

# ADVERSARIAL ASYMMETRY IN THE CRIMINAL PROCESS

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*It is a common lament that prosecutors in our criminal justice system are too adversarial. This Article argues that in a deeper sense, prosecutors may not be adversarial enough. The issue—which I call adversarial asymmetry—is that, as political actors, prosecutors have no inherent desire to seek maximal punishment, at least in any consistent way. While commentators tend to see this as a good thing, adversarial asymmetry helps explain a range of seemingly disparate pathologies in the criminal process. A number of problems—including the coerciveness of plea bargaining; pretextual prosecution; discriminatory charging practices; the proliferation of overly broad criminal statutes; the difficulty in deterring prosecutorial misconduct; and use of the grand jury as political cover for unpopular decisions—would not exist, or at least could be more easily solved, in a world where prosecutors were more single mindedly focused on maximizing victory in the criminal process. In fact, a more consistently adversarial system might have surprising advantages over our own, providing more accountability for prosecutors while being more consistent with the rule of law. And while heightened adversarialism unquestionably poses risks, alternative institutional structures could minimize those dangers. Even if actually implementing such a system is unrealistic or unappealing, the proposal has value as a thought experiment, for it exposes deep fault lines in the theoretical foundation of our system of criminal prosecution. Our current approach combines an adversarial process with politically accountable prosecutors—yet we lack a compelling account of what precise level of adversarialism is optimal or why political accountability is the right tool for producing good behavior from prosecutors. It should thus be unsurprising that our system often works poorly in practice. Absent a better reason to think that our current approach is the only option, we should be more willing to reconsider basic structural arrangements in criminal justice.*

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INTRODUCTION ..... 764

I. UNDERSTANDING ADVERSARIAL ASYMMETRY..... 771

    A. *Identifying the Problem* ..... 772

    B. *Why Adversarial Asymmetry Matters*..... 782

    C. *Prosecutorial Adversarialism in Historical Context* .. 786

II. THE COSTS OF ADVERSARIAL ASYMMETRY ..... 791

    A. *Insufficient Maximization* ..... 792

        1. *Substantive Overbreadth* ..... 792

        2. *Plea Bargaining, Coercion, and Overcharging*... 794

        3. *Discriminatory Charging Decisions* ..... 800

    B. *Targeted Prosecution and External Incentives* ..... 803

        1. *Pretextual Prosecution* ..... 804

        2. *Entrepreneurial Prosecution*..... 806

        3. *Grandstanding and Abuse of Process* ..... 808

    C. *Playing to Lose* ..... 811

        1. *Misuse of the Grand Jury* ..... 811

        2. *Throwing Cases* ..... 814

    D. *Incentive-Design Problems* ..... 815

        1. *Legislative Priorities* ..... 816

        2. *Prosecutorial Misconduct* ..... 818

III. THE SURPRISING CASE FOR ADVERSARIALISM..... 820

    A. *The Unexpected Benefits of Adversarialism* ..... 821

        1. *Accountability* ..... 822

        2. *The Rule of Law*..... 826

        3. *Political Feedback* ..... 828

    B. *Mitigating the Risks* ..... 831

        1. *Prosecutorial Misconduct and False Convictions* ..... 831

        2. *Equitable Discretion and Harsh Punishment* .... 833

        3. *Case Selection*..... 836

    C. *Thoughts on Implementing Adversarialism* ..... 837

        1. *Choosing Metrics and Dividing Responsibility* .. 838

        2. *Motivating Prosecutors*..... 840

    D. *A Note on Resource and Power Asymmetries* ..... 842

IV. IMPLICATIONS: THOUGHT EXPERIMENT AS CRITIQUE ... 844

    A. *Reconsidering the Minister-of-Justice Ideal* ..... 844

    B. *The Puzzles of Prosecutorial Accountability* ..... 846

    C. *Rethinking Adversarialism* ..... 851

CONCLUSION ..... 854

## INTRODUCTION

Our criminal justice system is built on an adversary model.<sup>1</sup> While few criminal cases today are resolved through full-blown trials, the adversarial ideal nevertheless guides the entire criminal-adjudicative process. Few observers, however, are entirely happy with the state of adversarialism in American criminal justice. Critics argue that the adversarial process does a poor job of establishing the truth.<sup>2</sup> Some contend that the adversarial contest is unfairly imbalanced in favor of the government.<sup>3</sup> Others suggest that adversarialism is a highly inefficient approach to dispute resolution.<sup>4</sup> One particularly common lament, however, is that prosecutors are *too* adversarial. Prosecutors too eagerly embrace their role as defendants' opponents and often exceed the outer limits of permissibly zealous advocacy in their single-minded pursuit of convictions.<sup>5</sup>

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<sup>1</sup> See ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 61 (2001) ("Procedurally, American criminal justice is structured and pervaded by adversarial legalism . . ."); JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 1 (2003) ("The lawyer-conducted criminal trial, our so-called adversary system, is the defining feature of criminal justice in . . . the United States . . .").

<sup>2</sup> See, e.g., LANGBEIN, *supra* note 1, at 331–43; WILLIAM T. PIZZI, *TRIALS WITHOUT TRUTH* 117–39 (1999); Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 12–24 (1996); Christopher Slobogin, *Lessons from Inquisitorialism*, 87 S. CAL. L. REV. 699, 702–09 (2014).

<sup>3</sup> See, e.g., Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for the Truth*, 56 N.Y.L. SCH. L. REV. 911, 912 (2011–12) (describing the adversarial process as "so compromised by imbalance between the parties" that "true adversary testing is virtually impossible").

<sup>4</sup> See, e.g., KAGAN, *supra* note 1, at 66 ("[A]dversarial legalism[ ] [has the] capacity to drag the legal process into a costly and protracted procedural morass."); Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 475–79 (1992) (attributing the increasing length of trials to "adversary excesses, including extreme lawyer dominance and aggressiveness and exceedingly complex rules of evidence and procedure").

<sup>5</sup> See, e.g., Kenneth Bresler, *"I Never Lost a Trial": When Prosecutors Keep Score of Criminal Convictions*, 9 GEO. J. LEGAL ETHICS 537, 541–44 (1996) (arguing that prosecutorial conviction counting creates perverse incentives); Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 330–33 (2001) (describing several ways in which the adversarial structure of trial conflicts with the prosecutor's responsibility to seek the truth); Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 388–91 (2001) (arguing that the adversarial system drives prosecutors to pursue winning cases over pursuing just outcomes); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 107–08 (1991) (describing the prosecutor's "do justice" mandate as unrealistic given the competitive nature of our legal system).

Such criticism of prosecutorial “hyperadversarialism”<sup>6</sup> is nothing if not deserved. Despite much lip service,<sup>7</sup> the notion that prosecutors should seek justice and not merely victory remains more of an aspiration than a reality. While many prosecutors discharge their duties honorably, too many shirk their ethical duties—sometimes doggedly pursuing defendants despite compelling evidence of innocence—and in far too many cases have been responsible for serious injustice.<sup>8</sup> Former prosecutors have themselves described how the prosecutorial role can warp one’s sense of right and wrong.<sup>9</sup>

And yet for all that it gets right, the critique of prosecutors as too adversarial obscures a more important truth—not because it is wrong, exactly, but because it is too simple. While prosecutors are often overly adversarial, in a more fundamental sense, prosecutors may not be adversarial *enough*. While commentators tend to celebrate the limits on prosecutorial adversarialism, this Article argues that the failure of prosecutors to be consistently adversarial is actually a quandary for the criminal process. Properly understood, insufficient adversarialism is at the root of a number of troubling aspects of our system.

The key is an idea I’m calling *adversarial asymmetry*. The basic problem is that prosecutors—because they are, or are controlled by, politically accountable actors—have no inherent incentive to seek maximal punishment within the criminal process, both in deciding which cases to bring and in litigating individual cases. Though often

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<sup>6</sup> Hadar Aviram, *Legally Blind: Hyperadversarialism, Brady Violations, and the Prosecutorial Organizational Culture*, 87 ST. JOHN’S L. REV. 1 (2013); see also DANIEL S. MEDWED, PROSECUTION COMPLEX: AMERICA’S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT 3 (2012) (“Although no tension should exist between a prosecutor’s advocacy and minister-of-justice duties, the role of zealous advocate often takes precedence.”).

<sup>7</sup> See, e.g., *Brady v. Maryland*, 373 U.S. 83, 87 n.2 (1963) (“[A prosecutor’s] chief business is not to achieve victory but to establish justice.”); MODEL RULES OF PROF’L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS’N 2015) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”); Robert H. Jackson, *The Federal Prosecutor*, 31 J. AM. INST. CRIM. L. & CRIMINOLOGY 3, 6 (1940) (“[T]he citizen’s safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.”); Gershman, *supra* note 5, at 313 (“[T]he prosecutor has a legal and ethical duty to promote truth and to refrain from conduct that impedes truth.”); David Luban, *The Conscience of a Prosecutor*, 45 VAL. U. L. REV. 1, 15 (2010) (“In a time-honored formula, [a prosecutor’s] job is to seek justice, not victory.”).

<sup>8</sup> See Aviram, *supra* note 6, at 3 (citing studies enumerating instances of misconduct). For a compelling case that prosecutorial zeal and misconduct likely led to the execution of an innocent man, see JAMES S. LIEBMAN ET AL., *THE WRONG CARLOS: ANATOMY OF A WRONGFUL EXECUTION* (2014).

<sup>9</sup> See, e.g., PAUL BUTLER, *LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE* 101–21 (2009) (describing how his progressive views were eroded by his desire to win cases and succeed professionally).

thought to be a desirable feature of our system, this fact of prosecutorial motivation can help elucidate a surprising range of problems.

For example, adversarial asymmetry helps us understand what is particularly troubling about plea bargaining. Although there is broad agreement that the current plea bargaining regime is troubling, scholars have struggled to pinpoint why exactly plea bargaining is problematic. Why is the plea-bargaining process more troubling than the process of civil settlement?<sup>10</sup> Prosecutorial motivation is key. In a world where prosecutors had strong incentives to maximize convictions and sentence length across the board, we could be more confident that plea bargains would actually be *bargains*; defendants and the prosecution would reach compromises that reflect expected trial outcomes. But because prosecutors do not inevitably desire to maximize punishment, plea bargaining becomes a coercive process in which prosecutors use the threat of overly harsh sentences as weapons for extracting guilty pleas from defendants. Although previous scholars have emphasized the coercive nature of plea bargaining,<sup>11</sup> recognizing that plea bargaining can involve prosecutors threatening to impose harsh sentences that prosecutors themselves have no particular desire to impose helps explain why the process is coercive.

This Article is not the first to suggest that insufficient adversarialism is part of the problem with plea bargaining: William Stuntz argued that plea bargaining does not occur in the shadow of substantive law because “[p]rosecutors are not like civil plaintiffs.”<sup>12</sup> Yet Stuntz’s basic insight has never been systematically extended beyond the plea-bargaining context. So extended, it has great explanatory power: Adversarial asymmetry can be used to elucidate numerous problems in criminal law and procedure beyond plea bargaining, including the proliferation of overbroad substantive law; discriminatory charging practices; pretextual prosecution; persecution of innocent defendants; and use of the grand jury as political cover for unpopular decisions. These problems, while familiar, can be understood in a new way when considered through the lens of adversarial asymmetry. The less that prosecutors care about maximizing criminal punishment for its own sake, and the more they care about using the criminal process to pursue other goals, the greater these problems become.

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<sup>10</sup> See *infra* Section II.A.2.

<sup>11</sup> See *infra* notes 137–39.

<sup>12</sup> William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 HARV. L. REV. 2548, 2554 (2004).

The Article then goes further, and imagines an alternative system involving more consistently adversarial prosecutors—that is, prosecutors more single mindedly focused on maximizing punishment. At first glance, such a system may seem dystopian or frightening. But, if properly designed, a truly adversarial system might provide stronger accountability for prosecutors and fewer abuses of power while also ensuring better adherence to basic rule-of-law values. Moreover, the substance of the law in a truly adversarial system might also look significantly different, if more consistent enforcement changed the political dynamics of criminal lawmaking.

Of course, actually adopting such a system may seem unrealistic or unwise. But the proposal's value is as a thought experiment, not a concrete proposal for reform. As a limiting case, an extreme alternative to the way our own system currently operates, the proposal provides a vantage point from which we can reexamine some basic premises of our system. That reexamination shows that the structure of our criminal process rests on assumptions that are difficult to justify—such as assumptions about how prosecutors will behave, about the value of political accountability for prosecutors, and about how divided institutional power is supposed to protect liberty. Indeed, this analysis should cause us to question our basic commitment to the adversary model in criminal justice today.

The Article proceeds to that conclusion in four Parts. Part I provides the theoretical framework for the rest of the Article. Section I.A begins by defining adversarial asymmetry and explaining why it is particularly pervasive in criminal law. Although criminal defendants usually have strong incentives to avoid conviction and to minimize their sentences, prosecutors do not inevitably care about maximizing convictions and high sentences. Instead, prosecutors are motivated by a more complicated mix of political, professional, and personal incentives that lead prosecutors to be less than fully adversarial in many ways. Prosecutors do not bring every case that they could win; they do not invariably try to maximize severity of punishment; and they sometimes gain utility from bringing cases with little or no prospect of victory.

Now, as Section I.B acknowledges, it's usually assumed to be a good thing that prosecutors aren't consistently adversarial; prosecutors are supposed to serve as ministers of justice, not merely zealous advocates for conviction. Yet despite the popularity of that conception, we lack a good account of how treating prosecutors as ministers of justice will produce good results over the long run. Moreover, as Section I.C recounts, the minister-of-justice model is not an inevitable component of our system of criminal justice. Earlier in American his-

tory prosecutors, both public and private, may have behaved somewhat more consistently like zealous advocates. Federal prosecutors in the nineteenth century, for example, were paid by the conviction.<sup>13</sup> The modern conception of prosecutors as ministers of justice is a relatively new invention.

Part II then shows how adversarial asymmetry helps explain a number of seemingly disparate pathologies in criminal law and procedure. A range of problems in criminal justice would not exist, or could be more easily solved, if prosecutors single mindedly focused on maximizing punishment. Section II.A discusses instances where prosecutors' failure to consistently seek maximal punishment creates bad results. Legislatures pass overbroad substantive laws precisely because they know that prosecutors will not enforce those statutes consistently. Plea bargaining becomes more coercive the less that prosecutors care about maximizing sentences relative to the law on the books. And discriminatory charging decisions are only possible to the extent that prosecutors aren't expected to push the law to its limits.

Section II.B then considers the problem of targeted prosecution—situations where prosecutors select particular *people* for prosecution rather than selecting *cases*. These include pretextual prosecution (where a prosecutor charges a person with crime *X* because she believes him to be guilty of crime *Y*); entrepreneurial prosecution (where prosecutors target defendants or classes of defendants in order to curry favor with political constituencies); and abuse of process (where a prosecutor targets an innocent defendant for political reasons without any expectation of victory, and/or to make that person suffer the rigors of the criminal process). These problems exist—and indeed are only conceptually possible—precisely to the extent that prosecutors care about pursuing goals other than maximizing punishment.

Next, Section II.C analyzes instances where prosecutors' political incentives cause them to play to lose—that is, to behave exactly the opposite of how the adversary process would predict. Prosecutors often use the grand jury to duck cases they could win, and could even throw cases at the trial stage, if the political incentives were there. Prosecutors who cared only about maximizing punishment would not do that. Finally, as Section II.D explains, adversarial asymmetry also explains why it is difficult to design incentives for prosecutors. Precisely because prosecutors are ultimately motivated by incentives *external* to the litigation process, it's much harder to calibrate their incentives than it would be if they single mindedly focused on maxi-

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<sup>13</sup> See *infra* Section I.C.

mizing punishment. For example, it is challenging to design effective remedies for prosecutorial misconduct precisely because it is unclear the degree to which remedies like reversals of convictions or sentence reductions for defendants actually influence prosecutorial behavior.

Part III extends the insights of the previous Part further, and imagines an alternative criminal justice system in which prosecutors were expected to care only about maximizing punishment. Though such a system may seem troubling at first, it might, as Section III.A reveals, have surprising benefits. First, consistent adversarialism would promote accountability for prosecutors. Giving prosecutors a single value to maximize would make monitoring them easier, and it would provide a useful lever for discouraging bad conduct. Adversarialism would also promote rule-of-law values; in a system where the law enforcers have an incentive to enforce the written law to its fullest extent, the law really is *law* in a more meaningful way than in our system, where criminal law is merely a veil hiding the unchecked exercise of discretion. Finally, a fully adversarial system could improve the politics of criminal lawmaking. To the extent that selective nonenforcement is a critical element of political pathologies in criminal justice, changing prosecutors' motivations in enforcing the law could create political feedback that would improve the law's substance.

More fully adversarial prosecutors do, to be sure, pose significant dangers, as Section III.B acknowledges. Yet those risks could be mitigated with careful design. The most obvious risk—that such prosecutors would pursue the innocent—is certainly real. But such prosecutors might not be more inclined to pursue the innocent than politically motivated prosecutors today. Punishment-maximizing prosecutors would have incentive to focus their efforts on those defendants they could convict most easily. So long as the trial process does an acceptable job of differentiating guilt and innocence, this should mean that punishment-maximizing prosecutors would focus their efforts on the guilty. Moreover, prosecutors incentivized to maximize a single variable would ultimately be easier to deter from bad conduct, because that incentive structure creates a powerful lever for shaping behavior.<sup>14</sup> Other risks could be similarly addressed. Punishment-maximizing prosecutors would bring all cases they could prove, which means that they would never forbear for equitable reasons. And they would consistently pursue the most serious charges available, creating a risk of overly harsh punishment. Yet we could give other actors—such as judges and juries—greater roles in screening cases and more control over sentences. That approach would preserve room for equi-

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<sup>14</sup> See *infra* Section III.B.1.

table forbearance while also creating systemic benefits of predictable behavior by prosecutors.<sup>15</sup>

Section III.C briefly offers some thoughts on implementation in order to make the thought experiment plausible. Careful design would be necessary to ensure that prosecutors behaved in a more consistently adversarial fashion both *globally*—in terms of selecting which cases to bring—and *locally*—in terms of seeking maximal punishment within each criminal case. One solution would be to divide authority between prosecutors who select charges and those who litigate cases. As for how to motivate prosecutors, financial incentives are one, but not the only, option. While there would be many complexities to resolve, there is no reason to think that designing a truly adversarial system would be impossible.

Section III.D then complicates the analysis by considering other asymmetries beyond the motive asymmetry on which the Article has thus far focused. Critics have stressed the significant power and resource advantages enjoyed by prosecutors; ensuring consistent adversarialism by itself would not solve these problems. The key point, however, is that designing a well functioning adversary system would require addressing *both* motive and power asymmetries; focusing only on the latter is not enough.

Part IV then considers the implications of the preceding part's thought experiment. Regardless of what one thinks of the proposal, its real purpose is to highlight difficult questions about some of the basic assumptions on which our system of criminal justice rests.

First, as Section IV.A discusses, we should have doubts about our commitment to a system in which the prosecutor acts in dual roles as both a zealous advocate and as a minister of justice. This Article imagines a world in which prosecutors would be expected to take on only one of those roles—zealous advocacy—but in which other structural mechanisms would be designed to rein in abusive practices. Whatever the merits of that approach, the current state of affairs has problems. Given that we lack strong external accountability mechanisms, our system depends heavily on trust in prosecutors to do the right thing. But we are inevitably disappointed when many of them ignore their obligations to serve justice. Yet that is the result we should predict, given that prosecutors are ultimately political actors and there is often no political incentive in seeking justice. To the extent that our system depends on faith in political actors to do the right thing, that trust is misplaced and naïve.

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<sup>15</sup> See *infra* Section III.B.2.

Section IV.B shows how thinking through the costs and benefits of consistent adversarialism raises hard questions about the value of political accountability for prosecutors. One assumption of our system is that political accountability for prosecutors will encourage the optimal level of prosecution and will prevent prosecutors from abusing their power. But the reasons why political accountability is supposed to have these effects are a mystery, and in fact accountability may cause as many problems as it solves. While political accountability may prevent prosecutors from charging some innocent defendants, it may also encourage them to target innocent, or marginally guilty, defendants in other contexts. Even if we cannot give prosecutors a simple metric like maximizing punishment, we need a more nuanced account of how to design accountability mechanisms to produce optimal behavior from prosecutors.

Finally, Section IV.C argues that there is no compelling justification for our system's half-hearted approach to adversarialism. We combine an adversarial process with prosecutors who have no inherent incentives to maximize victory in that process. That combination creates results that are difficult to defend normatively. For example, our system resolves most criminal cases through pleas—yet, because prosecutors do not consistently seek to maximize punishment across the board, there's no guarantee that plea bargaining really occurs in the shadow of expected trial outcomes at all. Instead, prosecutors act as our system's primary adjudicators, determining who deserves punishment and how much. If we are comfortable with letting prosecutors do the bulk of our criminal adjudication, why do we even have a trial system in the first place? Why not just let prosecutors make all the relevant determinations? No one thinks that would be a good idea, but absent some better theory for how our system draws the line in the particular place that it does, it's hard to be confident that our approach is the right one. We thus may need to reconsider our basic commitment to an adversary process. Instead of clinging to a framework that originally evolved for resolving private disputes, it is wise to rethink the criminal justice system's structural foundations now that the criminal process is firmly within the fold of public law.

## I.

### UNDERSTANDING ADVERSARIAL ASYMMETRY

This Part provides the theoretical foundation for the rest of the Article. Section A defines adversarial asymmetry and explains why it is particularly pervasive in criminal litigation. Section B provides some reasons why adversarial asymmetry in criminal prosecution may be a

problem. Section C briefly examines the history of criminal prosecution in America in order to suggest that our current approach to discretion and adversarialism may be more contingent than it may sometimes seem.

### A. Identifying the Problem

This Section explains the idea I'm calling adversarial asymmetry, and explains why it is prevalent in the criminal process. To start with, of course, it helps to understand how I'm using the term "adversarial." Although there is no perfect definition on offer, there's general agreement that an adversary system is one in which opposing sides compete according to a set of rules in front of a generally passive decision-maker (such as a judge or jury).<sup>16</sup> An adversary system gives the parties significant control over how the contest will proceed—it is largely left to them to decide what claims to bring, what arguments to make, what evidence to present, and so on.<sup>17</sup>

Adversarial asymmetry can occur within the context of any such system. The simplest way to explain it is to define its opposite: adversarial *symmetry*. Put briefly, this is the idea that the opposing sides are playing the same game; that is, the two sides' conceptions of what it means to win are mirror images of each other. Each side derives utility from winning (and loses utility from losing) the process in the same way. Adversarial *asymmetry*, by contrast, appears whenever the purported adversaries' conceptions of winning, or desire to win, differ in some key respect.<sup>18</sup> As I am using the phrase, adversarial asymmetry

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<sup>16</sup> See, e.g., MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* 3 (1986); Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 449 (2009).

<sup>17</sup> Frost, *supra* note 16 ("Party control over case presentation is a central tenet of the American adversarial legal system."); Slobogin, *supra* note 2, at 706 ("In an adversarial system the parties control not only the questioning of witnesses, but their selection and preparation as well."); Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301, 302 (1989) (citing party control as a defining feature of the adversarial legal system).

<sup>18</sup> The vocabulary of game theory may be helpful. Putting aside various complexities such as litigation costs, adversary systems in which adversarial symmetry is present are essentially *zero-sum* games: with respect to each possible outcome, one side's gains balance out the other side's losses. See MORTON D. DAVIS, *GAME THEORY: A NONTECHNICAL INTRODUCTION* 14 (rev. ed. 1983) ("The term 'zero-sum' . . . means the players have diametrically opposed interests."); see also Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225, 227 (1982) ("A zero-sum game is a game in which total winnings minus total losses equals zero."). When adversarial asymmetry arises, the process ceases to be zero-sum in some way. While the parties might still have *opposed* interests, different outcomes may create more gains for one side than losses for the other, and so on. There is, to be sure, nothing inherently objectionable about non-zero-sum approaches; much alternate dispute resolution is built around the premise that seemingly zero-sum litigation disputes can be resolved in ways

is orthogonal to whether adversaries are equally matched in terms of power; it concerns how the adversaries define success in the process, not their ability to succeed in the process.<sup>19</sup>

Although the focus here is criminal law, thinking about civil litigation can help illustrate the concepts. As Abram Chayes observed, our traditional conception of a civil lawsuit involves “a contest between two individuals or at least two unitary interests” whose interests are “diametrically opposed.”<sup>20</sup> Where this assumption holds, we can make reasonably straightforward predictions about how litigants will behave. Yet this assumption frequently fails to hold in various areas of the law.<sup>21</sup> In many contexts, opposing sides have different conceptions of victory, or at least measure victory in fundamentally different currencies. When that is so, the litigation process malfunctions—or, at least, it functions differently than it would if the parties’ motivations were fully symmetrical. Consider a few examples: In the class-action context, a well-known agency problem between class plaintiffs and their counsel disrupts the reliability of settlements, requiring heightened judicial scrutiny of settlement agreements.<sup>22</sup>

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that benefit both sides. *See, e.g.,* Thomas O. Main, *ADR: The New Equity*, 74 U. CIN. L. REV. 329, 361 (2005) (“Proponents of ADR argue that rigid adherence to legal formulae can frame debates in a zero-sum model that obscures parties’ goals and overlooks a richer set of possible resolutions.”). But adversarial asymmetry can cause problems if an adversary system is premised on the assumption that the parties will behave as if they had diametrically opposing interests.

<sup>19</sup> David Engstrom has used the phrase “adversarial asymmetries” to refer to “mismatches in plaintiff- and defense-side resources and sophistication.” David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616, 636 (2013). While such power and resource asymmetries are an important object of study in both the civil and criminal spheres, my analysis focuses on *incentive* asymmetries. While previous scholarship has focused attention on power and resource differentials between prosecutors and defense attorneys, *see infra* notes 26–27, the incentive asymmetry that I am highlighting has received much less attention.

<sup>20</sup> Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282 (1976).

<sup>21</sup> Adversarial asymmetry includes, but extends beyond, the concept of “asymmetric stakes” first introduced by George Priest and Benjamin Klein. In their seminal analysis of settlement behavior, Priest and Klein considered cases where “the amount at stake to the parties [in a particular dispute] differs”—such as where “the loss of the case may damage the defendant’s public reputation,” causing the defendant to suffer economic harms significantly outweighing the economic benefits enjoyed by the prevailing plaintiff. George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 24–25 (1984). Such a case involving asymmetric stakes is surely one where adversarial asymmetry is present. Yet the concept of adversarial asymmetry is more capacious, extending not just to situations where one party has more to gain or lose than the other, but also to situations where the opposing parties define victory in orthogonal or even contradictory ways.

<sup>22</sup> The problem arises because the individual class-action plaintiff often has too little at stake to police the actions of the lawyers purportedly representing her interests. *See* John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and*

Defamation suits settle much less frequently than other tort cases, because plaintiffs tend to have nonpecuniary goals: reclaiming their reputations through public victories.<sup>23</sup> And incarcerated pro se litigants who repeatedly file frivolous suits can clog up court dockets,<sup>24</sup> which has led to rules and legislation limiting inmates' abilities to file suit.<sup>25</sup> Although these examples are all very different, the common

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*Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 884–86 (1987) (“[I]n many settings, few plaintiffs expect a recovery sufficient to justify the cost of monitoring.”). And the few plaintiffs sufficiently motivated to monitor their cases face a collective action problem. The result is that class-action plaintiffs’ lawyers act as “agents without principals.” William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 UCLA L. REV. 1435, 1442 (2006). This is an example of adversarial asymmetry: defendants want to minimize damages, but plaintiffs’ counsel may not necessarily care about maximizing overall damages; they are often willing to bind their clients to “sweetheart” settlements that allow for high attorneys’ fees but that provide little meaningful recovery for class members. *Id.* at 1442; Coffee, *supra*, at 883. Given this adversarial asymmetry, judges must carefully scrutinize class settlements for fairness to class members. See FED. R. CIV. P. 23(e)(2) (requiring judges to hold a hearing and determine that a proposed settlement is “fair, reasonable, and adequate” before approval); see also Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 45 (1991) (“The regulatory response to these conflicts is to require judicial scrutiny of proposed settlements.”).

<sup>23</sup> See, e.g., Anita Bernstein, *Real Remedies for Virtual Injuries*, 90 N.C. L. REV. 1457, 1475 (2012) (noting that in settling only fifteen percent of the time, libel actions “differ[] dramatically” from most tort actions). This, too, is an instance of adversarial asymmetry, although of a slightly different variety than the previous two examples. Here, the problem is not that defamation plaintiffs don’t care about winning. Rather, the problem is that they measure victory in a fundamentally different *currency* than their opponents do: defendants tend to care about dollars for their own sake, while many plaintiffs care about damage awards only as a proxy for restoration of reputation. This instance of asymmetry impedes effective bargaining between the parties. Some have suggested that making it easier for defamation plaintiffs to obtain a judicial declaration that a statement is false, while making it harder for them to recover money damages, could help solve this problem. See Marc A. Franklin, *A Declaratory Judgment Alternative to Current Libel Law*, in REFORMING LIBEL LAW 68, 69 (John Soloski & Randall P. Bezanson eds., 1992) (advocating for greater reliance on declaratory judgments in libel cases as an inexpensive means of restoring plaintiffs’ reputations).

<sup>24</sup> See, e.g., *In re Green*, 669 F.2d 779, 783 (D.C. Cir. 1981) (discussing an inmate who filed thirty-eight separate complaints); Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1578–87 (2003) (discussing perceived “deluge” of inmate suits which led to the passage of the Prison Litigation Reform Act). The problem is that, unlike a litigant who sees litigation as a cost to be avoided, an incarcerated, pro se litigant might not see litigation as costly; they (by definition) pay nothing for legal representation, and they can also often avoid filing fees due to their pauper status. Moreover, not all such litigants care about winning verdicts; instead, some simply use litigation as a way to harass enemies or as a form of entertainment.

<sup>25</sup> See 28 U.S.C. § 1915(b) (2012) (requiring payment of partial filing fee by inmates proceeding in forma pauperis); SUP. CT. R. 39.8 (permitting Court to deny in forma pauperis status for frivolous filings). Such restrictions are themselves problematic, however, as they can limit inmates’ ability to file meritorious suits challenging prison conditions. See Schlanger, *supra* note 24, at 1644 (“[T]he PLRA’s new decision standards

thread in each is that one side of the dispute has an idiosyncratic conception of victory, which causes the adversary process to malfunction, or at least to function differently than it does otherwise.

Whatever the extent of adversarial asymmetry in civil law, however, the focus here is on the criminal sphere. And my claim is that adversarial asymmetry is particularly pervasive in criminal law. Of course, some asymmetries in criminal litigation are quite familiar. Observers have stressed the significant advantages in power and resources prosecutors enjoy vis-à-vis defense attorneys.<sup>26</sup> Indeed, some seek to justify defendant-friendly procedural asymmetries as a compensation for the fundamental power asymmetry favoring prosecutors.<sup>27</sup> I am drawing attention to a different kind of asymmetry, however: an *incentive* asymmetry. Simply put, the claim is that though the criminal process is an adversary system designed for doling out punishment, and though defendants generally care about minimizing punishment, prosecutors lack incentives in a consistently adversarial fashion—that is, they have no inherent desire to maximize punishment. And combining an adversary process with this incentive asymmetry can lead to unintended consequences.

Let me spin out my claim about the incentive asymmetry in more detail. Start with criminal defendants. There's reason to believe that, as a class, defendants will seek to minimize punishment. We can safely assume that virtually all defendants experience disutility from criminal sanctions—indeed, that's at least partly the idea behind punishment.<sup>28</sup> So we should expect criminal defendants, with limited exceptions, to try to avoid conviction, and, failing that, to minimize the sentence (or other punishment) they face.<sup>29</sup> Minimizing punishment is likely to be

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have imposed new and very high hurdles so that even constitutionally meritorious cases are often thrown out of court.”).

<sup>26</sup> See, e.g., Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1152 (1960) (“Both doctrinally and practically, criminal procedure . . . gives overwhelming advantage to the prosecution.”); David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1731–49 (1993) (describing the advantages that prosecutors enjoy in personnel and funding).

<sup>27</sup> See, e.g., Issachar Rosen-Zvi & Talia Fisher, *Overcoming Procedural Boundaries*, 94 VA. L. REV. 79, 135 (2008) (“The pro-defendant bias inherent in the rules of criminal procedure is intended to remedy the system’s built-in imbalance of power in favor of the prosecution, which stems from the government’s greater access to resources . . . .”); see also Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 HARV. L. REV. 1065, 1145–46 (2015) (“Perhaps some pro-defendant procedural asymmetries merely cancel out the government’s inherent advantages in the investigative and adjudicative process.”).

<sup>28</sup> The rationales of deterrence and retribution both depend on the assumption that criminal punishment is unpleasant in some way. The incapacitation rationale does not, however.

<sup>29</sup> See Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1149 (2008) (“[D]efendants always operate as sentence minimizers.”).

defendants' sole, or at least highest, motivation in how they approach the criminal process; even those defendants who value their day in court are likely to value their freedom more highly.

To be sure, defense attorneys muddy the waters somewhat. The defense lawyer may have different preferences about the costs and benefits of trial versus settlement, or different risk preferences, and may thus pressure the defendant to accept (or reject) a plea bargain even if doing so is not in the defendant's best interest.<sup>30</sup> Nonetheless, the defendant must make the ultimate decisions about whether to take a plea deal, and so his or her desire to minimize punishment is likely to be the overwhelming consideration—even if the defendant is sometimes misinformed about the best way to do that.

The incentives on the other side of the “v.” are more complicated, however. Criminal prosecutions are brought by public prosecutors<sup>31</sup> who are either directly elected themselves or are in some way accountable to another elected official.<sup>32</sup> As salaried and politically accountable public actors, prosecutors have no inherent reasons to value punishment qua punishment the way that an idealized civil plaintiff might value dollars qua dollars.<sup>33</sup> Instead, prosecutors are motivated by political incentives; by professional norms; by their own conceptions of duty and justice; and by other personal motivations that are best understood as agency costs. And so understanding how prosecutors behave as adversaries requires some theory of how their complicated motivations translate into action.

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<sup>30</sup> See Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43, 53–55 (1988) (detailing conflicts of interest between defense counsel and clients in plea bargaining decisions).

<sup>31</sup> Stephanos Bibas, *Rewarding Prosecutors for Performance*, 6 OHIO ST. J. CRIM. L. 441, 442 (2009) (“[M]ost prosecutors receive flat, lockstep annual salaries tied to their years of seniority and experience.”).

<sup>32</sup> More than 95% of head prosecutors at the state level are elected. Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 734 (1996). All federal prosecutors are ultimately accountable to the President. Donald A. Daugherty, *The Separation of Powers and Abuses in Prosecutorial Discretion*, 79 J. CRIM. L. & CRIMINOLOGY 953, 986 (1988).

<sup>33</sup> Cf. Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000) (making the analogous argument in the civil context that, unlike private plaintiffs, government plaintiffs are not guided by financial incentives).

Scholars have investigated that question,<sup>34</sup> but no complete theory of prosecutorial motivation is yet on offer.<sup>35</sup> A complete theory is not required here, however. What matters is that there is general agreement that, for a variety of reasons, prosecutors do not consistently behave as if maximizing punishment was their sole goal.<sup>36</sup> That is not to say that prosecutors have no incentives to convict many criminals, or that they don't usually want to win the cases that they bring, or that they don't often seek harsh penalties. But prosecutors don't behave as if their sole goal were simply to win in the adversary process—that is, to maximize criminal punishment. At first glance, this might seem fitting; while defense lawyers are bound to advocate for the interests of their client regardless of the public interest, prosecutors are at least nominally expected to seek justice for all involved, defendants included.

Part II will spin out specific ways in which prosecutors' failure to be fully adversarial harms the ends of justice. Before doing so, I should broadly outline the major ways in which prosecutors fail to be fully adversarial. At the outset, however, I stress that I am painting with a broad brush. There is, however, likely significant variation in prosecutorial behavior and motivation due to the differences in culture and institutional structure among the numerous prosecutors' offices, state and federal, throughout the United States.<sup>37</sup> And thus this discussion will inevitably obscure many relevant details. Though speaking in broad generalities about prosecutorial behavior unquestionably obscures many important truths, that approach pays dividends as well. As Part II shows, a number of pathologies in criminal law and procedure can be understood as the result of combining an adversarial process with inconsistently adversarial prosecutors. So

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<sup>34</sup> See, e.g., Richard T. Boylan, *What Do Prosecutors Maximize? Evidence from the Careers of U.S. Attorneys*, 7 AM. L. & ECON. REV. 379 (2005) (studying the performance metrics and career outcomes of federal prosecutors); Edward L. Glaeser et al., *What Do Prosecutors Maximize? An Analysis of the Federalization of Drug Crimes*, 2 AM. L. & ECON. REV. 259 (2000) (studying the decisionmaking process of federal prosecutors); Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939 (1997) (analyzing whether prosecutors are motivated by more than simply maximizing convictions).

<sup>35</sup> See Stuntz, *supra* note 12, at 2554 n.6 (“There is as yet no developed social science literature on what prosecutors maximize, probably because the solution is too complex to model effectively.”).

<sup>36</sup> See Richman, *supra* note 34, at 988 (“[B]ehavior models based on conviction (or sentence-year) maximization are unacceptably simplistic.”); Stuntz, *supra* note 12, at 2553–54 (“[H]owever prosecutors define their preferred sentence, there is no good reason to assume that their preference is always for the harshest sentence they can possibly get.”).

<sup>37</sup> See Ronald F. Wright, *Guilty Pleas and Submarkets*, 157 U. PA. L. REV. PENNUMBRA 68, 72–73 (2008) (detailing the factors that lead to local variances in prosecutors' motivations).

even if some of the broad statements I make about prosecutorial behavior are less true of specific prosecutorial environments, this analysis could help explain why some pathologies are more or less present in particular contexts.

There are two key ways in which prosecutors are not consistently adversarial. First, prosecutors do not seek to maximize punishment in a *global* sense. That is, prosecutorial decisions about which cases to bring are not driven solely by their desire to obtain victories, but are instead informed by additional considerations external to the legal system. This means that prosecutors do not bring every case that they could win. Even where there is strong evidence that a particular defendant's conduct falls within the letter of a criminal prohibition, a prosecutor might nonetheless decline to bring charges for any number of reasons. A prosecutor will sometimes fail to charge where a defendant is particularly sympathetic,<sup>38</sup> or when a prosecutor thinks a defendant's conduct is not sufficiently blameworthy even if technically criminal.<sup>39</sup> Prosecutors occasionally decline to charge due to fundamental disagreement with substantive law or discomfort with the severity of the likely penalty.<sup>40</sup>

It is difficult to know exactly how often such prosecutorial discretion not to charge occurs—both because of the opacity of prosecutorial decisionmaking in general and because decisions *not* to act are particularly hard to measure.<sup>41</sup> But it is hard to dispute that prosecutors generally have broad power to decline to bring charges and that they use that power sometimes.<sup>42</sup>

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<sup>38</sup> See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 548 (2001) (“[I]f the defendant is sympathetic (or is likely to become so), the prosecutor has every incentive not to [bring charges].”).

<sup>39</sup> See Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1657 (2010) (noting that “a prosecutor may decline not to charge because . . . she concludes that the prospective defendant is insufficiently blameworthy”).

<sup>40</sup> See Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1252–54 (2011) (“Prosecutorial nullification [occurs when] a prosecutor has sufficient evidence to secure a conviction against a defendant for conduct that violates a criminal law, but declines prosecution because of a disagreement with the law or [because prosecution] would be unwise or unfair.”).

<sup>41</sup> Some jurisdictions have adopted policies requiring prosecutors to declare when they decline to prosecute a case, and scholars have studied these records in order to better understand declination decisions. For a review of the federal system, see Michael Edmund O’Neill, *When Prosecutors Don’t: Trends in Federal Prosecutorial Declinations*, 79 NOTRE DAME L. REV. 221 (2003). For a useful study of state-level prosecutors, largely focusing on the New Orleans District Attorney’s Office, see Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125 (2008).

<sup>42</sup> A study of the federal system concluded that “federal prosecutors decline roughly a quarter of all criminal matters referred to them.” O’Neill, *supra* note 41, at 271.

That prosecutors do not globally maximize punishment also has implications for *which* cases prosecutors choose to pursue. The likelihood of obtaining a conviction may not have a direct relationship with the rewards for obtaining a conviction. For example, a prosecutor may derive greater political (or personal) benefits from bringing one case with little prospect of victory (say, against a particularly unpopular defendant, but where evidence of guilt is weak) than she would from bringing ten cases where conviction was guaranteed. If, for example, Preet Bharara were concerned with nothing more than maximizing the total sentence-years obtained by the U.S. Attorney's Office for the Southern District of New York, he likely would not direct his subordinates to devote substantial resources towards difficult and time-consuming insider-trading prosecutions.<sup>43</sup> At least part of the reason why a prosecutor like Bharara chooses to focus on those hard white-collar cases rather than, say, devoting even more resources to quotidian drug and gun crimes or smaller-scale but easier-to-prove financial frauds is that he sees significant *political* rewards in taking down Wall Street titans.

This isn't to say prosecutors are indifferent to litigation costs. Prosecutors' desire to minimize trials is surely a large part of their motivation for relying so heavily on plea bargaining.<sup>44</sup> But a prosecutor's conception of the costs and benefits of the process is more complicated than it would be if she were solely concerned with maximizing punishment.

The second way in which prosecutors are not fully adversarial is in a *local* sense. That is, once charges have been brought, prosecutors do not inevitably insist on the harshest punishment available. While they often insist on stiff penalties for serious crimes, they are less likely to do so for misdemeanors and other less serious violations.<sup>45</sup> This is partly by design: Prosecutors are supposed to act "as agents of society," and maximizing punishment for every violation of law is not optimal; "excessive sentences are costly to the public [prosecutors]

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<sup>43</sup> See Sheelah Kolhatkar, *The End of Preet Bharara's Perfect Record on Insider Trading*, BLOOMBERG (July 8, 2014), <http://www.bloomberg.com/news/articles/2014-07-08/rengan-rajaratnam-and-the-end-of-an-insider-trading-win-streak> (noting that Bharara's office has achieved "stunning success" with insider trading prosecutions, which has "sent a strong message to Wall Street"); Benjamin Weiser & Peter Lattman, *U.S. Attorney Sends a Message to Wall Street*, N.Y. TIMES (May 12, 2011, 9:21 PM), [http://dealbook.nytimes.com/2011/05/12/u-s-attorney-sends-a-message-to-wall-street/?\\_r=0](http://dealbook.nytimes.com/2011/05/12/u-s-attorney-sends-a-message-to-wall-street/?_r=0) (describing Preet Bharara's focus on insider trading and the broad political effects of his concentrated effort).

<sup>44</sup> See Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 54–56 (1968) (describing the influence of resource constraints on a prosecutor's decision to offer a plea).

<sup>45</sup> See Bowers, *supra* note 29, at 1153–54, 1157.

represent.”<sup>46</sup> Agency costs also play a role. Conviction rates are simpler and easier to understand than sentencing statistics for members of the public interested in evaluating prosecutorial performance.<sup>47</sup> Whatever the reason, however, the point is that in many circumstances prosecutors simply have no reason to desire to get the longest sentence available, and this affects their behavior. As Stuntz put it:

[E]xtra months in prison are not like marginal dollars in civil cases. Once the defendant’s sentence has reached the level the prosecutor prefers—or, if you like, the level that the local voters who elect her boss demand—adding more time offers no benefit to the prosecutor. Indeed, prosecutors may actually value “extra” prison time negatively.<sup>48</sup>

Thus, for some crimes, prosecutors may desire a particular sentence that is lower than the legal maximum. For others, prosecutors may not even care about the sentence at all, and may desire merely a conviction.<sup>49</sup>

To summarize: Criminal defendants are almost always punishment-minimizers, and yet prosecutors are not punishment-maximizers, at least in a consistent way. As salaried and politically accountable public actors, prosecutors draw no direct benefit from criminal punishment qua punishment. To the extent that prosecutors maximize anything, they maximize political incentives, and so they will maximize punishment or convictions only to the extent that there are political or personal rewards in doing so. In a number of situations, their priorities will differ significantly from what those of pure punishment-maximizers would be.

This state of affairs should not be particularly surprising, for there are no institutional-design mechanisms built into either federal or state prosecution systems that require or encourage strict adversarialism. If prosecutors maximize any one thing, they maximize political rewards, and there is no reason to think that there is political upside in always pushing for maximal punishment, at least in a global sense.<sup>50</sup>

Now, some rules governing prosecutors might seem to require consistent adversarialism. For example, the *United States Attorneys’*

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<sup>46</sup> Oren Gazal-Ayal & Limor Riza, *Plea Bargaining and Prosecution*, in *CRIM. L. & ECON.* 145, 152 (Nuno Garoupa ed., 2009).

<sup>47</sup> See Alschuler, *supra* note 44, at 106 (“In political terms, it is far more important for a prosecutor to secure convictions than it is for him to secure adequate sentences.”).

<sup>48</sup> Stuntz, *supra* note 12, at 2554.

<sup>49</sup> See Bowers, *supra* note 29, at 1122 (“[P]rosecutors do not aim principally—or even at all—to maximize sentence lengths where the charges are minor.”).

<sup>50</sup> There may, of course, be political upside in seeking maximal punishment in *particular* cases or classes of cases.

*Manual*, which provides guidance for the nation's federal prosecutors, instructs:

The attorney for the government should commence or recommend Federal prosecution if he/she believes that the person's conduct constitutes a Federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction, unless, in his/her judgment, prosecution should be declined because:

1. No substantial Federal interest would be served by prosecution;
2. The person is subject to effective prosecution in another jurisdiction; or
3. There exists an adequate non-criminal alternative to prosecution.<sup>51</sup>

It further instructs that "once the decision to prosecute has been made, the attorney for the government should charge, or should recommend that the grand jury charge, the most serious offense that is consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction."<sup>52</sup> On their face, these guidelines seem to suggest a fairly broad obligation on the part of federal prosecutors to push criminal law to its limits in charging and punishment: They imply that prosecutors should charge everyone who is guilty of federal offenses, and in charging should select the stiffest crime available. Yet the guidelines are riddled with exceptions, and there is no reason to think that in practice they preclude the failures of consistent adversarialism described above.<sup>53</sup>

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<sup>51</sup> U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-27.220 (2014). A 2003 memorandum from then-Attorney General Ashcroft made this directive even stronger, with the result that critics complained that the new policies would "strip[] the discretion that federal prosecutors need to do justice." Amie N. Ely, *Prosecutorial Discretion as an Ethical Necessity: The Ashcroft Memorandum's Curtailment of the Prosecutor's Duty to Seek Justice*, 90 CORNELL L. REV. 237, 239 (2004). A superseding 2010 memorandum by then-Attorney General Eric Holder softened the commands of the earlier Ashcroft memo. Letter from Eric H. Holder, Jr., Attorney General of the United States, to All Federal Prosecutors (May 19, 2010).

<sup>52</sup> U.S. DEP'T OF JUSTICE, *supra* note 51, § 9-27.300.

<sup>53</sup> For example, the Manual provides that prosecutors may consider a wide range of considerations in determining whether to decline prosecution on the ground that it would serve no federal interest:

1. Federal law enforcement priorities;
2. The nature and seriousness of the offense;
3. The deterrent effect of prosecution;
4. The person's culpability in connection with the offense;
5. The person's history with respect to criminal activity;
6. The person's willingness to cooperate in the investigation or prosecution of others; and
7. The probable sentence or other consequences if the person is convicted.

*Id.* "This broad listing of factors gives prosecutors almost total discretion in determining whether a possible defendant's conduct merits an indictment." Rachel Ratliff, *Third-Party Money Laundering: Problems of Proof and Prosecutorial Discretion*, 7 STAN. L. & POL'Y

More generally, the claim that prosecutors are not consistently adversarial should not be controversial. There's general consensus that American prosecutors meaningfully exercise a large amount of *discretion* in deciding whom to prosecute and in deciding how much punishment any particular defendant should receive.<sup>54</sup> And true adversarialism is in tension with broad prosecutorial discretion. If prosecutors' only consideration when deciding whether to bring charges was the likelihood of obtaining a conviction, and if when they brought charges they also always sought the most serious charges available, then in practice they would not be meaningfully exercising discretion. Or, at least, there would be less reason to be concerned about the ways in which they used or abused that discretion. It is only because the rules and norms governing prosecutors give them substantial freedom to depart from strict adversarialism that discretion matters. For this reason, James Vorenberg, a major critic of unchecked prosecutorial power, observed that the "most drastic limitation on prosecutorial discretion would be a legislative mandate that the prosecutor charge the most serious offense for which he concludes there is probable cause."<sup>55</sup> This theme—the tension between consistent adversarialism and discretion—will recur throughout the Article.

### B. *Why Adversarial Asymmetry Matters*

Why is insufficient adversarialism in criminal justice a reason for concern? Usually, society considers it a good thing for prosecutors to avoid a single-minded focus on obtaining convictions. As public officials, prosecutors are *supposed* to care about objectives other than winning. As the American Bar Association's standards for prosecutors instruct, the "duty of the prosecutor is to seek justice . . . not merely to convict."<sup>56</sup> Almost all states have codified this basic norm in their ethical rules.<sup>57</sup>

Yet this conception of the prosecutorial role has problems. For one, the content of the norm is famously hard to pin down. What does it *mean* for a prosecutor to "seek justice"? That command

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REV. 173, 181 (1996). See also O'Neill, *supra* note 41, at 231 (noting that, despite the seeming statutory command to "[p]rosecute for all offenses against the United States," U.S. Attorneys are understood to enjoy broad prosecutorial discretion in practice).

<sup>54</sup> See generally, e.g., James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981); KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969).

<sup>55</sup> James Vorenberg, *Narrowing the Discretion of Criminal Justice Officials*, 1976 DUKE L.J. 651, 680 (1976).

<sup>56</sup> A.B.A. STANDARDS FOR CRIMINAL JUSTICE § 3-1.2(b) (4th ed. 2015).

<sup>57</sup> Zacharias, *supra* note 5, at 46 n.2.

might be taken to imply a posture of detachment characteristic of that assumed by judges, and quite apart from that ordinarily assumed by advocates, particularly in the trial context. It might imply an obligation of fairness in a procedural sense. Or, it might imply a substantive obligation of fairness—for example, an affirmative duty to ensure that innocent people are not convicted.<sup>58</sup>

Scholars disagree about which version is correct.<sup>59</sup>

Given this uncertainty about the basic content of the requirement to do justice, it is unsurprising that there is little agreement about how that requirement should inform particular prosecutorial decisions. For example, in deciding whether to bring charges, what standard should the prosecutor follow? Should she require certainty beyond a reasonable doubt that a defendant is guilty,<sup>60</sup> a reasonable likelihood of conviction,<sup>61</sup> or is only probable cause—the bare minimum required by ethical rules—enough?<sup>62</sup> A separate question is *when* the duty to seek justice applies. Some think that prosecutors should act in a “judicial role” only when choosing *which* charges to file, but that once an indictment has issued the prosecutor must “become[ ] the most zealous champion of justice you can imagine.”<sup>63</sup> Others think that the obligation to do justice extends further.<sup>64</sup> Even in contexts where there is less doubt what the obligation to do justice requires, authoritative legal sources rarely provide guidance that can be generalized to other situations.<sup>65</sup>

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<sup>58</sup> Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 FORDHAM URB. L.J. 607, 622 (1999).

<sup>59</sup> Compare, e.g., Gershman, *supra* note 5, at 313 (“[T]he prosecutor has a legal and ethical duty to promote truth.”), with Zacharias, *supra* note 5, at 60 (“[P]rosecutors must strive for *adversarially valid* results rather than *factually correct* results.”).

<sup>60</sup> See, e.g., Gershman, *supra* note 5, at 339 (“[A] prosecutor should not proceed with a case unless he is personally convinced, beyond a reasonable doubt, of the factual truth of his case.”).

<sup>61</sup> See Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. REV. 669, 684 (1992) (noting that most prosecutors themselves require a reasonable likelihood of conviction before proceeding with trial).

<sup>62</sup> MODEL RULES OF PROF'L CONDUCT, *supra* note 7, at r. 3.8(a) (stating that a prosecutor must “refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause”).

<sup>63</sup> Whitney North Seymour, Jr., *Why Prosecutors Act Like Prosecutors*, 11 REC. ASS'N B. CITY OF N.Y. 302, 312–13 (1956).

<sup>64</sup> For example, Fred Zacharias argues that if the adversarial process breaks down in some way during trial, a prosecutor must “step[ ] out of the pure advocate’s role” and “help restore adversarial balance” that is missing or has been lost. Zacharias, *supra* note 5, at 63–64.

<sup>65</sup> See PETER A. JOY & KEVIN C. McMUNIGAL, DO NO WRONG: ETHICS FOR PROSECUTORS AND DEFENDERS 4 (2009) (“Cases and ethics opinions dealing with prosecutorial conduct often resolve issues by simply noting that a particular course of action is dictated by the prosecutor’s special obligation to seek justice or the prosecutor’s special role as a minister of justice, without explaining the reasoning that connects

Another difficult question is whether the hybrid advocate/minister-of-justice model makes any sense in theory. There is an obvious tension between zealously pursuing convictions and leading a disinterested search for truth. It has been suggested that the pressure to maintain these dual but conflicting roles creates an “ongoing schizophrenia” for the prosecutor.<sup>66</sup> Even if it is theoretically possible for a prosecutor to maintain an appropriate balance between the competing identities, it may not be realistic to expect most prosecutors to do so in practice. As Daniel Medwed argues, “this skirmish between the ill-defined goals of justice and the blatant benefits of conquest within a prosecutor’s psyche results in the triumph of the latter.”<sup>67</sup>

Such questions have bedeviled scholars and lawyers who have examined the minister-of-justice model. Yet there is a deeper problem still. Despite the prevalence of the minister-of-justice ideal, not enough has been done to justify it at the level of *system* design. Advocates of the minister-of-justice model tend to focus on its implications for prosecutorial decisionmaking in concrete cases. This is understandable, because it is easy to identify instances where a prosecutor’s insufficient regard for truth rather than victory led to great injustice.<sup>68</sup> Still, in order to evaluate the minister-of-justice model, it is critical to understand not merely how it plays out in particular cases but what its systemic effects might be. Yet, as Adrian Vermeule has observed, such a theory has not been fleshed out in the literature.<sup>69</sup>

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relatively abstract ideas of justice to an appropriate course of conduct in a particular situation.”).

<sup>66</sup> Melilli, *supra* note 61, at 698.

<sup>67</sup> MEDWED, *supra* note 6, at 79.

<sup>68</sup> See, e.g., *id.* at 7–11 (describing how prosecutors’ *Brady* violations led to a false rape conviction).

<sup>69</sup> As Vermeule puts it:

In the standard view, the criminal defense lawyer’s obligation is to act as a zealous advocate for the accused, a role frequently justified by the equilibrium theory that vigorous competition between self-interested parties will produce more information overall. At the same time, however, the standard view holds that the prosecutor’s duty is to “seek truth and not victims”—to act in the interests of public justice rather than as a partisan advocate for conviction.

These two ideas are patently in some tension with one another. One cannot simply say that the prosecutor and the defense lawyer have different roles, because the invisible-hand justification for adversarial litigation involves the systemic relationship between the two. If the premise is that the defense lawyer may be a zealous advocate because a *system* of competitive production of evidence by parties best promotes truth overall, it is not obvious how one can go on to deny that the other party, namely the prosecutor, should be equally entitled to produce evidence in a competitive and partisan fashion. A system in which prosecutors but not defense lawyers have an obligation to present evidence impartially to the tribunal might be the worst of all possible worlds.

I hope to show that, when viewed from a broad perspective, prosecutors' lack of a systemic motive to be consistently adversarial is troubling. Proving that claim will take some time, but at the outset I want to acknowledge one serious objection: more consistently adversarial prosecutors may seem disturbing because of the well-known problem of hyperadversarialism—the very real danger that prosecutors may become so focused on obtaining convictions that they will ignore important protections like *Brady* and thereby commit serious injustice.<sup>70</sup>

This is a serious concern. Yet more *consistent* adversarialism does not inevitably go hand in hand with *hyperadversarialism*. The Supreme Court's classic articulation of the proper prosecutorial role in *Berger v. United States*<sup>71</sup> provides a helpful frame:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.<sup>72</sup>

*Berger* suggests that there are two distinct issues involved when we talk about prosecutorial adversarialism. The first is the “foul blows” problem: the risk that prosecutors will try to convict a defendant at all costs, even if doing so means violating procedural rules or basic norms of fairness. Such behavior is obviously undesirable, and the system should aim to minimize it.

The foul blows problem is, however, distinct from the issue of “hard blows”: whether prosecutors have incentives to push for the maximal amount of criminal punishment within the four corners of the law. My claim is that if prosecutors were motivated to be more consistently adversarial, they might be more likely to strike hard blows at every opportunity—yet perhaps *less* likely to strike *foul* ones, if the system were designed to properly channel adversarial behavior.

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ADRIAN VERMEULE, *THE SYSTEM OF THE CONSTITUTION* 91 (2011) (alteration and footnote omitted).

<sup>70</sup> See generally Aviram, *supra* note 6.

<sup>71</sup> 295 U.S. 78 (1935).

<sup>72</sup> *Id.* at 88.

That is, the very fact that prosecutors don't care about maximizing punishment qua punishment explains some of the instances where prosecutors seem to want to win *too much*. Moreover, insufficient adversarialism by prosecutors is also part of the reason why it is so difficult to deter abusive practices by prosecutors.

More support for these claims is adduced below, but for now, I want to stress that one can believe that adversarial asymmetry is a problem without rejecting the view that hyperadversarialism is a problem. Prosecutors could simultaneously be both too zealous in particular cases and yet not sufficiently adversarial in their overall attitude toward the legal process.

### C. *Prosecutorial Adversarialism in Historical Context*

Having identified adversarial asymmetry as an object of study, the next Part will explore ways in which it can create problems in criminal justice. But before doing that, this Section briefly examines the history of public prosecution. While only a brief discussion is possible, that history is illuminating, for it shows that our current approach to prosecutorial adversarialism is not inevitable.

Today, salaried public prosecutors appear to be an essential feature of the criminal process. But in fact, "public prosecution is a relatively recent phenomenon in American history."<sup>73</sup> In early colonial America and in England, the crime victim was "the key decisionmaker in the criminal justice system."<sup>74</sup> In a typical case, the victim (sometimes assisted by hired detectives or paid counsel) was responsible for investigating the crime and for litigating the case if it proceeded to trial.<sup>75</sup> Thus, though we now think of criminal law as a quintessentially public-law field, it was once largely the domain of private law, at least in practical terms.<sup>76</sup>

Private prosecutors were highly adversarial in their drive to punish alleged wrongdoers. Given that prosecutors either were themselves, or were lawyers paid by, the victims (or family members of the victim) of the alleged crimes, the desire for vengeance played a signifi-

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<sup>73</sup> Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U.C. DAVIS L. REV. 411, 421 (2009).

<sup>74</sup> Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL'Y 357, 366 (1986).

<sup>75</sup> Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 449 (2001).

<sup>76</sup> See Abraham S. Goldstein, *Prosecution: History of the Public Prosecutor*, in 3 ENCYCLOPEDIA OF CRIME & JUST. 1242, 1242-43 (Joshua Dressler ed., 2d ed. 2002) (describing the American history of private prosecution).

cant role in their motives.<sup>77</sup> Yet in addition to that, the legal system itself gave private prosecutors “various financial inducements” to obtain convictions.<sup>78</sup> Victims could obtain restitution of stolen goods as well as punitive damages.<sup>79</sup> If the defendant could not afford to pay, he was required to serve the victim as an indentured servant; the victim could also sell the defendant’s labor to a third party.<sup>80</sup> In some circumstances, private prosecutors could reach financial settlements with defendants, which may also have encouraged aggressive prosecution.<sup>81</sup>

Eventually, this victim-centered system gave way to public prosecution. The story of how and why public prosecutors obtained an effective monopoly on criminal justice is complicated, and it is not fully understood by scholars today.<sup>82</sup> Reformers argued that “the criminal justice system should serve the interests of society, not the individual victim.”<sup>83</sup> The private model appeared ill-suited for addressing crime problems in increasingly large urban areas.<sup>84</sup> It was also thought to lead to “abuse of the judicial system—by victims initiating prosecution to exert pressure for financial reparation, and by offenders avoiding criminal sanctions by settling their cases privately.”<sup>85</sup>

The transition was gradual, with different jurisdictions creating public prosecutors’ offices at different times—as early as 1643 in Vir-

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<sup>77</sup> See Anthony C. Thompson, *It Takes a Community to Prosecute*, 77 NOTRE DAME L. REV. 321, 350 (2002) (“[A] drive for vengeance often fueled the victim’s conduct, resulting in quite punitive private efforts to redress grievances.”); see also Cardenas, *supra* note 74, at 359 (“The practice of allowing crime victims to initiate private prosecutions is a long-held English tradition, based on the common belief that the surest method of bringing a criminal to justice is to leave the prosecution in the hands of the victim and his family.”); Robert M. Ireland, *Privately Funded Prosecution of Crime in the Nineteenth-Century United States*, 39 AM. J. LEGAL HIST. 43, 47–48 (1995) (noting contemporary objections to private prosecution as motivated by vengeance).

<sup>78</sup> Cardenas, *supra* note 74, at 360.

<sup>79</sup> *Id.* at 367.

<sup>80</sup> *Id.*

<sup>81</sup> See David D. Friedman, *Making Sense of English Law Enforcement in the Eighteenth Century*, 2 U. CHI. L. SCH. ROUNDTABLE 475, 483–92 (1995) (making this argument about English private-prosecution system). *But see* George Fisher, *Making Sense of English Law Enforcement in the Eighteenth Century: A Response*, 2 U. CHI. L. SCH. ROUNDTABLE 507, 508–12 (1995) (arguing that settlements of criminal suits were rare and that they did not play a large role in encouraging prosecutions).

<sup>82</sup> See Jack M. Kress, *Progress and Prosecution*, 423 ANNALS AM. ACAD. POL. & SOC. SCI. 99, 100 (1976) (“[T]he derivation of the office of public prosecutor surprisingly remains an historical mystery.”).

<sup>83</sup> Cardenas, *supra* note 74, at 369.

<sup>84</sup> Davis, *supra* note 75, at 450.

<sup>85</sup> Goldstein, *supra* note 76, at 1243.

ginia.<sup>86</sup> Once established, public prosecutors did not immediately supplant private ones. Though most states had created some form of local public prosecutors by 1820, “privately funded prosecutors constituted a significant element of the state criminal justice system throughout the nineteenth century.”<sup>87</sup>

Even when public prosecutors secured a monopoly on the right to bring criminal cases, however, they may have initially behaved in a more consistently adversarial manner than they are expected to do today. In many jurisdictions, their compensation encouraged zeal. As Nicholas Parrillo has recounted, early public prosecutors were not salaried, but “made their income from fees, usually based on the number of cases they brought or the number of cases they won.”<sup>88</sup> While prosecutors paid merely to *initiate* cases may have had no particular incentive to push for guilty verdicts, many jurisdictions (including the federal system) made compensation contingent on conviction.<sup>89</sup> In jurisdictions of the latter type, “once the [prosecuting] officer picked a case as a winner, he had the incentive to win it—to see that the defendant was not merely tried but also found guilty.”<sup>90</sup>

Indeed, one reason that conviction-based compensation ultimately fell by the wayside was that it caused prosecutors to seek convictions so consistently. In the late nineteenth century, law was becoming increasingly reliant on what Parrillo calls “alien imposition”—defined as “when a sovereign external to the community demanded compliance with directives that violated the social expectations of the people governed.”<sup>91</sup> Most notably, Congress passed broad criminal statutes designed to effect compliance with excise taxes on liquor and tobacco, and in so doing “intrude[d] on the conduct of millions of ordinary people.”<sup>92</sup> As one might expect given the incentives created by the conviction-based fees, prosecutions for technical violations of the tax laws proliferated.<sup>93</sup> Congressmen eventually came to believe, however, that “law’s legitimacy required many of the guilty to

<sup>86</sup> Cardenas, *supra* note 74, at 369.

<sup>87</sup> Ireland, *supra* note 77, at 43.

<sup>88</sup> NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940*, at 255 (2013); *see also id.* at 363–65 (cataloguing adoption of various compensation systems in different states); WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 87–88 (2011) (describing the compensation system in early America of paying district attorneys by the case).

<sup>89</sup> *See* PARRILLO, *supra* note 88, at 256–57.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 25.

<sup>92</sup> *Id.* at 274.

<sup>93</sup> *See id.* at 275 (citing statistics showing the substantial increase in prosecutions of tax crimes, which, by 1870, accounted for 49 percent to 75 percent of all federal indictments).

be spared.”<sup>94</sup> That is, because “federal criminal legislation was ever more alien, intrusive, and rigid . . . the way to render it bearable and acceptable to the population was to ‘sand off’ its hard edges with discretionary nonenforcement and forbearance.”<sup>95</sup> Congress thus replaced case fees with salaries for U.S. Attorneys in 1896.<sup>96</sup> The immediate result was “a dramatic and permanent shift toward forbearance—that is, sparing the guilty.”<sup>97</sup>

Changes in institutional structure have also likely encouraged greater adversarial asymmetry over time. The first public prosecutors “had little independence or discretion” and were appointed by a court or by state governors.<sup>98</sup> Popular election eventually became the norm, however; almost every state had opted for elected district attorneys by the early twentieth century.<sup>99</sup> While critics today often point to election pressure as an explanation of why prosecutors are too adversarial,<sup>100</sup> Angela Davis has observed that “the popular election of the prosecutor actually established and reinforced his power, independence, and discretion.”<sup>101</sup> The public had access to little information about how prosecutors performed their jobs on a day-to-day basis; for that reason, elected prosecutors were freer to pursue their own agendas than when they were under the direct supervision of a court or the governor.<sup>102</sup>

Finally, it also bears note that our conception of the public prosecutor’s role and responsibilities has shifted significantly over the last two centuries. Carolyn Ramsey has argued that the modern understanding of public prosecutors as “quasi-judicial” officers, who have the responsibility to protect innocent defendants and not merely to seek convictions, was not widely shared in the nineteenth century.<sup>103</sup> Instead, the public expected prosecutors “to engage in the vigorous

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<sup>94</sup> *Id.* at 277.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 278.

<sup>97</sup> *Id.*

<sup>98</sup> Davis, *supra* note 75, at 450.

<sup>99</sup> *Id.* at 450–51.

<sup>100</sup> See, e.g., Kenneth Bresler, *Seeking Justice, Seeking Election, and Seeking the Death Penalty: The Ethics of Prosecutorial Candidates’ Campaigning on Capital Convictions*, 7 GEO. J. LEGAL ETHICS 941, 946–47 (1994) (“One incentive for prosecutors to seek convictions, especially capital convictions, is to campaign on them later.”).

<sup>101</sup> Davis, *supra* note 75, at 451.

<sup>102</sup> *Id.* (“[S]ince the actions and decisions of the prosecutor were not generally a matter of public record, the people could not actually hold the prosecutor accountable.”).

<sup>103</sup> Carolyn B. Ramsey, *The Discretionary Power of “Public” Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1321–22 (2002) (“In the 1800s, the ‘public’ nature of prosecution did not translate into a commitment to neutrality and fairness to defendants, nor did American voters demand such a commitment.”).

prosecution of all defendants.”<sup>104</sup> When prosecutors increasingly began to use plea bargaining to resolve cases in the second half of the nineteenth century, they received significant public criticism—“not because it deprived defendants of a jury trial, but because prosecutors accepted guilty pleas to charges that the public viewed as insufficient to fit the defendants’ crimes.”<sup>105</sup> In time, plea bargaining, and the expectation that prosecutors have no obligation to seek maximal punishment, eventually became accepted features of our criminal justice system. That acceptance, however, did not happen simultaneously with the adoption of public prosecution.

The point of all this is to suggest that our system’s current approach to prosecutorial discretion and prosecutorial adversarialism is not inevitable. Prosecutors today have significant discretion to choose whom to prosecute, and have no particular incentive to maximize convictions or punishment, at least in some contexts. But that has not always been the case. For a significant part of American history, prosecutors—both private and public—may have been more consistently adversarial than they are today. Yet we have not systematically redesigned our criminal-procedural system to account for this significant change.

This is part of a larger failure to respond to a revolution (albeit a slow one) in the basic nature of the criminal process. With the transition to salaried, politically accountable prosecutors, criminal law came fully within the fold of public law. Yet it remains built upon a model developed largely for the resolution of *private* disputes—the common-law adversarial process. This “overlay of the public prosecutor upon a system premised on private prosecution” makes American criminal justice unique.<sup>106</sup> But it is not what any sensible institutional designer would choose; instead, it is, as Kenneth Culp Davis observed, “the product of unplanned evolution.”<sup>107</sup>

Though others have criticized our current approach, previous criticism may have focused on the wrong target. The story most commonly told is that the problem with the way our system evolved is that public prosecutors ended up with too much *discretion*.<sup>108</sup> Yet discre-

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<sup>104</sup> *Id.* at 1322.

<sup>105</sup> *Id.* at 1311.

<sup>106</sup> Kress, *supra* note 82, at 108–09.

<sup>107</sup> DAVIS, *supra* note 54, at 189.

<sup>108</sup> See, e.g., *id.* at 188–91 (questioning the soundness of the American system allowing virtually unchecked prosecutorial discretion); Davis, *supra* note 75, at 448–57 (arguing that the private nature of prosecutorial decisionmaking has resulted in a lack of public accountability); Kress, *supra* note 82, at 109 (“[T]he central issue today is prosecutorial discretion . . . .”); see also Vorenberg, *supra* note 54 (arguing for a reexamination of prosecutors’ essentially unchecked discretionary powers).

tion may be something of a red herring. The problem with our system is not that prosecutors have the power to decide what charges to bring against a particular defendant; the real problem is with how they *use* their discretionary power. That problem, as the next Part explores, arises from their motivations.

## II.

### THE COSTS OF ADVERSARIAL ASYMMETRY

The previous Part explained that adversarial asymmetry is pervasive in criminal litigation. This Part now will try to unsettle normative assumptions about adversarialism. While in individual cases prosecutors' lack of incentive to maximize punishment can be desirable, this Part aims to show that, viewed systemically, adversarial asymmetry is troubling. To that end, this Part examines a wide range of problems in the criminal process through the lens of adversarial asymmetry.

Most of the problems I discuss are familiar ones. This Part's contribution, however, is to show how these disparate pathologies have a connecting and unifying theme that has gone unrecognized. Each problem arises because prosecutors are not fully adversarial.

It's important to make clear here what that means. As noted above,<sup>109</sup> prosecutors fail to be fully adversarial in two senses: the global sense, in that they don't bring all the cases they could win; and the local sense, in that they don't inevitably seek the maximum punishment available in any given case. So when I suggest a contrast with more consistently adversarial prosecutors, I am imagining prosecutors who are consistently adversarial both globally and locally, in terms of their incentives and their behavior.<sup>110</sup>

I divide the pathologies I examine into four broad types. Section A discusses insufficient maximization. These are instances where prosecutors generally have incentives to seek convictions and punishment, yet not to their fullest extent—and where that failure to fully maximize punishment has surprisingly troubling systemic consequences. Section B identifies the external incentives problem, situations where prosecutors use the criminal process not to obtain punishment *per se* but instead to accomplish goals external to the legal system. Section C discusses “playing to lose,” instances where prosecutors gain utility from *losing* in litigation. Section D analyzes incentive-design

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<sup>109</sup> See *supra* Section I.A.

<sup>110</sup> There may seem to be some tension between maximizing punishment *across* cases and maximizing punishment *within* individual cases; I will address that later. See *infra* Section III.C.1.

problems—places where prosecutors’ asymmetric motivations make it hard to calibrate incentives properly.

A number of the pathologies I enumerate may be best understood as agency costs: situations where the current system of prosecutorial discretion and accountability produces behavior by prosecutors (the agents) that diverge from what the public (the principal) would desire, at least acting rationally. For example, prosecutors’ use of the grand jury to duck cases that the public would want them to bring is best understood as an agency cost created by insufficient transparency.<sup>111</sup> Yet not all of the pathologies fit easily into the agency-cost category. For example, in using the threat of severe punishment to induce plea bargains, at least part of what prosecutors are doing is trying to give the public what it wants: convictions and appropriate sentences at low cost. Yet the resulting *system*—in which criminal defendants are coerced into giving up their trial rights through the threat of sentences harsher than their conduct really deserves—is one that strikes many observers as normatively problematic.

### A. *Insufficient Maximization*

This Section discusses contexts where prosecutors generally have incentives to seek convictions and punishment, yet for various reasons do not seek *maximal* punishment.

#### 1. *Substantive Overbreadth*

Many observers lament the state of American criminal codes, complaining that the substantive law is both too broad and too deep. Too broad, because some conduct they prohibit is relatively innocent and unworthy of criminal sanctions.<sup>112</sup> And too deep, because they often criminalize the same conduct multiple times over.<sup>113</sup>

While the causes of these problems are complex and variable, part of the story is what William Stuntz famously called criminal law’s “pathological politics”—an iterative process of “institutional competition and cooperation” between prosecutors and legislators that creates strong pressure in favor of broader laws.<sup>114</sup> As Stuntz explained,

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<sup>111</sup> See *infra* Section II.C.1.

<sup>112</sup> See generally John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193 (1991) (arguing that federal criminal law has blurred the border between civil and criminal violations).

<sup>113</sup> See, e.g., Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 HASTINGS L.J. 633, 635–44 (2005) (highlighting examples in the Illinois and Kentucky criminal codes of newly adopted criminal offenses that duplicate, sometimes inconsistently, prior existing offenses).

<sup>114</sup> Stuntz, *supra* note 38, at 510.

legislators face asymmetrical incentives when defining crimes. If law is too narrow and doesn't give prosecutors sufficient tools for convicting criminals, prosecutors will blame the legislature, leading to political blowback. Yet legislatures face little downside risk from making substantive law too broad.<sup>115</sup>

That's because of how prosecutors use broader law; they won't inevitably press the law to its full limits. Instead, they treat broader statutes as tools for convicting the "real" criminals through a process of informal adjudication.<sup>116</sup> Because "not everything that is criminalized will be prosecuted,"<sup>117</sup> legislators can comfortably err on the side of overbreadth and overcriminalization. They know that prosecutors, because they are themselves politically accountable, are unlikely to bring charges against sympathetic defendants whose conduct falls within the words of a criminal statute when the public would find prosecution undesirable. And even in the rare cases when prosecutors do bring such charges, voters tend to blame the prosecutor, not the legislators who enacted the overly broad law.<sup>118</sup>

Stuntz blamed this pathology on prosecutorial discretion.<sup>119</sup> But discretion alone is not the problem. Prosecutorial *motivation* is critical. More specifically, the key is the interaction between two aspects of prosecutorial motivation. The first is that prosecutors are adversarial in one sense; they seek to convict criminals. This explains why they demand broader statutes from the legislators, because it helps them obtain more convictions more easily. At the same time, prosecutors have no motivation to go after *everyone* guilty of a particular offense; if they did, legislators would face a greater downside risk from painting with a broad brush when drafting statutes. Indeed, the less prosecutors care about enforcing the law as written, and the more they care about using the law as a tool for going after some set of bad actors, the more willing legislators should be to draft broadly.

Imagine how the system would work if prosecutors were differently motivated. What if they cared only about maximizing punish-

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<sup>115</sup> See *id.* at 548 (arguing that, when a prosecutor charges a sympathetic defendant, the public is more likely to blame the overaggressive prosecutor, as opposed to the overbroad statute).

<sup>116</sup> See *id.* at 519 (describing how broad and overlapping criminal laws allow prosecutors to engage in informal adjudication). Deeper criminal codes similarly help prosecutors to convict their desired targets, by giving them more charging options and by providing additional leverage for obtaining pleas. *Id.* at 519–20, 566. As Paul Robinson notes, "[i]t's probably easier to force a plea bargain, for example, when a prosecutor can tell a defendant he's committed several different crimes and could go to prison for decades." Paul H. Robinson, *Lost in a Legal Thicket*, L.A. TIMES, July 3, 2015, at A21.

<sup>117</sup> Stuntz, *supra* note 38, at 528.

<sup>118</sup> See *id.* at 548.

<sup>119</sup> See *id.* at 547.

ment? They wouldn't treat broader liability rules as substitutes for "real" crimes. Instead of using a crime like the federal ban on structuring financial transactions to evade a bank's \$10,000 reporting limit<sup>120</sup> only against those defendants whom they believe to be committing money-laundering and other serious crimes, prosecutors would bring charges against all who had apparently violated the provision.

Such prosecutorial behavior would likely influence legislation. At least to the extent that Stuntz's account is right, one would expect more consistent prosecutorial adversarialism to make legislators more precisely target socially harmful conduct when drafting criminal statutes. If legislators drafted laws with a background assumption that prosecutors would press the law to its limits, they would have to be more concerned about the downside risks of making criminal law too broad. Because punishment-maximizing prosecutors would go after all those who could be proven guilty of a particular offense, they couldn't be expected to forbear against particularly sympathetic but guilty defendants. Prosecution of all guilty defendants, even those that the public would prefer go free, would increase the likelihood of negative public feedback for overcriminalization. As Darryl Brown notes in reference to one particularly well-known instance of overcriminalization at the federal level, "it wouldn't take many prosecutions of Girl Scout troops for misusing Smokey Bear's image to move Congress to repeal that crime."<sup>121</sup> The problem of overbroad criminal legislation depends at least in part on the assumption that prosecutors will not single mindedly focus on maximizing punishment in charging decisions.

## 2. *Plea Bargaining, Coercion, and Overcharging*

Adversarial asymmetry has significant implications for plea bargaining—the means by which the vast majority of criminal cases are resolved today.<sup>122</sup> Recall that in a number of contexts prosecutors seem to care more about maximizing convictions than they care about maximizing punishment.<sup>123</sup> This is especially true for relatively minor crimes. For such offenses, prosecutors are often willing to agree to

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<sup>120</sup> 31 U.S.C. § 5324 (2006).

<sup>121</sup> Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 261 (2007) (referencing 18 U.S.C. § 711 (2012)).

<sup>122</sup> See Oren Gazal-Ayal & Avishalom Tor, *The Innocence Effect*, 62 DUKE L.J. 339, 341 (2012) ("About 95 percent of felony convictions follow guilty pleas, and most guilty pleas result from plea bargaining.").

<sup>123</sup> See Alschuler, *supra* note 44, at 106 ("In political terms, it is far more important for a prosecutor to secure convictions than it is for him to secure adequate sentences.").

pleas involving only minimal or nominal punishment.<sup>124</sup> Even when more serious crimes are at issue, prosecutors may desire a lengthy sentence—but that does not necessarily mean seeking the maximum punishment available. For crime *X*, a prosecutor might think that five years is the correct sentence, even if the maximum under the law is fifteen years.<sup>125</sup> And even when prosecutors prefer a higher punishment, they are often willing to settle for less, because they value reducing process costs—both because they want to preserve resources for other cases, and because they have self-interested reasons for reducing their workload.<sup>126</sup>

Prosecutors' attitude toward punishment in the plea process does not fully mirror that of defendants. Defendants want to avoid convictions entirely if they can, but they also care about minimizing the punishment they will face if they are convicted. Even innocent defendants will often plead guilty if that option offers the lowest expected punishment.<sup>127</sup> To the extent that defendants care about minimizing process costs, they do so only where process effectively enhances their punishment—for example, where going to trial prolongs the defendant's incarceration because of pretrial detention.<sup>128</sup> Where serious crimes are at issue, avoiding process costs is unlikely to be an important consideration compared to minimizing the total sentence faced.<sup>129</sup> Even those defendants paying for private counsel are likely to prioritize their money over their liberty. And those defendants represented by public defenders do not internalize litigation costs at all. Thus, plea bargaining involves significant adversarial asymmetry: prosecutors frequently “abandon sentence maximization,” but “defendants always remain sentence minimizers.”<sup>130</sup>

The law already takes account of this asymmetry to a small degree. Procedural rules give judges ultimate control over sentencing

<sup>124</sup> See Bowers, *supra* note 29, at 1122–23 (“[Q]uick pleas are most efficiently reached at low market prices, because—although prosecutors may abandon sentence maximization—defendants always remain sentence minimizers.”). A number of factors combine to create this behavior: politics and agency costs, the desire to avoid work, or the belief that harsher punishment is unnecessary to accomplish society's goals. See *id.* at 1140–43, 1148–49.

<sup>125</sup> See Stuntz, *supra* note 12, at 2553–54 (noting that prosecutors do not always prefer the harshest sentence possible).

<sup>126</sup> See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2470–71 (2004).

<sup>127</sup> See, e.g., Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1278–79 (1975).

<sup>128</sup> See Bowers, *supra* note 29, at 1137–39; MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT* 199–243 (1992) (examining the consequences of pretrial detention and the problems of securing pretrial release).

<sup>129</sup> See Bowers, *supra* note 29, at 1138 (“The threat of long sentences upends process-cost considerations.”).

<sup>130</sup> *Id.* at 1123.

after a plea, enabling them to impose harsher sentences than those requested by prosecutors.<sup>131</sup> This is in stark contrast to the way settlements work in civil litigation, where parties set the terms of deals and (outside of unique contexts like class actions) judges cannot modify them if they seem insufficiently generous to one side.<sup>132</sup> A potential justification for why criminal procedure deviates from the civil framework in this way is that it compensates for the risk that prosecutors will agree to pleas that are insufficiently harsh from the perspective of deterrence and other purposes of punishment. For the most part, however, our criminal procedure system does little to account for prosecutors' failure to maximize punishment in the plea-bargaining process. And it has significant implications.

Consider Stuntz's explanation of how prosecutors' failure to maximize punishment causes plea bargaining to occur outside of substantive law's shadow. Because "[p]rosecutors are not like civil plaintiffs," he argued, criminal statutes are not rules that set the upper bounds of the prosecutor's expectations.<sup>133</sup> Instead, criminal law merely creates "items on a menu from which the prosecutor may order as she wishes."<sup>134</sup> As the penalties available under the law become more severe, prosecutors do not necessarily demand higher sentences in return for plea agreements. Instead, they use a law's severity as a weapon to convince more defendants to plead guilty. If the price of a plea (i.e., the prosecutor's preferred sentence) remains constant, but the expected penalty for conviction after trial goes up, defendants (because they are sentence minimizers) should be more willing to plead guilty. Thus, as the criminal law on the books becomes broader and harsher, it casts less and less of a shadow on the outcomes of the bargaining process.<sup>135</sup> Prosecutorial behavior in turn distorts legislative incentives regarding severity. Because rational legislators know that prosecutors won't actually push for the highest sentence in every case, their incentive "is to vote for rules that even the legislators themselves think are too harsh."<sup>136</sup>

This basic insight can be extended further to help elucidate an important debate in the plea bargaining literature. One particularly common scholarly lament is that the plea process is unfairly coercive:

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<sup>131</sup> Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 *YALE L.J.* 1909, 1953–54 (1992).

<sup>132</sup> See, e.g., *Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 835 (3d Cir. 1995) ("Our federal courts have neither the authority nor the resources to review and approve the settlement of every case brought in the federal court system.").

<sup>133</sup> Stuntz, *supra* note 12, at 2554.

<sup>134</sup> *Id.* at 2549.

<sup>135</sup> *Id.* at 2558.

<sup>136</sup> *Id.*

prosecutors use the threat of harsh punishment to force defendants into giving up their valuable trial rights.<sup>137</sup> Critics stress the “trial penalty” faced in sentencing by defendants who insist on trial.<sup>138</sup> They also point to prosecutors’ willingness to “overcharge” defendants with harsher charges than the alleged crime really deserves in order to induce pleas.<sup>139</sup>

This critique of plea bargaining raises some conceptual difficulties, however. Frank Easterbrook observes that “the coercion argument . . . begs the question. If plea bargains are honest compromises among the parties, in which defendants who might be acquitted surrender that possibility in exchange for a lower sentence, then there will be a sentence differential that is indistinguishable from the coercive threat of which the critics complain.”<sup>140</sup> Parties in civil litigation agree to settle their disputes every day; despite some objections,<sup>141</sup> most observers seem to think civil settlement is either an affirmatively good thing or at least relatively unobjectionable.<sup>142</sup> Why is a similar settlement process in criminal cases more inherently coercive?

Criminal procedure scholars have struggled to answer this question. Many arguments revolve around trying to identify a coherent normative baseline against which to measure the penalty a defendant faces if he rejects a plea and goes to trial. Máximo Langer argues, for example, that plea bargaining becomes coercive if the threatened penalty for going to trial exceeds “a fair sentence that fits the characteris-

<sup>137</sup> See Conrad G. Brunk, *The Problem of Voluntariness and Coercion in the Negotiated Plea*, 13 L. & SOC’Y REV. 527, 542–52 (1979); John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 13–14 (1978) (“Plea bargaining, like torture, is coercive.”); Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, 50 CRIM. L.Q. 67, 87–92 (2005) (discussing the coercive effects of the “trial penalty” defendants incur by declining to plead); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 93 (2005).

<sup>138</sup> See, e.g., McCoy, *supra* note 137, at 68.

<sup>139</sup> See, e.g., Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 868 (1995).

<sup>140</sup> Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 311 (1983). In this vein, David Abrams has recently sought to prove that, once one factors in the possibility of acquittal, the “trial penalty” faced by defendants who turn down pleas does not exist. David S. Abrams, *Putting the Trial Penalty on Trial*, 51 DUQ. L. REV. 777 (2013). *But see* Albert W. Alschuler et al., *Two Small Band-Aids for a Festering Wound*, 51 DUQ. L. REV. 673, 687–91 (2013) (criticizing Abrams’s methodology).

<sup>141</sup> See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984) (“Like plea bargaining, settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised.”).

<sup>142</sup> See Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177, 1178 (2009) (“[T]he conventional wisdom [is] that settlement is favored and should be encouraged.”).

tics of the offense and the offender.”<sup>143</sup> Similarly, Conrad Brunk suggests that the relevant question is “whether the charge and sentence threatened and imposed” on the defendant who insists on trial are “normal.”<sup>144</sup>

While these arguments are important, adversarial asymmetry provides a simpler grounding for the coercion thesis. If the criminal process were the efficient market that Easterbrook describes, then plea bargains would be harder to distinguish from civil settlements: each party would give up something valuable to reach compromise. But because prosecutors have no inherent incentive to maximize sentences, the prosecutor can often give away nothing that she values when she agrees to a plea deal. Instead, she coerces the defendant into giving her 100% of what she wants (a conviction and appropriate sentence) in exchange for her promise not to do something from which she would derive zero or negative utility (go to trial and seek a higher sentence).

In this way, the analogy between plea bargaining and ordinary civil settlement turns out to be an illusion. Here’s a more apt analogy: a civil plaintiff who threatens to release embarrassing information about the defendant’s personal life unless the defendant agrees to settle the plaintiff’s (unrelated) civil claim for the full amount demanded in the complaint. Most people would see coercion as present in that scenario, and part of the explanation is that the plaintiff is not actually giving up anything of value to him in return for the defendant’s payment. This is, in Nozick’s terminology, an “unproductive exchange”—one that “merely gives [the offeree] relief from something that would not threaten if not for the possibility of an exchange to get relief from it.”<sup>145</sup>

So too with plea bargaining: some of the time, the prosecutor can demand that the defendant submit to the full dose of punishment the prosecutor (and the public) desires, and the prosecutor uses the threat of excessive punishment to secure that. The reason that it is hard to identify the source of the coercion problem is that unlike in the settlement-through-blackmail hypothetical (which involves extra-legal force being brought to bear) the coercion happens within the adversary process, not outside of it. Because of deep-rooted assumptions that an adversarial process entails adversarial behavior, it is sometimes hard

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<sup>143</sup> Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 239 (2006).

<sup>144</sup> Brunk, *supra* note 137, at 548.

<sup>145</sup> ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 85 (1977).

to recognize problems that arise precisely because one party is not acting in a fully adversarial fashion.<sup>146</sup>

Thus, the less that prosecutors care about maximizing sentences, surprisingly, the more troubling the plea bargaining process becomes. That is, the greater the gulf between the penalties on the books and what prosecutors actually seek to impose, the less plea “bargaining” will resemble real deal making in which two parties with opposing interests meet in the middle, and the more it becomes an unfair opportunity for the prosecutor to coerce the defendant into giving up valuable trial rights, while giving up nothing of value herself. Plea bargaining has become the tail wagging the dog of substantive criminal law because prosecutors don’t have sufficient motivation to maximize punishment.

Consider how plea bargaining would work if prosecutors were more consistently adversarial—if they were more focused on maximizing punishment. Imagine, for example, that once charges were brought, a prosecutor’s only motivation was to obtain the highest possible sentence—and that considerations about minimizing process costs played no role in the bargaining process. Plea bargains would be real bargains with both sides compromising. Prosecutors would give up the chance for a higher sentence, while defendants would give up the chance at an acquittal. The gap between the bargained-for sentence and the likely sentence after conviction at trial would reflect only the risk of acquittal—not an arbitrary trial penalty that a prosecutor could insist on merely as a means of inducing cheap pleas. (This is not to say that plea bargaining in a more consistently adversarial system would involve *no* coercion; to the extent that some of the coerciveness of pleas arises from power advantages enjoyed by prosecutors, that is a separate problem that would need to be addressed. I’ll address that issue below,<sup>147</sup> but for now my point is merely that a sig-

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<sup>146</sup> To be sure, not every plea bargain is truly “unproductive.” In some instances, the prosecutor may genuinely desire the harshest punishment available because it is the appropriate penalty for the defendant’s crime, but she is willing to give up that opportunity in exchange for the certainty of a conviction. However, such plea deals *should* be less troubling than those in which the prosecutor doesn’t actually give up anything meaningful. The case where a prosecutor wants to obtain the maximum life sentence for a serious murder but gives up that opportunity in exchange for a guaranteed twenty-five-year sentence should seem less disturbing than the case of a prosecutor who threatens the petty recidivist with an obviously excessive life sentence simply in order to induce a plea to a five-year term. *See, e.g., Bordenkircher v. Hayes*, 434 U.S. 357 (1978) (finding no violation of due process when a third-strike offender received the threatened life imprisonment for passing a bad check after he declined to plead to a lower offense). There might be other reasons to object to the former example, but it is more of a fair bargain than the latter one.

<sup>147</sup> *See infra* Section III.D.

nificant part of the coerciveness of plea bargaining arises from the motive asymmetry between the two sides.)

In a more adversarial system, plea bargaining would take place in the shadow of substantive law to a much greater extent. The concept of “overcharging” would no longer make sense, for prosecutors would always seek to push for the harshest charges that covered a defendant’s conduct. Perhaps most importantly, these changes in prosecutorial behavior would hopefully affect the legislative process. No longer could legislatures provide overly severe sentences simply to give prosecutors more weapons for cheaply obtaining guilty pleas. Instead, legislators would know that they would be effectively raising the baseline for *all* convictions when they raised the maximum punishment for any given crime, because the statutory maximum would influence the sentence to which the prosecution would agree. In such a system, legislatures would be much more responsible for setting the real penalties than they are in our system, where prosecutors get to decide the appropriate penalties.

To go further, making prosecutors even more adversarial would effectively eliminate plea bargaining entirely. Imagine if prosecutors always insisted on maximum punishment and wouldn’t agree to deals for anything less than that—and had no regard for the costs of process whatsoever. The resulting system would involve no plea *bargaining* whatsoever. But it could still involve guilty *pleas* if other actors provided concessions for pleading guilty, such as a sentencing discount offered by judges.<sup>148</sup> That might go too far, but the point is that as prosecutors care less about maximizing punishment, more plea bargaining takes place; the trial penalty (and the accompanying coerciveness of the plea offer) becomes larger; and the written law matters less and less for determining what punishment defendants actually receive.

### 3. *Discriminatory Charging Decisions*

As noted, prosecutors can and do decline to bring charges even when they could obtain convictions, and even when bringing charges, they can and do seek less than the maximum penalty available. Prosecutors often fail to maximize the charges they could bring for good reasons, such as when a particular defendant has reduced culpability even if he is technically guilty. But prosecutors also decline to seek punishment for bad reasons.

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<sup>148</sup> In practice, that system might closely resemble the New Orleans system in which no plea bargaining takes place. See Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 58–84 (2002) (analyzing New Orleans District Attorney’s office in a case study).

Indeed, in choosing whom to prosecute, and what sentence to seek, prosecutors are sometimes influenced by factors that should, as a matter of law and justice, be irrelevant. In particular, race—the defendant's, as well as that of the victim—appears to play a role some of the time. While few prosecutors today may take race into account consciously in the charging decision, unconscious racism can play a significant role in shaping a prosecutor's assessment of what charges are appropriate.<sup>149</sup> Such bias can affect the choice of whether to bring charges at all, and it can also influence the choice of what penalty to seek. Both anecdotal<sup>150</sup> and statistical<sup>151</sup> evidence confirms that such discrimination persists.

Despite significant attention to this problem, solutions have not been forthcoming. The judiciary has proven unwilling to address the problem. In *McCleskey v. Kemp*,<sup>152</sup> a capital defendant presented statistical evidence of racial bias in the administration of capital punishment—specifically, a study that showed (among other troubling findings) that Georgia prosecutors sought the death penalty for 70% of black defendants accused of killing white victims yet only 19% of white defendants accused of killing black victims.<sup>153</sup> The Court refused to permit defendants to rely on such statistical evidence to prove claims of discriminatory punishment based on the Eighth and Fourteenth Amendments.<sup>154</sup> The Court has been similarly unwilling to permit equal-protection claims based on the contention that the defendant was singled out because of his own race. In *United States v.*

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<sup>149</sup> See Angela J. Davis, *Racial Fairness in the Criminal Justice System: The Role of the Prosecutor*, 39 COLUM. HUM. RTS. L. REV. 202, 205–10 (2007) (alluding to the difficulty of assessing unconscious bias in prosecutions).

<sup>150</sup> Take one example that has attracted scholarly attention: Georgia law permits (but does not require) district attorneys to seek an automatic life sentence for a second drug offense. As of 1995, prosecutors appeared much more likely to use their discretion to punish black defendants: prosecutors “had invoked it against only 1 percent of white defendants facing a second drug conviction, but against more than 16 percent of eligible black defendants.” DAVID COLE, *NO EQUAL JUSTICE* 143 (1999); see also *Stephens v. State*, 456 S.E.2d 560 (Ga. 1995) (rejecting equal protection claim based on this statistical evidence). A disparity such as this does not by itself prove discrimination; the percentage of defendants charged, standing alone, surely obscures non-racial factors relevant to the charging decision. But more complex analyses have provided evidence that race influences some prosecutorial charging decisions. See *infra* note 151.

<sup>151</sup> A recent analysis confirmed that prosecutors are more likely to bring harsher charges against black defendants, especially when it comes to charges carrying mandatory minimums. See Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L.J. 2, 27–31 (2013).

<sup>152</sup> 481 U.S. 279 (1987).

<sup>153</sup> *Id.* at 327 (Brennan, J., dissenting); see also MICHELLE ALEXANDER, *THE NEW JIM CROW* 109–12 (rev. ed. 2012).

<sup>154</sup> *McCleskey*, 481 U.S. at 312–13.

*Armstrong*,<sup>155</sup> the Court held that criminal defendants could not even obtain discovery on racially selective prosecution claims unless they could present evidence that “similarly situated individuals of a different race were not prosecuted.”<sup>156</sup> This requirement “is a prototypical Catch-22: . . . a defendant can only obtain evidence needed to prove . . . purposeful discrimination by establishing a substantial threshold showing of purposeful discrimination.”<sup>157</sup>

Courts have been unwilling to provide appropriate review of racial discrimination in charging because they tend to see the problem as inherently tied up with prosecutorial discretion. In explaining why the defendant’s claim could not succeed, *McCleskey* quoted Kenneth Davis’s observation that “the power to be lenient is [also] the power to discriminate.”<sup>158</sup> Indeed, given the numerous legitimate factors that go into discretionary charging decisions, it is hard to imagine how courts could review such decisions for bias without effectively superintending the entire prosecutorial process. *Armstrong* cited separation-of-powers concerns raised by the judiciary reviewing the executive branch’s exercise of prosecutorial discretion.<sup>159</sup>

Another reason why the problem appears difficult to solve is that the discrimination involved may be largely unconscious. Many prosecutors may, in deciding what charges to bring, consciously consider only legitimate factors such as the seriousness of the offense and the defendant’s likelihood of recidivism. Yet a prosecutor’s weighing of those ostensibly race-neutral considerations could be influenced by unconscious bias.<sup>160</sup> Figuring out how to prevent such unconscious bias from seeping into discretionary decisions is challenging.

But there’s another angle from which one could attack the problem. Here, again, the problem can be understood as existing only because prosecutors are not fully adversarial. If prosecutors considered only maximizing punishment when bringing charges, discriminatory charging decisions would be significantly less common. Prosecutors who consistently sought to maximize the amount of punishment available would not inflict harsh penalties against only

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<sup>155</sup> 517 U.S. 456 (1996).

<sup>156</sup> *Id.* at 465.

<sup>157</sup> Robert Heller, Comment, *Selective Prosecution and the Federalization of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion*, 145 U. PA. L. REV. 1309, 1323 (1997).

<sup>158</sup> *McCleskey*, 481 U.S. at 312 (quoting DAVIS, *supra* note 54, at 170).

<sup>159</sup> *Armstrong*, 517 U.S. at 464.

<sup>160</sup> See Davis, *supra* note 149, at 205–10; Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1139–42 (2012) (acknowledging lack of hard data on prosecutors and implicit bias but hypothesizing specific risks).

minority defendants—because they would seek to use them against *all* defendants.<sup>161</sup>

To be sure, *some* decisions by punishment-maximizing prosecutors could still be infected by bias. Even a prosecutor who cared only about maximizing punishment would have to decide which cases to bring. And “although the strength of the evidence and the likelihood of conviction are facially race-neutral factors, they may be influenced by initial, unconscious racial valuations.”<sup>162</sup> Moreover, to the extent that other decisionmakers in the system (such as jurors and judges) are themselves biased, then punishment-maximizing prosecutors might still make charging decisions based on discriminatory criteria. As Richard McAdams notes: “If a case of a given strength is easier to win against racial minorities, and prosecutors seek to maximize their conviction rate, then prosecutors who harbor neither racial animus nor stereotypes will nonetheless *intentionally* seek to charge members of racial minorities.”<sup>163</sup> Nonetheless, fully adversarial prosecutors would almost certainly make fewer discriminatory charging decisions than prosecutors do today, because there would be fewer opportunities for bias to creep into their decisions.

### B. Targeted Prosecution and External Incentives

The previous Section sought to show that prosecutors’ failure to seek maximal punishment can be blamed for several different pathologies. This Section continues in that vein, and discusses a conceptually related problem: that prosecutors will target defendants for reasons external to the legal system itself. This danger was eloquently identified by Justice Jackson:

If the prosecutor is obliged to choose his case, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. . . . It is in this realm—in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies.<sup>164</sup>

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<sup>161</sup> This, one would hope, would cause legislators to be more circumspect in creating such penalties, although whether that is true does not matter for this point.

<sup>162</sup> Davis, *supra* note 149, at 207–08.

<sup>163</sup> Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of* Armstrong, 73 CHL-KENT L. REV. 605, 652 (1998).

<sup>164</sup> Jackson, *supra* note 7, at 5.

Justice Scalia quoted these words in his dissent in *Morrison v. Olson*,<sup>165</sup> arguing that “the primary check against prosecutorial abuse is a political one. . . . [W]hen crimes are not investigated and prosecuted fairly, nonselectively, with a reasonable sense of proportion, the President pays the cost in political damage to his administration.”<sup>166</sup>

Angela Davis has noted that Justice Scalia’s view of the efficacy of political remedies for prosecutorial abuse is overly optimistic, given that the public is unaware of most prosecutorial decisions and in any event has little opportunity to actually hold prosecutors accountable, especially at the federal level.<sup>167</sup> This Section, however, develops a different response to Justice Scalia: that the danger Justice Jackson identified—that prosecutors will pick *people*, rather than cases, to prosecute—is one that exists because, and only because, prosecutors do not care about maximizing punishment qua punishment. Such prosecutions occur (or, rather, are only conceptually possible) precisely because prosecutors use the adversary process to maximize things external to the legal system itself—most significantly, political gains. Political accountability can be as much the cause of, rather than the solution to, the problem of targeted prosecution. If prosecutors were fully adversarial and cared only about maximizing convictions and subsequent punishment, this type of selective prosecution, based on motivations external to the legal system, would be uncommon.

This Section considers three types of targeted prosecution.

### 1. *Pretextual Prosecution*

Perhaps the most common situation in which prosecutors pick people rather than cases is pretextual prosecution. In such a situation, prosecutors charge the defendant with crime *X*, of which the defendant is provably guilty. Yet the motivation for prosecution is not the violation of crime *X*; instead, there is some other reason why the prosecutor concludes the defendant merits punishment. Commonly, the prosecutor may believe that the defendant is guilty of a different crime that the prosecutor cannot prove. The most famous such example is the prosecution of Al Capone for tax evasion.<sup>168</sup> More recent examples come from the war on terror, as the government has used immigration charges as a means of detaining suspected terrorists.<sup>169</sup>

<sup>165</sup> 487 U.S. 654 (1988).

<sup>166</sup> *Id.* at 728–29 (Scalia, J., dissenting).

<sup>167</sup> Davis, *supra* note 75, at 439–40.

<sup>168</sup> See Daniel C. Richman & William J. Stuntz, *Al Capone’s Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 583–84 (2005).

<sup>169</sup> See David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 962–63 (2002).

Not all readers will find these particular examples troubling. The defendants in question likely did commit the crimes with which they were charged, and incarcerating them, if nothing else, likely prevented them from committing more serious crimes. Moreover, forbidding pretextual prosecution entirely would seem to require prosecutors to act irrationally. As one former U.S. Attorney argues, prosecutors have to choose whom to prosecute; and when choosing among otherwise similarly situated defendants, it would “seem[] almost indefensible not to prosecute” the defendant whom the prosecutor believes to be responsible for additional, serious crimes—even if those other crimes cannot be proven in court.<sup>170</sup>

Yet there is clearly some cause to feel uneasy about pretextual prosecution. If the real reason that a defendant is prosecuted is not the fact that he committed crime *X*, but the fact that the prosecutor thinks him guilty of crime *Y*, there is a meaningful sense in which the defendant is being punished for *Y*, and not *X*. But the defendant has absolutely no opportunity to contest his guilt as to crime *Y*, since the relevant “adjudication” is just the prosecutor’s own assessment. Moreover, if prosecutors can pretextually charge defendants for good reasons (like stopping terrorism) they can also do so for *bad* reasons.<sup>171</sup> And the legal system has few tools for separating out those two different kinds of cases. Pretextual prosecution also makes it harder for the public to monitor law enforcement officials and it dilutes law’s signaling function.<sup>172</sup>

If prosecutors were consistent punishment-maximizers, however, pretextual prosecution would be an incoherent concept and thus wouldn’t occur. If the prosecutor’s sole goal were to maximize victories in the litigation process, the idea that the prosecutor was pursuing a case as a “pretext” for something else beyond the crime being charged would make no sense. Prosecutors would choose cases under crime *X* solely based on their confidence in obtaining a conviction—

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<sup>170</sup> See Harry Litman, *Pretextual Prosecution*, 92 GEO. L.J. 1135, 1160 (2004).

<sup>171</sup> For example, a prosecutor could choose to bring pretextual charges as punishment for criticizing the government. This arguably occurred in *Wayte v. United States*, 470 U.S. 598 (1985). There, the Selective Service prosecuted the defendant for failing to register for the draft after he wrote letters to government officials stating that he would not register. *Id.* at 601. The Selective Service had a “policy of passive enforcement,” under which it prosecuted only those who had failed to register if they had “advised that they had failed to register or who were reported by others as having failed to register.” *Id.* In his dissent, Justice Marshall argued that the defendant had made out a prima facie case for discovery on his selective prosecution claim. *See id.* at 629.

<sup>172</sup> See Richman & Stuntz, *supra* note 168, at 598 (discussing these problems through the lens of several high-profile, possibly pretextual prosecutions).

not based on their belief that the defendant had committed some other bad acts.

Perhaps consistent adversarialism would not create a better world in this scenario; perhaps we would be worse off if the prosecutors never identified perceived bad actors like Capone or suspected terrorists and then searched the law books for crimes with which to prosecute them. But the problem (if it is a problem) only exists because prosecutors are not single mindedly focused on maximizing punishment.

## 2. *Entrepreneurial Prosecution*

Consider another kind of prosecutorial targeting, one that I'll call "entrepreneurial prosecution." This is the phenomenon in which prosecutors target a particular defendant or class of defendants in order to reap political rewards.

As Dan Kahan has noted, such entrepreneurialism is common with U.S. Attorneys, who enjoy significant freedom to pursue their own agendas and often wish to position themselves for later political careers.<sup>173</sup> These prosecutors "have strong incentives to use their power while in office to cater to—or to circumvent—local political establishments."<sup>174</sup> Because entrepreneurial prosecutors target *persons*, and not crimes, they sometimes advance tendentious cases that stretch the boundaries of the law.<sup>175</sup>

Instances of entrepreneurial prosecution come in different varieties. A prosecutor might be inclined to bring corruption charges against another public official because such prosecutions create significant, positive publicity for the prosecutor even if the evidence in the case is weak. Or the prosecutor might target a defendant or entity that is disfavored by the prosecutor's political allies—such as a business competitor, as in the example discussed by Kahan in which Rudolph Giuliani was accused of seeking "to win the approval of established Wall Street firms" by pursuing insider-trading cases against their competitors.<sup>176</sup> Moreover, precisely because the rewards for such prosecutions are external to the legal system, prosecutors may devote seemingly disproportionate resources to them. Angela Davis notes examples where prosecutors have devoted huge amounts of time and

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<sup>173</sup> Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 486–87 (1996).

<sup>174</sup> *Id.* at 486.

<sup>175</sup> *See id.* at 487–88 (describing how this process can distort doctrine).

<sup>176</sup> *Id.* at 487 (citing DANIEL FISCHER, PAYBACK 98–127 (1995)).

money pursuing public officials on charges that could be classified as trivial.<sup>177</sup>

Some of our system's procedural protections can be understood as guarding against these kinds of politically motivated prosecutions. Keith Hylton and Vikramaditya Khanna have sought to justify the reasonable doubt standard and double jeopardy protections on the ground that they "make the criminal process more costly to use, providing enforcement agents and those who would lobby them with a disincentive to use it for selfish ends."<sup>178</sup> Those procedural protections are, however, an imperfect solution to the problem of politically motivated prosecution. First of all, because skewing procedural rules to err in favor of *all* defendants across the board should result in a large number of truly guilty defendants going free, it is an imprecise and costly way to limit corruption. Nor are such procedural protections sufficient to prevent politically motivated abuse. In a world where vast swaths of conduct are made criminal, a prosecutor can often identify a target and then find some statute that criminalizes his conduct—especially if the prosecutor is willing to devote substantial resources to doing so.<sup>179</sup> Moreover, as discussed later,<sup>180</sup> in some cases a prosecutor may gain political capital simply from *bringing* a case, irrespective of any chance of victory. Heightened procedural protections can reduce the possibility of an unjust conviction in that case, but will not deter the improper prosecution.

This problem, too, arises precisely because prosecutors are not strictly adversarial. A punishment-maximizing prosecutor (at least one that faced constraints on how many cases she could bring) would not bring tendentious or overreaching cases against political enemies. Her incentive would be to use her limited resources to bring the strongest cases that she could. Nor would such a prosecutor make the kinds of disproportionate allocations of resources to single prosecutions that are sometimes seen in our system. Her incentive would be to prosecute as many apparently guilty defendants as possible.

To be sure, entrepreneurial prosecution is not an unambiguous evil. To the extent that political ambition causes prosecutors to focus on the cases that the public cares most about, it could cause them to

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<sup>177</sup> Davis, *supra* note 75, at 445–46. Ken Starr's dogged prosecution of Bill Clinton for perjury charges is the most extreme example of this kind of prosecutorial behavior.

<sup>178</sup> Keith N. Hylton & Vikramaditya Khanna, *A Public Choice Theory of Criminal Procedure*, 15 SUP. CT. ECON. REV. 61, 64 (2007).

<sup>179</sup> Cf. Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROBS. 401, 431 (1958) ("What sense does it make to insist upon procedural safeguards in criminal prosecutions if anything whatever can be made a crime in the first place?").

<sup>180</sup> See *infra* Section II.B.3.

focus on the most important social problems. Public corruption, for example, is a problem, and it is probably a good thing that prosecutors have incentives to target it. The difficulty, though, which I explore more later,<sup>181</sup> is that there's no reason to assume that political incentives inevitably create the optimal level of prosecution. If, say, there are enough political gains in being seen as a reformer, prosecutors might have reason to pursue charges against politicians even when the evidence is weak. One can hope that political incentives cause prosecutors to bring only the strongest cases, but we have no reason to be certain that things will always shake out that way. If prosecutors cared only about maximizing punishment, however, we would have more confidence that if a prosecutor brought charges it was because the evidence was strong.

### 3. *Grandstanding and Abuse of Process*

An idealized, purely profit-maximizing civil plaintiff does not value process for its own sake; instead, such a plaintiff brings suit only where the expected recovery exceeds the cost of litigation. And even those “irrational” plaintiffs who attach value to the litigation process itself—to getting their “day in court”<sup>182</sup>—are unlikely to be indifferent to whether they win or lose. In this way, when it is present, adversarialism—understood as litigants caring about victory—provides some check against frivolous suits with no hope of victory.

But public prosecutors—who have no inherent reason to care about winning for the sake of winning—can sometimes have incentives to bring prosecutions even if they have little or no chance of leading to a conviction. A prosecutor might, for example, want to bring a case simply as an opportunity for political grandstanding. Virginia Attorney General Ken Cuccinelli's seemingly frivolous investigation into a University of Virginia climate change scientist looks like such an example.<sup>183</sup> Even though no prosecution (or even any civil fraud claim) got off the ground despite the Attorney General's office's substantial efforts, Cuccinelli may still have profited politically from the investigation if climate change skeptics in his political base approved of his investigation.

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<sup>181</sup> See *infra* Section IV.B.

<sup>182</sup> Frank B. Cross, *In Praise of Irrational Plaintiffs*, 86 CORNELL L. REV. 1, 19–23 (2000) (exploring noneconomic motivations for litigation).

<sup>183</sup> See Leslie Kaufman, *Virginia: Court Rules for University*, N.Y. TIMES, Mar. 3, 2012, at A12; John Collins Rudolf, *A Climate Skeptic with a Bully Pulpit in Virginia Finds an Ear in Congress*, N.Y. TIMES, Feb. 23, 2011, at A15. Although Cuccinelli's investigation of the academic was a civil, not criminal, matter, the example suffices to illustrate the phenomenon.

A particularly salient example of a politically motivated, tendentious prosecution is the case brought against three Duke Lacrosse players for sexual assault. After a woman accused three lacrosse players of rape, Durham County prosecutor Mike Nifong aggressively pursued charges despite an almost total lack of incriminating evidence.<sup>184</sup> Given the weaknesses in the case, it is not clear that even Nifong actually believed he would ultimately obtain a conviction. Instead, his actions appear to have been motivated by short-term political considerations: when the case first arose, Nifong was only weeks away from a primary election in which he faced a serious challenger.<sup>185</sup> Nifong appears to have anticipated that aggressively pursuing charges would help improve his election chances. To the extent that was his strategy, it was a good one; Nifong won the primary as well as the general election several months later.<sup>186</sup> Unfortunately for Nifong—and luckily for the three defendants—the problems with his prosecution came to light. The state Attorney General took over the case, and Nifong was subsequently disbarred.<sup>187</sup>

Grandstanding prosecutions like Nifong's may be less rare than they seem. The political incentives are real, and most defendants aren't nearly as well equipped to fight back as were the Duke lacrosse players.<sup>188</sup> Many innocent defendants might feel no choice but to plead guilty, despite the weakness of the case against them, simply because the risks of conviction are so severe. And even when weak charges don't hold up, it's extremely rare for a prosecutor to be punished for bringing them as Nifong was.

Another reason why a prosecutor might bring charges she knows are unlikely to stick is simply to force the defendant to endure the punishing rigors of the criminal process. Consider one recent example. In 2007, federal prosecutors in the Northern District of Alabama brought apparently baseless charges for violation of export restric-

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<sup>184</sup> See generally Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to "Do Justice,"* 76 *FORDHAM L. REV.* 1337 (2007) (examining the facts of the Duke Lacrosse team case and the failures of the prosecution).

<sup>185</sup> *Id.* at 1355.

<sup>186</sup> *Id.* at 1356–57. Although it is impossible to know for certain whether Nifong would have lost the election absent his aggressive pursuit of the Duke players, Mosteller notes that many local observers “attributed [the election] result to his actions in the Duke lacrosse case.” *Id.* at 1357.

<sup>187</sup> *Id.* at 1337.

<sup>188</sup> See David Feige, *One-Off Offing*, *SLATE* (June 18, 2007, 6:04 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2007/06/oneoff\\_offing.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2007/06/oneoff_offing.html). (describing how the Duke lacrosse players had access to “extraordinary legal talent, unusual political access, and significant press savvy”).

tions against the owner of a government-contracting firm.<sup>189</sup> The district court dismissed the charges, and concluded the prosecution was so unfounded that it awarded the defendant \$364,000 in attorneys' fees.<sup>190</sup> Yet perhaps a conviction was not what the prosecutors were after: the exonerated defendant and his attorneys subsequently filed an ethics complaint charging that prosecutors explicitly admitted that "their goal was to put [the defendant's company] out of business whether or not they won the case."<sup>191</sup> Although the defendant's business ultimately recovered, the prosecutors nearly succeeded in their apparent goal notwithstanding the defendant's acquittal.<sup>192</sup> While it is unclear exactly why the prosecutors chose to target the defendant, they seem to have erroneously concluded that he was a bad actor and decided that they would use the weapons at hand to inflict damage to his interests. That is, the prosecutors may have cared more about achieving a goal external to the legal system than about actually winning their case.

The prospect of prosecutors who seek to abuse the litigation process in this manner creates a real quandary for the adversary criminal process. On the civil side, plaintiffs who bring suit without sufficient concern for victory can be quite a nuisance, clogging up court dockets and requiring blameless defendants to incur significant legal fees defending themselves.<sup>193</sup> The law tries in various ways to discourage such behavior by plaintiffs through tort remedies, court sanctions, and other mechanisms. In some cases, litigants who insist on bringing meritless cases are barred from the litigation system altogether, as inmate "frequent filers" are banned from bringing subsequent suits under the Prison Litigation Reform Act (PLRA).<sup>194</sup>

Yet in criminal justice, every prosecutor can potentially act like such a litigant. If the political incentives are present, a prosecutor might choose to file baseless charges even if there is little chance of obtaining a conviction. Political accountability surely prevents some

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<sup>189</sup> See David J. Lynch, *Feds Knock; A Business Is Lost: 'This Is Like the Gestapo. This Is Not the United States,'* USA TODAY, July 10, 2008, at B1 (describing how the government's case quickly fell apart after the defendant was charged).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> See Brian Lawson, *Government Awards Alex Latifi \$290,000 After Failed 2007 Prosecution*, AL.COM (Aug. 13, 2010, 12:10 PM), [http://blog.al.com/breaking/2010/08/government\\_awards\\_alex\\_latifi.html](http://blog.al.com/breaking/2010/08/government_awards_alex_latifi.html) (stating that the business struggled, but has "bounced back" recently).

<sup>193</sup> See John W. Wade, *On Frivolous Litigation: A Study of Tort Liability and Procedural Sanctions*, 14 HOFSTRA L. REV. 433, 433 (1986) (describing the need for remedies to alleviate the harms that come from frivolous lawsuits).

<sup>194</sup> See *supra* notes 24–25 and accompanying text (describing the ways lawmakers have tried to stop frequent suits by prisoners).

baseless prosecutions, but at the same time, it encourages others. And neither procedural rules nor institutional structures are designed to eliminate that risk. The dangers of baseless prosecutions are especially high given the serious risks involved for defendants in refusing plea deals and insisting on their trial rights.

Yet what if prosecutors were motivated solely to maximize punishment? Assuming finite resources, they would direct their efforts to prosecuting those defendants who could be convicted at lowest cost—i.e., the most clearly guilty defendants. A prosecutor whose sole goal was to maximize the *outcomes* of litigation would have no incentive to abuse the litigation *process* by persecuting the innocent. It is precisely because prosecutors are not maximizing punishment that disturbing scenarios like the ones discussed here recur. Considered through this lens, abusive prosecution does not result from hyperadversarialism but instead from *insufficient* adversarialism.

### C. *Playing to Lose*

The adversarial model assumes that both sides care about winning. Yet prosecutors have no inherent reason to care about “winning” solely for the sake of winning; instead, what matters is how litigation outcomes translate into political or professional rewards. Much of the time, that relationship is straightforward: for the prosecutor, winning pays dividends. But this is not always true. Under the right circumstances, prosecutors may seek to *lose* in the criminal process.

#### 1. *Misuse of the Grand Jury*

The grand jury once played an important role in ensuring that insufficiently weak prosecutions could not proceed to an indictment.<sup>195</sup> Critics today say the grand jury no longer performs this screening function, largely because prosecutors have so much control over the process.<sup>196</sup> Yet the grand jury sometimes serves a different purpose: prosecutors use the grand jury as a means to drop cases they don’t want to pursue, without subjecting themselves to the political heat for not bringing charges.

The explanation, again, turns on political incentives. There are some cases that prosecutors do not wish to bring, for political or other reasons—perhaps because a prosecution would agitate a powerful

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<sup>195</sup> See R. Michael Cassidy, *Toward a More Independent Grand Jury: Recasting and Enforcing the Prosecutor’s Duty to Disclose Exculpatory Evidence*, 13 GEO. J. LEGAL ETHICS 361, 372 (2000) (describing the historical importance of the grand jury).

<sup>196</sup> See *id.* at 365 (stating the grand jury has lost the ability to “screen[] out unmeritorious cases”).

political bloc, or because the evidence is tenuous and a loss would be embarrassing, or because the prosecutor simply doesn't find the defendant's conduct blameworthy. But the prosecutor wants to avoid taking the responsibility for not bringing charges if that use of discretion would anger voters. The solution is to use the grand jury as a political cover. The prosecutor can convene a grand jury to investigate and present a weak case, with the effect that the grand jury fails to indict (or the prosecutor could even ask the grand jury not to indict, which is costless given the secrecy of grand jury proceedings). The prosecutor can then point to the grand jury's decision to "no bill" as a way "to insulate him against public criticism for dropping a case he believes should not be pursued."<sup>197</sup>

This is no mere theoretical possibility; one former federal prosecutor told David Luban that the practice was common.<sup>198</sup> The journalist Radley Balko has documented a particularly disturbing set of examples. Though police in Houston, Texas have been responsible for a significant number of shootings in recent years (many involving unarmed citizens), no officer has faced indictment in a decade.<sup>199</sup> And the grand jury has played a significant role in shielding officers from prosecution. As one vocal critic explained it:

[Prosecutors] pick and condition these grand juries to be sympathetic to cops . . . . So when a controversial police shooting comes up, they can present the case to a faceless, unaccountable grand jury with no recommendation. The grand jury no-bills, the cop gets off, and the prosecutor doesn't have to face any consequences.<sup>200</sup>

An even more recent—and much more famous—example of the troubling use of the grand jury occurred in the aftermath of the shooting of Michael Brown by Ferguson, Missouri police officer Darren Wilson. The local prosecutor, Robert P. McCulloch, brought the shooting before the grand jury, which declined to bring charges against Wilson.<sup>201</sup> Commentators debated whether McCulloch had presented evidence to the grand jury fairly or whether he purposefully

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<sup>197</sup> Vorenberg, *supra* note 55, at 678. See also Frances Robles, *Lawman in Missouri Defends Objectivity*, N.Y. TIMES, Aug. 21, 2014, at A15 ("Many critics oppose the use of grand juries because they believe that route allows prosecutors to present halfhearted cases without anyone finding out.").

<sup>198</sup> Luban, *supra* note 7, at 20.

<sup>199</sup> See Radley Balko, *Houston Grand Juries: Too White, Too Law-and-Order, and Too Cozy with Cops*, WASH. POST (Aug. 1, 2014), <http://www.washingtonpost.com/news/the-watch/wp/2014/08/01/houston-grand-juries-too-white-too-law-and-order-and-too-cozy-with-cops/> (noting the last indictment of a police officer for a shooting occurred in 2004).

<sup>200</sup> *Id.*

<sup>201</sup> Monica Davey & Julie Bosman, *Grand Jury Declines to Indict Police Officer in Ferguson Killing*, N.Y. TIMES, Nov. 25, 2014, at A1.

presented a weak case in an attempt to clear Wilson without taking blame for doing so.<sup>202</sup> One thing that seems difficult to dispute, however, is that McCulloch handled the grand jury in an unusual way. As Jeffrey Fagan and Bernard Harcourt put it, “[t]he proceedings resembled a trial rather than a grand jury proceeding. For example, the transcripts show that the prosecutors cross-examined potential prosecution witnesses, probing for inconsistencies in their testimony. They were openly skeptical of the testimony of others.”<sup>203</sup> Prosecutors ordinarily treat the grand jury as merely a formal hurdle to clear before going forward with a case. Here, that was not the case, and so it appears that McCulloch gave the Wilson case special treatment because of the intense public attention the case received—perhaps in order to avoid prosecuting Wilson.

Perhaps in some cases the political cover provided by a grand jury is a good thing for society. If a case arouses strong public anger, but the underlying evidence of guilt is weak, a prosecutor’s use of the grand jury to get rid of the case might prevent the unnecessary harassment of an innocent person. As a general matter, however, this use of the grand jury is troubling. The grand jury was never meant to be used as a mechanism for elected officials to shift blame for unpopular decisions. Prosecutors, having voluntarily taken on a public office that controls prosecution, act disingenuously when they consciously shift responsibility for prosecution decisions. And prosecutors seem to be using the grand jury in some instances to dispose of cases that probably *should* be prosecuted (like police-shooting cases).

Again, this problem would not occur if prosecutors were fully adversarial. A prosecutor who cared only about maximizing victory within the legal process would have no incentive to use the grand jury as a screen. She would either decline to initiate grand jury proceedings in the first place or would bring a case and see it to its conclusion.

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<sup>202</sup> See, e.g., Paul G. Cassell, *The Michael Brown Grand Jury Process Was Fair*, WASH. POST (Nov. 25, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/11/25/the-michael-brown-grand-jury-process-was-fair/> (defending the grand jury that did not indict Wilson); Noam Scheiber, *St. Louis Prosecutor Bob McCulloch Abused the Grand Jury Process*, NEW REPUBLIC (Nov. 25, 2014) <https://newrepublic.com/article/120422/bob-mcculloch-abused-grand-jury-process-ferguson> (critiquing the process used by Bob McCulloch in getting the grand jury to decline to indict).

<sup>203</sup> Jeffrey Fagan & Bernard E. Harcourt, *Professors Fagan and Harcourt Provide Facts on Grand Jury Practice in Light of Ferguson Decision*, COLUM. L. SCH., [http://www.law.columbia.edu/media\\_inquiries/news\\_events/2014/november2014/Facts-on-Ferguson-Grand-Jury](http://www.law.columbia.edu/media_inquiries/news_events/2014/november2014/Facts-on-Ferguson-Grand-Jury) (last updated Dec. 5, 2014).

## 2. *Throwing Cases*

A more extreme example of playing to lose is a prosecutor proceeding to trial, but intentionally “throwing” the case. Such behavior is almost certainly more rare, and thus less of a problem, than many of the other pathologies I discuss. Still, it is worth considering because it provides a particularly stark illustration of the ways in which prosecutors can behave differently than adversarialism might predict.

In some instances, a prosecutor might throw a case for commendable reasons. For example, one prosecutor in the New York City District Attorney’s Office sabotaged a trial against two defendants accused of murder because he believed they were innocent but could not convince his superiors to drop the case.<sup>204</sup> But prosecutors may also throw cases for less noble reasons. In some instances, prosecutors could face conflicting pressures from different constituencies, one of which supports prosecution and one of which opposes it. In such a situation, the prosecutor’s optimal strategy might be to bring charges, but then to present a weak case at trial. That approach would let the prosecutor avoid incurring the political consequences of actually convicting the defendant while mollifying the constituency that demanded prosecution (assuming that it is not apparent to them that the prosecutor presented a weak case). Throwing the case lets the prosecutor shift blame for the loss onto the petit jury that acquits the defendant, similarly to how prosecutors use grand juries to evade blame for not bringing cases.

The Jim Crow South provides troubling examples of throwing cases at trial. In a number of cases, Southern prosecutors brought criminal charges against the white perpetrators of lynchings and other acts of racial violence—but then conducted prosecutions that were “half-hearted at best” and at worst “outright shams.”<sup>205</sup> In one instance, a district attorney in closing arguments actually apologized to the jury for bringing the case. Needless to say, an acquittal followed shortly.<sup>206</sup> While it is not clear what precise confluence of political incentives caused prosecutors to take this approach (rather than choosing not to bring charges in the first place), such incentives seem to have been present.

One situation where “playing to lose” is likely to be particularly useful is when the public at large supports prosecution and the constit-

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<sup>204</sup> See Luban, *supra* note 7, at 3–14 (telling the story of the Palladium murder prosecution).

<sup>205</sup> CLAY S. CONRAD, JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE 179 (1998).

<sup>206</sup> *Id.* at 184–85.

uency opposed to prosecution is made up of law-enforcement insiders: members of the public will lack sufficient expertise to know whether the prosecution failed to act with sufficient zeal at trial, but insiders will. For this reason, it is perhaps unsurprising that prosecutors have been accused of employing this strategy in cases involving alleged crimes by police officers.<sup>207</sup> The public often directs significant outrage at alleged police misconduct; prosecutors, however, may not want to harm their working relationships with police by pursuing such cases aggressively. Playing to lose is a way to save face with both constituencies.

It's unclear how often prosecutors intentionally throw cases. But there is nothing implausible about the phenomenon. And it is undesirable. Although one can disagree about the precise purposes that criminal trials serve, they (like grand-jury proceedings) certainly should not serve as elaborate charades designed to shield prosecutors from political repercussions. This pathology would not arise in a world where prosecutors single mindedly maximized punishment. They would have incentives to bring only those cases they hoped to win, and to see those cases through to the end.

#### D. Incentive-Design Problems

The fact that prosecutors do not inevitably or solely care about maximizing victory in litigation makes it difficult to provide them with optimal incentives through procedural rules. At a high level of abstraction, the problem is that we lack a comprehensive account of prosecutorial motivation. Because prosecutors appear to care about maximizing a number of different values, their attitude towards the outcomes generated by the litigation process is contingent and complicated. But if prosecutors were incentivized to maximize a single variable—punishment—it would be much easier for courts and legislatures to influence their behavior.

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<sup>207</sup> See, e.g., Hal R. Areinstein & Martin S. Pinales, *Cincinnati: Two Tales, One City*, CHAMPION, Apr. 26, 2002, at 18, 19 (“While prosecutions of police officers have been a recent phenomenon, many charge that the prosecutions were half-hearted efforts in which prosecutors, known for their trial ferocity in other prosecutions, sat docile while defense counsel made clearly objectionable closing arguments.”); Jonathan Turley, *Jury Acquits Denver Officer Who Broke Teeth of Man By Slamming His Head into the Pavement*, JONATHAN TURLEY (Sept. 23, 2009), <https://jonathanturley.org/2009/09/23/jury-acquits-denver-officer-who-broke-teeth-of-man-by-slamming-his-head-into-the-pavement/> (describing how prosecutors did not use all the available evidence during the prosecution).

## 1. *Legislative Priorities*

Consider a familiar pattern. The legislature passes a criminal statute aimed at an important social problem. Yet prosecutors refuse to enforce the law vigorously—perhaps because they disagree with the legislature about whether the conduct at issue should be criminal at all, or because they disagree about the seriousness of the conduct in question relative to other crimes.

While overenforcement of the criminal laws receives more scholarly attention, such underenforcement has real social costs as well.<sup>208</sup> One area where it has been a particular problem is the domestic-violence context, where law-enforcement authorities have often failed to take the laws on the books seriously. While police surely bear some of the blame, prosecutors have significant responsibility as well.<sup>209</sup> Indeed, reluctance of state prosecutors to pursue both sexual-assault and domestic-violence cases formed part of the justification for the federal Violence Against Women Act.<sup>210</sup> In a more cutting-edge example, critics have recently accused prosecutors of not taking cases involving Internet-based harassment seriously enough.<sup>211</sup>

Reluctance by prosecutors can make it particularly difficult for legislatures to use criminal law to address emerging or newly recognized social problems. Simply passing a new criminal law isn't enough. Prosecutors must also be persuaded that the law deserves to be enforced. And because the prosecutorial power is divided among numerous districts and political subdivisions, this may be no simple task; it could require a sustained effort over many years.

Yet it would be much easier for the legislature to set priorities in a world where prosecutors were incentivized to maximize punishment. Prosecutors would not need to be persuaded that the problem at which a statute is aimed is sufficiently serious; they would be motivated to enforce it so long as cases under that statute are winnable.<sup>212</sup>

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<sup>208</sup> See generally Alexandra Natapoff, *Underenforcement*, 75 *FORDHAM L. REV.* 1715, 1717 (2006) (describing the social costs of underenforcement of crimes).

<sup>209</sup> See Angela Corsilles, Note, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 *FORDHAM L. REV.* 853, 866–67 (1994) (“[P]rosecutors often choose to exercise discretion by not proceeding or later dismissing [domestic-violence] charges.”).

<sup>210</sup> See H.R. REP. NO. 103–395, at 27 (1993) (“A judicial commission in Maryland found that prosecutors often refuse to pursue rape and domestic violence complaints . . .”).

<sup>211</sup> See Danielle Keats Citron, *Law's Expressive Value in Combating Cyber Gender Harassment*, 108 *MICH. L. REV.* 373, 402 (2009) (“Law-enforcement agencies refuse to pursue cyber harassment complaints on the grounds that the conduct is legally insignificant, in much the same way that prosecutors once refused to file charges in cases involving gender-specific sexual assaults such as domestic violence and rape.”).

<sup>212</sup> Indeed, in contexts where underenforcement is a significant problem, legislatures have adopted strategies that encourage prosecutors to behave in a more consistently

And legislatures could, if they chose, calibrate how prosecutors set priorities among different types of crimes. If, say, punishment-maximizing prosecutors were focusing too much on drug crimes and not enough on domestic-violence cases, the legislature could simply reallocate budgetary priorities between the two types of offenses: it could designate that  $X\%$  of the prosecutor's offices resources could be devoted to drug crimes while requiring  $Y\%$  to be devoted to domestic violence. Within each domain, the prosecutor's office would have incentives to pursue winnable cases up to the limits of their resources.

Of course, in some situations prosecutorial refusal to enforce the written law to its fullest extent may be desirable. This could be true where there is a disconnect between the state or national electorate that elected the legislature and the smaller political community that the prosecutor represents. When Bronx County District Attorney Robert T. Johnson announced that he would not enforce New York's newly enacted death-penalty provision,<sup>213</sup> he was surely subverting the will of New York state legislators and their constituents. Yet he was likely doing so in part because the voters who elected him in Bronx County thought the death penalty was unjust.

Depending on how one feels about the Johnson example, it may suggest that there should be some way for localities to express disagreement with criminal statutes enacted at a higher level of government. The problem, however, is that vesting that power in *prosecutors* may be dangerous. Few prosecutors are as candid as Johnson (and even fewer will be after seeing that Johnson's candor ultimately led Governor George Pataki to replace him with another prosecutor in a high-profile murder case).<sup>214</sup> Instead, prosecutors do what some appear to have done in connection with domestic-violence and sexual-assault cases: implement an unannounced policy against bringing those cases by resting the refusal to prosecute in each case on the supposed weakness of the evidence. This is problematic; it is difficult for voters and legislators to determine when a failure to prosecute actually stems from weaknesses in a case or when it occurs due to

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adversarial fashion. To solve the underenforcement problem, some jurisdictions have adopted "no drop" laws, which restrict prosecutors' ability to dismiss domestic-violence prosecutions. See Corsilles, *supra* note 209, at 856 (describing the no-drop policies as they relate to domestic violence victims).

<sup>213</sup> See John A. Horowitz, Note, *Prosecutorial Discretion and the Death Penalty: Creating a Committee to Decide Whether to Seek the Death Penalty*, 65 *FORDHAM L. REV.* 2571, 2581 (1997) (quoting District Attorney Johnson's announcement that he would refuse to seek the death penalty).

<sup>214</sup> See *id.* at 2582–87 (detailing the contentious relationship between Governor Pataki and D.A. Johnson as Johnson refused to seek the death penalty).

political motivation. If prosecutors maximized punishment, they would only decline to bring cases that really were unlikely to lead to convictions.

## 2. *Prosecutorial Misconduct*

Serious misconduct by prosecutors, most commonly the withholding of exculpatory evidence, is a recurring problem. It is one that is often blamed on too much adversarialism.<sup>215</sup> Yet *insufficient* adversarialism may make the problem particularly difficult to solve.

A significant obstacle is that current rules provide an insufficient deterrent to prosecutors. Judges who discover instances of prosecutorial misconduct have a limited toolkit with which to sanction prosecutors: they are largely limited to reversing a conviction or dismissing an indictment if the misconduct is sufficiently serious. This remedy is inadequate because it is both too strong and too weak. Too strong, because much identified misconduct does not actually affect the reliability of a verdict, such as when there is already overwhelming evidence of guilt. Too weak, because prosecutorial misconduct is often hard to detect, meaning that a prosecutor who strongly desires convictions may still misbehave if a particular act of misconduct guarantees a conviction but has a low chance of being detected and therefore requiring reversal.

Sonja Starr has offered an interesting proposal to address the first problem. She argues for empowering courts to reduce a defendant's sentence "as a remedy for prosecutorial misconduct when the reliability of the conviction has not been affected."<sup>216</sup> Such a remedy could deter bad behavior by providing a sanction even when the misconduct is not sufficiently serious to require reversal. It might also make judges more willing to conclude that misconduct occurred in the first place, given that judges may be reluctant to award a defendant the seeming windfall of a new trial even if the misconduct is egregious.<sup>217</sup>

The difficult question about such a proposal, however, is whether it would effectively motivate prosecutors. Starr makes a good case that it would, even under various assumptions about prosecutors'

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<sup>215</sup> See Aviram, *supra* note 6, at 4 ("[T]he literature on prosecutorial misconduct increasingly regards it as a broader phenomenon stemming from overzealousness and conviction-oriented 'tunnel vision.'").

<sup>216</sup> Sonja B. Starr, *Sentence Reduction as a Remedy for Prosecutorial Misconduct*, 97 GEO. L.J. 1509, 1519 (2009).

<sup>217</sup> *Id.* at 1520–21 (describing judicial frustration with the lack of "non-windfall remedies for prosecutorial misconduct").

utility functions.<sup>218</sup> Yet as she acknowledges, calibrating such a system would be challenging, given the complexities of prosecutorial motivation.<sup>219</sup> Applied to our current system, much of the deterrent value in Starr's proposal might lie not in the sentence reduction as such, but in the potential professional consequences of being declared guilty of misconduct by a court.<sup>220</sup> And even there, we lack a fully developed theory of how such declarations interact with prosecutors' political motivations. In some circumstances prosecutors might actually *benefit* from such declarations, if they made the prosecutor appear sufficiently "tough on crime." (Texas voters, for example, apparently approved of Governor Rick Perry's involvement in a seemingly wrongful execution, because "[i]t takes balls to execute an innocent man."<sup>221</sup>)

Now, consider how the problem would look if prosecutors were more consistently adversarial. One might assume that misconduct would be rampant in such a world; if prosecutors saw their only goal as maximizing punishment, they might be even more willing than some are today to cut corners in order to obtain convictions. This danger is real, and I will address it below.<sup>222</sup> Here, though, my point is that *insufficient* adversarialism creates real challenges for discouraging bad conduct. If prosecutors were more consistently motivated to maximize punishment, they might have more incentives to commit misconduct in particular situations—yet at the same time, it would be much easier to design and implement remedies that would discourage that misconduct. For example, if we knew that prosecutors cared about maximizing sentence length, Starr's sentence-reduction remedy would be guaranteed to work. The only question would be precisely how much of a sentence reduction would be necessary to provide sufficient deterrence.

One can imagine additional variations that could harness adversarialism in order to optimize incentives. Imagine a system in which prosecutors were professionally rewarded (financially or otherwise) based on the amount of punishment obtained. The system could

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<sup>218</sup> *Id.* at 1524–32 (examining how sentence reduction would impact prosecutor calculations in regard to deterrence, efficiency, career advancement, winning, political power, and justice).

<sup>219</sup> *Id.* at 1530–32.

<sup>220</sup> *Id.* at 1532 (claiming even small sentence reductions might be effective if there is a "fear of professional embarrassment").

<sup>221</sup> Alexander Burns & Maggie Haberman, *GOP Ponders Perry: Savior or Flop?*, POLITICO (Aug. 3, 2011, 1:03 PM), <http://www.politico.com/story/2011/08/gop-ponders-perry-savior-or-flop-060593?paginate=false>.

<sup>222</sup> See *infra* Section III.B.1 (describing the increased risk of prosecutorial misconduct if prosecutors are punishment maximizers).

penalize prosecutors by denying them “credit” for punishment based on misconduct. Such a system could effectively solve the underdeterrence problem noted above: reversal of a conviction may not be a sufficiently harsh remedy for cases of misconduct that are hard to detect. If a *Brady* violation makes a conviction much more likely, and is only likely to be discovered some small percentage of the time, an unethical prosecutor may choose to commit the violation if reversal is the most severe remedy available. The system could thus provide an additional sanction: in a case of serious misconduct, the defendant’s conviction would be overturned, but the prosecutor would be punished further by denying her “credit” for some additional amount of punishment validly obtained. For example, if serious misconduct by a prosecutor led to a defendant being convicted and sentenced to ten years’ imprisonment, a court could sanction the prosecutor by denying her credit for fifty years of imprisonment. Because prosecutors in our system have no single variable that they are trying to maximize, it is much more challenging to provide the right incentives and disincentives to discourage misconduct.

### III.

#### THE SURPRISING CASE FOR ADVERSARIALISM

The goal of the preceding sections was to unsettle the reader’s assumptions about prosecutorial adversarialism. The stage is now set for the next step: this Part argues that a system that relied on more consistently adversarial prosecutors—those who saw themselves as single mindedly focused on maximizing punishment—might be better than our current system along several normative dimensions. At the very least, such a system, if well designed, would be far from the dystopian nightmare one might first assume. Adversarialism poses risks and has real costs, but careful institutional design could mitigate the worst dangers.

Before diving in, though, it is important to make clear the ambitions, and limits, of this Part’s argument. First, I don’t seek to prove that adopting a more consistently adversarial system is a good idea. Fully evaluating the costs and benefits of such a system is an effort beyond the scope of this article. Moreover, even if we were convinced that a fully adversarial system was a good one in the abstract, that isn’t the same as being convinced that we should actually move to such a system today. Changing our own system to make it more consistently adversarial would involve significant transition costs and other complexities that could easily swamp the benefits of more consistent adversarialism. If nothing else, it is critical that the argument not be

read as saying that we should change our conception of the prosecutorial role without making any other changes to the system. That would only make a flawed system worse. Our current conception of prosecutors as ministers of justice may be hard to justify as a first-best solution if we were writing on a blank slate, but it is likely a necessary second-best, taking prevailing institutional arrangements—such as extremely weak checks against prosecutorial misconduct—for granted.

Thus, this Part should not be understood as offering a blueprint for reform. Instead, the goal is merely to make a first-cut normative argument; I want the reader to imagine a fully adversarial system, and to try to think through what the benefits of such a system might be. Given these caveats, one might ask what the point is. Why imagine a truly adversarial system if I'm not urging that we actually implement such a system? As Part IV makes clear, the immediate goal is less reform than it is critique. I hope that imagining a truly adversarial system provides a unique vantage point from which we can reexamine our own system. The idea is to lay bare a number of assumptions that form the basis of current arrangements—assumptions that seem questionable on close analysis. Embracing adversarialism may not be the right solution, but even so our current approach is hard to justify. Part IV will discuss those implications, but it will be helpful to keep that goal in mind as this Part proceeds.

Section A discusses the benefits of a consistently adversarial system. Part B discusses the dangers involved in more consistent adversarialism and how to mitigate them. Section C offers some thoughts on how a system could be designed in order to encourage more consistent adversarialism. Section D then expands the analysis by factoring in other kinds of asymmetries in the criminal process that the Article has otherwise largely ignored—power and resource advantages enjoyed by the prosecution.

### A. *The Unexpected Benefits of Adversarialism*

Imagine a world in which prosecutors were more consistently adversarial. That is, imagine that our understanding of the prosecutorial role, and the incentives we give prosecutors, were such that prosecutors were strongly encouraged to maximize a single variable: punishment. Section C will offer some thoughts on whether prosecutors could actually be so motivated. For now, it suffices to imagine that it is possible. More specifically, I am asking the reader to imagine prosecutors were motivated to be more consistently adversarial in two senses. First, prosecutors must maximize punishment in *charging deci-*

sions: they must select cases solely based on their likelihood of leading to punishment. And then they must maximize punishment at the micro level: within each case, they must have strong incentives to seek maximal punishment within the bounds of the law. These two desires may seem to be in some tension with each other at some times; I explore that later.<sup>223</sup>

A consistently adversarial system would have three key benefits. First, adversarialism could prove to be a robust accountability mechanism. Second, it could ensure greater adherence to rule-of-law values. Third, it could produce valuable political feedback that might improve the substance of criminal law.

### 1. Accountability

Ensuring consistent adversarialism would create a powerful accountability mechanism. This claim may initially seem surprising. Isn't part of the reason that prosecutors don't consistently seek maximal punishment because doing so isn't in the public's interest? Prosecutors represent the public, and the public does not want every criminal defendant to be punished, nor does it want criminal statutes pushed to their full limits in terms of breadth or severity. We give prosecutors discretion to decide whether to bring charges in the first instance and how severe a sentence to seek so that they can better promote the public interest in individual cases.<sup>224</sup>

Yet if our system of broad prosecutorial discretion is in theory supposed to produce results that accord with the public's preferences, in practice it has two significant and related accountability deficits. First, prosecutors' broad discretion gives them a tremendous amount of power, and some of the ways they exercise that power are troubling. Second, because the conception of the public interest that prosecutors are supposed to serve is fuzzy and amorphous, it is difficult for the public to effectively monitor and control prosecutorial behavior. A system designed to ensure true adversarialism by prosecutors would solve both problems.

Take discretion first. In exercising their discretion to decide whom to charge and how much punishment to seek, prosecutors enjoy more unreviewable power than perhaps any other government official.<sup>225</sup> While many prosecutors likely try to use their discretion judi-

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<sup>223</sup> See *infra* Section III.C.1 (discussing how to balance maximizing prison sentences and number of convictions).

<sup>224</sup> See Gazal-Ayal & Riza, *supra* note 46, at 152 (describing the balance between using discretion for efficiency and using discretion to promote the public interest).

<sup>225</sup> See DAVIS, *supra* note 54, at 188 (noting that the "excessive and uncontrolled discretionary powers" of prosecutors "stands out above all others"); Vorenberg, *supra* note

ciously, the scope of that power creates—as power always does—real potential for abuse. Prosecutors can charge, or decline to charge, defendants for whatever reason they choose. And sometimes those choices are troubling. They can choose to refuse to enforce laws with which they disagree. They can decline to charge guilty defendants who are politically powerful or otherwise attractive. They can apply the law selectively against poor defendants, or racial minorities, or other disfavored groups. And they can charge a defendant with the kitchen sink in the hopes of inducing a plea to some minor charge.

Despite the persistence of such abuses of prosecutorial discretion, the legal system offers no real solution. The doctrine imposes extremely high barriers to selective prosecution claims.<sup>226</sup> Courts have refused to regulate the terms of plea offers, no matter how coercive they appear.<sup>227</sup> And it is essentially impossible to challenge a prosecutor's decision *not* to bring charges.<sup>228</sup>

One potential fix that scholars have proposed is some form of mandatory charging rules. As James Vorenberg put it, “[t]he most drastic limitation on prosecutorial discretion would be a legislative mandate that the prosecutor charge the most serious offense for which he concludes there is probable cause.”<sup>229</sup> Other scholars, looking to examples from Europe, have made similar proposals.<sup>230</sup> Indeed, if prosecutors were obligated to bring the most serious charges for which probable cause existed, a number of the most troubling instances of prosecutorial discretion might disappear. Prosecutors wouldn't apply the law selectively, or refuse to prosecute favored but guilty wrongdoers. And prosecutors would have less ability to offer bargains in exchange for pleas if they were always obligated to seek the most serious charges available.

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54, at 1523–24 (noting that the restraints on discretionary power usually imposed on public officials are not imposed on prosecutors).

<sup>226</sup> See *supra* Section II.A.3.

<sup>227</sup> See, e.g., *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) (holding that the defendant's due process rights were not violated when the prosecutor carried out a threat to reindict him on more serious charges because he did not plead guilty to the originally charged offense); *Brady v. United States*, 397 U.S. 742 (1970) (holding that a defendant's plea was voluntary when he chose to plead guilty after learning the co-defendant confessed and would testify against him).

<sup>228</sup> See, e.g., *Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375 (2d Cir. 1973) (holding that prosecutors cannot be compelled to bring charges); see also *Heckler v. Chaney*, 470 U.S. 821, 831–34 (1985) (acknowledging that an agency's decision not to prosecute is virtually unreviewable and discussing the rationales for granting such absolute discretion).

<sup>229</sup> Vorenberg, *supra* note 55, at 680.

<sup>230</sup> See, e.g., John H. Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439 (1974).

Yet mandatory prosecution regimes involve serious practical obstacles. The problem is that even if prosecutors were required to charge every crime that they could prove, they would still need to decide *which cases they could prove*: that is, whether the evidence in a particular case was sufficient to sustain a conviction.<sup>231</sup> Yet “that discretion can all too easily morph into” the discretion not to bring charges because “prosecutors believe some laws deserve less enforcement than others.”<sup>232</sup> And a court reviewing charging decisions would find it challenging to differentiate between the two kinds of decisions. Given the difficulty of this task, courts have been understandably reluctant to permit review of prosecutorial charging decisions. Here is how the Second Circuit expressed its concerns:

[T]he problems inherent in the task of supervising prosecutorial decisions do not lend themselves to resolution by the judiciary. The reviewing courts would be placed in the undesirable and injudicious posture of becoming “superprosecutors.” . . .

Nor is it clear what the judiciary’s role of supervision should be were it to undertake such a review. At what point would the prosecutor be entitled to call a halt to further investigation as unlikely to be productive? What evidentiary standard would be used to decide whether prosecution should be compelled?<sup>233</sup>

Any effort to seriously limit prosecutorial discretion through some kind of mandatory prosecution regime would have to overcome these challenges.

Yet embracing prosecutorial adversarialism could provide the benefits of a mandatory prosecution regime—without those practical difficulties. If prosecutors were given *incentives* to maximize punishment, they would effectively act as if prosecution were mandatory, even if they formally retained the power to choose what cases to take, and even if no judge or other third party could review their charging decisions. As Stuntz observed about the nineteenth-century system in which prosecutors were paid by the conviction: “Prosecutors paid by the case have the same [discretionary power as prosecutors today] in theory, but not in practice. Their incentive is to pursue all criminal charges brought to them, not to pick and choose among the charges.”<sup>234</sup> At least in a system where prosecutors were rewarded only for winning (rather than merely bringing) cases, it is more accu-

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<sup>231</sup> See Stuntz, *supra* note 38, at 580 (“Unreviewable screening for probable guilt creates the opportunity for unreviewable screening on other grounds—perhaps because this law should be enforced more vigorously than that one.”).

<sup>232</sup> *Id.* at 580–81.

<sup>233</sup> *Inmates of Attica*, 477 F.2d at 380.

<sup>234</sup> STUNTZ, *supra* note 88, at 87.

rate to say that prosecutors would use their discretionary power differently. Assuming prosecutors faced constraints on their time, they would still have to pick and choose among the cases brought to them—but they would choose differently than politically motivated prosecutors do.

The system could thus preserve the useful aspects of prosecutorial discretion while limiting its potential for misuse. As Josh Bowers has noted, prosecutorial discretion “is no undifferentiated whole. Rather, a prosecutor’s decision about what and whether to charge is guided by three separate categories of reasons for discretion’s exercise: legal reasons, administrative reasons, and equitable reasons.”<sup>235</sup> Prosecutors are unquestionably well positioned to exercise the first two categories of discretion: a prosecutor “knows most about the evidentiary support for a given charge” and “knows most about her strategic priorities and limitations.”<sup>236</sup> Yet as Bowers observes, prosecutors may not be the right actors to exercise *equitable* discretion—to decide whether a particular defendant who is legally guilty nonetheless deserves to avoid punishment.<sup>237</sup> The beauty of a system in which prosecutors maximize punishment is that it effectively allows prosecutors to retain the first two categories of discretion while depriving them of the third.

Consistent adversarialism would also promote accountability by making it easier for the public and other institutions to monitor and control prosecutorial behavior. One reason that prosecutors exercise so much power in practice is that it is so hard for external actors to monitor their activities.<sup>238</sup> Extreme deviations—such as relentlessly pursuing obviously innocent defendants, as in the Nifong case—may come to light. But for the most part, it is hard to have confidence that prosecutors are pursuing the right defendants or that they are prosecuting cases with sufficient energy. Are prosecutors choosing cases and defendants based on the seriousness of the crimes and the strength of the evidence? Or are they targeting defendants for bad reasons? Unless a prosecution leads to an acquittal, it’s hard for outsiders to evaluate whether a prosecutor selected the right defendant—and even then it is hard to be certain that the prosecutor chose poorly. And given the weapons our legal system gives prosecutors for inducing guilty pleas, few cases end in acquittals.

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<sup>235</sup> Bowers, *supra* note 39, at 1656.

<sup>236</sup> *Id.* at 1657.

<sup>237</sup> See *id.* at 1660 (discussing the reasons why prosecutors may be ill-suited to exercise equitable discretion).

<sup>238</sup> See Russell M. Gold, *Promoting Democracy in Prosecution*, 86 WASH. L. REV. 69, 84–87 (2011) (describing prosecutors as sovereigns with unchecked power).

Giving prosecutors a single goal—to maximize punishment—would make it easier for the public to evaluate the performance of any particular prosecutor. And the accompanying incentive for the prosecutor to focus on that metric would limit opportunities for shirking and other self-interested behavior. Moreover, controlling prosecutors would be simpler. Where prosecutors have incentives to maximize one thing, that goal provides a useful level for influencing their behavior. Just as profit-maximizing litigants can be deterred or encouraged using dollars, courts would find it easier to calibrate prosecutorial incentives by allocating punishment. For example, prosecutorial misconduct would be much easier to rein in using the sentence-reduction remedy proposed by Starr and discussed above.<sup>239</sup>

## 2. *The Rule of Law*

The second key benefit of consistent adversarialism is that it would ensure better adherence to basic rule-of-law values. As presently constituted, our system gives the power to enforce the law to officials who have no inherent incentive to enforce the law for its own sake. They, instead, are motivated to use the law as a tool for achieving other social goals—such as incapacitating people who are likely to commit harmful acts in the future. Sometimes, those goals often match up closely with the substance of criminal law. For example, murder is a particularly reprehensible crime, and so prosecutors tend to have strong incentives to enforce homicide laws to their full limits. And for this reason, the written law closely matches the law actually applied.<sup>240</sup>

Yet in many areas this is much less true. Various crimes are not enforced to their fullest degree, but instead largely serve as proxies for other kinds of conduct that is difficult to prove. Prosecutors don't bring perjury charges for every arguably false statement made under oath. Instead, they use perjury and other “process” crimes as an excuse to imprison those suspected of having committed other

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<sup>239</sup> See *infra* Section II.D.2.

<sup>240</sup> See Richman & Stuntz, *supra* note 168, at 605 (arguing that “prosecutors prosecute [crimes like murder] systematically and aggressively, meaning that, at least roughly, the crimes are enforced as written”). Even for homicide, this is not quite true. Capital murder statutes are not pushed to their limits, but instead are reserved for a very small class of offenders deemed especially culpable by prosecutors and juries and/or judges. And thus, the law of capital murder is much less law-like, and much more subject to the problems documented here, than the law of murder more generally. See Carol S. Steiker, *Justice vs. Mercy in the Law of Homicide: The Contest Between Rule-of-Law Values and Discretionary Leniency from Common Law to Codification to Constitution*, 47 TEX. TECH. L. REV. 1, 13 (2014) (arguing that in “the capital sentencing process, the effect of the Court’s constitutional doctrine over time has been to enhance opportunities for individualized discretion, with only a formal veneer of procedural regularity”).

crimes.<sup>241</sup> Other crimes, like various drug laws and other vice crimes, are enforced severely in some communities, and barely enforced at all in other places. Even where the substance of the law is applied to most perceived violators, the penalties on the books may have no clear relationship with the sentences actually served. That's because those penalties may not actually be treated as the benchmark for the average sentence. Instead, they are used as weapons for inducing guilty pleas to the sentence that the prosecutor thinks is appropriate.

When law is used in these ways, there is a real sense in which the law ceases to be *law*. Instead, criminal law becomes, in William Stuntz's words, "a veil that hides a system that allocates criminal punishment discretionarily."<sup>242</sup> That system taken to its extreme—"a world in which the law on the books makes everyone a felon, and in which prosecutors and the police both define the law on the street and decide who has violated it"<sup>243</sup>—is deeply inconsistent with rule-of-law values.<sup>244</sup> Our system does not (yet) go that far. But it goes further in that direction than we should be comfortable with.

A system with more consistently adversarial prosecutors would much better accord with basic rule-of-law values. Statutes would be enforced to their fullest extent against those who violate them, rather than merely delimiting the outer bounds of prosecutors' discretion in picking targets. Fully adversarial prosecutors would not enforce the law in a selective or discriminatory fashion, but would instead charge all lawbreakers equally. Written penalties on the books would set the benchmark for the sentences that defendants would actually receive—instead of being weapons for inducing pleas. The law would really be *the law*, and the same laws would be applied to everyone.

Of course, even if an adversarial system better complied with the rule of law, the rule of law is not the only value worth caring about. If embracing adversarialism had the result only of making more people subject to bad laws, that isn't necessarily progress. Whether such a system would in fact be an improvement turns in part on the next potential benefit.

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<sup>241</sup> See Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 GEO. L.J. 1435, 1442–46 (2009) (describing the logic and utility of bringing pretextual process charges).

<sup>242</sup> Stuntz, *supra* note 38, at 599.

<sup>243</sup> *Id.* at 511.

<sup>244</sup> Such delegation can also dilute or distort law's expressive function, since the law that is applied on the ground may differ substantially from the law on the books. *Id.* at 521–22.

### 3. *Political Feedback*

The final conceivable benefit of adversarialism is the most speculative—but potentially the most significant. While it is difficult to offer a confident prediction, changing the way the law is enforced could change the way the law is *written*. More adversarial prosecutors could reduce the legislative incentive to draft overly broad and overly harsh criminal statutes. The basic theory is that some troubling aspects of our criminal laws are politically sustainable only because of selective, and ultimately discriminatory, enforcement—and thus, a mechanism that prevented such selective enforcement might produce better policy. Prosecutors who were motivated solely to care about maximizing punishment would pursue all cases where they could obtain convictions. Thus, unlike in our current regime, prosecutors would pursue charges even when doing so might generate negative political feedback. And if that fact of prosecutorial motivation and behavior were a fixed and known feature of the system, legislatures might be much quicker to repeal bad laws—and perhaps more cautious in drafting criminal laws in the first place.

Indeed, as Jessica Bulman-Pozen and David Pozen recently observed, the idea that more consistent enforcement of the laws could “upend [ ] . . . the existing sociolegal order” is not a new one:

[W]hen Theodore Roosevelt became head of the New York Police Commission in the 1890s, he began to strictly enforce laws that required saloons to close on Sundays. Previously, the laws had been rarely and selectively enforced, according to Roosevelt, “to blackmail and browbeat the saloon keepers who were not the slaves of Tammany Hall.” Roosevelt contended that his approach might precipitate repeal of the Sunday closing law and furthermore “prevent the Legislature from passing laws which are not meant to be enforced.” He thus instantiated President Ulysses Grant’s dictum: “I know no method to secure the repeal of bad or obnoxious laws so effective as their stringent execution.”<sup>245</sup>

Such an approach could effect change today. Consider the war on drugs, which has had massive human and social costs over the recent decades, costs which most thoughtful observers think significantly outweigh any social benefits created by our current approach. Harsh sentences for first-time offenders maintain political support because affluent and politically powerful voters and legislators know that those sentences won’t be applied to their or their neighbor’s children; even if citizens from affluent, privileged communities are caught violating

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<sup>245</sup> Jessica Bulman-Pozen & David E. Pozen, *Uncivil Obedience*, 115 COLUM. L. REV. 809, 831–32 (2015).

the drug laws, prosecutors will almost certainly seek much less punishment than the law allows. If prosecutors didn't behave that way—if it was known that they would consistently seek the most serious charges against any who violated the law—voters and legislators might feel differently about passing harsh laws.

There is, to be sure, no guarantee that such political feedback would occur, or that its effects would be positive. As Marie Gottschalk has observed, one possible political response to increased awareness of inequality in how punishment is distributed is “leveling down.”<sup>246</sup> She suggests that “penal conservatives, confronted with evidence of the growing racial and ethnic disparities of the U.S. carceral state . . . may attempt to raise the ante for whites by subjecting them to tougher prison sentences.”<sup>247</sup> If more zealous enforcement just led to more consistent enforcement of bad laws, that would not be an improvement even if it were in a sense fairer.

Thus, a lot depends on how the politics would shake out in practice. And that is hard to predict. Still, discretionary prosecution is the key to Stuntz's account of the pathological politics of criminal law. To the extent that his account is right—and it is a persuasive one<sup>248</sup>—it follows that effectively *eliminating* discretionary prosecution would at least change, and perhaps improve, the politics of criminal justice.<sup>249</sup> If the assumption was that laws would be enforced more consistently, it is at least possible that we'd see a closer fit between criminal law on the books and truly blameworthy conduct.

Of course, prosecutors are only one part of the law-enforcement equation. Police choices are an important part of any story about dis-

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<sup>246</sup> MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* 134 (2014).

<sup>247</sup> *Id.*

<sup>248</sup> Recently, scholars have strongly criticized some of the more provocative claims in Stuntz's later work. See Donald A. Dripps, *Does Liberal Procedure Cause Punitive Substance? Preliminary Evidence from Some Natural Experiments*, 87 S. CAL. L. REV. 459 (2014) (analyzing Stuntz's argument that liberal ruling in criminal procedure cases have perverse effects on the substance of criminal law); Stephen J. Schulhofer, *Criminal Justice, Local Democracy, and Constitutional Rights*, 111 MICH. L. REV. 1045 (2013) (systematically critiquing the claims set forth by Stuntz in *The Collapse*). This criticism does not, however, undermine Stuntz's insights in *Pathological Politics*; that account remains, to me at least, a convincing account of the structural problems plaguing criminal lawmaking.

<sup>249</sup> This is another instance of a mechanism I have explored elsewhere. In previous work, I argued that making the system less formally protective of innocent defendants could encourage political feedback that would cut against the punitive impulse. See Epps, *supra* note 27. Here, too, the mechanism works in a similar way. Making the system seemingly harder on defendants could actually improve the status quo, if it causes key political decisionmakers to worry that they (or the people they care about) might face the brunt of harsh criminal sanctions.

cretionary enforcement of criminal law. And so one might object that consistent enforcement capable of creating political feedback would require some kind of arrest mandate for police.<sup>250</sup> However, for some crimes—such as white-collar crimes, for example—prosecutors often play the lead role in choosing targets and directing investigations.<sup>251</sup> For those crimes, more adversarial prosecutors would likely lead to much more consistent enforcement. And even for crimes where police play a much more central role, more adversarial prosecutors could still have a major impact. To focus on the war on drugs, for example, discretionary enforcement by police unquestionably is a big part of creating disparate outcomes among different racial and economic groups.<sup>252</sup> But prosecutorial choices play a role, too, in creating those disparities.<sup>253</sup> Members of privileged groups do sometimes get arrested for drug crimes, and if prosecutors couldn't be expected to be more lenient for those defendants, voters and legislators might think twice before enacting draconian penalties.

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<sup>250</sup> Debating the costs and benefits of such a policy is beyond the scope of this Article, but here are some very tentative thoughts. On the one hand, such a mandate would have significant costs. Unlike prosecutors—whose sole job is to enforce the law—police have a much more complicated role; their job is to protect public safety, which includes detecting and arresting wrongdoers but also includes preventing crime before it occurs and maintaining order in other ways. And a maximize-arrests mandate could do harm to these goals—if, for example, knowledge that police were required to arrest for every violation of law made people less willing to report crimes or otherwise seek police assistance. That said, the core of my critique of prosecutors has some applicability to police. Letting police treat the substantive law not as something important to enforce in and of itself, but rather as a tool to be used for getting the “bad guys” leads to all the same rule-of-law and discretion problems as it does for prosecutors. For example, the Supreme Court has held that it is permissible for police to use violations of the traffic laws as a mere pretext for stopping drivers whom police believe to be engaged in other crimes like drug dealing. *Whren v. United States*, 517 U.S. 806, 813 (1996). Many have criticized the Court in *Whren* for turning a blind eye to racial profiling. See Gabriel J. Chin & Charles J. Vernon, *Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of Whren v. United States*, 83 GEO. WASH. L. REV. 882, 886 & nn.12–20 (2015) (summarizing scholarly critiques). Solving this problem likely requires some mechanism to make police more interested in enforcing law for its own sake rather than simply using it instrumentally. An arrest mandate is almost certainly too blunt a tool, but *some* solution is needed.

<sup>251</sup> See Peter J. Henning, *Testing the Limits of Investigating and Prosecuting White Collar Crime: How Far Will the Courts Allow Prosecutors to Go?*, 54 U. PITT. L. REV. 405, 406–13 (1993) (discussing the role of prosecutors in white-collar criminal investigations).

<sup>252</sup> See, e.g., Shima Baradaran, *Race, Prediction, and Discretion*, 81 GEO. WASH. L. REV. 157, 212 (2013) (“Police . . . arrest black defendants much more often than white defendants for drug crimes.”); see also William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795 (1998) (arguing that police choices to focus investigation on downscale, urban drug markets exacerbates racial disparities).

<sup>253</sup> See, e.g., Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 266 (2002) (noting statistics showing that white defendants are “if arrested, less likely to be convicted; and if convicted, less likely to be imprisoned than members of other races”).

Now, even assuming that such positive feedback would occur, it's not clear it would be desirable. Is it obvious we would be better off in a world with more narrowly drawn criminal statutes that were enforced more consistently against all violators? Perhaps not: Samuel Buell has argued that some overbreadth in criminal law, combined with enforcement discretion, may be necessary in order to effectively punish sophisticated wrongdoers who can adapt their behavior to avoid criminal sanctions.<sup>254</sup> And Darryl Brown suggests that substantive overbreadth may be less of a problem than the critics claim, because prosecutors, in exercising their discretion, generally take account of majoritarian political preferences.<sup>255</sup>

Yet a system relying heavily on overbreadth and discretionary enforcement has costs. It effectively turns prosecutors into lawmakers and judges with unreviewable power. And there is no reason to believe that they use that power wisely 100% of the time. As McAdams puts it, "the same power overbreadth grants to punish those whom the public thinks (or would think if it considered the matter) are deserving of punishment also includes the power to punish those whom the public thinks (or would think) are undeserving of conviction, individuals who are neither blameworthy nor dangerous."<sup>256</sup> Whether that cost outweighs the benefits of enabling easier prosecution of sophisticated criminals is unclear. But it seems like a high price to pay.

### B. *Mitigating the Risks*

Incentivizing prosecutors to maximize punishment unquestionably poses risks. The discussion thus far has mostly ignored those risks, but it is now time to confront them. Though doing so might involve significant reallocation of power and responsibilities among institutions, these dangers could be mitigated.

#### 1. *Prosecutorial Misconduct and False Convictions*

Take the most obvious risk first. Punishment-maximizing prosecutors' eagerness to pursue convictions might create an unacceptable risk of the prosecution of the innocent. Indeed, scholars have explained miscarriages of justice in our own system as the result of prosecutors abandoning their minister-of-justice role.<sup>257</sup> A single-

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<sup>254</sup> Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491 (2008).

<sup>255</sup> See Brown, *supra* note 121, at 256–61.

<sup>256</sup> Richard H. McAdams, *Reply*, in CRIMINAL LAW CONVERSATIONS 539, 540 (Paul H. Robinson et al. eds., 2009).

<sup>257</sup> See MEDWED, *supra* note 6, at 2–3 (arguing that prosecutors often allow their zealous advocacy to overtake their minister-of-justice role).

minded focus on obtaining conviction can create an “ends-justifies-the-means mentality, resulting in various forms of prosecutorial misconduct.”<sup>258</sup> If prosecutors abandoned the minister-of-justice ideal entirely, wouldn’t these problems get even worse?

This risk is unquestionably real. But there are two reasons to think it could be less of a problem than it might seem. First of all, prosecutors who cared only about maximizing punishment would have no interest in going after innocent people. At least where prosecutors faced limits on how many cases they could bring, they would choose cases that would lead to convictions most easily—that is, the cases with the most compelling evidence of guilt. Indeed, Parrillo notes that the 19th-century system of conviction-based fees were seen as “affirmatively *protecting* the innocent”<sup>259</sup>: “Conviction fees encouraged public prosecutors to allocate their resources toward cases that would ‘pay,’ which gave them reason to avoid initiating prosecutions likely to end in acquittal . . . .”<sup>260</sup> Of course, if trial results largely turn on systematic biases unconnected with substantive guilt, then prosecutors who care only about charging those most likely to be convicted will not reliably sort between the innocent and guilty. Yet, if this is true, that is a problem with trial procedures themselves, rather than with the system of incentives we give to prosecutors.

Second, though a system that incentivized prosecutors to focus solely on punishment might seem to encourage bad behavior by prosecutors, such a system could actually better deter bad behavior than ours does. Recall the earlier discussion of remedies for prosecutorial misconduct. Precisely because prosecutors do not (and are not supposed to) care only about a single goal, it is challenging to craft an effective remedial scheme to punish and prevent misconduct. Without a theory of how much prosecutors care about reversals of convictions, reduction in sentences, and other tools in the judicial toolkit, it’s impossible to know how effective such remedies will be. Making prosecutors focus on a single goal—maximizing punishment—creates a powerful lever that can be used to shape behavior. The system could deter misconduct directly through the way it portioned out punishment to defendants—for example, by providing a sentence reduction for instances of less serious misconduct. Or it could do it indirectly—if prosecutors were paid or otherwise professionally rewarded for the amount of punishment they obtained, the system could (in addition to levying other sanctions) deny them credit for all instances of miscon-

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<sup>258</sup> Melilli, *supra* note 61, at 690 (footnotes omitted).

<sup>259</sup> PARRILLO, *supra* note 88, at 265 (emphasis added).

<sup>260</sup> *Id.*

duct. Either way, as long as the legal system effectively calibrated remedies to respond to bad behavior, it could encourage consistent zeal without encouraging misconduct—hard blows, but not foul ones.

Finally, in evaluating this proposal what's relevant are comparative, not absolute, judgments. The question is not whether punishment-maximizing prosecutors would be responsible for more injustice as compared to an idealized vision of the prosecutor as minister of justice, a prosecutor who never brought charges unless the evidence was all but certain. The question is whether punishment-maximizing prosecutors would be responsible for more or less injustice as compared to *real* prosecutors, operating under their complex mix of political and professional incentives. If, for example, our trial system does a poor job of sorting between innocent and guilty defendants, there is no reason to think that prosecutors blind themselves to that fact when deciding whom to charge. What is worse, political accountability creates its own problems. As noted, politically motivated prosecutors sometimes have incentives to prosecute innocent defendants even when there is little chance of victory. Punishment-maximizing prosecutors would not behave that way. Adversarialism could thus protect, rather than jeopardize, the innocent.

## 2. *Equitable Discretion and Harsh Punishment*

A system involving fully adversarial prosecutors seems to involve two additional risks related to leniency: such prosecutors would not exercise equitable discretion in deciding whether to bring charges, and they would also seek harsh sentences for less culpable wrongdoers. Both risks could be mitigated.

Take equitable discretion first. Punishment-maximizing prosecutors would bring all winnable cases—which means that even if a particular prosecution were not in society's interest, all things considered, a prosecutor would nonetheless seek a conviction. Some amount of equitable discretion may be necessary to avoid serious injustice, such as where a particular defendant is technically guilty but obviously not culpable. More generally, where legislators may paint with a broad brush in drafting criminal statutes, equitable discretion may be necessary to sand off the law's rough edges.<sup>261</sup> A system in which prosecutors never exercise equitable discretion thus seems troubling.

Yet a system with fully adversarial prosecutors need not be one that lacks equitable discretion entirely. The solution could be to dele-

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<sup>261</sup> See O'Neill, *supra* note 41, at 231–32 (describing how Congress is ill-equipped to tailor criminal laws to specific cases, forcing prosecutors and judges to refine the law in individual application).

gate responsibility for weeding out cases for equitable reasons to actors other than prosecutors. A reinvigorated grand jury, such as Bowers proposes, could serve this role well.<sup>262</sup> Grand juries may be more representative of the conscience of the community than prosecutors are. Alternatively (or additionally) judges could receive more power to dismiss charges at an early stage for equitable reasons. Right now, both judges and grand juries screen cases mainly (to the extent they serve a screening role at all) for legal sufficiency.<sup>263</sup> But they may be better equipped than prosecutors to screen cases on equitable grounds.

If retaining political accountability is important, the power to decline prosecutions could be given to some elected or otherwise accountable official—so long as that person was separated from control over litigating decisions within the criminal process. That approach might provide the benefits of using politically accountable prosecutors without creating distorting effects on the adversarial process itself. One could also imagine giving the official in charge of leniency power to narrow criminal statutes across a swath of cases. Legislatures may simply lack the capacity and knowledge to draft statutes that are sufficiently tailored to focus solely on truly harmful conduct. That problem does not require the kind of prosecutorial discretion seen in our system, however. Legislatures could delegate broad power not to individual prosecutors, but to some other official more capable of identifying lines between harmful and harmless conduct.<sup>264</sup>

However it were accomplished, effectively stripping prosecutors of equitable discretion (as a fully adversarial system would) could have significant benefits. One problem with our current system is the opacity of prosecutorial discretion: Where a prosecutor declines to press charges, it is often unclear whether the underlying decision is based on legal considerations (*e.g.*, the evidence of guilt is weak) or

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<sup>262</sup> Josh Bowers, *The Normative Case for Normative Grand Juries*, 47 WAKE FOREST L. REV. 319, 329–35 (2012) (arguing that grand juries are well-suited to make equitable decisions because they are composed of individuals who are lay and local).

<sup>263</sup> As noted, the grand jury is essentially defunct as a check on prosecutorial decisionmaking. See *supra* Section II.C.1. Judges, too, do less than they could to check cases for legal sufficiency at the outset, at least at the federal level. As James Burnham recently explained, though federal district courts have the power to dismiss indictments for legal insufficiency at the outset, they rarely do so. James M. Burnham, *Why Don't Courts Dismiss Indictments? A Simple Suggestion for Making Federal Criminal Law a Little Less Lawless*, 18 GREEN BAG 2D 347, 348 (2015).

<sup>264</sup> Along these lines, Dan Kahan's proposal to give *Chevron* deference to statutory interpretations advanced by the Department of Justice (but not to those advanced merely by individual U.S. Attorneys) is particularly instructive. See generally Kahan, *supra* note 173, at 486–90.

other considerations (e.g., the prosecutor disagrees with the policy judgment underlying the criminal statute). A system in which prosecutors consistently behaved like adversaries would be much more transparent: If the prosecutor brought charges, the public would know that the case was potentially winnable, and then the relevant equitable decision-maker would have to decide—publicly—whether the case should proceed.

Now take the problem of overly harsh punishment. Although not every defendant deserves the maximum punishment for each violation of law, punishment-maximizing prosecutors would have incentives to seek the maximum in each case. Yet again, the proper solution may be to transfer that power to other decision-makers. Judges, or perhaps juries, could receive more control over sentencing after a conviction. Judges might also need to exercise the ability to reduce a charge if it appeared disproportionately harsh given the facts of the case. However the system were constructed, prosecutors would have incentives to consistently *seek* maximal punishment—but that does not mean that defendants have to always *receive* the maximal punishment. Again, ensuring consistent adversarialism by prosecutors would make the way that leniency is exercised more transparent. If a defendant were to receive a particularly low sentence for a particular crime, it would be because a judge (or perhaps a sentencing jury) selected that sentence—not because the prosecutor simply declined (without having to provide any reason at all) to ask for a harsher sentence.

One response is that these solutions might simply replicate the problems that adversarialism was supposed to solve. If other institutions reliably exercise discretion, won't that eliminate any potential negative political feedback that would cut against overbreadth? And if judges or juries are to bear more responsibility in selecting sentences, won't they just reproduce the bias that adversarialism supposedly eliminates? Neither body is immune from bias; for example, juries in particular may bear significant blame for the racially skewed application of the death penalty.<sup>265</sup>

Yet taking responsibility for equitable discretion away from prosecutors, and giving it to some other official or institution required to announce publicly that leniency was being exercised, could change the way discretion was exercised. Imagine, for example, if a public official promulgated a notice stating that young people in wealthy, white zip

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<sup>265</sup> See Justin D. Levinson et al., *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. REV. 513, 522 (2014) (concluding that “death-qualified jurors are more racially biased (both implicitly and explicitly) than non-death-qualified jurors and also that both implicit and explicit biases can play a role in the ultimate decision of whether a defendant lives or dies”).

codes wouldn't be charged with drug crimes even if the cases could be proven, or that if they were charged they would be eligible for more lenient charges than youthful defendants from poorer, less white neighborhoods. Such a policy, if actually announced publicly, would almost certainly be politically unsustainable (not to mention unconstitutional). Yet we effectively have such policies in our system today: the key difference is that because the relevant discretion is exercised case by case, in a largely invisible way, through unreviewable charging decisions, we can largely avoid having an open debate about whether it is fair or good policy.<sup>266</sup>

Discriminatory punishment might also be less of a problem in a fully adversarial system. Discriminatory charging decisions are largely invisible and unreviewable; again, it's hard to know whether a prosecutor declined to seek a more severe charge or penalty because the facts didn't support it or because of equitable reasons. In an adversarial system, all the equitable discretion would be exercised by judges or juries, groups which arguably pose more manageable challenges in rooting out bias. Sentencing decisions by judges are public, on the record, and often subject to appellate review, which could help weed out bias. Juries, by their nature, have the potential to be more representative of various groups than are prosecutors, and other reforms could reduce biased decisionmaking.<sup>267</sup>

Any system that has some form of equitable discretion will pose a real risk of bias and discrimination, but there's no reason to believe that our own system has reached the perfect solution. A truly adversarial system might be an improvement.

### 3. *Case Selection*

Another risk concerns case selection. Assuming that prosecutors had finite resources, they would still have to choose their cases to some degree, and the danger is that they would choose poorly. Judge Wilkinson has warned of the danger in prosecutors who "pick only low-hanging fruit," i.e., "cases that are easy to work up or easy to prove" rather than addressing "larger threats to social well-being" that involve more work to prosecute.<sup>268</sup> Indeed, Parrillo notes that

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<sup>266</sup> This suggests that if judges or grand juries were to play a role in charging decisions, some requirement that they give publicly stated reasons for declining to charge might be helpful.

<sup>267</sup> One recent study concluded, for example, that merely including one black juror in a jury *pool* is sufficient to eliminate a gap between conviction rates of black and white defendants. Shamena Anwar et al., *The Impact of Jury Race in Criminal Trials*, 127 Q.J. ECON. 1017, 1019 (2012).

<sup>268</sup> J. Harvie Wilkinson III, *In Defense of American Criminal Justice*, 67 VAND. L. REV. 1099, 1135 (2014).

critics of the old conviction-based compensation system “complained that the fee system’s imperative to maximize convictions pushed U.S. Attorneys to round up the bit players in criminal operations rather than pursue the leading men.”<sup>269</sup>

This risk is significant, and it suggests that prosecutorial incentives might require careful calibration. Perhaps prosecutors need external incentives to go after the major players in criminal operations and to take on other difficult-to-prove but socially important prosecutions. Yet if that is true, perhaps we should consider how to more carefully provide those incentives without simply giving political actors free rein to use the criminal litigation process for whatever purposes they desire. Even if we need to provide *some* additional incentive to prosecutors to take on “big” cases, the problem with our present system could be that prosecutors have *too much* incentive to find those cases—because they obtain significant political gains from taking down well-known people, there is a large incentive to focus their efforts on such defendants even if evidence of guilt is not strong.

Perhaps the system could provide some bonus (financial or otherwise) to prosecutors for taking on large and difficult-to-prove cases, without destroying the benefits of consistently adversarial behavior in the litigation process. Alternatively, it would be possible to achieve this effect through docket constraints: if, say, some prosecutors within a prosecutor’s office were incentivized to maximize punishment but were limited to prosecuting certain categories of major crime, we might provide sufficient incentive for pursuing major players without creating opportunities for entrepreneurialism. The problem is that letting prosecutors choose cases without *any* regard for maximizing punishment gives them too much freedom to pursue their own agendas.

### C. *Thoughts on Implementing Adversarialism*

The previous discussion largely bracketed practical questions about *how* to incentivize prosecutors to be fully adversarial. Given that this proposal is offered more as a thought experiment than a reform proposal, getting into the weeds on how to implement a fully adversarial system would miss the point. Still, to succeed as a thought experiment the proposal needs to feel plausible, or at least possible, so this Section offers a few thoughts on whether a truly adversarial system might work in practice.

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<sup>269</sup> PARRILLO, *supra* note 88, at 279.

### 1. *Choosing Metrics and Dividing Responsibility*

Thus far, I have talked about prosecutors who consistently seek to maximize punishment, without fully articulating what that might mean in practice. One option is simply giving prosecutors a mandate to maximize total sentence-years.

Yet there are two serious problems with that simplistic approach. First, it may provide too much incentive for prosecutors to bring weak charges, so long as doing so offered some chance of a conviction and punishment. By itself, it would also encourage too much misconduct. A better mechanism would be a system that kept track of the punishment that prosecutors obtained, while denying credit, or providing some kind of demerit or penalty for instances of misconduct. Calibrating precisely what level of penalty would be necessary to provide a sufficient deterrent might be complicated, but it could provide a powerful tool for accountability. Would prosecutors be as willing to risk withholding exculpatory evidence if, for example, the discovery of that violation caused them to lose professional credit (and perhaps compensation) for half of the cases they prosecuted in that year? Moreover, such a system would enable fine-tuning of incentives without actually distorting the punishment defendants received as contrasted with Starr's proposal, which would actually reduce a defendant's sentence in cases of prosecutorial misconduct that did not affect the integrity of the verdict.

A second problem with a simple mandate to maximize punishment is that it might create a real tension between adversarialism in the global sense and adversarialism in the local sense. A prosecutor whose goal was simply to maximize sentence-years within resource constraints might simply bring many small charges in the hopes of inducing lots of cheap guilty pleas. This would seriously undermine some of the benefits that adversarialism is supposed to offer. I have described how criminal law might function better if prosecutors were adversarial both globally—choosing cases based solely on their likelihood of leading to convictions and punishment—and locally—seeking maximal punishment in each case. Prosecutors incentivized to maximize punishment, but who had the power to select which cases they litigate, might thus sacrifice local adversarialism for global adversarialism.

One solution is to separate charging decisions from litigation decisions, and to provide some kind of disincentive for selecting weak cases at the charging stage. The key would be trying to make the charging prosecutors indifferent towards resource constraints, so that the likelihood that a particular case would lead to a plea (as opposed

to a trial) would not enter into the equation, coupled with some mechanism to ensure that prosecutors charged with litigating individual cases had incentives to be zealous.

Figuring out the details would be complicated, but here is one way it could work. Imagine that a set of prosecutors were given responsibility for screening the initial evidence and for charging decisions—but not for litigating.<sup>270</sup> They could select whichever cases they wanted for prosecution, with the goal of maximizing total punishment obtained. They would need some incentive *against* selecting weak cases. This could be done by simply limiting the number of cases they could select for prosecution—where only some cases can be brought, punishment-maximizing prosecutors would presumably select only the strongest cases.

Another option would be to let them select however many cases they want—but provide some penalty for choosing too many cases that lead to acquittals or dismissals. The idea would be to give these prosecutors incentive to bring charges in only those cases highly likely to lead to convictions—and thus those cases where the evidence was strong. One could imagine rewarding prosecutors based on the total number of sentence-years ultimately obtained in the cases they select—yet penalizing them if the eventual acquittal rate dropped below some high rate (say, 95%). This mechanism would have the effect of making the screening prosecutors apply a very demanding standard of proof before bringing charges.

After the charging decision was made, a different set of prosecutors would be given responsibility for actually litigating the cases. Because the charging decision would already be made, the prosecutor would have no ability to charge-bargain with the defendant for a lower offense.<sup>271</sup> But the litigating prosecutors would also need to be incentivized to seek not merely convictions, but maximal punishment within each case, to avoid letting prosecutors offer cheap (and coercive) plea deals. Prosecutors could be evaluated based on how much punishment they obtained in comparison to the maximum amount they conceivably could have obtained based on the charges selected

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<sup>270</sup> Rachel Barkow has argued for such an institutional division of labor within U.S. Attorneys' offices. Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 895–906 (2009) (arguing for the implementation of an administrative investigative model). A number of local district attorneys' offices already employ such a division. See Langer, *supra* note 143, at 296 (2006) (describing the feasibility of dividing investigative and adjudicative tasks).

<sup>271</sup> Cf. Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 1001 (2009) (“Centralized charging units, staffed by prosecutors who will not try the cases themselves, eliminate prosecutors' self-interest in overcharging weak cases so that they can later charge-bargain them away.”).

by screeners. Such an incentive structure would encourage consistent adversarialism throughout the prosecution.

There are additional variations that could be implemented to optimize the system. The litigating prosecutors might be allowed to withdraw charges entirely in some number of cases where a conviction appeared sufficiently unlikely, in order to provide a safeguard against erroneous charging decisions by the first-line prosecutors. Whatever the specifics, it seems possible to design an incentive scheme that would encourage adversarialism while also discouraging undesirable conduct.

## 2. *Motivating Prosecutors*

Even if we can identify precisely how we would measure adversarialism, there's a further question about whether it would be actually possible to make prosecutors behave in a consistently adversarial fashion. Generally, there are two methods for ensuring optimal behavior from actors within governmental institutions: you can select good types likely to behave in the desired way, or you can sanction bad behavior to incentivize good conduct.<sup>272</sup> The first option suggests that one could encourage more consistent adversarialism by changing the identity of prosecutors. As previously discussed, earlier in American history, many cases were brought by private prosecutors, who likely behaved much more like profit-motivated plaintiffs than public prosecutors do today. Reintroducing privatized criminal prosecution—as some recent advocates of victim's rights have suggested<sup>273</sup>—is thus one option for ensuring consistent adversarialism. Unlike public prosecutors, victims will have a personal stake in a case and thus reason to insist on pushing the law to its limits.

But despite its historical pedigree, private prosecution is unlikely to be a good option for our system today. Many people would feel discomfort with the idea of giving private citizens the power to force accused wrongdoers into court to answer criminal charges. Private prosecution creates the possibility of abuse by those who might use the criminal process as a way of settling scores. Moreover, a wide range of crimes today are often “victimless,” and in those cases there would be no relevant private party to handle the litigation. Such crimes often require extensive investigative work to detect and prove,

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<sup>272</sup> See James D. Fearon, *Electoral Accountability and the Control of Politicians: Selecting Good Types Versus Sanctioning Poor Performance*, in *DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION* 55, 56–57 (Adam Przeworski et al. eds., 1999).

<sup>273</sup> See, e.g., Cardenas, *supra* note 74, at 392–96 (proposing systemic reforms that would make the victim a party in criminal proceedings and allow the victim to challenge prosecutorial decisions).

and private litigants are likely not the best parties to lead such efforts. For these and other reasons, private prosecution fell by the wayside in this country, and there are good arguments against turning back the clock.

Therefore, sticking with professionalized, public prosecutors is likely the best option. Because public prosecutors have no inherent stake in the cases they bring, some mechanism would be necessary to incentivize them to behave in a more consistently adversarial manner. History provides one suggestion: financial incentives. Recall that federal prosecutors were once paid by the conviction.<sup>274</sup> Instead of, or in addition to, their salaries, prosecutors could receive dollar rewards for acting adversarially—for example, a litigating prosecutor could receive some bonus in proportion to the amount of punishment obtained in any given case, in order to ensure local adversarialism. If those financial incentives were large enough to dwarf other sources of motivation, they could work.

The terms of the financial incentives could be tweaked to optimize behavior. For example, Tracey Meares has proposed ending overcharging through financial incentives: if a prosecutor received a bonus whenever “the defendant is convicted on the same charge or charges that the prosecutor pursues at the outset of the case,” she would be “motivated to charge the defendant with *only* those offenses the prosecutor believed she could prove at trial and with *all* those offenses the prosecutor believed she could prove at trial.”<sup>275</sup> One can imagine other ways to use money as a tool to combat abuses of discretion.

But though the profit motive provides a powerful lever for incentivizing prosecutors, financial rewards have costs. Parrillo notes that conviction fees were ultimately rejected in part because they encouraged distrust of government: the perception of prosecutors as self-interested profit seekers encouraged “resentment, distrust, and resistance” among the populace.<sup>276</sup> Such harm to legitimacy could outweigh any benefits more consistent adversarialism would create. Any financial rewards would thus have to be carefully implemented to try to avoid these bad effects.

But money is not the only way to encourage adversarialism. Stephanos Bibas has suggested that non-monetary rewards—such as promotions and commendations—could influence prosecutorial behavior.<sup>277</sup> Thus, if such rewards were divvied out based on internal

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<sup>274</sup> See *supra* Section I.C.

<sup>275</sup> Meares, *supra* note 139, at 873.

<sup>276</sup> PARRILLO, *supra* note 88, at 282.

<sup>277</sup> Bibas, *supra* note 31, at 448–51.

performance metrics designed to track adversarialism, they could promote more consistently adversarial behavior. And even in the absence of any changes to the formal incentive structure, if we changed our conception of what prosecutors are supposed to be doing, their behavior would likely change.<sup>278</sup>

Whatever mechanism were chosen, however, it would need to be combined with insulation against other pressures. If those who run prosecutors' offices continue to see themselves as politicians, political incentives to avoid punishment maximization might be too powerful for prosecutors to resist, even in the face of strong incentives in the other direction. So long as prosecutors' offices are ultimately led by political actors, politics is likely to exert a strong pull. That would mean some kind of formal wall separating line prosecutors who make individual charging and litigation decisions from elected officials. But such insulation would have to go beyond mere formal rules. As long as serving in a prosecutors' office is seen as a stepping-stone to a political career, political considerations are likely to influence prosecutorial choices more than they should.

There are more practicalities to consider, but for now the important point is that, though calibrating incentives appropriately might not be simple, there are various possible ways to encourage the right kinds of adversarialism.

#### D. *A Note on Resource and Power Asymmetries*

My analysis thus far has focused on one important kind of asymmetry in the criminal process: the asymmetrical *motives* between the prosecution and the defense. Yet this is, of course, not the only kind of asymmetry in criminal cases. No less important are disparities in the relative power and resources between the two sides. Observers have argued that prosecutors have a number of significant advantages over the accused in criminal cases. The prosecution is generally better funded than the defense, and it has access to significantly better investigative resources given its relationship with police departments.<sup>279</sup> Despite our system's lip service to the presumption of innocence, the prosecution has a significant advantage in perceived legitimacy: "the jury enters the box with an overwhelming predisposition to believe that the accused is guilty as charged."<sup>280</sup> In the plea bargaining pro-

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<sup>278</sup> Cf. Stuntz, *supra* note 38, at 581 ("A culture in which prosecutors are taught that it is unprofessional to decline to charge based on anything other than lack of evidence will lead to different charging patterns than one in which prosecutors are taught that they are czars of their dockets, dispensing justice as they see fit.").

<sup>279</sup> See Luban, *supra* note 26, at 1732–35.

<sup>280</sup> *Id.* at 1741.

cess, the prosecution has the upper hand because it effectively acts as a monopsonist: a unitary actor negotiating with individual defendants.<sup>281</sup> And while the system builds in some procedural asymmetries favoring defendants, critics argue that formal procedural rules like the high burden of proof are insufficient to counteract the prosecution's vast power.<sup>282</sup>

The discussion has largely bracketed these asymmetries, but the time has come to address them. Fixing the *motive* asymmetry in criminal prosecution that I have focused on would not address these other asymmetries. And my argument is not that ensuring consistent adversarialism by prosecutors, by itself, would lead to a system of criminal justice that was perfectly fair and well functioning across all dimensions. Indeed, promoting adversarialism without addressing power disparities could exacerbate many problems. For example, to the extent that the coerciveness of plea bargaining depends in part on the power differential between the two sides, giving prosecutors motives to seek maximal punishment, without addressing that power differential, could just make defendants subject to even more coercive pressure. Ensuring adversarialism is not a cure-all for all the problems with our system.

Instead, the point I want readers to take away is subtler: it is that a well designed adversarial criminal justice system would require addressing both kinds of asymmetries (power and motive). Although prior observers have advocated fixing the power- and resource-differential problem, that is not enough. Even if defendants were given more leverage in plea bargaining, the process would still be coercive in a world where prosecutors had no incentive to seek maximal punishment and where legislators felt free to draft overly harsh penalties in order to give prosecutors better weapons for obtaining pleas. That problem will exist so long as the motive asymmetry to which I have drawn attention persists. Recognizing the failings of the adversarial process in criminal justice requires understanding that motive asymmetry, and not merely the power asymmetries that are already familiar.

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<sup>281</sup> See Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CALIF. L. REV. 1471, 1477–88 (1993) (explaining the prosecutor's relationship to defendants in plea bargaining using economic terminology).

<sup>282</sup> See, e.g., Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 395–423 (1992) (discussing the prosecutor's extensive power asymmetries including sway over the grand jury, charging discretion, favorable evidentiary rules, and the ability to reward cooperation); Goldstein, *supra* note 26, at 1152–57 (questioning the suggestion that proof beyond a reasonable doubt instills “substantial advantage to the defendant and disadvantage to the prosecution”).

## IV.

## IMPLICATIONS: THOUGHT EXPERIMENT AS CRITIQUE

The previous Part imagined a system with fully adversarial prosecutors and argued that such a system might have surprising advantages over our own. Some may remain unconvinced that the risks might be as easily mitigated as the last Part suggests. And in any event, given how different such a system would look from our own, it's hard to come to any confident conclusion about whether an adversarial system really would be a better one—let alone whether changing our system would be wise.

For these reasons, it is important to stress that the proposal is merely a thought experiment. The ultimate goal is not to convince the reader that embracing adversarialism is the best path. Rather, I want to suggest that the particular approach our system in fact does take—our combination of an adversarial process with politically accountable, public prosecutors has no sound justification. Understanding how our system breaks down in practice requires understanding that fundamental problem. Put another way, the ultimate goal is more diagnosis than it is prescription. Adversarialism might or might not solve current problems with plea bargaining. But no matter what, I don't think it's possible to understand what's wrong with plea bargaining without recognizing how plea bargaining becomes more coercive the less that prosecutors care about maximizing sentences.

Beyond helping explain particular areas where our system breaks down, a hypothetical, fully adversarial system provides a useful looking glass through which we can reexamine some questionable, or at least insufficiently explained, assumptions of our own system. This Part examines some of those deep assumptions. Section A reconsiders the minister-of-justice ideal. Section B reconsiders the benefits of political accountability for prosecutors. Section C questions our fundamental commitment to the adversarial ideal.

*A. Reconsidering the Minister-of-Justice Ideal*

The previous Part's thought experiment should leave us with lingering doubts about the minister-of-justice ideal. As discussed, some have criticized that ideal for being hard to define and even incoherent.<sup>283</sup> Perhaps a deeper problem is simply that that ideal rests on naïve faith in public actors. Our system gives prosecutors a huge amount of power, and instructs them to use that power to pursue the ends of justice. But we do not combine that delegation with strong

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<sup>283</sup> See *supra* Section I.B.

external accountability mechanisms.<sup>284</sup> Instead, we largely trust prosecutors to do the right thing. Prosecutorial decisions about whom to charge, whom not to charge, and what specific charges to bring, are largely unreviewable. And the system's structural checks against abuses of power are weak.<sup>285</sup> Our main approach to preventing miscarriages of justice is trusting that prosecutors will exercise their powers responsibly.

Indeed, the most sophisticated defenses of the way in which our criminal justice system broadly empowers prosecutors emphasize a view of prosecutors as noble public servants. Buell's justification of overbreadth in criminal law depends, in part, on a conception of prosecutors as public actors who seek to enhance "the public interest" and who "should be expected . . . to seek out problems of a public nature and see if they might use legal tools to address them."<sup>286</sup> Similarly, Gerald Lynch has defended our system's reliance on prosecutors as the primary adjudicators in criminal cases by insisting that prosecutors can be expected to "conduct themselves with fairness and in the broadest public interest."<sup>287</sup>

Buell and Lynch are right that many or most prosecutors are faithful public servants. Inevitably, however, some prosecutors fail to live up to this standard. There are far too many stories of prosecutors whose zealousness or self-interest caused them to ignore their *Brady* obligations and other ethical rules, resulting in significant injustice.<sup>288</sup>

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<sup>284</sup> See Ronald F. Wright & Marc L. Miller, *The Worldwide Accountability Deficit for Prosecutors*, 67 WASH. & LEE L. REV. 1587, 1604–09 (2010) (noting that most states rely solely on public elections to ensure the accountability of their prosecutors and analyzing the shortcomings of such an approach).

<sup>285</sup> For example, though *Brady* imposes an obligation on prosecutors to disclose exculpatory evidence to the defense, it is largely left to prosecutors themselves to decide whether the evidence is sufficiently "material" to require disclosure. Scott E. Sundby, *The Conundrum of Zealous Representation*, 8 OHIO ST. J. CRIM. L. 567, 578 n.26 (2011) ("[T]he enforcement of prosecutors' obligations to disclose exculpatory evidence has largely been left to the prosecutors themselves."). Even when violations of this obligation are later discovered, a conviction may be reversed but the prosecutor him- or herself is unlikely to face meaningful consequences. JOY & McMUNIGAL, *supra* note 65, at 17 ("[P]rosecutors are rarely disciplined for *Brady* violations.").

<sup>286</sup> Buell, *supra* note 254, at 1516. While Buell recognizes that broad delegations to prosecutors can create significant agency costs, *id.* at 1554–55, he seems optimistic that those costs do not swamp the benefits of giving prosecutors more tools to pursue bad actors who will seek to evade legal prohibitions.

<sup>287</sup> Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2150 (1998). In fairness to Lynch, he acknowledges that not all prosecutors live up to this standard and advocates for some additional institutional checks. *Id.* Nonetheless, he is sanguine about the possibility that prosecutors can be expected to live up to our highest ideals.

<sup>288</sup> To take just one example from a case in which I was involved, an elected Commonwealth's Attorney in Virginia admitted in court that he prefers not to disclose

Moreover, even when prosecutors believe they are pursuing the ends of justice, they can still make mistakes about what justice requires in any particular case. And given the tremendous power that prosecutors exercise, those mistakes can be very costly.

Rather than hoping prosecutors will always be public-minded faithful agents, perhaps we should accept that some inevitably won't—and design the system to prevent bad results nonetheless. The American constitutional order rests on the belief that those who occupy public offices are human, and thus often fallible and sometimes guided by base motives—making structural mechanisms necessary to prevent abuses of power. As Madison put it, “[i]f angels were to govern men, neither external nor internal controls on government would be necessary.”<sup>289</sup> Experience shows that prosecutors are not angels. Rather than hoping that things were otherwise, we should accept that reality, and design the system accordingly. The minister-of-justice ideal is part of a larger approach that depends on trust that those who exercise vast prosecutorial powers will consistently do so responsibly. Because experience shows us that trust is often undeserved, we need a more reliable method for limiting prosecutorial power.

This Article has proposed an alternative vision, a system that would not rely on the assumption that prosecutors always act in good faith. It instead imagines that prosecutors would act solely as zealous advocates, while other mechanisms would shape their incentives in order to prevent abuses of power. Whatever the ultimate merits of that proposal, it has one important virtue: it does not rely on unrealistic assumptions about the good faith of public actors. It instead treats public officials as self-interested actors and seeks to shape that self-interest towards good ends. And even if this particular proposal is not the right solution, our system needs to be better premised on realism about prosecutors.

### *B. The Puzzles of Prosecutorial Accountability*

Thinking through the costs and benefits of a fully adversarial system implicates difficult questions about our system's mechanism for producing the right kinds of behavior by prosecutors. Consider the conventional arguments for the current system. A leading explanation for the use of public prosecutors in criminal justice is that public officials can act in the public's interest. In private civil litigation, there is

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potentially exculpatory material to defendants because they might use it “to fabricate a defense.” *Wolfe v. Clarke*, 691 F.3d 410, 423 (4th Cir. 2012). In *Wolfe*, the prosecution's failure to turn over exculpatory evidence resulted in the reversal of a capital murder conviction. *Id.* at 426.

<sup>289</sup> THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

often a large divergence between private motives to use the legal system and the public benefits that litigation creates; using public actors to bring prosecutions is seen as a way to avoid this problem in criminal law.<sup>290</sup>

Yet this explanation leaves important questions unanswered. It is true that in civil justice there is often a divergence between the social interest in litigation and the private interests of profit-seeking plaintiffs.<sup>291</sup> But it does not follow from this observation that no such divergence exists whenever public prosecutors enter the picture. Prosecutors may formally represent the public, but there is no reason to assume they will inevitably choose the socially optimal degree of prosecution. Just as the public and private social motives to use the legal system can diverge, so too can the public motive and the prosecutorial motive.<sup>292</sup> The key is figuring out some mechanism to encourage and incentivize prosecutors to consistently make choices that enhance the public interest.

The previous Part argued that ensuring consistent adversarialism might be one such mechanism. Many may resist this conclusion on the ground that the public interest is not served by maximizing punishment, and that prosecutors instead should focus on justice. Along these lines, Mary Fan has persuasively argued against evaluating prosecutorial performance using statistics like conviction rates, because such statistics are poor proxies for the substantive aims of the criminal law.<sup>293</sup> One could reach a similar conclusion about punishment maximization as a goal. We don't want prosecutors to think only about maximizing punishment in selecting cases, and severity may only roughly track the importance of punishing any particular crime. Murder is punished more severely than shoplifting, and most people would agree that murder should be a higher priority for prosecutors than shoplifting. But how should prosecutors allocate resources between armed robberies and wire frauds? We might punish armed robberies with heavier sentences—perhaps because we think they are

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<sup>290</sup> See Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575, 600 (1997) (arguing that public prosecution, as opposed to private prosecution, ensures that the social benefits of prosecuting crime are captured, including the benefits of deterrence and incapacitation).

<sup>291</sup> See generally *id.*

<sup>292</sup> See Vikramaditya S. Khanna, *Double Jeopardy's Asymmetric Appeal Rights: What Purpose Do They Serve?*, 82 B.U. L. REV. 341, 364 n.94 (2002) (explaining that the public and prosecutors may place different weight on the importance of avoiding false convictions); William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1892–93 (2000) (arguing that the reason for divergence between public and prosecutorial interest is because individual prosecutors do not internalize the effects of their decisions).

<sup>293</sup> Mary De Ming Fan, *Disciplining Criminal Justice: The Peril Amid the Promise of Numbers*, 26 YALE L. & POL'Y REV. 1, 4–5 (2007).

particularly hard to deter, or particularly blameworthy. But maybe fraud actually does more social harm even if we think it deserves less punishment. Prosecutors need to have discretion in choosing which cases to bring in order to best promote the public interest.

This makes sense as far as it goes, and it may explain why people would find a truly adversarial system unappealing. Yet the argument misses a step. If we think prosecutors should be pursuing aims that don't correlate with seeking maximal punishment, we need some kind of structural mechanism that will ensure that prosecutors actually act in the public's interest, and don't pursue their own agendas. Our system's preferred mechanism for aligning prosecutorial behavior with the public's interest is political accountability. But here, too, there are major gaps in the theory. We don't have a good explanation of how political accountability, by itself, should ensure that prosecutors focus their energy on the right kinds of cases. If the public's attitudes towards criminal justice are distorted by a lack of empathy and by cognitive biases—as many have argued<sup>294</sup>—then political responsiveness seems unlikely to produce the optimal level of prosecution. Even if punishment maximization is the wrong goal, why is the right goal letting politically accountable prosecutors follow the political winds?

We also lack a good account of how political accountability prevents abuses of power. We divide power over criminal justice between two different politically accountable branches of government—legislatures draft laws and the executive branch applies them. The main justification for this arrangement is the separation of powers: Because criminal sanctions involve grave threats to liberty, it's considered important to provide multiple vetogates; someone can go to prison only if two different, separately accountable branches (as well as the judiciary) agree that criminal sanctions are appropriate.<sup>295</sup>

Yet this traditional separation-of-powers story collapses once one recognizes that the existence of an additional political vetogate can have feedback effects. The fact that prosecutors are separately accountable from legislators means that prosecutors will not prosecute defendants who most voters think don't deserve punishment—and it also means that legislators feel free to draft criminal statutes

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<sup>294</sup> See Epps, *supra* note 27, at 1115–17 (describing scholarly consensus on this point).

<sup>295</sup> See, e.g., Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1014 (2006) (“The separation of powers . . . requires not only that the executive and legislative branches agree to criminalize conduct but also includes the judiciary as a key check on the political branches.”); Frank H. Easterbrook, *The Case of the Speluncean Explorers: Revisited*, 112 HARV. L. REV. 1913, 1914 (1999) (“[C]riminal punishment is meted out only when all three branches (plus a jury representing private citizens) concur that public force may be used against the individual.”).

broadly.<sup>296</sup> If prosecutors were not politically accountable, but instead were simply zealous advocates who pushed law to its limits, law-making might look different. Political accountability for prosecutors thus has both costs and benefits.<sup>297</sup>

By asking whether we would be better off in a world where prosecutors single mindedly maximized punishment rather than acting as independent political decision-makers, this Article has been asking, albeit in a somewhat roundabout fashion, whether those costs might outweigh the benefits—that is, whether political accountability for prosecutors is a good idea. Answering that question is not possible here, which is why the proposal remains a thought experiment. But previous accounts of the benefits of political control over prosecution are significantly incomplete. Consider Justice Scalia’s argument in *Morrison* that perceived abuses by federal prosecutors will “come home to roost in the Oval Office.”<sup>298</sup> Justice Scalia was surely right that political control can prevent some serious abuses. But political accountability can also be responsible for other abuses of prosecutorial power. A prosecutor may decline to prosecute a technically guilty but morally blameless defendant if he fears political consequences. But that same prosecutor might also see significant political benefits in persecuting a person who is widely disliked yet innocent. We need a more complex theory of the political dynamics among voters, prosecutors, and legislators on criminal justice matters before we can conclude that political accountability over prosecution promotes the public good.

If nothing else, the value of political accountability may vary in different contexts. In terms of limiting prosecutorial discretion, political accountability may be most useful for crimes that evoke the greatest public attention. For a crime like murder, the public understands the basic definition of the crime at issue and largely wants to see cases pushed as far as the law and penalties on the books will allow against all violators. In such contexts, public attention thus provides a strong check on prosecutorial discretion,<sup>299</sup> limiting practices

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<sup>296</sup> See Stuntz, *supra* note 38, at 510–11 (arguing that broad criminal laws are mutually advantageous for legislators and prosecutors).

<sup>297</sup> Cf. Jacob E. Gersen & Matthew C. Stephenson, *Over-Accountability*, 6 J. LEGAL ANALYSIS 185, 186–87 (2014) (identifying “situations in which effective accountability mechanisms can *decrease*, rather than increase, an agent’s likelihood of acting in her principal’s interests”).

<sup>298</sup> *Morrison v. Olson*, 487 U.S. 654, 729 (1987) (Scalia, J., dissenting).

<sup>299</sup> See Vorenberg, *supra* note 54, at 1526 (“Prosecutors exercise the least discretion over those crimes that most frighten, outrage, or intrigue the public . . .”).

like pretextual prosecution.<sup>300</sup> Prosecutorial discretion is likely to be least problematic in precisely those contexts where the underlying politics encourage fairly consistent adversarialism.

Elsewhere, however, political accountability provides much less in the way of constraint. The public cares about seeing white-collar criminals prosecuted—but outside of extreme cases like the Madoff scandal,<sup>301</sup> voters have no way of knowing whether an alleged financial fraud was actually a crime—and thus no way of knowing whether prosecutors are targeting the right defendants. Voters may also lack strong intuitions about what charges prosecutors should select or what sentences are appropriate. All this gives prosecutors significant discretion in charging and plea bargaining. And that discretion creates a significant potential for abuse. In areas where political accountability does not provide a strong check on prosecutorial power, some other mechanism is needed to rein in prosecutorial discretion. Our system does not offer a satisfying option: most prosecutorial decisionmaking is unreviewable by courts, and disciplinary controls are weak at best.<sup>302</sup>

This Article has suggested attacking the problem of prosecutorial discretion from a new angle. Rather than trying to rein in prosecutorial zeal, we could simply accept and encourage it, while shifting to other actors and institutions all the responsibility for duties associated with the minister-of-justice ideal. Whether that seems like a good idea or not, thinking it through is illuminating. A number of the problems discussed above are blamed on too much discretionary power. But eliminating discretion is close to impossible, because it is difficult for external actors (such as courts) to reliably sort between good and bad uses of discretion.<sup>303</sup> Yet if prosecutors were motivated to maximize punishment consistently, they could retain their discretion—and they would be more likely to use their discretionary power in an appropriate way, declining to bring cases that were unlikely to lead to convictions while bringing all provable cases within the boundaries of the substantive law. Thus, perhaps we should worry less about

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<sup>300</sup> See Richman & Stuntz, *supra* note 168, at 605 (arguing that pretextual prosecution is not possible for serious crimes where the public is familiar with the basic elements of the crime, like murder or robbery).

<sup>301</sup> See Diana B. Henriques, *Madoff Is Sentenced to 150 Years for Ponzi Scheme*, N.Y. TIMES, June 29, 2009, at A1 (detailing the criminal investigation, conviction, and sentencing of Bernard L. Madoff).

<sup>302</sup> See Wright & Miller, *supra* note 284, at 1604–09 (detailing the drawbacks of using the electoral process to keep prosecutors accountable and observing the lack of other effective accountability mechanisms).

<sup>303</sup> See Stuntz, *supra* note 38, at 580–81 (describing the challenges in reviewing police and prosecutorial decisions in charging).

the scope of prosecutorial power, and instead should try to do more to understand, and to shape, prosecutorial motivation. Even if we do not go so far as to embrace adversarialism, it may be possible to identify ways to motivate prosecutors to use their power in the right ways.

### C. *Rethinking Adversarialism*

Embracing adversarialism, despite the arguments here, may ultimately seem undesirable or unrealistic. But that is no argument for maintaining the status quo. Instead, we should question our commitment to the criminal adversarial process in the first place. The problem is that we lack a compelling theory to justify our current approach to adversarialism. We use an adversarial process to resolve criminal cases, trusting that good results will emerge from the clash of self-interested opponents. Yet on one side of each case we rely on prosecutors that consistently fail to behave in a fully adversarial manner—and in fact we actively encourage prosecutors to be less than fully adversarial, by acting as ministers of justice. That approach may make sense when considered in the context of individual cases. But as an overall system, that approach produces troubling results.

Consider the example of plea bargaining. The vast majority of convictions in our system are resolved through pleas, with trials serving as only an occasional backstop. That arrangement might make some sense if most pleas took place fully in the shadow of expected trial outcomes. But there's no reason to think that's true. Cognitive biases and structural problems distort defendants' decisionmaking regarding pleas.<sup>304</sup> But more than that, plea bargains won't mirror expected trial outcomes if prosecutors have no inherent incentive to maximize sentence length.<sup>305</sup> Instead, the substantive law simply creates "a menu from which the prosecutor may order as she wishes."<sup>306</sup> In the plea bargaining process, prosecutors are not really acting as partisan advocates seeking compromise; instead, they are, as scholars have recognized, acting as our criminal justice system's principal adjudicators.<sup>307</sup> Yet that adjudication is almost entirely unchecked by law.

This state of affairs raises hard questions. If we trust prosecutors to make most of the determinations of guilt and innocence that for practical purposes actually matter in our system, why not go further? Why not accept "a world in which the law on the books makes eve-

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<sup>304</sup> See Bibas, *supra* note 126, at 2467–68 ("Structural forces and psychological biases sometimes inefficiently prevent mutually beneficial bargains or induce harmful ones.").

<sup>305</sup> See *supra* Section II.A.2.

<sup>306</sup> Stuntz, *supra* note 12, at 2549.

<sup>307</sup> See Lynch, *supra* note 287, at 2127 (arguing that prosecutors use their role in plea bargaining to assess guilt and determine appropriate sentences).

ryone a felon, and in which prosecutors and the police both define the law on the street and decide who has violated it”<sup>308</sup> And if that isn’t an attractive world—and to almost everyone it won’t be—what principle explains why we draw the line in the place that we have? Why is a system that criminalizes too much conduct (but not everything), and then leaves it to prosecutors to pick the really bad people who deserve punishment, acceptable?

Now, if we could be confident that prosecutors would always use their vast powers responsibly and never make mistakes, our system might be tolerable. But it is unrealistic to expect such perfection. Even though our system assumes that prosecutors will do what is in society’s interests, there is no reason to assume they always will. Instead, what we end up with is prosecutors who use the adversary process to maximize various rewards—cheap plea bargains, political victories, punishment of targeted bad actors, professional reputation, and so on. And as I have tried to show, prosecutors’ use of the adversary process to achieve those ends—to maximize values external to the legal system itself—helps explain much of what makes us uneasy about various areas of criminal litigation today.

It is thus not truly adversarial, punishment-maximizing prosecutors who should frighten us most. Such prosecutors would behave in a more rational and predictable way, and their excesses could be reined in because their motivations would be easy to predict and understand. What should worry us most are prosecutors who use the criminal process to maximize things other than punishment. That is, we should be troubled by the system we have today. And if embracing adversarialism is not the right path, perhaps we should reconsider our fundamental commitment to the adversarial model entirely.

What might it mean to abandon adversarialism? Existing scholarship provides a couple of potential paths. One well-charted course is to draw on “inquisitorial” models found in civil-law countries.<sup>309</sup> Although distrust of inquisitorialism pervades American legal dis-

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<sup>308</sup> Stuntz, *supra* note 38, at 511.

<sup>309</sup> Of course, providing a satisfying definition of the differences between adversarial and inquisitorial systems is not easy. See DAMAŠKA, *supra* note 16, at 3–6; David Alan Sklansky, *Anti-inquisitorialism*, 122 HARV. L. REV. 1634, 1639 (2009) (“[T]here [is not] even agreement about what makes a procedural system inquisitorial.”). Moreover, even if one can specify the relevant differences in terms of ideal types, real justice systems tend to combine elements of both models. See Abraham S. Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009, 1019 (1974); Sklansky, *supra*, at 1640 (explaining that most scholars characterize modern European criminal procedure as mixing inquisitorial and adversarial qualities).

course,<sup>310</sup> scholars have persuasively argued that other countries' criminal justice systems may provide more attractive models than our own, at least in some respects. For example, John Langbein has urged Americans to learn from the German model of trial procedure, which in his account manages to fairly and efficiently resolve cases without relying on plea bargaining.<sup>311</sup> Rethinking our adversarial approach would require drawing on such comparative insights.

Another source of comparative insights is not foreign but domestic: the law of the American administrative state. In recent years, scholars have pointed out the ways in which our criminal-justice system displays administrative characteristics,<sup>312</sup> and others have suggested ways in which our system might benefit from implementing lessons learned from administrative law.<sup>313</sup> A key insight of this literature is that tools developed in administrative law for checking and guiding discretion should have a place in criminal law, and that the long-held assumption that prosecutorial decisionmaking should be unreviewable requires reevaluation. Questioning the adversarial underpinning of our criminal process would require extending this line of inquiry further.

The larger lesson, however, is that one cannot make sensible choices about the structure and design of the criminal justice system without doing systematic thinking about the motivations of the public actors who participate in that system. The problem with our current system is not adversarialism, *per se*. It is that we have chosen an adversarial approach without an adequate theory of how public prosecutors' incentives will interact with the adversarial structure to produce good outcomes in the aggregate. Instead, we simply installed public actors into a litigation system that originally developed for the resolution of private disputes and assumed that everything would work well.<sup>314</sup> Simply replacing our current system with a more inquisi-

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<sup>310</sup> See generally Sklansky, *supra* note 309 (analyzing the theme of anti-inquisitorialism in American jurisprudence).

<sup>311</sup> John H. Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204 (1979).

<sup>312</sup> See, e.g., Lynch, *supra* note 287.

<sup>313</sup> See, e.g., Barkow, *supra* note 270; Richard A. Bierschbach & Stephanos Bibas, *Notice-and-Comment Sentencing*, 97 MINN. L. REV. 1 (2012); Note, *Comparative Domestic Constitutionalism: Rethinking Criminal Procedure Using the Administrative Constitution*, 119 HARV. L. REV. 2530 (2006).

<sup>314</sup> These observations have force beyond the criminal sphere. Public actors play a significant role in various kinds of civil litigation. Yet we are only beginning to understand the motivations of government lawyers. Along these lines, Margaret Lemos and Max Minzner have recently revealed how public enforcers—contrary to our vision of them as focused solely on protecting the public good—have self-interested motives for seeking high financial penalties in civil enforcement actions. Margaret H. Lemos & Max Minzner, *For-*

torial system, or a more fully administrative one, without fully accounting for the motivations of and incentives for the public actors within the system would simply replicate our original mistake in a new way. Whatever model is chosen as the ideal, it would be critical to design the system with an eye towards the incentives and capabilities of the public actors who participate in it.

### CONCLUSION

It is widely agreed that prosecutors are too adversarial. Yet it could also be true that, in a deeper sense, prosecutors are not adversarial enough. A more consistently adversarial system might have surprising advantages over our own—providing greater accountability for prosecutors and better fidelity to the rule of law, while also improving the substance of criminal lawmaking. And while actually implementing such a system may seem unrealistic or unwise, the proposal is nonetheless valuable as a limiting case, representing one extreme end of a spectrum. The other extreme end is a system in which the written law makes everyone a criminal, and it is left entirely to the discretion of law enforcers to decide who are the bad people who actually deserve to go to jail. Even if the first extreme—the more consistently adversarial system imagined here—is not the right approach, we need a better account of which precise place on that spectrum between fully consistent and totally discretionary enforcement is the right one, and why we have chosen to draw the line where we have. Moreover, even if punishment-maximization is not the right goal for prosecutors, absent some mechanism to actually make prosecutors care about enforcing the law itself—instead of merely using the law as a tool to accomplish social goals or achieve political victories—our system of prosecution will be one in which those who enforce the law also effectively make the law. Our current, half-hearted approach to adversarialism lacks any such mechanism. And that—not the spectre of truly adversarial prosecutors—is what should truly frighten us.

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*Profit Public Enforcement*, 127 HARV. L. REV. 853 (2014). Assessing whether the adversarial structure works well in public law more generally would require extending these insights further and developing a more comprehensive theory of how government lawyers behave.