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## REVISITING *OUR ADMINISTRATIVE SYSTEM OF CRIMINAL JUSTICE*

*Benjamin E. Rosenberg\**

I recall feeling shocked when I first read Judge Gerard E. Lynch's 1998 article, "Our Administrative System of Criminal Justice."<sup>1</sup> Although I recognized its description of how the criminal justice system worked, the shock came from the context in which Judge Lynch placed his observations. He pointed out what had been in front of me, unacknowledged all along: that our adversarial system of criminal justice was not adversarial at all. Instead, he posited that it resembled the European system of administrative criminal law, which had long been considered the alternative to our system of criminal justice, not its cousin. Judge Lynch further suggested that perhaps the European administrative system of criminal justice was not *so* bad, that we might learn something from it, and that we might continue to adopt some of its most attractive features.

Nineteen years after Judge Lynch's piece, this Article considers recent developments in the criminal justice system and whether Judge Lynch's observations have withstood the test of time. It suggests that Judge Lynch's observation—that our criminal justice system has strayed far from the model of the adversarial system—remains as true today as it was when he made it in 1998. It further explains that developments in the nineteen years since the publication of "Our Administrative System of Criminal Justice" have caused the criminal justice system to stray even further from the adversarial model and in ways that Judge Lynch may not have anticipated. The Article concludes with a discussion of the shortcomings of our administrative system, and it offers suggestions for ways it might be improved.

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1. Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117 (1998). When he wrote the article, Judge Lynch was a professor at Columbia Law School. He was appointed as a federal district judge in the Southern District of New York in 2000, and in 2009, he was appointed to the Second Circuit Court of Appeals where he now sits. See *Gerard E. Lynch*, *COLUM. L. SCH.*, <http://web.law.columbia.edu/faculty/gerard-lynch> (last visited Mar. 8, 2017) [<https://perma.cc/G48P-9UET>]. Although he was not a judge when he wrote "Our Administrative System of Criminal Justice," this Article refers to him as Judge Lynch.

## I. JUDGE LYNCH ON OUR CRIMINAL JUSTICE SYSTEM

Our criminal justice system is premised on an adversarial model in which prosecutors and defense attorneys face off, and the court acts as a neutral umpire and ultimately the decision maker on the guilt or innocence of defendants.<sup>2</sup> The adversarial model is contrasted with the “inquisitorial” model used in Europe, among other places, in which only the judge investigates a case, prepares an extensive written record, and determines the defendant’s guilt or innocence.<sup>3</sup>

The systems have their partisans and detractors, but the main point of “Our Administrative System of Criminal Justice” was not to champion one or the other. Instead, it sought to show that our criminal justice system was no longer accurately described as an adversarial system, principally because of the plea bargaining process that had overwhelmed both the state and federal criminal justice systems. It asserted that our system of justice more closely resembled the inquisitorial system than had previously been appreciated.<sup>4</sup> Furthermore, the article argued that the resemblance was not necessarily something to be regretted, for there were potential advantages to the inquisitorial system.<sup>5</sup>

Judge Lynch’s focus was on plea bargaining, which accounts for approximately 90 percent of criminal dispositions throughout the United States.<sup>6</sup> He argued that plea bargaining was so prevalent that it could not be considered a mere exception to the standard trial-based adversarial model but had to be considered a part of the process itself.<sup>7</sup> And, he argued, despite its name—which conjures up images of unprincipled back-and-forths, with agreements reached solely on the basis of bargaining power, compromise, and expedience—plea bargaining was in many instances a fairly principled process. Judge Lynch noted that in a plea bargaining negotiation, defense counsel puts forth reasoned arguments to prosecutors who—like their European counterparts—consider the evidence as both investigators and judges, and seek a just result consistent with those reached in similar cases.<sup>8</sup> The result is most often a plea that the court simply, and

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2. See Lynch, *supra* note 1, at 2118–19.

3. See *id.* at 2119 (describing the inquisitorial model). Plainly, the description of both models is quite rough; there are doubtless significant variations among the different inquisitorial systems just as there are among the various states’ adversarial systems. Nothing that follows in this Article depends, however, on any of those variations.

4. See *id.* at 2118 (“[T]he American system as it actually operates in most cases looks much more like what common lawyers would describe as a nonadversarial, administrative system of justice than like the adversarial model they idealize.”).

5. See *id.* at 2141–45.

6. See *id.* at 2121 n.2; see also Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), <http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/> (stating that 97 percent of criminal charges that are not dismissed are resolved through plea bargaining, and observing that “it is a rare state where plea bargains do not similarly account for the resolution of at least 95 percent of the felony cases that are not dismissed”) [<https://perma.cc/X9JK-LL3Z>].

7. See Lynch, *supra* note 1, at 2141–42.

8. See *id.* at 2124–36.

relatively uncritically, accepts. Thus, the adversarial system is replaced by the more consultative—and at times collaborative—relation between the defense counsel and the prosecutor. This ultimately relegates the court to a less important role.

Judge Lynch's article was largely descriptive—he showed what every criminal lawyer knew was happening in the criminal justice system. But, he placed it in a new context. He suggested that we should not think about the criminal justice system simply by noting how far it deviated from the adversarial model (and bemoaning the deviation). Instead, we should recognize our system's evolution as one toward a competing system resembling the inquisitorial model.<sup>9</sup> He further suggested that the system that had developed was not to be regretted and was perhaps preferable in some ways to the pure adversarial model.<sup>10</sup> He also suggested ways in which the emerging system could be improved.<sup>11</sup>

## II. FROM ADVERSARIAL TO INQUISITORIAL: RECENT DEVELOPMENTS IN OUR CRIMINAL JUSTICE SYSTEM

Criminal law practitioners will recognize the accuracy of Judge Lynch's observations, regardless of whether they agree with his generally positive evaluation of them. This part notes several developments that have pushed the criminal justice system even further in the direction of the inquisitorial system. Although Judge Lynch explored some of these developments, several deserve special mention.

### A. *The Prosecution of Corporations*

That prosecutors can and, in appropriate circumstances, should prosecute corporate entities is hardly debatable. It is well documented that, especially in complicated white-collar cases, the prosecution of corporations has a pattern: the corporation learns of an investigation from prosecuting authorities, after which the corporation approaches the authorities and vows to aid in the investigation.<sup>12</sup> The reason that a corporation would do so is simple. At the conclusion of the investigation, it intends to tell the prosecutors either (1) there was no wrongdoing within its ranks, or (2) there was wrongdoing, but it was an aberration that has been rectified—for instance, the corporation might explain that the scoundrels who engaged in

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9. *See generally id.*

10. *See id.* at 2141–45.

11. *See id.* at 2145–51.

12. *See generally* DAN K. WEBB ET AL., CORPORATE INTERNAL INVESTIGATIONS (release 37 2012) (describing the form of a typical corporate investigation); *see also* United States v. Stein, 541 F.3d 130, 136 (2d Cir. 2008) (describing the course of a corporate entity's cooperation with the prosecution); WEBB ET AL., *supra*, § 4.03[4][b] (“Often, the impetus for a company to conduct an internal investigation is that it has learned that it is under a DOJ criminal investigation or SEC enforcement proceeding . . . . In some instances, especially where the investigation has been conducted by outside independent counsel, law enforcement authorities may give substantial deference to an investigation report, findings and remedial plan of action.”).

the wrongdoing have been dismissed or disciplined, and the corporation has made amends. Therefore, the corporation would argue, it should not be punished (at least, not harshly).<sup>13</sup>

Corporate cooperation in criminal investigations is the norm, and it is undertaken precisely so that the corporation can avoid prosecution.<sup>14</sup> The risk of prosecution is borne by the individuals at the corporation who are investigated zealously by both the corporation and outside counsel consisting of former prosecutors retained specially for the assignment.<sup>15</sup> Those investigators, unlike prosecutors, are not limited by federal constitutional constraints and thus have a heavy bludgeon to wield. Whereas individuals can assert their Fifth Amendment rights against state or federal investigators, it is unrealistic to expect them to refuse to speak when questioned by private counsel retained by their corporations. Individuals can refuse to cooperate but risk losing their job—a cost that many cannot afford. The corporation can thus obtain potentially self-incriminating statements from individuals in circumstances in which the government would not have been able to do so. And, the corporation often turns over the fruits of its investigation—including those incriminating statements—to the government. The government in effect outsources its investigation, and individuals have no effective recourse.<sup>16</sup>

Corporate prosecutions do not align precisely with the adversarial-inquisitorial fault line, but they do move prosecutors away from the standard adversarial model in at least two ways. First, as noted above, the corporation becomes an adjunct prosecutor, helping the actual prosecutor's office build a case against the responsible individuals. Thus, there is a cooperative *modus vivendi* developed between the prosecutor and the corporation.

Second, the prosecutor's investigation of the corporation often ends in an agreement—either a plea or deferred prosecution agreement—with the corporation, and in many instances the agreement calls for some ongoing oversight of the corporation.<sup>17</sup> For example, depending on the misbehavior

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13. See, e.g., *Stein*, 541 F.3d at 136 (describing the government's decision to dismiss the indictment against a corporate defendant in light of its cooperation).

14. See, e.g., Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. BOOKS (Jan. 9, 2014), <http://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions/> (noting how corporate internal investigations routinely result in the government and corporations entering into “deferred prosecution agreement[s] that couple[] some immediate fines with the imposition of expensive but internal prophylactic measures” after which the case is over “for all practical purposes”) [<https://perma.cc/T77L-3T5J>].

15. See *id.*

16. See *id.*

17. For example, the deferred prosecution agreements that the federal government reached with Deutsche Bank, Commerz Bank, and General Motors in 2015 included monitors. See *Client Alert: 2015 Year-End Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs)*, GIBSON, DUNN & CRUTCHER LLP, app. A at 23–30 (Jan. 5, 2016), <http://www.gibsondunn.com/publications/documents/2015-Year-End-Update-Corporate-Non-Prosecution-Agreements-and-Deferred-Prosecution-Agreements.pdf> [<https://perma.cc/B9QP-ZSQN>]. For a useful compilation of

giving rise to the criminal investigation, the agreement may include oversight relating to appropriate accounting standards, disclosures, employment practices, or pollution controls. While the plea negotiations between a prosecutor and an individual defendant are usually quite simple,<sup>18</sup> the negotiations of the terms of an agreement between a prosecutor and a corporate defendant may be substantially more complex and cover numerous items.<sup>19</sup> Such terms may include the standards of scrutiny to be used, who an appropriate monitor would be, and how often should the monitor be permitted to scrutinize the corporation. Through this process, the prosecutor often becomes enmeshed in the details of the corporation's business. Accordingly, the prosecutor and the corporation's lawyers work out an agreement in a far more profound and cooperative way than is allowed for in the adversarial model.<sup>20</sup> And, the resulting agreement typically is far more detailed than a court can meaningfully review.

### B. Baseless Pleas

Judge Lynch was correct to emphasize the prevalence of pleas as evidence that our justice system was becoming more administrative and less adversarial. Adding to that, however, is the prevalence of "baseless pleas," or pleas for which there is no factual predicate but which are accepted by the court anyway.<sup>21</sup>

Baseless pleas give prosecutors, defense counsel, and courts the flexibility to resolve cases in ways that they determine are fair or lenient to the defendant, even though such pleas may not be authorized by law.<sup>22</sup> For example, a defendant who engages in conduct that might be prosecuted as drunk driving—typically a misdemeanor<sup>23</sup>—might plead to a lesser offense, say disorderly conduct—a violation<sup>24</sup>—thus resolving a case without the adverse consequences that a drunk driving conviction might bring. The prosecutor may believe that the violation is an adequate punishment for the

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deferred prosecution agreements and nonprosecution agreements with corporate entities, see generally *id.*

18. The main point of contention in such negotiations is likely the severity of the punishment, usually measured in terms of months or years of incarceration or probation.

19. See, e.g., JAMES T. O'REILLY ET AL., PUNISHING CORPORATE CRIME 144 (2009) (stating that each deferred prosecution agreement or nonprosecution agreement is the "handcrafted" result of an "individual negotiation process between the relevant entity and the prosecutors").

20. See *id.* at 145 (noting that deferred prosecution agreements and nonprosecution agreements "fall within the essentially unreviewable category of decisions for which there is substantial [and] almost unlimited prosecutorial discretion"); see also *United States v. Fokker Servs. B.V.*, 818 F.3d 733, 738 (D.C. Cir. 2016) (holding that the court had virtually no authority to refuse to accept a deferred prosecution agreement as such refusal would infringe upon the prosecutor's discretion).

21. See Mari Byrne, Note, *Baseless Pleas: A Mockery of Justice*, 78 *FORDHAM L. REV.* 2961, 2966–68 (2010).

22. See *id.* at 2972–74.

23. See, e.g., N.Y. VEH. & TRAF. LAW § 1192(2) (McKinney 2011); *id.* § 1193(1)(b) (Supp. 2017).

24. See N.Y. PENAL LAW § 240.20 (McKinney 2008).

defendant's behavior and may also be pleased not to fight a contested case. The judge is fully informed of all aspects of the plea and may even require an allocution to the "real" offense (drunk driving). This practice is more prevalent in state courts than federal courts because it tends to occur with low-level crimes like misdemeanors, which are overwhelmingly before state courts.<sup>25</sup>

My point is neither to condemn baseless pleas nor to extoll them but simply to point out that they are another example of how the criminal justice system is becoming more administrative and less adversarial. The prosecutor, defense counsel, and trial court work out a creative and efficient resolution to a case, which is quite possibly more beneficial to all parties than a conviction or acquittal on the charged crime would be. It is surely a creative solution and an example of the paradigm of administrative problem solving rather than the paradigm of justice through adversarial combat.

### C. Restitution for Victims

One of the assumptions underlying the adversarial model was that the prosecutor was entirely apolitical and the only factors she considered when determining whether and how to prosecute a case—or what plea to offer or accept—were the strength of the evidence, the severity of the crime, and the character of the defendant.<sup>26</sup> The adversarial model is essentially binary—the state represented by the prosecutor, versus the defendant represented by counsel, both exercising their professional judgment. Law, at its highest level as conceived by the adversarial model, was distinct from politics.<sup>27</sup>

In both state and federal criminal law, however, recent developments have given victims increasing roles, and they have become a constituency of the prosecutor. For example, under federal law, the Criminal Victims' Rights Act (CVRA) provides that crime victims have the right, among others, to (1) be "reasonably heard" at any hearing involving the accused's release, plea, sentencing, or parole; (2) confer (reasonably) with the government attorney; (3) full and timely restitution "as provided in law"; and (4) proceedings "free from unreasonable delay."<sup>28</sup> The full scope of

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25. See, e.g., Byrne, *supra* note 21 (discussing predominantly state cases in the baseless pleas context). Further, Federal Rule of Criminal Procedure 11 requires an allocution to the crime of conviction, which cannot be satisfied by a baseless plea. See FED. R. CRIM. P. 11.

26. Under the Federal Sentencing Guidelines, for example, the sentence is largely determined based on the defendant's provable "offense conduct" and his criminal history, which presumably reflects his character. See U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (U.S. SENTENCING COMM'N 2016); see also *United States v. Shaygan*, 652 F.3d 1297, 1326 (11th Cir. 2011) (Edmondson, J., dissenting) (discussing the "Hyde Amendment," which allows the court to award attorney's fees to a defendant in criminal prosecutions that are brought in "bad faith" and stating that "the phrase 'or in bad faith' was intended to reach prosecutions conducted in a manner that was motivated by—and that demonstrated—personal vindictiveness, personal ambition, politics, and so on").

27. See, e.g., THE FEDERALIST NO. 78, at 383 (Alexander Hamilton) (Lawrence Goldman ed., 2008) ("[T]he courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments . . .").

28. See 18 U.S.C. § 3771(a)(1)–(a)(8) (2012).

these rights is unclear, but together they provide victims an interest that the prosecutor must take into account when making decisions.

To be sure, the CVRA expressly states that a victim whose rights have been denied has no cause of action for damages and further states that “[n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.”<sup>29</sup> It further provides that denial of any victim’s right is not grounds for granting a criminal defendant a new trial but may be grounds for reopening a plea or a sentence only if the victim was denied the right to be heard at the plea or sentencing proceeding.<sup>30</sup> Nonetheless, the very fact that the CVRA contains these caveats demonstrates that the victim is intended to have some influence on the prosecutor; otherwise, the CVRA would be nugatory.

Consider a case such as *Doe v. United States*,<sup>31</sup> in which the prosecutor entered into a nonprosecution agreement with the potential defendant following an investigation regarding the sexual abuse of minors.<sup>32</sup> This agreement provided that if the potential defendant engaged in no wrongdoing for a certain period following his entering into the agreement, he would not be charged for any of the investigated behavior.<sup>33</sup> The prosecutor had not conferred with the alleged victims before entering the agreement, and two of the victims filed suit to enforce their right under the CVRA to obtain the correspondence between the government and potential defendant.<sup>34</sup> The Eleventh Circuit held that the correspondence was not privileged and lifted the stay of the order compelling the disclosure of the correspondence.<sup>35</sup> Presumably, the victims were then able to obtain the correspondence.

The question here is not whether the decision was right or wrong, or even whether as a matter of policy victims should have the rights that the CVRA affords them. The point is simply that the CVRA alters the relationship between prosecutors and defendants such that the adversarial model is not an accurate description of the reality of criminal prosecution.

Perhaps the most important role of the victim in a criminal trial is during sentencing. Victims have the right to be heard at sentencing,<sup>36</sup> and while victims may often support the prosecution’s sentencing arguments and be called by prosecutors, their interests may not always align. For example, prosecutors may wish to offer leniency to a defendant but victims may be less inclined to do so. If the victim is given a right to appear at plea and

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29. *Id.* § 3771(d)(6).

30. *See id.* § 3771(d)(5).

31. 749 F.3d. 999 (11th Cir. 2014).

32. *See id.* at 1002.

33. *See id.* Note, however, that as part of the federal nonprosecution agreement, the potential defendant did agree to plead guilty to state offenses stemming from his conduct. *Id.*

34. *See id.*

35. *See id.* at 1010.

36. *See, e.g.,* FED. R. CRIM. P. 60(a)(3) (“The court must permit a victim to be reasonably heard at any public proceeding in the district court concerning release, plea, or sentencing involving the crime.”).



sentencing hearings, then the balance between the prosecution and the defendant is affected.

Restitution presents another clear example of how the adversarial model may no longer be complete. The law mandates restitution for crime victims,<sup>37</sup> but “victims” are defined quite broadly.<sup>38</sup> In particular, courts have adopted a capacious definition for victims of a conspiracy,<sup>39</sup> and given that the majority of federal criminal indictments include conspiracy charges,<sup>40</sup> that capacious definition has significant consequences. Thus, restitution folds more people into the criminal process than might have been contemplated under the adversarial model.

In his 1976 article, “The Role of the Judge in Public Law Litigation,” Abram Chayes showed how in many instances civil litigation had moved from the traditional binary model of party versus party to a model that allowed for judges’ consideration of the interests of many parties.<sup>41</sup> The same may be happening in criminal law: prosecutors no longer consider only the defendant and his actions, rather they consider those actions in conjunction with a set of other interests attributable to the victims.

#### D. Smarter Prosecutions

Judge Lynch recognized that the existence of prosecutorial discretion contributed to the inquisitorial and administrative models of criminal justice.<sup>42</sup> He demonstrated that limited resources required prosecutors to “triage” what cases they investigated and brought<sup>43</sup> and that broad criminal statutes gave prosecutors flexibility in making prosecutorial decisions.<sup>44</sup> Rather than decry prosecutors’ discretion, Judge Lynch applauded it, arguing that prosecutorial discretion in enforcement allowed for a flexible and nuanced response to social attitudes.<sup>45</sup> Prosecutorial discretion thus comported with Judge Lynch’s view that prosecutors should be thought of as administrative agencies that shape policy rather than as simply enforcers of a static and legislatively controlled criminal law.

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37. See 18 U.S.C. § 3663A (2012) (providing for “[m]andatory restitution to victims of certain crimes”).

38. See *id.* § 3771(e) (defining a “crime victim” as “a person directly and proximately harmed as a result of the commission of a Federal offense”); see also *United States v. Amato*, 540 F.3d 153, 159 (2d Cir. 2008) (finding that employer was a victim and entitled to reimbursement from defendant for its expenses in conducting an internal investigation).

39. See, e.g., *United States v. Jinwright*, 683 F.3d 471, 485–86 (4th Cir. 2012) (noting that victims include even those outside the period of the alleged conspiracy and those who may have been harmed by conduct for which the defendant was acquitted).

40. See, e.g., *United States v. Reynolds*, 919 F.2d 435, 439 (7th Cir. 1990) (“[P]rosecutors seem to have conspiracy on their word processors as Count I; rare is the case omitting such a charge.”).

41. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976).

42. See Lynch, *supra* note 1, at 2141–42.

43. See *id.* at 2136.

44. See *id.*

45. See *id.* at 2136–41.

Since Judge Lynch's article, the breadth and number of criminal statutes has only grown, as has prosecutors' discretion.<sup>46</sup> Thus, the policymaking nature of prosecutors' offices has become even more apparent. Indeed, some New York City prosecutors have publicly announced that they will not prosecute the possession of small amounts of marijuana even though the written laws criminalize such possession.<sup>47</sup> That is plainly a policy announcement in the form of prosecutorial discretion.

My former boss, Manhattan District Attorney Cyrus Vance, has been explicit about his view that being a prosecutor entails crafting social policy: "Philosophically, I really believe that a modern D.A.'s office's job is reducing crime. You do that by your work in the courtroom, *you also do that by effective strategies out of the courtroom and in the community.*"<sup>48</sup> Because Vance is the district attorney in a particularly visible and prominent county, his views are especially influential.

Developments in criminology have allowed prosecutors to use their discretion to achieve great effect. Gang prosecutions have been influenced by the belief that that criminal gangs often are led by relatively few people. Accordingly, to maximize increases in public safety resulting from prosecutions, prosecutors and police have employed tactics focused on arresting and jailing gang leaders.<sup>49</sup> Focusing prosecutorial and police resources on the prosecution of such leaders is thus a good example of "smart prosecutions."<sup>50</sup>

In addition, prosecutors throughout the country, often working with defense counsel and the courts, have devised "diversion" programs pursuant to which those who might otherwise be prosecuted—typically for relatively

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46. Indeed, there are 27,000 pages of criminal laws in the U.S. Code. See Charles G. Koch & Mark V. Holden, *The Overcriminalization of America*, POLITICO (Jan. 7, 2015), <http://www.politico.com/magazine/story/2015/01/overcriminalization-of-america-113991> [<https://perma.cc/W2GK-YGNY>]; see also *Yates v. United States*, 135 S. Ct. 1074, 1100–01 (2015) (Kagan, J., dissenting) (noting the "the real issue[s]" are "overcriminalization and excessive punishment in the U.S. Code," and referring to overcriminalization and overpunishment as a "deep[] pathology in the federal criminal code").

47. See, e.g., Stephanie Clifford & Joseph Goldstein, *Brooklyn Prosecutor Limits When He'll Target Marijuana*, N.Y. TIMES (July 8, 2014), <https://www.nytimes.com/2014/07/09/nyregion/brooklyn-district-attorney-to-stop-prosecuting-low-level-marijuana-cases.html> [<https://perma.cc/R6GP-KXG8>].

48. Megan Bungeroth, *Fighting Crime from All Sides*, W. SIDE SPIRIT (Jan. 15, 2015, 11:45 AM) (emphasis added), <http://www.westsidespirit.com/westsidespirit/20150115/fighting-crime-from-all-sides> [<https://perma.cc/887T-VXB3>].

49. See Robert Vargas, *Criminal Group Embeddedness and the Adverse Effects of Arresting a Gang's Leader: A Comparative Case Study*, 52 CRIMINOLOGY 143, 143 (2014) (recognizing that law enforcement agencies aim to arrest gang leaders). See generally BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, THE POLICE-PROSECUTION PARTNERSHIP INITIATIVE FY 2016 COMPETITIVE GRANT ANNOUNCEMENT (2016), <https://www.bja.gov/funding/PPPI16.pdf> (seeking to establish partnerships among prosecutors and police to promote smart prosecutions and giving examples of such prosecution strategies throughout the nation) [<https://perma.cc/A58K-UQBD>].

50. Note, however, that some have questioned the efficacy of this tactic. See Vargas, *supra* note 49, at 143–44.

low-level drug offenses—agree to enter drug treatment programs.<sup>51</sup> If the offenders graduate from the programs, they will not be prosecuted.<sup>52</sup> These diversion programs frequently work in tandem with special courts created to solve particular problems. For instance, veterans' court, which deals with veterans who have been charged with certain offenses, or mental health court, which deals with defendants who have been criminally charged but who have significant mental health issues.<sup>53</sup> The purpose of such courts, like the diversion programs, is to provide treatment for the defendants so that they may avoid criminal convictions.

Prosecutors have even addressed problems of recidivism and the hurdles faced by convicted defendants after they complete their sentences. For example, prosecutors have established programs to promote education in prison<sup>54</sup> and to hire incarcerated individuals following their release.<sup>55</sup>

### E. Discovery

Criminal defendants have long had the right to discovery, although not nearly to the extent of discovery in civil cases.<sup>56</sup> Defendants' right to criminal discovery has grown in response to a recent spate of judicial decisions and articles decrying as "crises" the failure of the government in numerous cases to disclose exculpatory evidence.<sup>57</sup>

In response to the concerns about discovery failures, more prosecutors are providing "open-file" discovery to defendants. While the exact contours of open-file discovery programs may differ among jurisdictions, such programs typically direct the prosecutor to turn over his entire case file

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51. See generally CTR. FOR HEALTH & JUSTICE AT TASC, NO ENTRY: A NATIONAL SURVEY OF CRIMINAL JUSTICE DIVERSION PROGRAMS AND INITIATIVES (2013), [http://www2.centerforhealthandjustice.org/sites/www2.centerforhealthandjustice.org/files/publications/CHJ%20Diversion%20Report\\_web.pdf](http://www2.centerforhealthandjustice.org/sites/www2.centerforhealthandjustice.org/files/publications/CHJ%20Diversion%20Report_web.pdf) [<https://perma.cc/L24M-7SZS>]; CTR. FOR PRISON REFORM, DIVERSION PROGRAMS IN AMERICA'S CRIMINAL JUSTICE SYSTEM: A REPORT BY THE CENTER FOR PRISON REFORM (2015), <https://centerforprisonreform.org/wp-content/uploads/2015/09/Jail-Diversion-Programs-in-America.pdf> [<https://perma.cc/3G8N-DDQH>].

52. See generally CTR. FOR HEALTH & JUSTICE AT TASC, *supra* note 51.

53. See, e.g., Erin R. Collins, *Status Courts*, 105 GEO. L.J. (forthcoming 2017) (describing the evolution and proliferation of problem-solving courts).

54. See, e.g., Kamala D. Harris, *Shut the Revolving Door of Prison*, in SOLUTIONS: AMERICAN LEADERS SPEAK OUT ON CRIMINAL JUSTICE 37 (Inimai Chettiar & Michael Waldman eds., 2d ed. 2015).

55. See, e.g., Rich Lord, *Pittsburgh's U.S. Attorney Urges Employers to Hire Ex-Offenders*, PITT. POST-GAZETTE (May 20, 2013, 7:40 PM), <http://www.post-gazette.com/local/region/2013/05/20/Pittsburgh-s-U-S-Attorney-urges-employers-to-hire-ex-offenders/stories/201305200114> [<https://perma.cc/9L9A-BF2M>].

56. For example, criminal defendants, unlike civil litigants, cannot take depositions of witnesses, issue interrogatories to their adversaries, make document demands, or issue broad subpoenas to nonparties. Compare FED. R. CRIM. P. 15–17, with FED. R. CIV. P. 26–37.

57. See, e.g., *United States v. Olsen*, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, J., dissenting from denial of rehearing en banc) ("There is an epidemic of *Brady* violations abroad in the land.").

to the defendant regardless of whether the defendant would have a right to the materials under the constitution or any applicable rule.<sup>58</sup>

There are typically limits. For example, if turning over materials would endanger a witness, then the prosecutor may seek a protective order from the court to avoid turning them over.<sup>59</sup> Also, the definition of the “file” may not be clear in all cases, especially in long-running investigations. Furthermore, even an open-file discovery program may not avoid all *Brady* errors. Although the prosecutor’s *Brady* obligation applies to exculpatory information, material exculpatory evidence not reduced to a written form may not be in the case file.<sup>60</sup> Even with these limits, open-file discovery is still far removed from the adversarial system, and while there may not be a precisely analogous procedure in administrative law, it carries with it a collaborative element that is more akin to administrative law than to traditional criminal practice.<sup>61</sup>

#### F. Conviction Integrity Units

With rare and notorious exceptions, every prosecutor wishes to get convictions right; no prosecutor wants to send the innocent to jail. And, prosecutors have always been reasonably confident that they have “gotten it right.” It was only after the development and spread of DNA testing in the last fifteen to twenty years that prosecutors began to realize that they may not have been right as invariably as they had thought.<sup>62</sup>

The adversarial means of addressing the realization that wrongful convictions are more frequent than previously believed would be to do *nothing*. After all, innocent people wrongly convicted can and do petition

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58. Open-file discovery in criminal cases has long had adherents, including two of the more notable jurists of the twentieth century. *See, e.g.*, William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U. L.Q. 279; Roger J. Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U. L. REV. 228 (1964). Calls for open-file discovery have been more insistent recently as evidence of prosecutorial errors has increased. *See* Brian P. Fox, Note, *An Argument Against Open-File Discovery in Criminal Cases*, 89 NOTRE DAME L. REV. 425, 426 & n.5 (2013) (noting the upsurge in articles discussing open-file discovery in the wake of the Duke lacrosse case).

59. *See, e.g.*, FED. R. CRIM. P. 16(d).

60. For example, if a witness makes an unrecorded remark that tends to exculpate the defendant.

61. *See generally* Laurie L. Levenson, *Discovery from the Trenches: The Future of Brady*, 60 UCLA L. REV. DISCOURSE 74, 76 (2013) (“No matter what the case law may suggest, there is a right and a wrong way to conduct discovery. The wrong way is to cling to the notion that the adversarial system should guide how prosecutors and defense lawyers approach their discovery duties. The right way is to open a dialogue so that both sides can work cooperatively to ensure a fair trial.”). Leaving aside Professor Levenson’s characterization of a right and wrong way, she correctly identifies the shift in the discovery discussion from an adversarial to a collaborative model.

62. *See* Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 56 (2008) (“Actors in the criminal system long doubted whether courts ever wrongly convicted people . . .”); Richard A. Leo & John B. Gould, *Studying Wrongful Convictions: Learning from Social Science*, 7 OHIO ST. J. CRIM. L. 7, 8 (2009).

for habeas relief,<sup>63</sup> and many state statutes give convicted persons a right to DNA testing in at least some circumstances.<sup>64</sup> The role of the prosecutor could be, and for some time has been, simply to respond appropriately to habeas petitions.

But, an increasing number of prosecutors' offices have taken proactive administrative steps to address the problem of wrongful convictions. Most importantly, many prosecutors' offices have created "conviction integrity units" that are devoted to identifying and remedying wrongful convictions often without the need for the petitioner to file a habeas petition.<sup>65</sup> The conviction integrity units, although part of the prosecutors' offices, have a different focus than the line prosecutors and generally a different mind-set. They are almost ombudsmen for the offices and are intended to be less adversarial than archetypal prosecutors. Several of the units engage in joint reinvestigations, pursuant to which they reinvestigate old or suspect convictions jointly with defense counsel.<sup>66</sup> Indeed, such measures are welcome steps toward alleviating wrongful convictions.

### III. HOW THE ADMINISTRATIVE SYSTEM TOOK HOLD

I often hear veteran prosecutors say that the role of the prosecutor is getting bigger and bigger.<sup>67</sup> There are myriad issues that prosecutors deal with today—including how to address recidivism, what to do about the disparity in incarceration rates between persons of color and whites, how forfeiture funds should be used, and whether records of youthful convictions should be expunged or sealed—that until recently were not

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63. *See, e.g.*, *People v. Hamilton*, 979 N.Y.S.2d 97, 107–09 (App. Div. 2014) (recognizing that defendants may assert a cognizable claim of actual innocence on collateral review).

64. *See, e.g.*, N.Y. CRIM. PROC. LAW § 440.10(1)(g-1) (McKinney Supp. 2017) (providing for a right to postconviction DNA testing under certain circumstances).

65. According to the National Registry of Exonerations, the number of conviction integrity units "has grown rapidly in the past six years. There were 24 [conviction integrity units] in the United States in 2015, double the number in 2013 and quadruple the number in 2011." NAT'L REGISTRY OF EXONERATIONS, CONVICTION INTEGRITY UNITS 1 (2016), [https://www.law.umich.edu/special/exoneration/Documents/2.2016\\_Newsletter\\_Art2.pdf](https://www.law.umich.edu/special/exoneration/Documents/2.2016_Newsletter_Art2.pdf) [<https://perma.cc/5E8T-EUUS>].

66. *See, e.g.*, John Hollway, *Conviction Review Units: A National Perspective* 48–52 (Univ. of Pa. Law Sch. Pub. Law and Legal Theory Research Paper Series, Paper No. 15-41, 2016), [http://scholarship.law.upenn.edu/faculty\\_scholarship/1614](http://scholarship.law.upenn.edu/faculty_scholarship/1614) [<https://perma.cc/8GQR-35JN>]. In fact, they even interview witnesses together and may share documentary evidence. *See id.*

67. *Cf.* Lauren-Brooke "L.B." Eisen, *Prosecutors Can Play Role in Ending Mass Incarceration*, BRENNAN CTR. (Sept. 30, 2014), <https://www.brennancenter.org/blog/prosecutors-can-play-role-ending-mass-incarceration> ("Th[e] new theory of prosecution has three overarching goals: reducing violence and serious crime; reducing prison populations; and reducing recidivism.") [<https://perma.cc/9H2A-YRBN>]; Jennifer Polish, *The Role of Prosecutors as Social Justice Advocates*, LAW STREET (June 16, 2015), <https://lawstreetmedia.com/issues/law-and-politics/role-of-prosecutors-as-social-justice-advocates/> ("The immense racial disparities in charging, plea bargaining, and sentencing are all directly traceable to prosecutors' structurally informed choices.") [<https://perma.cc/W9WT-KS6T>].

significant issues for prosecutors. This observation ties in neatly with Judge Lynch's observation that criminal procedure is becoming more administrative than allowed for in the adversarial model. The issues faced by prosecutors are not ones that succumb to a simple prosecutor versus defendant model.

How did we get here? I believe that the answer begins with the observation that criminal justice is, at its core, one form of social control and that it is compensating for other means of social control, like family, community, and societal mores, which have proven insufficient to the task. Political scientist Samuel Huntington observed that unlike any other country in the world, the United States was defined not by ethnicity, religion, or a deep, shared history. Rather, its origins as a country of immigrants made it a country based on one idea: equality.<sup>68</sup> And because that idea is given content largely through laws, Alexis de Tocqueville's famous observation that in the United States almost every issue eventually becomes a legal one,<sup>69</sup> has proven to be true. It may be that the criminal justice system is tasked with addressing too many iterations of socially undesirable behavior, perhaps because the deep social constraints often found in other societies are lacking here. It is unclear whether the criminal justice system can bear the strain but the effort to do so has caused it to explore methods other than those that can be accommodated by the adversarial model.

Added to this is the recognition that prosecutors' offices are themselves a bureaucracy. Prosecutors never identify themselves as bureaucrats; they invariably distinguish themselves from the administrators in other parts of state or federal government. The distinction, however, may not be as clean as they like to believe. The prosecutorial office is a bureaucratic agency and, like any such agency, it seeks both to aggrandize its own power and to influence the behavior of the people who man it. As a consequence, prosecutorial offices become involved in the whorl of issues that surround criminal justice—recidivism, the expenditure of forfeited funds, and the disparity in criminal prosecution rates between persons of color and whites—and those issues are simply not amenable to the adversarial system.

#### IV. SHORTCOMINGS OF THE ADMINISTRATIVE SYSTEM AND STEPS MOVING FORWARD

What consequence follows the shift from the adversarial system toward the administrative system of criminal justice?

First, we should look to legislative and rule-based sources for changes in criminal justice, rather than to changes in constitutional doctrine. To be sure, since Judge Lynch's article, the U.S. Supreme Court has strengthened

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68. See SAMUEL P. HUNTINGTON, *AMERICAN POLITICS: THE PROMISE OF DISHARMONY* 23–30 (1981).

69. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 270 (J.P. Mayer ed., George Lawrence trans., HarperPerennial 1988) (1835) (“There is hardly a political question in the United States which does not sooner or later turn into a judicial one.”).

defendants' rights in connection with pleas. In *Padilla v. Kentucky*,<sup>70</sup> *Lafler v. Cooper*,<sup>71</sup> and *Missouri v. Frye*,<sup>72</sup> the Supreme Court recognized defendants' rights to have the immigration consequences of their plea explained to them by their counsel,<sup>73</sup> to have plea offers communicated to them,<sup>74</sup> and to receive competent advice with respect to those offers.<sup>75</sup> The content of these rights is, for present purposes, less important than the fact that the Supreme Court recognized them—really created them out of the right to counsel of the Sixth Amendment—and therefore fashioned what Justice Antonin Scalia scornfully called “a whole new field of constitutionalized criminal procedure: plea-bargaining law.”<sup>76</sup>

But, constitutional rules can expand only so far, and to ensure that pleas lead to a suitable form of justice it would be appropriate to consider what nonconstitutional rules might be adopted. Plea procedures used in various prosecutorial districts could be studied systematically to see if there are preferred practices in some that should be adopted by all. For example, some prosecutorial offices may have a higher percentage of cases that plead than other offices. It is hard to say *ex ante* whether one percentage would be too high or another too low, but the comparison might be instructive. In addition, there might be changes to procedures that would enhance the integrity of pleas and guard against those that are coerced by the draconian risks of going to trial.<sup>77</sup>

Further, each of the areas discussed above might be explored by appropriate legislative or rulemaking authorities. Victims' rights, including restitution, have historically been statutory and have increased tremendously over the last thirty years.<sup>78</sup> Some states have already passed laws or enacted procedural rules that expand discovery, and at least one

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70. 130 S. Ct. 1473 (2010).

71. 132 S. Ct. 1376 (2012).

72. 132 S. Ct. 1399 (2012).

73. *See Padilla*, 130 S. Ct. at 1486 (holding that at minimum clients have the right to counsel who tell them if their pleas will result in deportation).

74. *See Frye*, 132 S. Ct. at 1408.

75. *See Lafler*, 132 S. Ct. at 1388.

76. *See id.* at 1391 (Scalia, J., dissenting).

77. *See* Donald A. Dripps, *Guilt, Innocence, and Due Process of Plea Bargaining*, 57 WM. & MARY L. REV. 1343, 1384–92 (2016); *see also* *United States v. Kupa*, 976 F. Supp. 2d 417, 419–20 (E.D.N.Y. 2013) (describing how prosecutors use the threat of filing prior felony informations to pressure defendants to plead guilty), *aff'd*, 616 F. App'x 33 (2d Cir. 2015).

78. *See, e.g., About Victims' Rights*, VICTIMLAW, <https://www.victimlaw.org/victimlaw/pages/victimsRight.jsp> (last visited Mar. 8, 2017) (“Thirty years ago, victims had few legal rights to be informed, present, and heard within the criminal justice system . . . . Since then, there have been tremendous strides in the creation of legal rights and assistance programs for victims of crime. Today, every state, the District of Columbia, and several territories have an extensive body of basic rights and protections for victims of crime within its statutory code. Victims' rights statutes have significantly influenced the manner in which victims are treated within the federal, state, and local criminal justice systems.”) [<https://perma.cc/SQ5S-ZBGD>].

state expressly requires open-file discovery.<sup>79</sup> Smarter prosecutions would be promoted if legislatures pared away lesser criminal offenses, which currently occupy the time and resources of police, prosecutors, and courts, such that resources could be focused on more significant targets. The increase in the number of conviction integrity units is not the result of legislation but of the steady drumbeat of advocates who have established that the number of wrongfully convicted people is greater than previously believed. Still, it too would be amenable to legislation.

Regardless of whether any particular reforms in these areas are wise or adopted, it appears clear that legislative action is required to improve the criminal justice system, for it has changed from the adversarial system envisioned by the Constitution. Legislators who enact reforms should do so with full acknowledgement of the administrative nature of our system of justice.

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79. *See, e.g.*, N.C. GEN. STAT. § 15A-903(a)(1) (2016) (“Upon motion of the defendant, the court must order . . . [t]he State to make available to the defendant the complete files of all law enforcement agencies, investigatory agencies, and prosecutors’ offices involved in the investigation of the crimes committed or the prosecution of the defendant.”).