁰⁵ The movement to record interrogations has also gained enormous momentum over the last generation in police departments.²⁰⁶ *Sex, Lies, and Videotape*²⁰⁷

unknown to New Orleans citizens; summaries or portions of the data were not publically released or available for external review.

We use the past tense because there is no indication that Harry Connick's successors have continued to use the same system. There was considerable evidence even before the flood that the then-new District Attorney planned to shift the goals of the office to include far more charge bargaining. See Gwen Filosa, *Jordan Reduces Backlog of Cases; DA Lets Many Plead Guilty to Lesser Charges*, TIMES-PICAYUNE (New Orleans, La.), Apr. 23, 2003, at A1 (highlighting the new District Attorney's use of charge bargains in backlog reduction in first 100 days in office); Michael Perlstein, *Open to Appeal: Convicted Criminals Say DA Policy Change Gives Them Fair Shot*, TIMES-PICAYUNE (New Orleans, La.), July 20, 2003, at A1 (detailing changes in the District Attorney's office and emphasizing the increased use of charge bargains).

204. The drive to collect data about each stop has tended to include not only information about the initial stop but also about the subsequent decision to conduct a search or to request consent. The movement to collect this additional information was informed by prominent research suggesting that initial stops might be race neutral or at least not significantly disparate, but that subsequent decisions—when the police officer knows the race of the driver or passengers—could be far more disparate. The various articles of David Harris nicely summarize the experience of police departments in collecting information about stops and subsequent consensual searches.

205. See, e.g., Dionne Searcey, *State Patrol to Begin Collecting Race Data During Traffic Stops*, SEATTLE TIMES, Sept. 30, 1999, at A1 (describing a new Washington State Patrol policy of recording the race of each driver subject to a traffic stop, to uncover and combat racial profiling); Adam Silverman, *Police to Collect Race Data*, BURLINGTON FREE PRESS (Vt.), June 11, 2008, at 1B (describing a test by three Vermont police departments of recording the race of each person subject to a traffic stop, an initiative intended to uncover and combat racial profiling).

206. See MILLER & WRIGHT, *supra* note 37, at ch. 8, pt. E; Saul M. Kassin et al., *Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs*, 31 LAW & HUM. BEHAV. 381, 393 (2007) (finding that only 16% of the 631 police investigators surveyed worked in jurisdictions where electronic recording was required but that 81% believed that interrogations should be recorded); Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 489–506 (including a brief survey of the history of recording requirements across the United States); Lisa C. Oliver, *Mandatory Recording of Custodial Interrogations Nationwide: Recommending a New*

notwithstanding, video provides a record of critical interactions that does not fit easily within traditional notions of review by an appellate body to regulate executive action.

These reforms do not seem designed to promote better citizen challenges to government action in individual cases. While recordings might benefit challengers in judicial review of individual cases, recordkeeping holds even more power to deter and shape conduct on the front end and to review patterns of conduct over time. This kind of transparency is fundamentally different from the recordkeeping, reason articulation, and case-by-case review that were the foundation of the modern due-process revolution in criminal procedure.

The potential for prosecutors to increase transparency through internal data collection and analysis is nicely illustrated by the Vera Institute's Prosecution and Racial Justice ("PRJ") project.²⁰⁸ The PRJ project is built on the idea of internal data collection and analysis within the offices of chief prosecutors who want to make sure that their public commitment to race (and gender) neutrality is borne out in the practices of their offices.²⁰⁹

The PRJ model stresses internal transparency, but it does have an external component that comes into play when the chief prosecutor acknowledges disparate decisionmaking in the office, and announces revised rules and procedures. Perhaps down the road, prosecutors who gain confidence in the institutional and political viability of detailed internal data collection and analysis will be willing to share portions of that data directly with the public. The PRJ model is fundamentally different from prosecutors who defensively assert race neutrality or who issue generic internal rules reinforcing a race-neutral goal without specific inquiry into the enforcement of that norm.²¹⁰

Model Code, 39 SUFFOLK U. L. REV. 263, 268–77 (2005) (including a detailed analysis of recording requirements across the United States).

207. SEX, LIES, & VIDEOTAPE (Sony Pictures 1989). Of course images can be manufactured and cameras can malfunction, be turned on too late, or be turned off.

208. See *supra* Part II.B.2 (discussing the PRJ project).

209. Vera Inst. of Justice, *supra* note 12. The virtues of designing or improving data models for prosecutorial decisionmaking include self-reflection by line and supervising prosecutors in designing the information system and in explaining decisions in ways that traditional prosecutorial models do not require.

210. See, e.g., Sandy Davis, *Jena Braces for Marchers; Prosecutor Says Victim of Beating Lost in "Racism" Claims*, ADVOC. (Baton Rouge, La.), Sept. 20, 2007, at A1 (quoting the LaSalle Parish District Attorney as saying that the Jena beating case "is not and never has been about race"); Natalie Neysa Alund & Carl Mario Nudi, *Jury Picked to Hear Walker Murder Trial*, BRADENTON HERALD (Fla.), Apr. 8, 2008, at 1 (reporting that the Manatee County Prosecutor said that "race plays no role in our decision-making process"); Mary Beth Pfeiffer & Kathianne Boniello, *Black Suspects Lose Assets Most*, POUGHKEEPSIE J. (N.Y.), Jan. 25, 2004, at 1A (noting that the Dutchess County Senior Assistant District Attorney stated that the District Attorney's office has "a complete and totally race-neutral policy in regard to all prosecutions"); Jeremy Redmon, *Sex Landed Him in Prison; Will Petition Bail Him Out?*, ATLANTA J.-CONST., June 6, 2007, at A1

Perhaps prosecutors will take another bold step and provide explanations and data about declination decisions. Good information about declination decisions might transform the understanding of the concept of declination. It might offer political cover for district attorneys (although reelection rates suggest that district attorneys in the United States do not need much more political cover).²¹¹ Declination reasons and data might illuminate the tensions between police arrests and prosecutorial charging decisions, and might sort out how different applicable legal standards, office values, or resources affect declination choices.

Whatever precise form it takes, greater transparency in a prosecutor's office bodes well for the quality of internal regulation. The obligation to explain and the aspiration to make consistent and principled decisions can both thrive in an environment that embraces transparency in many forms. These can become our hopes when the black box of prosecutorial choices becomes more translucent.

CONCLUSION

Just as transparency is the key mechanism to an internal rule of law in prosecutors' offices, transparency could mark the road to stronger legal and democratic values in our administrative state. The importance of internal norms for prosecutors in New Orleans, Milwaukee, and elsewhere allows us to see the importance of transparency as a theoretical building block for understanding effective internal regulation of discretion. These ideas point toward a more complete theory of executive decisionmaking and legitimacy.

For now, we hope that we have convincingly demonstrated that internal regulation of prosecutors, contrary to the belief of Herbert Wechsler and most legal scholars, has many of the characteristics and virtues of law in other settings. If we have successfully shown that internal executive regulation is an important and largely unexplored path for legal reform and scholarship, then, for now, we rest our case.

(discussing the fact that the Douglas County District Attorney said that "race did not play a role" in the aggravated child molestation case against Genarlow Wilson, seventeen years old at the time of the alleged crime); Farah Stockman, *Candidates Spar After Point Raised on Minorities*, BOSTON GLOBE, Oct. 23, 2002, at B6 (stating that the Suffolk County District Attorney said that "race plays no role in his prosecutions"); Nicole Weisensee, "Not About Race" DA: Probe of Shooting Proceeding at "Priority," PHILA. DAILY NEWS, Jan. 21, 1998, at 6 (observing that the Philadelphia District Attorney said that "race does not play a role in any decision we make").

211. See Wright & Miller, *supra* note 107, at 95-96.