2020

Against Prosecutors

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AGAINST PROSECUTORS

I. Bennett Capers†

INTRODUCTION

It has now become common, at least among progressive criminal justice scholars, to argue that the criminal justice system could be fixed—or at least greatly improved—if we simply regulated prosecutors more. If we curbed their unfettered discretion.[1] If they sought less harsh punishments. Or if they charged fewer people, which arguably has contributed more to mass incarceration than the War on Drugs.[2] If we required

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1 ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 15–17, 192–94 (2007).

2 JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM 206 (2017) (concluding that "[p]rosecutors have been and remain the engines driving mass incarceration"); *see also* EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION 77–81 (2019) (arguing that prosecutors bear much of the responsibility for over-incarceration).

them to have open file discovery—the '220 norm in civil cases—instead of keeping evidence, even exculpatory evidence, close to the vest.[3] If they confronted their implicit biases about race and class and everything else.[4] If we limited their power to coerce pleas[5] or fixed things so the prosecutors who investigate and advocate are not the same prosecutors who in effect adjudicate decisions.[6] The suggestions continue. If we elected progressive prosecutors.[7] If we at least leveled the funding between prosecutors and public defenders.[8] I too made some of these arguments.[9] Not anymore.

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3 *Cf.* Miriam H. Baer, *Timing* Brady, 115 COLUM. L. REV. 1, 43, 57–58 (2015) (exploring timing and institutional design as a way to increase prosecutorial compliance with discovery obligations). *See generally* Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 514 (2009) (arguing for open-file discovery); Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CALIF. L. REV. 1585, 1637 (2005) (similar).

4 Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1139–42 (2012) (discussing implicit biases among prosecutors); Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 797 (2012) (arguing that "implicit racial attitudes and stereotypes skew prosecutorial decisions in a range of racially biased ways").

5 *See, e.g.*, Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1151–60 (2011) (proposing protections for defendants who enter into plea bargains similar to protections for consumer contracts); I. Bennett Capers, *The Prosecutor's Turn*, 57 WM & MARY L. REV. 1277, 1299–1305 (2016) [hereinafter Capers, *The Prosecutor's Turn*] (discussing plea bargaining in the context of the Due Process Clause); Eric S. Fish, *Against Adversary Prosecution*, 103 IOWA L. REV. 1419, 1444–45 (2018) ("American criminal justice is essentially a system of negotiated dispositions administered by prosecutors.").

6 *See, e.g.*, Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 898 (2009) (arguing that borrowing from the institutional design inherent in administrative law checks could do much to rein in prosecutorial excess).

7 BAZELON, *supra* note 2, at 147–95; Angela J. Davis, *The Progressive Prosecutor: An Imperative for Criminal Justice Reform*, 87 FORDHAM L. REV. 1, 1 (2018) (urging the election of more progressive prosecutors); *cf.* David Alan Sklansky, *The Progressive Prosecutor's Handbook*, 50 U.C. DAVIS L. REV. ONLINE 25, 27 (2017) (providing ten suggestions of "best practices" for progressive district attorneys).

8 WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 299 (2011); David Rudovsky, Gideon *and the Effective Assistance of Counsel: The Rhetoric and the Reality*, 32 LAW & INEQ. 371, 377–82 (2014) (discussing the depth of the funding crisis); Eve Brensike Primus, *Defense Counsel and Public Defense*, *in* 3 REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESSES 121, 123–26 (Erik Luna ed. 2017); Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731, 1733–35 (2005).

9 *See, e.g.*, I. Bennett Capers, *Cross Dressing and the Criminal*, 20 YALE J. OF L. & HUMAN. 1, 22–30 (2008) (overviewing exercises of perspective "switching" for actors in the criminal justice system); Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259, 1299–1300 (2011) [hereinafter Capers, *Real Rape Too*] (arguing for gender-neutrality and better training for prosecutors of sexual assault); Capers,

The argument I put forward in this Article may seem radical, but if I may channel Ralph Ellison, "[b]ear with me."[10] Because I subscribe to the belief that "subject position is everything in my analysis of the law,"[11] it is worth disclosing that I come to this argument not just as a criminal justice scholar but also as a former federal prosecutor. That argument is this: it is time to turn away from prosecution as we know it. As a federal prosecutor I put hundreds of defendants, mostly brown and black and almost always poor, in prison as part of the War on Drugs. But if the goal was to limit the influx of drugs in this country, what I did was an abject failure.[12] And it is not just drug prosecutions. Even looking back on many of the other cases I prosecuted involving victimless "crimes" I certainly know I did more harm than good. I certainly contributed to mass incarceration and to the separation of families. But to what end?

Just consider. Each year our jails cycle through approximately ten million people, the vast majority charged with nonviolent crimes.[13] We are at a point where one in every three adults in America has a criminal record,[14] and where for every fifteen persons born in 2001, one will likely spend time in jail or prison.[15] Compared to other countries, the crime rate in the

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The Prosecutor's Turn, *supra* note 5, at 1299–1305 (discussing heightened due process requirements for prosecutors who plea bargain).

10 RALPH ELLISON, INVISIBLE MAN 12 (1952).

11 PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 3 (1991) ("Since subject position is everything in my analysis of the law, you deserve to know that it's a bad morning.").

12 *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 60 (rev. ed. 2012) (arguing that the war on drugs is the "single most important cause of the explosion in incarceration rates in the United States"). *See generally* STEVEN WISOTSKY, BEYOND THE WAR ON DRUGS: OVERCOMING A FAILED PUBLIC POLICY 8 (1990) ("One way or another, no matter what the War on Drugs does to supply, the black market in cocaine will play its trump: it thrives on enforcement, depends on it."); PAULA MALLEA, THE WAR ON DRUGS: A FAILED EXPERIMENT 11 (2014) ("It is by now indisputable that the War on Drugs has failed in all of its objectives.").

13 ZHEN ZENG, U.S. DEP'T OF JUSTICE, NCJ 251210, JAIL INMATES IN 2016, at 1 (2018), https://www.bjs.gov/content/pub/pdf/ji16.pdf [https://perma.cc/TDW6-B2K4] (noting that "[j]ails reported 10.6 million admissions during 2016").

14 CHIDI UMEZ & REBECCA PIRIUS, BARRIERS TO WORK: IMPROVING EMPLOYMENT IN LICENSED OCCUPATIONS FOR INDIVIDUALS WITH CRIMINAL RECORDS 1 (2018), https://www.ncsl.org/Portals/1/Documents/Labor/Licensing/criminalRecords_v06_web.pdf [https://perma.cc/JT77-R98T]; THE SENTENCING PROJECT, AMERICANS WITH CRIMINAL RECORDS 1 (2014), https://www.sentencingproject.org/wp-content/uploads/2015/11/Americans-with-Criminal-Records-Poverty-and-Opportunity-Profile.pdf [https://perma.cc/Y3Z3-RLRP].

15 THOMAS P. BONCZAR, U.S. DEP'T OF JUSTICE, NCJ 197976, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974–2001 7 (2003), https://www.bjs.gov/content/pub/pdf/piusp01.pdf [https://perma.cc/7BTT-SXDS].

United States is not exceptional,[16] and yet we have by far the highest incarceration rate in the world.[17] None of this can be solved by simply tinkering with the machinery of prosecution. It is time to rethink why and how we prosecute in the first place.

What would it mean to turn away from public prosecutors and not rely on the criminal justice system as the first responder to address social ills, such as mental illness and poverty (two of the main drivers of our prison industrial complex)? More radically, what would it mean to turn away from state-controlled prosecution as the primary way to address crime? What would it mean to replace a system where prosecutors hold a monopoly in deciding which cases are worthy of pursuit with a system in which "we the people," including those of us who have traditionally had little power, would be empowered to seek and achieve justice ourselves?

This Article attempts to answer these questions. It begins in Part I with the enormous, monopolistic power public prosecutors wield. But this power is not inevitable. Indeed, public prosecutors are not even inevitable. This is the main point of Part II, which surfaces the rarely discussed history of criminal prosecutions in this country *before* the advent of the public prosecutor, when private prosecutions were the norm and in a very real sense criminal prosecutions belonged to "the people." Part II then demonstrates that our history of private prosecutions and the turn to public prosecutions is more than just a curious footnote, as this very history has, in turn, shaped criminal law and justice as we know it. Part III, in many ways the core of this Article, makes the argument for turning away from public prosecutors and restoring prosecution to the people. It also returns to the question that motivates this Article: what benefits might accrue if victims had the option to pursue criminal charges through private prosecution or public prosecution? Part III argues there would be several benefits, including democratizing criminal justice and, quite possibly, reducing mass incarceration.

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16 *See, e.g.*, U.N. OFFICE ON DRUGS AND CRIME, GLOBAL STUDY ON HOMICIDE 12, 126 (2013) (showing that the U.S. homicide rate is below the global average).

17 ROY WALMSLEY, INST. FOR CRIMINAL POLICY RESEARCH, WORLD PRISON POPULATION LIST 2 (12th ed. 2018).

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THE PROSECUTORS

Consider two fairly recent news stories: one that is not so well known and one that has received national attention. In May 2019, the *New York Times* began a story with the following lines: "Evidence so neglected it grew mold. Calls to the authorities for help that went unanswered. Witnesses and victims who were never interviewed."[18] The story was in part about the failure of police and prosecutors to charge rape cases. Indeed, in many respects that part of the story was familiar. According to one recent study looking at rape reporting between 1995 and 2012, roughly a million reported "forcible vaginal rapes of female victims nationwide disappeared from the official records";[19] police officers and prosecutors simply decided not to prosecute them.[20] Instead, prosecutors culled and chose the few cases they wanted to pursue. What was less familiar was the second part of the story: now, victims are trying to force action. In various cities around the country, victims are actually suing to force police and district attorneys to investigate and prosecute.[21]

The other story is better known and continues to receive coverage nationwide. On July 7, 2019, a federal indictment was unsealed in the Southern District of New York charging financier Jeffrey Epstein with running a sex trafficking ring between 2002 and 2005.[22] The ring involved enticing and

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18 Valeriya Safronova & Rebecca Halleck, *These Rape Victims Had to Sue to Get the Police to Investigate*, N.Y. TIMES (May 23, 2019), https://www.nytimes.com/2019/05/23/us/rape-victims-kits-police-departments.html [https://perma.cc/8ZK2-Z7YK].

19 Corey Rayburn Yung, *How to Lie with Rape Statistics: America's Hidden Rape Crisis*, 99 IOWA L. REV. 1197, 1198, 1204 (2014).

20 As it stands now, prosecutors have full discretion in deciding which rape cases to pursue and what redress to seek. As one scholar recently observed, this approach "concomitantly reifies state power and positions the state as the savior of women," at least in the few cases the state does prosecute. *See* Erin Collins, *The Criminalization of Title IX*, 13 OHIO ST. J. CRIM. L. 365, 371 (2016). This discretion also results in prosecutors relying on non-legal factors in selecting cases to pursue, such as which victims look like "good girls," a selection process that has class, race, and other status implications. *See* I. Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. REV. 826, 854–65 (2013) [hereinafter Capers, *Real Women, Real Rape*].

21 Safronova & Halleck, *supra* note 18. The cities in which women have filed lawsuits to force police and prosecutors to investigate and prosecute cases include Austin, San Francisco, Memphis, Houston, and Baltimore. *Id.*

22 Ali Watkins & Vivian Wang, *Jeffrey Epstein is Accused of Luring Girls to His Manhattan Mansion and Abusing Them*, N.Y. TIMES (July 7, 2019), https://www.nytimes.com/2019/07/07/nyregion/jeffrey-epstein-sex-trafficking.html [https://perma.cc/Z4LX-8MKE].

recruiting girls as young as fourteen to visit his mansion in Manhattan and his estate in Palm Beach, Florida "to engage[ ] in [paid] sex acts with him."[23] The indictment also charged Epstein with paying his victims to recruit additional girls for abuse and with creating "a vast network of underage victims for him to sexually exploit."[24] A search of his mansion in Manhattan conducted to coincide with his arrest revealed hundreds of sexually suggestive photographs of young girls who appear underage.[25] While this and Epstein's subsequent suicide made the story newsworthy and gave it legs, the public and the news talk shows also expressed outrage over the "secret plea deal" Epstein received years earlier in a different case. That case was based on similar evidence involving more than eighty victims;[26] however, those prosecutors gave Epstein a "sweetheart" plea deal.[27] Under that earlier deal, prosecutors allowed Epstein to bypass a life sentence to instead serve just a year in a Palm Beach jail under terms that allowed him to leave the facility for twelve hours each day, six days a week, so that he could work from home.[28] The prosecutors negotiated this plea in secret, without informing Epstein's victims.[29] The prosecutors also agreed to immunize Epstein's unindicted co-conspirators.[30]

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23 Indictment at 3, United States v. Epstein, 425 F. Supp. 3d 306 (S.D.N.Y. 2019) (No. 19–cr–490).

24 Watkins & Wang, *supra* note 22.

25 Ali Watkins, *Jeffrey Epstein Is Indicted on Sex Charges as Discovery of Nude Photos Is Disclosed*, N.Y. TIMES (July 8, 2019), https://www.nytimes.com/2019/07/08/nyregion/jeffrey-epstein-charges.html [https://perma.cc/8ZAN-EFEK].

26 Julie K. Brown, *Cops Worked to Put Serial Sex Abuser in Prison. Prosecutors Worked to Cut Him a Break*, MIAMI HERALD (Nov. 28, 2018), https://www.miamiherald.com/news/local/article214210674.html [https://perma.cc/K8PP-Q4DJ]; Watkins & Wang, *supra* note 22.

27 *See* Watkins & Wang, *supra* note 22.

28 To add insult to injury, prosecutors routinely prosecute minors on charges of prostitution while discounting the fact that they are also victims of statutory rape. Cynthia Godsoe, *Punishment as Protection*, 52 HOUS. L. REV. 1313, 1323–32 (2015).

29 Despite victims having the right to have their views heard pursuant to the Crime Victims' Rights Act of 2004, the prosecutors kept the plea negotiations and actual plea secret from victims until after the plea was entered. Though a federal judge later ruled that the prosecutors violated CVRA, the judge stopped short of invalidating the plea. *See* Doe 1 v. United States, 359 F. Supp. 3d 1201, 1217–22 (S.D. Fla. 2019); Julie K. Brown, *Federal Prosecutors Broke Law in Jeffrey Epstein Case, Judge Rules*, MIAMI HERALD (Feb. 21, 2019, 2:51 PM), https://www.miamiherald.com/news/state/florida/article226577419.html [https://perma.cc/6XPR-L69Q].

30 *Doe 1*, 359 F. Supp. 3d at 1208. It was not just Florida prosecutors who helped Epstein. At Epstein's request, the District Attorney for Manhattan made a motion to have Epstein's sex registration status reduced to the lowest possible classification. Jan Ransom, *Cyrus Vance's Office Sought Reduced Sex-Offender*

These two stories—victims suing to have their cases investigated and prosecuted, and the sweetheart deal Epstein received in Florida—are not just linked by the subject of sexual assault. They are linked—and indeed, undergirded—by the unbridled power of prosecutors. The power to charge or not charge. The power to plead or not plead. And this power is reflected in a range of cases. It runs the gamut from a Chicago prosecutor's decision to dismiss charges against the actor Jussie Smollett notwithstanding overwhelming evidence,[31] to the Department of Justice's decision to forego charges against the police officer who caused the death of Eric Garner by holding him in an illegal chokehold while he protested that he was unable to breathe,[32] to prosecutors' failure to charge any executive in connection with the financial collapse of 2008.[33]

Status for Epstein, N.Y. TIMES (July 9, 2019), https://www.nytimes.com/2019/07/09/nyregion/cyrus-vance-epstein.html [https://perma.cc/6MQ6-A6Z3]. Even though the Manhattan judge refused, in the end it did not matter. When Epstein failed to comply with his registration, the Manhattan DA's Office simply looked the other way. Erin Donaghue, *NYPD Says It Wasn't Required to Monitor Jeffrey Epstein's Sex Offender Registration*, CBS NEWS (July 11, 2019, 8:26 PM), https://www.cbsnews.com/news/jeffrey-epstein-nypd-says-it-wasnt-required-to-monitor-sex-offender-registration/ [https://perma.cc/D2ZQ-EWN2].

31 Julia Jacobs, *Jussie Smollett Fights Appointment of Special Prosecutor*, N.Y. TIMES (July 19, 2019), https://www.nytimes.com/2019/07/19/arts/television/jussie-smollett-special-prosecutor.html [https://perma.cc/TH7F-NX2E]. This power is also reflected in the subsequent decision of a special prosecutor to pursue charges. *See* Julia Jacobs, *Jussie Smollett Indicted Again in Attack That Police Called a Hoax*, N.Y. TIMES (Feb. 11, 2020), https://www.nytimes.com/2020/02/11/arts/television/jussie-smollett-indicted-chicago.html [https://perma.cc/LQ6K-B8K2]. Indeed, one could even say that the Jussie Smollett case has become less about him than about prosecutorial power generally. *See* Paul Butler, *Paul Butler: The Real Target of the Jussie Smollett Charges is a Progressive Prosecutor*, CRIMESTORY (Feb. 17, 2020), https://crimestory.com/2020/02/17/paul-butler-the-real-target-of-the-jussie-smollett-charges-is-a-progressive-prosecutor/ [https://perma.cc/T3EL-FJZ8].

32 Sharon Otterman, *'The D.O.J. Has Failed Us': Eric Garner's Family Assails Prosecutors*, N.Y. TIMES (July 16, 2019), https://www.nytimes.com/2019/07/16/nyregion/eric-garner-justice-department-charges.html?searchResultPosition=1 [https://perma.cc/VP96-LK5L].

33 *See also* Jerry W. Markham, *Regulating the "Too Big to Jail" Financial Institutions*, 83 BROOK. L. REV. 517, 518–19 (2018) (noting that only lower level officers and traders were prosecuted criminally, and that high level executives were given immunity from prosecution); Nick Werle, Note, *Prosecuting Corporate Crime When Firms Are Too Big to Jail: Investigation, Deterrence, and Judicial Review*, 128 YALE L.J. 1366, 1370 (2019) (arguing that deterrence principles do not function properly when firms are too big to jail); Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. BOOKS (Jan. 9, 2014) https://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions/?printpage=true [https://perma.cc/F43T-YU2X] (criticizing the Department of Justice's rationales for not prosecuting executives). *See generally* BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE

Nor are prosecutors universally declining to pursue charges or universally declining to enforce the laws vigorously, either of which could be categorized as under enforcement. At the same time prosecutors use their power to decline to pursue some offenders, they also use their power to overcharge many others. Some stories we know because they make the news or are from Supreme Court opinions. The Alabama prosecutor who indicted a pregnant woman on manslaughter charges because she got in an altercation resulting in another woman shooting her in the stomach.[34] The Connecticut prosecutor who indicted Tanya McDowell, a poor black woman, on larceny charges for enrolling her child in a better neighboring school district in which she did not live, resulting in a five-year sentence.[35] The California prosecutor who filed a three-strikes charge against Gary Ewing, resulting in a mandatory twenty-five to life sentence for stealing three golf clubs worth less than $1200.[36] These are the stories that make the news or make it to the Supreme Court. But there are also routine, quotidian stories. The thirteen million misdemeanor cases that prosecutors file each year.[37] The half a million prosecutions for marijuana possession.[38] There is a reason John Pfaff, in his analysis of mass incarceration, concluded that much of the blame lies with prosecutors.[39] The point is not just that we should be troubled by how prosecutors exercise their power in particular cases. The point is that we should be troubled by how much power they have in the first place. And we should be troubled by the fact that it tends to be the poor and the vulnerable who get the short end of the stick.

WITH CORPORATIONS 6 (2014) (noting the rise of deferred prosecution agreements instead of filing criminal cases against corporations).

34 Sarah Mervosh, *Alabama Woman Who Was Shot While Pregnant is Charged in Fetus's Death*, N.Y. TIMES (June 27, 2019), https://www.nytimes.com/2019/06/27/us/pregnant-woman-shot-marshae-jones.html [https://perma.cc/D4ZL-MPF5].

35 *Admissions Scandal Revives Story of Mom Imprisoned for Son's Out of District Schooling*, VIBE (Mar. 15, 2019, 2:53 PM), https://www.vibe.com/2019/03/tanya-mcdowell-school-prison [https://perma.cc/AEE2-T978].

36 Ewing v. California, 538 U.S. 11, 19–20 (2003).

37 ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL 2 (2018).

38 *Drug War Statistics*, DRUG POLICY ALLIANCE http://www.drugpolicy.org/issues/drug-war-statistics [https://perma.cc/77JW-QUGD] (last visited July 26, 2019).

39 PFAFF, *supra* note 2, at 206. *But see* Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 MICH. L. REV. 835, 856 (2018) (concluding that "it is misleading and counterproductive to claim that [prosecutors], not legislators or judges," are primarily responsible for mass incarceration).

After all, the prosecutor has the unfettered power to decide whether to charge an individual or not,[40] as well as to decide which charges to bring.[41] So much power that when the Court in *McCleskey v. Kemp*[42] was confronted with gross racial disparities in prosecutors' decisions to seek the death penalty even after controlling for thirty-nine other variables, it claimed it was powerless to intercede.[43] The prosecutor's current control over the grand jury,[44] and her ability to issue subpoenas,[45] is similarly staggering. It is the prosecutor who decides whether to negotiate a plea or not, and what terms to offer.[46] In many jurisdictions, the prosecutor in effect decides the sentence.[47] With "nearly-unfettered and nearly-unreviewable discretion, prosecutors determine almost every aspect of a defendant's case."[48] In short, the prosecutor often functions as the "police, prosecutor, magistrate, grand jury, petit jury, and

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40 As Josh Bowers writes, prosecutors' "prerogative to pursue easy legal cases is essentially plenary: They may, but need not, consider normative guilt; they may, but need not, exercise equitable discretion." Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1659 (2010).

41 DAVIS, *supra* note 1, at 126–27, 140–41. One of the clearest examples of this discretion arose out of the riots at the Attica Correctional Facility in 1971. As the guards were ostensibly taking steps to regain control of the prison, they retaliated by killing several prisoners and continued to assault and beat prisoners after regaining control. When federal and state prosecutors declined to pursue charges against the guards, prisoners and family members sued. The Second Circuit Court of Appeals dismissed the claims, citing the discretionary power of prosecutors. *See* Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375, 382 (2d Cir. 1973). For a historical perspective on this discretionary power, see Carolyn B. Ramsey, *The Discretionary Power of "Public" Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1323–52 (2002).

42 481 U.S. 279, 297 (1987) (citing prosecutorial discretion as a reason to not disturb conviction, notwithstanding evidence of racial disparities in prosecutors' charging decisions).

43 *Id.* at 308.

44 Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 264 (1995) (concluding that the current system "ensures that even reasonable, independent-minded jurors will defer to the prosecutor's judgment"); Note, *Restoring Legitimacy: The Grand Jury as the Prosecutor's Administrative Agency*, 130 HARV. L. REV. 1205, 1208 (2017); *see also* Commonwealth v. Walczak, 979 N.E.2d 732, 752 (Mass. 2012) (Lenk, J., concurring) ("It can fairly be said that the prosecutor holds all the cards before the grand jury.").

45 Miriam H. Baer, *Law Enforcement's* Lochner, MINN. L. REV. (forthcoming 2021) (manuscript at 4–6, 30–31) (on file with author) (detailing rules that enable government prosecutors and regulators to collect an immense amount of information relatively easily and quickly).

46 Capers, *The Prosecutor's Turn*, *supra* note 5, at 1290–95.

47 SANFORD H. KADISH, STEPHEN J. SCHULHOFER, & RACHEL E. BARKOW, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 1180 (10th ed. 2017).

48 John F. Pfaff, *Criminal Punishment and the Politics of Place*, 45 FORDHAM URB. L.J. 571, 575 (2018); *see also* Angela J. Davis, *Meet the Criminal Justice System's Most Powerful Actors*, APPEAL (May 29, 2018), https://theappeal.org/

judge in one."[49] "He is *the* pivotal figure in the justice process."[50] Indeed, law itself "is qualified, and may even be nullified completely, by [a prosecutor's] discretion."[51] And through charges and lobbying, prosecutors play a role in law making, enough to prompt Bill Stuntz to describe prosecutors as "the criminal justice system's real lawmakers."[52] It is little wonder that Erik Luna and Marianne Wade have observed that, for all intents and purposes, "the prosecutor *is* the criminal justice system."[53] Or that a U.S. Attorney General acknowledged, "[t]he prosecutor has more control over life, liberty, and reputation than any other person in America."[54] After all, because of separation-of-powers requirements, courts are prohibited from compelling prosecutors to file charges.[55] And yet society rarely questions this.[56]

None of this is to suggest that judges, legislators, or the police play no role in the criminal justice system. They do,

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meet-the-cj-systems-most-powerful-actors/ [https://perma.cc/3WAH-4GLT] ("The power and discretion of prosecutors cannot be overstated.").

49 RAYMOND MOLEY, POLITICS AND CRIMINAL PROSECUTION vii (1929).

50 Jack M. Kress, *Progress and Prosecution*, 423 ANNALS AM. ACAD. POL. & SOC. SCI. 99, 100 (1976).

51 KADISH ET AL., *supra* note 47, at 1179; *see also* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 506 (2001) (noting that prosecutors "frequently decline to arrest or charge").

52 Stuntz, *supra* note 51, at 506, 578; *see also id.* at 509 ("As criminal law expands, both lawmaking and adjudication pass into the hands of police and prosecutors; law enforcers, not the law, determine who goes to prison and for how long."); Bowers, *supra* note 40, at 1659–60 ("Laws are shells, and prosecutors retain almost unfettered discretion to decide how to fill the void within.").

53 Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413, 1415 (2010).

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

55 *See, e.g.*, State *ex rel.* Unnamed Petitioners v. Connors, 401 N.W.2d 782, 791 (Wis. 1987) (holding that a state statute permitting courts to compel prosecution violated the separation-of-powers requirement of the constitution); *cf.* Steen v. Appellate Div. Superior Court, 331 P.3d 136, 141–42 (Cal. 2014) (similar).

56 Nor can we simply dismiss this concentrated power with the consolation that prosecutors, the overwhelming majority of whom are elected, are acting as our representatives. While this is nominally true, it is also true that many are also motivated by self-interest, including their future careers. *See* Capers, *The Prosecutor's Turn*, *supra* note 5, at 1290–92; Bruce A. Green & Rebecca Roiphe, *Rethinking Prosecutors' Conflicts of Interest*, 58 B.C. L. REV. 463, 472 (2017); Kay L. Levine & Ronald F. Wright, *Prosecutor Risk, Maturation, and Wrongful Conviction Practice*, 42 LAW & SOC. INQUIRY 648, 657–58 (2017); *see also* Jed Shugerman, *"The Rise of the Prosecutor Politicians": Database of Prosecutorial Experience for Justices, Circuit Judges, Governors, AGs, and Senators, 1880–2017*, SHUGERBLOG (July 7, 2017), https://shugerblog.com/2017/07/07/the-rise-of-the-prosecutor-politicians-database-of-prosecutorial-experience-for-justices-circuit-judges-governors-ags-and-senators-1880-2017/ [https://perma.cc/DMN7-L5D7] (theorizing that prosecutors have historically used their position "as a stepping stone for higher office").

especially the police.[57] But their power pales in comparison to that of prosecutors. While the police can make an arrest, in most jurisdictions it is the prosecutor who must seek charges. With respect to the power of judges, the federal judge Jed Rakoff has described prosecutors as "the real rulers of the American criminal justice system."[58] And the power of prosecutors has only grown, along with their numbers. In 1974, there were approximately 17,000 state prosecutors nationwide.[59] By 2001, that number had swollen to approximately 27,000, with a budget of $4.68 billion.[60] A little over a decade ago, Rachel Barkow described the prosecutor as a "leviathan."[61] No word seems more apt.

Thus far, I have argued that the stories of women suing to force prosecutors to prosecute, the plutocratic "justice" that Epstein initially received, and the other examples of under and over enforcement, are linked by the unreviewable and monopolistic power of prosecutors to say yea or nay. But another link is the relative powerlessness of the victims and by extension all of us, especially those of us with the least power in society. At the same time that prosecutors have amassed power, actual victims have lost power. Consider that it is not uncommon for prosecutors to demand the incarceration of domestic violence victims for refusing to "cooperate" against their alleged abusers.[62] Or consider a death penalty case in Colorado where prosecutors blocked the victim's family from telling jurors they oppose the death penalty.[63]

Victims have lost power. This is especially true of victims who are already disadvantaged because of gender, or race, or

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57 *See generally* Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 191–94 (2019) (discussing the power of the police to influence outcomes before the charging stage).

58 Jed S. Rakoff, *Why Prosecutors Rule the Criminal Justice System—And What Can Be Done About It*, 111 NW. U. L. REV. 1429, 1436 (2017).

59 PATRICK F. HEALY, NATIONAL PROSECUTOR SURVEY (1977).

60 CAROL J. DEFRANCES, U.S. DEP'T OF JUSTICE, NCJ 193441, PROSECUTORS IN STATE COURTS, 2001, at 4 (2002), https://www.bjs.gov/content/pub/pdf/psc01.pdf [https://perma.cc/8P7E-SH6T].

61 Barkow, *supra* note 6, at 874.

62 Leigh Goodmark, *The Impact of Prosecutorial Misconduct, Overreach, and Misuse of Discretion on Gender Violence Victims*, 123 DICK. L. REV. 627, 637–40 (2019) [hereinafter Goodmark, *Prosecutorial Misconduct*] (discussing the practice of using material witness warrants and incarceration to force domestic violence victims to cooperate).

63 *See* Andrew Cohen, *When Victims Speak Up in Court—In Defense of the Criminals*, ATLANTIC (Jan. 28, 2014), https://www.theatlantic.com/national/archive/2014/01/when-victims-speak-up-in-court-in-defense-of-the-criminals/283345/ [https://perma.cc/A4AZ-N2JY].

class, or sexuality.[64] And it is true of the public more generally. After all, nearly ninety-seven percent of all convictions are now the result of pleas, a number so staggering that the Court finally acknowledged that plea bargaining "*is* the criminal justice system."[65] The disappearing jury trial is itself an issue in terms of justice; and as a key source of public input into guilt or innocence, it also speaks to the public's diminishing role in criminal justice.[66] "We now have not only an administrative criminal justice system," Ronald Wright and Marc Miller observe, "but one so dominant that trials take place in the shadow of guilty pleas."[67] The jury trial that Alexis de Toqueville famously celebrated as a key component of democracy and part of "the sovereignty of the people" has become the exception, not the rule.[68] In its place stands the prosecutor. This accumulation of power by prosecutors and diminution in power by the people has been gradual—Stephanos Bibas' term "legal drift"[69] is appropriate here—and has been more than 300 years in the making. It has been so gradual that many of us have come to take it for granted and see it as natural. It has even been said that we became "careless of the continual growth of power in the prosecuting attorney."[70] But things were not always this way. We were not always so careless. Originally, we, the people, had more power. The Part below recounts this neglected history.

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64 This is true in sexual assault cases. *See, e.g.*, Capers, *Real Women, Real Rape*, *supra* note 20, at 865–71 (arguing that black women face stereotypes about their sexuality that weakens their protection under rape shield laws); Capers, *Real Rape Too*, *supra* note 9, at 1297–1301 (discussing the lack of enforcement against rape when the victim is male). It is true in capital cases. *See, e.g.*, Randall L. Kennedy, McCleskey v. Kemp*: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1390 (1988) (examining the Court's failure to protect black victims of murder); BRANDON L. GARRETT, END OF ITS ROPE: HOW KILLING THE DEATH PENALTY CAN REVIVE CRIMINAL JUSTICE 84, 192 (2017) (finding that the race of victim matters in the pursuit of the death penalty; Garrett calls this the "white lives matter" effect). It is true too of black and brown victims of police violence.

65 Missouri v. Frye, 566 U.S. 134, 144 (2012) (stating that plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system") (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)).

66 *See, e.g.*, John W. Keker, *The Advent of the 'Vanishing Trial': Why Trials Matter*, 29 CHAMPION 32, 32 (2005) (noting the statistical decline of trials).

67 Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 STAN. L. REV. 1409, 1415 (2003).

68 *See* 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 282–83 (Phillips Bradley ed., Henry Reeve trans., 1945) (1835).

69 STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE 1 (2012).

70 NAT'L COMM'N ON LAW OBSERVANCE AND ENF'T, REPORT ON PROSECUTION 11 (1931).

II
WE, THE PEOPLE

While the notion of a crime victim pursing criminal charges herself may seem "alien to modern America,"[71] throughout colonial America and in England private prosecution was the norm. To be sure, there were Attorneys General that handled criminal matters, but for the most part their authority was limited to cases that directly affected the Crown. For everyday criminal matters, power resided with the people. This Part recounts this rarely discussed history and then suggests three lessons that can be gleaned from it. The goal is not to pay obeisance or offer blind fealty to our forebears by suggesting we adopt whole cloth their system of private prosecution. Far from it.[72] Nor is the point merely to show that private prosecution is part of our collective cultural DNA. Rather, the point is to show that the public prosecutor, a "historical latecomer,"[73] is not inevitable. The point too is to show that the turn to public prosecutors has had very real consequences in terms of the expansion of criminal law and the contraction of the role of victims.

A. From Private Prosecution to Public Prosecutors

Today, the fact that public prosecutors bring cases in the name of the "people" is for the most part taken for granted.[74]

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71 JOAN E. JACOBY, THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY 10 (1980).

72 Nor is the goal to idealize or romanticize the past, especially given evidence that the private prosecution system became very imperfect in some places. One such place was Philadelphia. As Allen Steinberg has documented, by the mid-nineteenth century the private prosecution system in Philadelphia was "subject to exploitation, and often, relative to the formal law, quite corrupt." ALLEN STEINBERG, THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800–1880 2 (1989). Steinberg acknowledges that this was attributable, at least in part, to the unique conditions of Philadelphia at the time:

> The spatial and social density of life in Philadelphia produced the circumstances in which ordinary people came to depend—and prey—upon one another. All facets of popular life in Philadelphia created the propensity toward litigation: poverty, the stress of bewildering social change, family tensions, ethnic and racial prejudice and rivalry, the boisterousness of the streets and saloons—in short, the everyday affairs of ordinary people living in crowded conditions in, or on the edge of, poverty. The resolution of their quarrels and spats, and their attempts to take advantage of one another or to avenge injustices, took them regularly to court.

Id. at 16–17.

73 John H. Langbein, *The Origins of Public Prosecution at Common Law*, 17 AM. J. LEGAL HIST. 313, 313 (1973).

74 *Cf.* Jocelyn Simonson, *The Place of "The People" in Criminal Procedure*, 119 COLUM. L. REV. 249, 250–55 (2019) (exploring and challenging the assumption that prosecutors represent the people).

But things were not always this way. It is not even part of our long common law history.[75] From the point of view of our forebears, it is the idea of public prosecutors having a monopoly over—or indeed, any role at all in—everyday criminal matters that would seem alien.[76] As historian Joan Jacoby succinctly put it, there was "no figure like the prosecutor at Jamestown or Plymouth."[77] Rather, private prosecution was the norm, and ingrained in the common law.

> In common law . . . a crime [was] viewed not as an act against the state, but rather as a wrong inflicted upon a victim. The aggrieved victim, or an interested friend or relative, would personally arrest and prosecute the offender, after which the courts would adjudicate the matter much as they would a contract dispute or a tortuous injury.[78]

Put differently, prosecution of criminal offenses "consisted of charges being brought to the attention of the courts by individuals who had been wronged and who sought redress."[79] In small, sparsely populated areas, justice existed without a trained bar. In larger areas that could support a professional judiciary, the model was still that of the rural justice-of-the-

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75 *See, e.g.*, JACOBY, *supra* note 71, at 6–7. ("The public prosecutor is not part of America's heritage from British common law." Rather, the "prosecuting attorney is a distinctly American figure, and for distinctly American reasons."); *see also* JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 10–13 (2003) (describing the English practice, common through the sixteenth and seventeenth centuries, of public prosecutors handling treason cases only; otherwise, victims of crimes served as their own prosecutors). Evidence suggests the average trial lasted fifteen to twenty minutes. *Id.* at 16. Later, the Marian Committal Statute would employ justices of the peace to play a more active role in private prosecutions by in effect issuing arrest warrants, compelling witnesses to appear, and in some occasions assisting in the investigation by examining the prisoner and other witnesses. *Id.* at 40–41. That said, even as recently as 1960, public prosecutions accounted for only eight percent of the prosecutions in England, with the remaining prosecutions being brought by private individuals or the police, who under law are acting as private citizens "interested in the maintenance of law and order." JACOBY, *supra* note 71, at 8.

76 John Langbein makes a similar observation. "We seldom appreciate," writes Langbein, "that [our] lawyerized criminal trial looks as striking from the perspective of our own legal history as from that of comparative law." John H. Langbein, *The Criminal Trial Before The Lawyers*, 45 U. CHI. L. REV. 263, 263 (1978).

77 JACOBY, *supra* note 71, at 6.

78 JACOBY, *supra* note 71, at 6–8 ("[T]he British common law system for prosecution was essentially litigation between private parties."); Albert J. Reiss, Jr., *Public Prosecutors and Criminal Prosecution in the United States of America*, 20 JURID. REV. 1, 4 (1975) ("Historically in England, while the Attorney-General, as Law Officer of the Crown, was responsible for criminal prosecutions in which the Crown was directly interested, the enforcement of criminal law was left almost entirely to private individuals.").

79 JACOBY, *supra* note 71, at 12–13.

peace system then predominant in England. Either way, criminal justice in colonial America tended to be "the business of laymen, not lawyers."[80] Indeed, at common law a citizen could appeal directly to a grand jury to press charges.[81] The criminal justice system in the Bay Colony of Massachusetts was not atypical.[82] There, criminal justice was a decidedly private matter, with "simple courts [that] required no officer to represent the government or to bring prosecution. The court itself represented the government; individuals brought charges against law breakers."[83] This is not to say that the public prosecutor was completely absent in the colonies. In fact, the colonies had the equivalent of attorneys general. However, their function, as in England,[84] was limited to prosecuting matters that were of particular interest to the Crown—in England, think the trial of Sir Walter Raleigh; in the colonies, think the trial of British soldiers for firing on colonists during the Boston Massacre.[85] For everyday matters, "crime" was handled through private actors, the aggrieved against the alleged offender.[86] For this reason, historians have concluded that the public prosecutor,

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80 Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 912 (2006); LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 27 (1993) ("Colonial justice was a business of amateurs.").

81 *See* 3 WAYNE R. LAFAVE ET AL., 3 CRIMINAL PROCEDURE § 8.4(b) (4th ed. 2015).

82 JACOBY, *supra* note 71, at 13.

83 *Id.* It also speaks volumes that the primary summary of colonial trials, *Criminal Trials in the Court of Assistants and Superior Court of Judicature, 1630–1700*, contains no reference to prosecuting attorneys. *See* JOHN NOBLE, CRIMINAL TRIALS IN THE COURT OF ASSISTANTS AND SUPERIOUR COURT OF JUDICATURE, 1630–1700 (1897).

84 Yue Ma, *Exploring the Origins of Public Prosecution*, 18 INT'L CRIM. JUST. REV. 190, 195 (2008) ("Apart from his duty in civil courts, the [Crown's] attorney general reviewed cases of crime to see if a royal interest was implicated."). Early English law distinguished between State trials, which involved matters of importance to the crown, and ordinary criminal cases. While lawyers were involved in the former—Sir Walter Raleigh's Case being a prime example—lawyers were typically not involved in the prosecution or defense of the latter. *See* Langbein, *supra* note 73, at 316.

85 In addition to having prosecutorial authority over matters that directly affected the Crown, Attorneys General also had the power of *nolle prosequi* to dismiss privately brought prosecutions. Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 728 n.65 (1996).

86 *See* DAVIS, *supra* note 1, at 9 ("Before the American Revolution, the crime victim maintained sole responsibility for apprehending and prosecuting the criminal suspect."); Roger A. Fairfax Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U.C. DAVIS L. REV. 411, 421 (2009) ("Although prosecutorial power in the early colonies initially often was concentrated in a representative of the Crown, the English tradition of private prosecution dominated the early American experience before the Revolution.").

"virtually unknown to the English system,"[87] was "an historical latecomer"[88] to the American colonies.

There was one notable exception to this norm of private prosecution, but this exception is traceable not to the English but to the Dutch, who controlled New York and much of the surrounding area as New Netherland from 1624 until 1673.[89] In 1653, the Dutch established the area's first courts in Manhattan, then known as New Amsterdam, and then in Elizabeth, New Jersey, then called Bergen, in 1661.[90] The Dutch system included a *schout*, "a combination constable and court officer," whose duties included "presenting the case against the defendant and notifying all accused of the charges being levelled against them."[91] "Citizens with complaints would go to the *schout*, provide him with statements and available evidence; he would notify the accused and make the presentation before the court."[92] When the English wrested control from the Dutch in 1674 and New Amsterdam was rechristened New York, the English kept intact the responsibilities of the *schout*, though those responsibilities were now assigned to the sheriff.[93] Indeed, as late as 1676 magistrates in English-controlled New York were being instructed to administer justice according to "former practice, not repugnant to the laws of the government."[94] When questioned about the propriety of maintaining

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87 Kress, *supra* note 50, at 100. By the 17th century, criminal proceedings were undertaken under the name of the King, but largely administered by victims themselves. As Marie Manikis puts it, victims "remained in charge of arrests, collecting evidence, and prosecutions." Marie Manikis, *Conceptualizing the Victim Within Criminal Justice Processes in Common Law Tradition*, *in* THE OXFORD HANDBOOK OF CRIMINAL PROCESS 247, 248 (Darryl K. Brown et al. eds., 2019).

88 Langbein, *supra* note 73, at 313.

89 Most legal historians trace the American form of prosecution to the Dutch. JACOBY, *supra* note 71, at 13–14; *see also* SANFORD H. KADISH & MONRAD G. PAULSEN, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS, 1034 (2d ed. 1969) (observing that the public prosecutor "is possibly a legacy from the Dutch administration in what is now New York"); Reiss, *supra* note 78, at 5 (identifying the *schout* as the likely origin for American prosecutors). Other influences include the English Attorney General and the French *procureur*. *See* Reiss, *supra* note 78, at 1–21; JACOBY, *supra* note 71, at 3. There is also the possibility that the colonists recalled the hybrid role English Justices of the Peace assumed in the narrow class of serious felonies. *See generally* Langbein, *supra* note 73, at 313–25 (discussing this historical development). The end result was a "uniquely American prosecutor." Joan E. Jacoby, *The American Prosecutor in Historical Context*, 39 PROSECUTOR 34, 37 (2005).

90 JACOBY, *supra* note 71, at 14.

91 *Id.*

92 *Id.*

93 Reiss, *supra* note 78, at 6–7.

94 Instructions for the Commissaries of Albany, Albany Ordinary Ct. 1676, quoted in 2 WILLIAM E. NELSON, THE COMMON LAW IN COLONIAL AMERICA 32 (2013).

public prosecutions, essentially a "foreign" practice now being exercised by the sheriff, the English colony responded by officially affirming the practice and issuing a written statement to that effect.[95]

Even beyond the former Dutch possessions,[96] small changes were happening elsewhere that set the stage for public prosecution. By 1666, the Attorney General for Maryland was presenting criminal indictments to the grand jury.[97] And by 1670, the Attorney General for Virginia was appearing in the Court of Oyer and Terminer[98] during all trials.[99] Still, even as public prosecutors entered the scene—a period that some might call part of the "publicization of the private"[100]—their power was understood to be limited. In "the eyes of the earliest Americans, [the public prosecutor was] clearly a minor actor in the court's structure."[101] There was nothing approaching true public prosecution until 1704, when Connecticut—which had been partly under Dutch control—became the first colony to abolish all private prosecutions and adopt in its place a system of public prosecution.[102] The Connecticut law provided:

> Henceforth there shall be in every countie a sober, discreet and religious person appointed by the countie courts, to be atturney for the Queen . . . to prosecute and implead in the lawe all criminals and to doe all other things necessary or convenient as an atturney to suppresse vice and immoralitie.[103]

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95 W. Scott Van Alstyne, Jr., Comment, *The District Attorney—A Historical Puzzle*, 1952 WIS. L. REV. 125, 137 (1952).

96 There is some evidence to suggest that the Dutch influence of using a *schout* also extended to other Dutch possessions, including Delaware and Pennsylvania. JACOBY, *supra* note 71, at 14–15; *see also* Kress, *supra* note 50, at 104 (discussing Dutch influence despite a small Dutch settler population).

97 JACOBY, *supra* note 71, at 15. New Hampshire followed suit in 1683. *Id.*

98 Courts of Oyer and Terminer were essentially courts of general jurisdiction hearing and determining criminal cases. *See* Melissa J. Mauck, *Court of Oyer and Terminer*, *in* THE SOCIAL HISTORY OF CRIME AND PUNISHMENT IN AMERICA: AN ENCYCLOPEDIA 360 (Wilbur R. Miller ed., 2012).

99 JACOBY, *supra* note 71, at 15.

100 JOHN BRAITHWAITE, REGULATORY CAPITALISM: HOW IT WORKS, IDEAS FOR MAKING IT WORK BETTER 7–8 (2008); *see also* Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1285 n.1 (2003) (discussing the opposite theory of "privatization").

101 JACOBY, *supra* note 71, at 23.

102 *Id.* at 10.

103 NAT'L COMM'N ON LAW OBSERVANCE AND ENF'T, REPORT ON PROSECUTION 7 (1931).

Gradually, other colonies followed suit,[104] though evidence makes clear that public and private prosecution continued to co-exist well into the American Revolution and the ratification of the Constitution.[105] But public prosecution was clearly in the ascendance, such that by the time of the Civil War, private prosecution was becoming a memory.[106] Equally significant changes were happening federally. Most notably, the federal government established the Office of a United States Attorney General and U.S. Attorneys through the Judiciary Act of 1789.[107] Private prosecution was receding and public prosecution was becoming the norm, though a few remnants of the old system remain even now.[108] And public prosecutors, who went

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104 As Joan Jacoby has observed, the "most apt description of the process that has occurred in American criminal prosecution over the past 350 years is 'evolution.'" JACOBY, *supra* note 71, at 6. Unfortunately, until fairly recently, little had been written about the origin or history of public prosecutors. What *can* be safely said is this:

> [T]hat there was no figure like the prosecutor at Jamestown or Plymouth; that by the time of the Revolution an officer with some of his basic characteristics had appeared in various colonies; that by the civil war, there were District Attorneys quite like those we have in the present era functioning in a large number of the states; and that, at the present time, most states employ a single, locally elected officer with primary responsibility and discretion to prosecute all criminal matters within a defined political subdivision.

Id.

105 For example, the legal historian George Thomas, in his examination of records from the New Jersey Court of Oyer and Terminer from 1749 to 1762, found citizens routinely "acted as prosecutor by bringing criminal prosecutions for most crimes. . . . [C]harges could be, and often were, laid by private citizens." George C. Thomas III, *Colonial Criminal Law and Procedure: The Royal Colony of New Jersey 1749–57*, 1 N.Y.U. J.L. & LIBERTY 671, 679 (2005).

106 *See* Allen Steinberg, *From Private Prosecution to Plea Bargaining: Criminal Prosecution, the District Attorney, and American Legal History*, 30 CRIME & DELINQ. 568, 569–70 (1984).

107 Judiciary Act of 1789, ch. 20, § 35, 1 Stat 73, 92–93. This is not to suggest that, by the turn of the nineteenth century, public prosecution looked like prosecution as we know it today. For example, it is telling that "early Congresses limited themselves to targeting activity that injured or interfered with the federal government itself, its property, or its programs." DANIEL C. RICHMAN ET AL., DEFINING FEDERAL CRIMES 3 (2d ed., 2018).

108 For example, in rape cases especially, it remains not uncommon for the victim to be described as the "prosecutrix"—*see, e.g.*, Stephens v. Morris, 756 F. Supp. 1137, 1139 (N.D. Ind. 1991); State v. Rodriguez, 2012 WL 5358856, *1 (Del. Super. Ct. 2012); Rusk v. State, 406 A.2d 624, 625 (1979); People v. Abbot, 19 Wend. (N.Y.) 192, 192 (1838); —a likely a carryover from the period when victims prosecuted their own cases. Similarly, it is not infrequent for law enforcement to ask a victim if he or she wants to "press charges." While this likely originally meant prosecute the case, now the term is simply used to see if the victim is willing to testify and/or is sufficiently invested in the outcome to want the officer to pursue charges. In many respects, the question is asked as a courtesy. In addition, citizens still have the right to play a role in prosecution in a handful of jurisdictions. *See, e.g.*, Jed Handelsman Shugerman, *Professionals, Politicos, and*

from being appointed to being elected,[109] were on the road to exercising the hegemonic power they wield today.[110]

There still remains the question of what prompted this transition from private prosecutions to public prosecutions. Although the historical record is thin[111]—unsurprising, given that until recently, little had "been written about [the history of] the prosecutor; scant research [was] conducted"[112]—it seems safe to assume that contributing factors include the rise in urbanization that accompanied the industrial revolution, together with the growing complexity of the law.[113] Britain's dwindling influence in local matters, largely as a result of geography and the colonists' preference for self-rule, likely played a role as well; this would have allowed the colonies to experiment with and embrace public prosecutors at a time when the British system was still predicated on private prosecution.[114] It is also possible that colonists viewed public prosecutors as a way to relieve victims of the need to pursue their own cases[115] or to level the playing field between victims with means to pursue private prosecutions, and victims without. In addition, public prosecutors may have been viewed as a buffer against vindictive or unscrupulous complainants, or even biased grand jurors. As such, it is entirely possible that colonists viewed the transition to public prosecutions as a net good. Joan Jacoby suggests that "[t]he office of the prosecutor is the natural and logical result of the legal, social, and political developments that shaped the United States' judicial system over the past

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Crony Attorneys General: A Historical Sketch of the U.S. Attorney General as a Case for Structural Independence, 87 FORDHAM L. REV. 1965, 1987 (2019) ("Even today, New Hampshire, New Jersey, Pennsylvania, Rhode Island, Virginia, and Texas allow private citizens to serve a role in criminal prosecutions.").

109 For a discussion of this change, see JACOBY, *supra* note 71, at 19–28.

110 To be sure, the victims' rights movement of the last few decades has resulted in victims normally having a right to make their views known. However, for the most part this has resulted in a right of consultation and expression, such as the right to submit victim impact statements. It has not resulted in dispositive participation. *See* Manikis, *supra* note 87, at 257–60.

111 Jacoby herself concedes that it "is impossible to say exactly why the system of private prosecution failed to root in the American colonies." JACOBY, *supra* note 71, at 16; *see also* FRIEDMAN, *supra* note 80, at 21 (describing the colonial criminal justice system as "elusive. The further we look back in time, the dimmer the world gets, and the stranger."); Langbein, *supra* note 76, at 263–64 (lamenting that the history "could be so little glimpsed from the conventional sources").

112 JACOBY, *supra* note 71, at xv.

113 *Id.* at 16–19.

114 *Id.* at 11–12, 16–18.

115 She adds, "[t]he rejection of the general notion of a privileged class within society also resulted in the rejection of ideas and forms that tended to protect that privilege. In colonial America, public prosecution was an available and progressive remedy for a population dedicated to a more democratic society." *Id* at 17.

350 years. [The result] is a distinctly American figure, and for distinctly American reasons."[116] Lawrence Friedman is even more direct, arguing that "the concept of *public* responsibility for prosecuting criminals rang a bell in the colonial mind."[117]

While these explanations have an intuitive appeal, they may obscure less generous reasons colonies had for embracing public prosecutions. Criminologist Nils Christie's observations bear repeating: "Authorities have in time past shown considerable willingness, in representing the victim, to act as receivers of the money or other property from the offender."[118] It is also worth observing that the rise in public prosecutors, at least in Virginia, may have had something to do with making sure money went into its coffers; one problem with private prosecutions was that it made it easy for parties to bypass paying fees to the court system.[119] The legal historian Nicholas Parrillo goes even further, noting that throughout much of the nineteenth century, "American public prosecutors made their income from fees, usually based on the number of cases they brought or the number of convictions they won."[120] Stephanos Bibas is specific: "Until the mid-nineteenth century, New York prosecutors searched for evidence, drafted legal documents, and empanelled juries upon victims' paying them set fees."[121] All of this suggests that the colonies' turn to public prosecution may have been anything but disinterested.

Indeed, it is worth noting that even today, states may have an incentive to maintain control over prosecutions. Just one data point: victims rarely receive restitution from defendants, even when the defendants have the financial wherewithal to make restitution. Instead of restitution to victims, we have moved to a system in which defendants are instead required to make payments to courts and indirectly to prosecutors, through court fees. Although in some places, courts require that restitution take precedence over any fines or fees, other

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116 *Id.* at 6. She adds "[t]he system [of private prosecutions] failed to hold because it fit poorly with the concept that the new Americans had developed for their government." *Id.* at 10.

117 FRIEDMAN, *supra* note 80, at 30.

118 Nils Christie, *Conflicts as Property*, 17 BRIT. J. CRIMINOLOGY 1, 4 (1977).

119 As Joan Jacoby notes, this practice threatened "the financial solvency of the courts." This concern was weighty enough such that in 1711, Virginia's Attorney General ordered his deputies to involve themselves in all prosecutions to ensure the state collected revenue from prosecutions. JACOBY, *supra* note 71, at 18.

120 NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940, at 255 (2013).

121 BIBAS, *supra* note 69, at 4.

jurisdictions give no such priority. Furthermore, given that the vast majority of indicted defendants are themselves poor, the requirement that they pay court fees and fines likely means defendants have less money at their disposal to make victims whole.[122]

Although it is important to grasp why our norm of private prosecutions disappeared—tellingly, the history is all but absent from criminal law casebooks[123]—the larger issue is that such a norm existed. What lessons can we take from this history? I submit there are three, which I describe below.

B. Three Lessons

It would be easy to view the history of private prosecutions, and subsequent turn to public prosecutions, as merely that: history. Dusty history. An interesting side note, or endnote, or footnote, but nothing more. While such a view is tempting, it would not be correct. In fact, understanding this history leads to three important insights, all of which thicken our understanding of the criminal justice system we have now.

First, this history reveals how contingent prosecutors are. We have become so inured to a system dependent on "insiders who run the criminal justice system—judges, police, and especially prosecutors"[124]—that we tend to think of it as natural, as just *how things are*. Knowing that the "very institution of public prosecution is largely an American invention"[125] denaturalizes the current system. And it shows that other ways are possible. Indeed, it reveals that a completely different way of doing things—private prosecutions—is in our collective cultural DNA.

Second, this history prompts us to consider how the state came to supplant the role of crime victims. Because this is what happened as public prosecutors became the norm. Just

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122 Putting a number on how much victims lose as a result of court fees and fines is difficult to assess, in part because there is so little data, let alone uniform data, on collection. It is also complicated by varying rules about what restitution means or who is a victim. For example, New York, in a bit of legislative legerdemain, requires all convicted defendants to pay a "victim" fee, regardless of whether the crime was victimless or not. *See* N.Y. PENAL LAW § 60.35(1)(a) (Consol. 2020) (requiring all persons convicted of a felony or misdemeanor to pay a "crime victim assistance fee of twenty-five dollars").

123 *See, e.g.*, KADISH ET AL., *supra* note 47, at 1191–92 (discussing the availability of private prosecutions in Britain and other countries but omitting the history of private prosecutions in the United States).

124 Bibas, *supra* note 80, at 911.

125 FRANK W. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 54 n.22 (1969).

consider. As early as 1777, the Pennsylvania Constitution declared that "all prosecutions shall commence in the name and by the authority" of Pennsylvania, and that all charged crimes violate the essential "peace and dignity of the same."[126] Although this language did not explicitly exclude actual victims, the sentiment clearly did, such that the concept of criminal justice soon conceived "of the criminal act to be a public occurrence and of society as a whole the ultimate victim."[127] A judge of the Court of Pleas, New Haven County, Connecticut, observed as much in his 1926 article, *The Office of Prosecutor in Connecticut*:

> In all criminal cases in Connecticut "the state" is the prosecutor. The offenses are aginst [sic] "the state." The victim of the offense is not a "party" to the prosecution nor does he occupy any relation to it other than that of a "witness," an interested witness mayhap, but none the less only a witness.
>
> It is not necessary that the injured party make complaint . . . . He cannot in any way control the prosecution and whether reluctant or no, he can be compelled like any other witness to appear and testify.[128]

Just a few years later in *Berger v. United States*, the United States Supreme Court used similar language to describe federal prosecutors: "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty . . . ."[129] Not only was the victim's role supplanted, the victim was, in effect, rendered superfluous. If anything, courts now frown upon victims seeking criminal recourse. To be sure, a handful of states today allow the use of private prosecutors, but their use is limited and restricted to a narrow range of cases.[130] What is more common is for states to entirely bar private prosecutions.[131] A decision from the Wiscon-

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126 PA. CONST. OF 1776 ch. 2, §§ 21, 27. The following year, Vermont added similar language to its constitution. *See* VT. CONST. OF 1777, ch.2, art. XXIV.

127 JACOBY, *supra* note 71, at 10.

128 Walter M. Pickett, *The Office of Prosecutor in Connecticut*, 17 J. AM. INST. CRIM. L. & CRIMINOLOGY 348, 356–57 (1926). Although this quote is often attributed to *Malley v. Lane*, 115 A. 674 (Conn. 1921), it is actually by the Honorable Walter Pickett, a Connecticut state judge. *Id.*

129 295 U.S. 78, 88 (1935).

130 The role of private attorneys is usually confined to assisting a public prosecutor and requires the consent of both the public prosecutor and the court. *See* Reiss, *supra* note 78, at 1.

131 *See, e.g.*, People v. Mun. Court, 103 Cal. Rptr. 645, 653–54 (Cal. Ct. App. 1972) (ruling that a private prosecution was inconsistent with California's constitution and a statute which required district attorney's approval for all prosecutions); In re Richland Cty. Magistrate's Court, 699 S.E.2d 161, 163 (S.C. 2010) (ruling that private prosecutions are inconsistent with the state's constitution,

sin Supreme Court speaks volumes. It not only reversed a conviction secured with the aid of private counsel; it also proclaimed that the use of private counsel to assist in prosecutions is contrary to the state's "public policy."[132]

The end result is that, contrary to popular understanding, a victim is not a "party" to a criminal prosecution. Nor, absent unusual circumstances, does the crime victim have an attorney in court.[133] Jack Kress's observations in this regard bear repeating:

> The American district attorney . . . represents the state and not the victim. This is why he rarely consults a victim with regard to charging or plea negotiations and almost never informs him of the results of the case in which the victim may have been injured or robbed. When the crime victim speaks of the assistant district attorney as being *his* attorney, he is spouting the myth of an adversary process and not the realities of a situation where he may never be informed of his rights to receive compensation or to refuse to testify.[134]

Though this may seem a matter of little consequence—after all, this is the system we have come to take for granted, and the movement for crime victims' rights has given victims some role—this shift to public prosecutors as a monopoly should give us pause. It means that victims have less agency, if any at all. It certainly seems to fall short of political philosopher Jean Hampton's notion that retributive punishment is a way for the victim to show her value and worth.[135] Though it

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statutes, and case law, which "place the unfettered discretion to prosecute solely in the prosecutor's hands").

132 State v. Peterson, 218 N.W. 367, 369 (Wis. 1928) (holding that a prosecution aided by private funds given by parties interested in the outcome invalidated the conviction). In *Young v. United States ex rel. Vuitton*, the United States Supreme Court reached a similar conclusion and imposed a "categorical rule against the appointment of an interested prosecutor." Young v. United States *ex rel.* Vuitton, 481 U.S. 787, 814 (1987). Although *Vuitton* could be read as announcing a constitutional rule, a closer reading makes clear the decision was predicated on ethical and statutory rules and the Court's supervisory authority, rather than grounded on a constitutional mandate. There is also *Robertson v. United States ex rel. Watson*, 560 U.S. 272 (2010)—a case involving a private criminal contempt action following a public prosecution—in which the Court dismissed the writ of certiorari as improvidently granted. In his dissent from the dismissal, Chief Justice Roberts took issue with the "threshold issue" that there can a private criminal action, but failed to articulate a constitutional basis for his rejection. *Id.* at 273.

133 Kress, *supra* note 50, at 107 ("In the American system of criminal justice, the crime victim does *not* have an attorney in court.").

134 *Id.*

135 *See* Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1679–85 (1992); *see also* JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 124–28 (1988) ("I am proposing that retributive punishment is the defeat of the wrongdoer at the hands of the victim (either

may seem as if I am going "far to seek disquietude,"[136] ponder for a moment what work public prosecution as a monopoly actually does. Ponder to what extent it functions as a type of erasure of the victim, or even as a revictimization. Perhaps no one has interrogated this process more eloquently than Nils Christie. In his oft-cited article *Conflict as Property*, Christie observes:

> The key element in a criminal proceeding is that the proceeding is converted from something between the concrete parties into a conflict between one of the parties and the state. So, in a modern criminal trial, two important things have happened. First, the parties are being *represented*. Secondly, the one party that is represented by the state, namely the victim, is so thoroughly represented that she or he for most of the proceedings is pushed completely out of the arena, reduced to the triggerer-off of the whole thing. She or he is a sort of double loser; first, *vis-à-vis* the offender, but secondly and often in a more crippling manner by being denied rights to full participation in what might have been one of the more important ritual encounters in life. The victim has lost the case to the state.[137]

Indeed, if the right to pursue cases is something that belongs to us, something we have a property interest in, then public prosecution as a monopoly is akin to a taking of that right.[138]

Third, this history reveals how easily *we* have been lulled into thinking of prosecution, once a means to redress wrongs to real victims, as a means to redress wrongs to the state. Put differently, the turn to public prosecution allowed the state not only to usurp the role of crime victims; it also enabled the state to create new crimes—and prop up old ones—in which the state could claim the role of the victim. Instead of the difficulty of wondering who the victim was if an interracial couple wanted to marry, for example, the state could now rely on the notion that the state itself was the victim. Ditto for two men having consensual sex.[139] Ditto for someone walking at night "with no

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directly or indirectly through an agent of the victim's, e.g., the state) that symbolizes the correct relative value of wrongdoer and victim.").

136 5 WILLIAM WORDSWORTH, THE PRELUDE OR, GROWTH OF A POET'S MIND: AN AUTOBIOGRAPHICAL POEM 65 (1850).

137 Christie, *supra* note 118, at 3.

138 *See id.* at 1–4.

139 This is not to suggest that there were not early laws against interracial marriage or same-sex sex. It is to suggest an explanation for the paucity of prosecutions prior to the creation of public prosecutors. *Cf.* Lawrence v. Texas, 539 U.S. 558, 569 (2003) (noting that early laws prohibiting sodomy "do not seem to have been enforced against consenting adults acting in private"); Robert A. Pratt, *Crossing the Color Line: A Historical Assessment and Personal Narrative of*

apparent reason or business."[140] And of course, the ability of the state to claim victim-status for victimless "crimes" continues today. It is this fiction that the state is harmed that allowed officers to forcibly arrest Eric Garner for selling loose cigarettes.[141] And to claim victimization when good Samaritans provide humanitarian aid in the form of water and food for immigrants attempting to cross the border.[142] And to seize assets associated with victimless crimes as "forfeited" and add them to the coffers of the "victim" state.[143]

Most importantly, the turn to public prosecutors and the concomitant ability of the state to claim victimization have underwritten the War on Drugs, resulting in the incarceration of more users than distributors. The creation of a system of state prosecutors not only allowed the state to claim victim-status when someone engages in the recreational use of drugs. It also allowed the state to claim to be victimized by some drug use more than other drug use. Hence, it could treat the use of crack cocaine more severely than the use of cocaine, and more severely than the current use of opioids, in ways that just happen to correlate with race.[144] There is a reason why the War on Drugs served as one of the major drivers of mass incarceration

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Loving v. Virginia, 41 HOW. L.J. 229, 234–35 (1998) (noting the long history of interracial couplings that went unprosecuted).

140 This is of course a reference to our history of arresting and prosecuting outsiders for "loitering." *See, e.g.*, Kolender v. Lawson, 461 U.S. 352 (1983) (finding a statute that required persons who loiter to provide "credible and reliable" identification void for vagueness); Charles A. Reich, *Police Questioning of Law Abiding Citizens*, 75 YALE L.J. 1161, 1161–66 (1966) (criticizing the ability of police to engage in various "preventive" police stops for potential loitering).

141 *See* Al Baker et al., *Beyond the Chokehold: The Path to Eric Garner's Death*, N.Y. TIMES (June 13, 2015), https://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html [https://perma.cc/7Z9B-NDPK].

142 Lorne Matalon, *Extending 'Zero Tolerance' to People Who Help Migrants Along the Border*, NPR (May 28, 2019, 4:22 PM), https://www.npr.org/2019/05/28/725716169/extending-zero-tolerance-to-people-who-help-migrants-along-the-border [https://perma.cc/C5XA-PC8Y]

143 *See* ALEXANDER, *supra* note 12, at 78–84.

144 *See* Khiara M. Bridges, *Race, Pregnancy, and the Opioid Epidemic: White Privilege and the Criminalization of Opioid Use During Pregnancy*, 133 HARV. L. REV. 770, 788–92 (2020) (describing the differences in response to the crack epidemic and the opioid epidemic); Ekow N. Yankah, *When Addiction Has a White Face*, N.Y. TIMES, (Feb. 9, 2016), https://www.nytimes.com/2016/02/09/opinion/when-addiction-has-a-white-face.html [https://perma.cc/RQN6-3F3T] (similar). *Cf.* Kimani Paul-Emile, *Making Sense of Drug Regulation: A Theory of Law for Drug Control Policy*, 19 CORNELL J.L. & PUB. POL'Y 691, 711, 729–30 (2010) ("[T]he extent to which the drug is identified with racial minorities or other marginalized groups will determine whether the drug will ultimately ever move from the [criminal regulatory] regime.").

and overcriminalization,[145] a reason why it is referred to as the "raced" War on Drugs,[146] and that reason has everything to do with the advent of public prosecutors and the prosecution of victimless crimes.

In short, our history of private prosecution and the turn to public prosecution explains much about many of the seemingly intractable problems in the criminal justice system.[147] All of this begs questions. What alternatives might open up if we imagine a world without, or at least with far fewer, prosecutors? What might it mean to reject the notion of the state as the "real" victim of crime and to instead imagine a criminal justice system in which real victims have the power to decide whether or not to seek recompense, whether in the form of monetary compensation or restorative justice or punishment? These are the questions I take up below.

III
BENEFITS

It has been said that "we are in the midst of a criminal justice 'moment,' when extraordinary reform may be possible."[148] If that is true, and I am persuaded it is, what alternatives might open up if we imagine a world without prosecutors, or at least with far fewer prosecutors? To be clear, I am not suggesting a return to purely private prosecutions or a system in which wealth inequality would allow some people to pursue private actions and preclude others. But what if, instead of

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145 Although only about seventeen percent of state prisoners in 2010 were incarcerated due to drug crimes, that number alone is significant. Perhaps more importantly, focusing solely on the percentage of inmates at any particular time obscures the importance of the flow of inmates. Focusing on flow, it becomes clear that more people are admitted to prison for drug crimes than for violent crimes or property crimes. *See* Jonathan Rothwell, *Drug Offenders in American Prisons: The Critical Distinction Between Stock and Flow*, BROOKINGS INSTITUTION (Nov. 25, 2015), https://www.brookings.edu/blog/social-mobility-memos/2015/11/25/drug-offenders-in-american-prisons-the-critical-distinction-between-stock-and-flow/ [https://perma.cc/25QK-LEVK].

146 Benjamin D. Steiner & Victor Argothy, *White Addiction: Racial Inequality, Racial Ideology, and the War on Drugs*, 10 TEMP. POL. & C. R. L. REV. 443, 443 (2001) (describing the War on Drugs as a "raced war").

147 For example, it is telling that in Allen Steinberg's study of crime in Philadelphia during the nineteenth century, victimless crimes such as public drunkenness, disorderly conduct, and vagrancy were usually state-initiated rather than the result of private prosecutions, and that the number of prosecutions for victimless crimes increased with the expansion of the police. STEINBERG, *supra* note 72, at 29–30.

148 John Rappaport, *Some Doubts About "Democratizing" Criminal Justice*, 87 U. CHI. L. REV (forthcoming, 2020) (manuscript at 8) (on file with author).

using the public fisc to solely fund public prosecutions, we used that fisc to also fund private prosecutions?[149]

What might it mean to allow a victim of theft, for example, to not only initiate a prosecution but also to prioritize, via prosecution, a return of the stolen item or financial damages? Or a hate crime victim to decide what is more important to him, punishment or an apology? Or a victim of domestic violence to decide whether to pursue charges or not, to decide whether incarceration of her partner is best for her or their children, and to decide whether mandating anger management classes or substance abuse classes might benefit her more? To be sure, returning prosecutions to the people runs the risk of empowering a few individuals to pursue personal vendettas and malicious prosecutions.[150] Yet even here, there is a gatekeeping mechanism in the intermediary of first a judge and then a grand jury to screen cases that lack probable cause, are unmeritorious, or are malicious.[151] We could even imagine jurisdictions requiring complainants to first post a bond of some sort, on a sliding scale tied to ability to pay, before allowing criminal cases to proceed, or allowing judges to impose sanctions for frivolous cases or cases brought solely to harass.[152] Even after these screenings, there is yet another gatekeeper: the trial jury. We would all do well to recall that the trial jury originally had much more power; for de Tocqueville, the jury

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149 Obviously, one of the major flaws of the Colonial system of private prosecutions was that victims who could afford to hire attorneys to prosecute on their behalf had an advantage over victims who could not, and who were therefore left to manage their cases *pro se*. *See* Fairfax, *supra* note 86, at 422–23.

150 *See* STEINBERG, *supra* note 72, at 42–43. This is not to suggest our current system of public prosecution is free from personal vendettas and malicious prosecutions.

151 The grand jury served the same gatekeeping function under the English system of private prosecutions. *See* LANGBEIN, *supra* note 75, at 45. In theory at least, the grand jury still serves that screening function today, and this is its key role. *See* Roger A. Fairfax Jr., *Does Grand Jury Discretion Have a Legitimate (and Useful) Role to Play in Criminal Justice?*, *in* GRAND JURY 2.0: MODERN PERSPECTIVES ON THE GRAND JURY 57, 57–58 (Roger Anthony Fairfax, Jr., ed., 2011) ("Where the grand jury truly adds value is through its ability to exercise robust discretion *not* to indict where probable cause nevertheless exists—what some might term 'grand jury nullification.'"). However, in practice, the ability of the grand jury to serve this role diminished as public prosecutors gained more power to charge, call witnesses, and present evidence. *See* Raymond Moley, *The Initiation of Criminal Prosecutions by Indictment or Information*, 29 MICH. L. REV. 403, 430 (1931) (observing that the modern prosecutor "seems to dominate the grand jury to such a degree that its actions are in reality his own, and for that reason they should be his nominally as well as actually"); *see also* R. Justin Miller, *Informations or Indictments in Felony Cases*, 8 MINN. L. REV. 379, 397–99 (1924) (similar).

152 This could be similar to the Rule 11 sanctions that are already available for civil cases. *See, e.g.*, FED. R. CIV. P. 11(c).

functioned almost as a fourth branch of government, a check against overreach.[153]

More importantly, what might it mean to reserve the default of public prosecution for only those matters where the state truly is a victim, or where regulatory expertise is essential, or where non-divisible harm truly effects a swath of the population, such as environmental crimes or crimes arising out of financial regulation?[154] Going one step further, what might it mean to abandon public prosecution for "crimes" where the state cannot claim victimization at all, "crimes" that run the gamut from sex work to selling or possessing sex toys[155] to status crimes which essentially criminalize homelessness;[156] in other words, "crimes" which should really be considered non-crimes?

Again, I am not suggesting that we rely exclusively on private prosecutions where victims are involved. But I am suggesting a system where victims have a range of options, including the option to pursue justice themselves. For example, consider a system in which a crime victim, say a burglary victim, has five options. One, to prosecute the case herself, i.e., swearing out a complaint before a magistrate, seeking an indictment, and negotiating a disposition or taking the case to trial. Two, assuming she would like to see the perpetrator brought to justice, but would prefer not to pursue the case herself, she could cede her right to prosecute the case to a public prosecutor. Three, if she wants to retain control but would like assistance in negotiating the criminal justice system, she could seek assistance from a prosecutor-advocate provided by the state. Four, if she wants to retain control and

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153 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 311–18 (Arthur Goldhammer trans., Library of Am. 2004) (1835).

154 This in fact was the practice before the advent of public prosecutors. In addition, during parts of the 16th and 17th centuries in England, justices of the peace functioned as "back-up prosecutors" when private prosecution was not possible. *See* Langbein, *supra* note 73, at 323.

155 *See, e.g.*, Richard Glover, *Can't Buy a Thrill: Substantive Due Process, Equal Protection, and Criminalizing Sex Toys*, 100 J. CRIM. L. & CRIMINOLOGY 555, 556 (2010); Brett Barrouquere, *In Texas, Even Possession of a Sex Toy is Regulated*, HOUST. CHRON. (May 21, 2017, 8:42 AM), https://www.chron.com/news/politics/texas/article/In-Texas-even-possession-of-a-sex-toy-is-11161211.php [https://perma.cc/LZX2-Z2R5].

156 *See, e.g.*, RISA GOLUBOFF, VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S, at 2–3 (2016) (describing vagrancy laws as a means of controlling those who threatened the social order); Jamelia N. Morgan, *Rethinking Disorderly Conduct*, CALIF. L. REV. (forthcoming, 2021) (manuscript at 13–15) (on file with author) (discussing how disorderly conduct laws exclude from public spaces those homeless who engage in survival strategies).

would like assistance in negotiating the criminal justice system, but would prefer not to rely on the state at all, she could seek assistance from a prosecutor advocate not provided by the state but instead by not-for-profits or community groups, which already are staking for themselves a larger role in the criminal justice system.[157] And finally, five, perhaps the most important option and one that has for too long gone undertheorized: she would have the option to "let the matter go" and not pursue prosecution at all. The common denominator in these options is that, absent extraordinary circumstances, the initial power to decide resides not with the state but with the victim herself and by extension with the people.

To be sure, one can imagine numerous situations—the aforementioned extraordinary circumstances—in which we might want the state to have the primary decision-making authority. These may include cases involving child abuse, certain cases of domestic violence, other types of cases involving victim/witness coercion and intimidation, homicide cases, or cases in which the victim is deceased and has no next-of-kin with decision making authority. The point here is not to exhaust the types of cases in which we may welcome state intervention as the primary decision-maker. The point is to suggest that in most instances, the state's usurpations of the victim's role should not be automatic. Rather, the state should have to make some kind of showing to a judge before being permitted to supplant the victim's authority to decide.

Although I am bracketing in this Article how a move to private prosecutions can be effectuated, one could easily imagine progressive prosecutors themselves playing a significant role. For example, progressive prosecutors could train incoming line assistants to serve as prosecutor-advocates to work for actual crime victims (much in the way public defense lawyers work for their clients) and assist them with an array of options, ranging from restorative justice to prosecution. This alone would set some of the groundwork necessary for a system that

157 For examples of the ways community members are asserting more control in the justice system, see Jocelyn Simonson, *Bail Nullification*, 115 Mich. L. Rev. 585, 587 (2017) (describing the growth of community groups that "use bail funds to post bail on behalf of strangers, using a revolving pool of money"); Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2181–83 (2014) (describing the power of the courtroom audience, "born from its physical presence in the courtroom," and the rise of "courtwatch" groups in disadvantaged communities).

shifts power from public prosecutors and gives it to the people.[158]

Having sketched out—concededly in broad strokes—what options a victim would have if we returned power to the people, and having gestured to how such a transition could be effected, the remainder of this Part turns to some of the benefits that might flow from such a realignment of power.

One, instead of a system in which prosecutors decide which cases are worthy of pursuit, "we the people," including those of us who have traditionally had little power, would now have the ability to seek justice and to achieve it ourselves. Consider again the failure of many prosecutors to pursue sex assault prosecutions.[159] Consider too the blue on black violence[160] that the Black Lives Matter movement has brought into the national conversation. Police kill about 1,000 civilians every year[161] and use excessive force in many multiples more—and yet prosecutors, who have a symbiotic relationship with the police, are loath to bring charges against officers.[162] These cases also reflect what scholars have identified, and what many black and brown people know firsthand, as under-enforce-

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158 I am thinking here of jurisdictions experimenting with providing victims more decision-making authority in prosecutions. The words of Richard Briffault, who in turn was channeling Justice Brandeis, come to mind:

> Many years ago, Justice Brandeis famously offered a defense of federalism in terms of the possibility that state autonomy provides for innovation. As he observed, "a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." Well, if the fifty states are laboratories for public policy formation, then surely the 3,000 counties and 15,000 municipalities provide logarithmically more opportunities for innovation, experimentation, and reform. Thousands of local governments provide thousands of arenas for innovation.

Richard Briffault, *Home Rule for the Twenty-First Century*, 36 URB. L. 253, 259 (2004) (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

159 *See supra* notes 18 to 30 and accompanying text.

160 *See* Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 127–130 (2017).

161 John Sullivan et al., *Four Years in a Row, Police Nationwide Fatally Shoot Nearly 1,000 People*, WASH. POST (Feb. 12, 2019, 11:26 AM), https://www.washingtonpost.com/investigations/four-years-in-a-row-police-nationwide-fatally-shoot-nearly-1000-people/2019/02/07/0cb3b098-020f-11e9-9122-82e98f91ee6f_story.html [https://perma.cc/BT4K-XCKP].

162 Barry Friedman puts it bluntly. "As we have seen, left to their own devices, lawmakers who must stand for election would rather not regulate the police." BARRY FRIEDMAN, UNWARRANTED: POLICING WITHOUT PERMISSION 101 (2017). *See also* Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L REV. 1447, 1449–52 (2006) (applying conflicts-of-interest law to argue that local prosecutors should not handle cases involving police-defendants).

ment.[163] To the extent prosecutors decline to pursue charges notwithstanding probable cause to proceed or the victim's (or victim's family's) wishes, these prosecutors engage in what Austin Sarat might call "lawful lawlessness,"[164] and what others have called "the 'mortality' of cases,"[165] both of which are entirely "legal" given a system in which prosecutors hold a monopoly over criminal prosecutions and discretion. Now again, imagine a system in which the victim has an array of options, all of which ultimately vest her with the choice of how and when to prosecute, subject to screening by the grand jury, the petit jury, and a judge? Consider a system that allows her to request the type of redress that would "reaffirm [her] worth," to borrow from Jean Hampton,[166] a redress that might include restorative justice and rehabilitation. Consider too that for many victims, "the opportunity to shape what repair looks like can be the most transformative part of the accountability process."[167]

Equally important, victims would also have the right not to pursue charges, to "let the matter go." We can all imagine a victim of a petty crime being willing to let the matter go, especially in situations where the victim senses the harm to the perpetrator and his community will far outweigh the benefit to herself. Consider the case *Ewing v. California*, in which Gary Ewing, a drug addict, was prosecuted for stealing three golf clubs from a sports shop to presumably pawn and feed his habit.[168] Even here we can imagine that the owner of the sports shop might decline to pursue charges, especially if he knew Ewing would be sentenced to twenty-five years to life, a sentence the Supreme Court would affirm. Or we can imagine a victim being open to reaching an out of court resolution with the offender.[169] The important thing is that all victims should

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163 *See* RANDALL KENNEDY, RACE, CRIME, AND THE LAW 19–20 (1997); Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1716–22 (2006).

164 Austin Sarat & Nasser Hussain, *On Lawful Lawlessness: George Ryan, Executive Clemency, and the Rhetoric of Sparing Life*, 56 STAN. L. REV. 1307, 1312 (2004).

165 Samuel Walker, *Origins of the Contemporary Criminal Justice Paradigm: The American Bar Foundation Survey, 1953–1969*, 9 JUST. Q. 47, 53 (1992).

166 MURPHY & HAMPTON, *supra* note 135, at 126.

167 DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR 114 (2019). "Trauma," Sered adds, "is fundamentally about powerlessness, so having the power to direct the future that arises out of the past can contribute significantly to a person's healing process." *Id.*

168 538 U.S. 11, 17–20 (2003).

169 *See, e.g.*, Ric Simmons, *Private Criminal Justice*, 42 WAKE FOREST L. REV. 911, 917–18 (2007) (discussing the possibility of private mediation as an alternative to the criminal justice system).

be able to exercise this type of agency, *even* victims of domestic violence.[170] Too often, domestic violence victims are revictimized by the state, forced to participate in a prosecution resulting in incarceration even when incarceration of their abusers causes more harm than good.[171] Even here, after ensuring that victims are aware of all of the options and the risk, the decision should lie with the victim whether to pursue prosecution and if so, on what terms.[172] For example, the victim may be satisfied with the issuance of a peace warrant that labels the perpetrator's behavior as a potential offense and requires the perpetrator to keep the peace going forward or face prosecution.[173] Indeed, having the power to chart one's own course is one way to make victims whole.

Two, when we transfer power from state prosecutors to the people, we may realize that many of the victimless "crimes" we take for granted are not deserving of prosecution at all. Drug use and distribution are the biggest examples since they are significant drivers of our incarceration rates, but this would also include the criminalization of minor acts Devon Carbado

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170 I emphasize domestic violence victims because, as a society, we have become used to deeming such victims incapable of making rational decisions. We engage in a type of paternalism, or even maternalism. *See* Bennett Capers, *On 'Violence Against Women*,' 13 OHIO ST. J. CRIM. L. 347, 360 (2016).

171 *See* Goodmark, *Prosecutorial Misconduct*, *supra* note 62, at 638–40; Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1, 3–5 (2009); *cf.* Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 53, 56–58 (2006) (describing a panoply of prosecutorial practices that deliberately override the preferences of domestic violence victims, including the imposition of protective orders that function as "de facto divorce").

172 In a sense, this is a return. As Roger Fairfax has observed, "[c]omplainants in the system of private prosecution could, and often did, settle their criminal cases out of court." Fairfax, *supra* note 86, at 423. In particular, Critical Race Theorists have attended to why a victim may view pursuing charges as not in the victim's best interest, especially when pursuing charges primarily benefits the state and disadvantages communities. *See, e.g.*, Regina Austin, *"The Black Community," Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769, 1774 (1992) (exploring the practice in black communities of identifying with lawbreakers "as an act of defiance" against the larger polity); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1257 (1991) (noting that minority victims of domestic violence are sometimes reluctant to request police intervention, given "a police force that is frequently hostile."); *cf.* Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 679 (1995) (arguing that "for pragmatic and political reasons, the black community is better off when some nonviolent lawbreakers remain in the community rather than go to prison").

173 For more on peace warrants, see LAURA F. EDWARDS, THE PEOPLE AND THEIR PEACE 73–74 (2009). For a discussion of peace warrants in the context of domestic violence, see Ariela Gross, *Beyond Black and White: Cultural Approaches to Race and Slavery*, 101 COLUM. L. REV. 640, 658 (2001).

puts under the umbrella of "mass criminalization," such as spitting in public.[174]

Put differently, returning decision-making authority to victims of crime might prompt us to reconsider the very concept of victimless crimes, and recognize how much the harm principle—once the *sine qua non* of legal intervention—has been collapsed.[175] To be sure, the state may be harmed by a variety of acts. But there are other acts that we criminalize—again, think of sex work or recreational drug use—where harm to the state seems nonexistent or at best is attenuated. Once we divide crimes into those that involve an actual victim and those where the state is a truly a victim (such as tax fraud), we are likely to discover that there are numerous "crimes" that do not fall into either category. Recognizing this might in turn spur us to question why truly victimless crimes—again, crimes where neither the state nor the people are victims—are designated as crimes at all. We might realize that so many of the "crimes" we think of as criminal justice problems are best addressed in other ways. We might for example recognize that the best way to address the opioid crisis or homelessness is not through criminal prosecution but through a public health response. The same may true of other crises, such as the plague of gun violence.[176] In brief, returning criminal decision-making power to the people has the potential to remake our entire system of criminal justice.

Three, returning decision-making power to crime victims may very well lead to collateral benefits to criminal justice jurisprudence. Right now, the problem is not just that public prosecutors wield enormous power. The problem is also that

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174 Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1487 (2016).

175 The "harm principle," traceable to John Stuart Mill's essay ON LIBERTY, posits that the state should deprive someone of liberty only when necessary to prevent harm to others. *See* JOHN STUART MILL, ON LIBERTY 9 (Elizabeth Rapaport ed., 1978) (1859). H.L.A. Hart also embraced this formulation. *See* H.L.A. HART, LAW, LIBERTY, AND MORALITY 60-61, 75–77 (1963). For a discussion of how the harm principle has been watered down as to become meaningless and devolved to permit state intervention to police almost any act, see Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 113–16 (1999).

176 *See, e.g.*, DAVID HEMENWAY, PRIVATE GUNS, PUBLIC HEALTH 8–26 (rev. ed. 2017) (arguing for treating gun violence as a public health problem and using tools of prevention); Zachary R. Rowan et al., *Proximal Predictors of Gun Violence Among Adolescent Males Involved in Crime*, 43 LAW & HUM. BEHAV. 250, 256–57 (2019) (similar); *see also* Ben Green et al., *Modeling Contagion Through Social Networks to Explain and Predict Gunshot Violence in Chicago, 2006 to 2014*, 177 JAMA Internal Med. 326, 330–31 (2017) (modeling gun violence as a social contagion and tracking its spread).

their power is almost completely unchecked.[177] Most troubling, the Court, reading the due process and equal protection clauses narrowly, has limited its supervision. For example, the Court has imposed no limits on a prosecutor's ability to threaten draconian sentences to "induce" pleas. Thus, a threat to subject a defendant to a mandatory life sentence if he failed to take a five-year plea for passing a false check in the amount of $88.30 was held constitutional in *Bordenkircher v. Hayes*.[178] Similarly, although the Court in *Brady v. Maryland*[179] read the due process clause as requiring prosecutors to disclose exculpatory information, the Court neutralized this directive by including a materiality requirement and by allowing prosecutors to postpone disclosure until the eve of trial.[180] Beyond this, *Brady* provides nothing to the overwhelming majority of defendants who plead guilty in lieu of trial.[181] Even when it comes to racial discrimination in jury selection, the Court has provided little oversight and has instead created a burden-shifting test in *Batson v. Kentucky*[182] that insulates all but the most "unapologetically bigoted or painfully unimaginative" prosecutors.[183] Part of the reason the Court provides so little oversight has to do with the trust courts extend to public prosecutors.[184] Courts are unlikely to extend such automatic trust to lay prosecutors who prosecute their own cases directly or with the aid of a prosecutor advocate. And this may result in collateral benefits. Courts and legislative bodies, faced with nonprofessional prosecutors, will likely respond by bringing

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177 *See, e.g.*, Barkow, *supra* note 6, at 885–86 (noting that the expansion of prosecutorial power occurred without corresponding checks by Congress or the Supreme Court).

178 434 U.S. 357, 363 (1978) (concluding that "in the 'give-and-take' of plea bargaining, there is no . . . element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer").

179 373 U.S. 83 (1963).

180 *Id.* at 87.

181 For an overview of a prosecutor's disclosure requirements under *Brady* and some of the decision's flaws, see Baer, *supra* note 3, at 11–15.

182 476 U.S. 80 (1986).

183 Jeffrey Bellin & Junichi P. Semitsu, *Widening* Batson*'s Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1075 (2011). For additional critiques of *Batson*, see Robin Charlow, *Tolerating Deception and Discrimination After* Batson, 50 STAN. L. REV. 9, 10–16 (1997); Camille A. Nelson, Batson, *O.J., and* Snyder: *Lessons from an Intersecting Trilogy*, 93 IOWA L. REV. 1687, 1688–92 (2008).

184 Some of this is attributable to the fact that a disproportionate number of trial judges are former prosecutors. This is not a recent phenomenon. *See* Norman Lefstein, Book Review, 56 TEMP. L. Q. 1101, 1110–11 (1983) (reviewing ALAN M. DERSHOWITZ, THE BEST DEFENSE (1982)) (noting that a "high percentage of judges are former prosecutors").

more oversight to *all* prosecutors, something that scholars such as Kenneth Culp Davis and Bill Stuntz have long advocated.[185] If this happens, we may all very well be the beneficiaries.

Four relates to the benefit above but focuses directly on the impact on society. Allowing victims to directly prosecute defendants who have harmed them—again subject to the gatekeeping of the grand jury, the petit jury, and the judge—may well prompt us to rethink how we see the adversarial process in the criminal justice system. We tend to think of public prosecutors as representing "the people" and we fund them accordingly. Indeed, the French philosopher Michel Foucault might even say we have been disciplined into aligning ourselves with prosecutors.[186] It is quite likely, however, that as more crime victims assert their right to seek redress directly, this notion that "the people" stand on one side of the "v." while the defendant stands alone on the other will start to crumble.[187] We will begin to see victims *and* defendants. This alone will neutralize some of the power public prosecutors have. But it may also do something else equally consequential: it may prompt us to rethink why we provide so much funding to public prosecutors and comparatively so little to public defenders.[188]

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185 *See, e.g.*, KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 207–14 (1969) (noting the lack of effective enforcement mechanisms to check prosecutorial misconduct); William J. Stuntz, Bordenkircher v. Hayes: *The Rise of Plea Bargaining and the Decline of the Rule of Law* 26–28 (Harvard Law Sch. Pub. Law, Working Paper No. 120, 2005), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=854284 (arguing for a standard that would require prosecutors to show that the threatened sentence has been proposed in similar cases or require that the judge find that the threatened sentence was fair and proportionate to the defendant's criminal conduct).

186 For a discussion of how criminal procedure jurisprudence and practices discipline all of us in a Foucauldian sense, see I. Bennett Capers, *Criminal Procedure and the Good Citizen*, 118 COLUM. L. REV. 653, 671–79 (2018). Here, we have been disciplined to think of the prosecutor as on *our* side. More troubling for defendants and the notion of fair trials, we have also been disciplined to think of ourselves on the side of the prosecutor.

187 *Cf.* Simonson, *supra* note 74, at 286–87, 294–95 (arguing for a criminal justice system that allows "the people" to play a role on both sides of the "v.").

188 *See, e.g.*, Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1046–54 (2006) (describing the various funding levels in different states); Barkow, *supra* note 6, at 882 ("Public defender offices are woefully underfunded and understaffed."); Martin Guggenheim, *The People's Right to a Well-Funded Indigent Defender System*, 36 N.Y.U. REV. L. & SOC. CHANGE 395, 401–05 (2012) (describing a "crisis" in funding for indigent defense). This change may even prompt us to support the appointment of a Defender General, a public official to represent the collective interests of defendants—as a counterpart to the Solicitor General. *See* Daniel Epps & William Ortman, *The Defender General*, 168 U. PA. L. REV. (forthcoming 2021).

This alone can do much to level the playing field between prosecution and defense and get us closer to a process that is fair and consistent with justice.

Five, shifting power back to the people can bring prosecution out of the shadows and into the open as something *we* do. This may at first seem a matter of little consequence, but in fact the consequences are far-reaching. As we begin to think of prosecution as something we do, we may question the constant ratcheting up of the criminal codes. Consider just one statistic: as of 2003 over 4,000 separate federal crimes were in the U.S. federal code,[189] and almost half of these "crimes" were added to the code after 1970.[190] We may come to see criminalization for what it is: "an expansionist power, pushing into its neighbors."[191] More significantly, we may come to see "that sometimes it makes sense to 'keep the law at bay.'"[192] And we may realize, as Robert Ellickson did years ago, that the notion that legal institutions are always necessary to maintain order is false. Neighbors can solve problems without state intervention. Even strangers can solve problems without state intervention. We can have order without law.[193]

Six, a system in which "we the people," including those of us who have traditionally had little power, are empowered to seek justice may be our best hope of resurrecting mercy, forgiveness,[194] and what Joshua Kleinfeld might call normative reconstruction.[195] This argument may strike many as contrary

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189 JOHN S. BAKER, JR., & DALE E. BENNETT, FEDERALIST SOC'Y FOR LAW & PUB. POLICY STUDIES, MEASURING THE EXPLOSIVE GROWTH OF FEDERAL CRIME LEGISLATION 3 (2004).

190 AM. BAR ASS'N TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIMINAL LAW 7 (1998)) (emphasis omitted) ("More than 40% of the federal criminal provisions enacted since the Civil War have been enacted since 1970.").

191 Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367, 1372 (2017).

192 I. Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. L. REV. 1, 55 (2019) (quoting Regina Austin, *"The Black Community," Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769, 1808 (1992)).

193 *See generally* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991) (analyzing how a rural community uses informal norms to settle disagreements).

194 For an exploration of the role law can play in facilitating forgiveness, see Martha Minow, *Forgiveness, Law, and Justice*, 103 CALIF. L. REV. 1615, 1620–26 (2015).

195 *See* Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485, 1486 (2016) (offering reconstructivism as an alternative theory of punishment and stating that reconstructivism views punishment as "a way of reconstructing a violated social order in the wake of an attack").

to common knowledge; we think of ourselves as living in a society where penal populism predominates. If we were to take a snapshot of the country at the time states were adopting three-strike laws, embracing sentences of life without parole, creating sex offender registries, or passing the Violent Crime Control and Law Enforcement Act, this view of us as punitive would be true.[196] But it becomes less true when we take a longer view. After all, for the roughly two centuries between the 1770s and the 1970s, the American criminal justice system was, for the most part, one of "reasonable compassion."[197] Now, as this country wrestles with mass incarceration and the knowledge that we have the highest incarceration rate in the world,[198] the tide seems to be turning. Certainly, the problem of mass incarceration is framing national politics. Even the Court is trending towards mercy. Consider its decision in *Miller v. Alabama*, barring life without parole for juveniles,[199] a decision that the Court in *Montgomery v. Louisiana* held should be applied retroactively,[200] or *Madison v. Alabama*, overturning a death sentence for a prisoner who, because of a mental disability, could not understand the reason for his execution,[201] or

196 *See* PETER K. ENNS, INCARCERATION NATION: HOW THE UNITED STATES BECAME THE MOST PUNITIVE DEMOCRACY IN THE WORLD 24–25, 31–38 (2016) (surveying punitiveness and concluding that the U.S. public became more punitive from the mid-1960s to the mid 1990s); JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 17–77 (2017) (detailing the rash of tough on crime legislation).

197 Kleinfeld writes that popular reforms:

> [S]wept through the young country from the Founding through the mid-nineteenth century, substantially eliminating punishments of the body (corporal punishment and maiming); aiming to abolish and succeeding in limiting capital punishment (abolition was a major issue just after the Founding); experimenting with rehabilitative prisons; and codifying substantive criminal law so as to reduce pockets of harshness and arbitrariness and transfer control from the judiciary to the more popularly accountable legislature. This penal moderation continued for most of the twentieth century: from the late 1920s through the early 1970s, America's incarceration rate was fairly low, fairly stable, and roughly equal to what it is in Western European countries today.

Kleinfeld, *supra* note 191, at 1369 (footnotes omitted). Kleinfeld acknowledges one major exception to this "reasonable compassion": many communities' punitive attitudes with respect to African-Americans. *Id.*

198 *World Prison Populations*, BBC NEWS, http://news.bbc.co.uk/2/shared/spl/hi/uk/06/prisons/html/nn2page1.stm. [https://perma.cc/8JUS-Q7B7] (last visited Mar. 1, 2020).

199 567 U.S. 460, 465 (2012).

200 136 S.Ct. 718, 736 (2016).

201 139 S.Ct. 718, 731 (2019).

even *Brown v. Plata*, upholding an order requiring California to reduce its prison population to address overcrowding.[202]

More importantly, there is evidence to suggest that on the individual level, mercy may have purchase. For example, Paul Robinson's empirical work suggests that, contrary to popular assumptions, what people believe is the appropriate punishment tends to be less than what the law actually prescribes.[203] The same, it turns out, is true for victims of crime. A recent study from the National Survey of Victims' Views found that "the overwhelming majority of crime victims believe that the criminal justice system relies too heavily on incarceration, and strongly prefer investments in prevention and treatment to more spending on prisons and jails."[204] This holds true for victims of violent crime.[205] By a three to one margin, "victims prefer holding people accountable through options beyond just prison, such as rehabilitation, mental health treatment, drug treatment, community supervision, or community service."[206] The same study found that, by a more than two to one margin, victims of violent crime believe prison is more likely to cause individuals to commit more crimes rather than rehabilitate them.[207] Danielle Sered's work with crime victims yielded similar responses, with the majority of victims, given the option, preferring a restorative justice process to incarceration. As she writes, these are

> survivors . . . who participated in the criminal justice system. They are among the less than half of victims who called the police and are part of the even smaller subgroup who continued their engagement through the grand jury process. They are people who initially chose a path that could lead to prison. They are people who have suffered serious violence—knives to their bodies, guns to their heads, lacerations to their livers, punctured lungs—and have engaged in the criminal justice system in a way likely to result in the incarceration of the person who hurt them. Even among these victims, when another option is offered, 90 percent choose something

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202 563 U.S. 493, 499–502 (2011).

203 Paul H. Robinson, *Democratizing Criminal Law: Feasibility, Utility and the Challenge of Social Change*, 111 NW. U. L. REV. 1565, 1574–80 (2017).

204 *See* ALLIANCE FOR SAFETY AND JUSTICE, CRIME SURVIVORS SPEAK: THE FIRST-EVER NATIONAL SURVEY OF VICTIMS' VIEWS ON SAFETY AND JUSTICE 13 (2016), https://allianceforsafetyandjustice.org/wp-content/uploads/documents/Crime%20Survivors%20Speak%20Report.pdf [https://perma.cc/W9N4-PTTE].

205 *Id.* at 16.

206 *Id.* at 20.

207 *Id.* at 21.

> other than the very incarceration they were initially pursuing.[208]

Put simply, more and more often victims are resisting the notion that incarceration will right the wrong and are instead insisting on different models of justice, including models that bypass the criminal justice system entirely.[209] Indeed, although the public assumption is that victim interests align with the state, as Marie Manikis observes it "can also align with those of defendants."[210]

There is another reason why shifting power to victims may foster mercy. One reason why prosecutors tend to be indifferent to incarceration is that local prosecutors bear little of the cost of incarceration, which is usually borne by the state.[211] The same is true with respect to citizens who, absent an incarcerated family member, externalize the cost of incarceration, and thus can easily support tough-on-crime measures. But this dynamic changes when the expectation is that victims of crimes will initiate actions, or at least, decide to cede their actions to the state. Citizens who will have to internalize the cost of pursuing cases—and here, I mean the cost of time rather than money—are very likely to think twice before pursuing minor cases. Department stores are already doing just this

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208 SERED, *supra* note 167, at 42.

209 For a persuasive discussion of the promise of the restorative justice model even in cases of violence, see SERED, *supra* note 167, at 129–56. For a discussion of an alternative to traditional restorative justice, which in some iterations functions as "an adjunct to the criminal justice system while simultaneously denying its enmeshment in traditional probationary and sentencing regimes," see M. Eve Hanan, *Decriminalizing Violence: A Critique of Restorative Justiceand Proposal for Diversionary Mediation*, 46 N.M. L. REV. 123, 125 (2016). Other significant readings include: Daniel J.H. Greenwood, *Restorative Justice and the Jewish Question*, 2003 UTAH L. REV. 533, 548–54 (2003) (showing that restorative justice also has support in religion, including Christianity and Jewish law); Mia Mingus, *Transformative Justice: A Brief Description*, TRANSFORM HARM, https://transformharm.org/transformative-justice-a-brief-description/ [https://perma.cc/3ARB-BHSB] (last visited Jan. 30, 2020) (describing the framework of "transformative justice," championed by prison abolitionist Miriame Kaba); Daniel H. Greenwood, *Restorative Justice and the Jewish Question*, 2003 UTAH L. REV. 533, 548–54 (2003) (showing that restorative justice also has support in religion, including Christianity and Jewish law); Stefanie Mundhenk Harrelson, *I Was Sexually Assaulted, And I Believe Incarcerating Rapists Doesn't Help Victims Like Me*, APPEAL (July 18, 2019), https://theappeal.org/i-was-sexually-assaulted-and-i-believe-incarcerating-rapists-doesnt-help-victims-like-me/ [https://perma.cc/3L2Y-DKB3].

210 Manikis, *supra* note 87, at 264.

211 *See* Richard A. Bierschbach & Stephanos Bibas, *Rationing Criminal Justice*, 116 MICH. L. REV. 187, 189, 196–204 (2017); Adam M. Gershowitz, *Consolidating Local Criminal Justice: Should the Prosecutors Control the Jails?*, 51 WAKE FOREST L. REV. 677, 679 (2016); Russell M. Gold, *Promoting Democracy in Prosecution*, 86 WASH. L. REV. 69, 82 (2011); STUNTZ, *supra* note 8, at 289.

by declining to call authorities, allowing first-time shoplifters to avoid the snare of the criminal justice system.[212] A very similar dynamic is possible when decision making rests with victims. This too is a form of mercy.

For the most part, I have bracketed the issue of race throughout this Article, even though "many of the problems that plague the criminal justice system—mass incarceration, over-criminalization, and capital punishment, to name just a few—are only intelligible through the lens of race."[213] But when it comes to thinking about the role returning prosecution to the people can play in fostering mercy, discussing race is essential. Although many imagine victims as white and defendants as black, the fact is that most crime remains intra-racial—in no small part because our country still remains residentially segregated along lines of race. For many black and brown victims of crime, and black and brown crime defendants, this means that their cases are largely mediated through criminal justice actors—including prosecutors—who are overwhelmingly white.[214] While this may seem unproblematic, it

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212 *See* John Rappaport, *Criminal Justice, Inc.*, 118 COLUM. L. REV. 2251, 2266–76 (2018).

213 Capers, *supra* note 192, at 5.

214 A 2015 study found that ninety-five of elected prosecutors are white, and that sixty-six of states that elect prosecutors have no black prosecutors at all. Latinos make up just 1.7% of elected prosecutors. WOMEN DONORS NETWORK, *Justice for All: Key Findings*, (2015) https://wholeads.us/justice/wp-content/themes/phase2/pdf/key-findings.pdf [https://perma.cc/C27S-T5H2]. Evidence suggests that minorities are also underrepresented among line prosecutors, given that minorities in general are underrepresented in the legal profession, with African-Americans making up only five percent of all attorneys, and Latinos another five percent. AM. BAR ASS'N, ABA PROFILE OF THE LEGAL PROFESSION 8 (Aug. 2019), https://www.americanbar.org/content/dam/aba/images/news/2019/08/ProfileOfProfession-total-hi.pdf [https://perma.cc/P5E6-LADN]. Although there is no national data on diversity in district attorneys' offices, a study of demographic data regarding prosecutors in California found that whites made up seventy percent of all prosecutors, even though they comprise just thirty-eight percent of the state's population. Debbie Mukamal & David Alan Sklansky, *Op-Ed: A Study of California Prosecutors Finds a Lack of Diversity*, LA TIMES (July 29, 2015, 4:43 AM), https://www.latimes.com/opinion/op-ed/la-oe-0729-sklansky-mukamal-diversity-prosecutors-california-20150729-story.html [https://perma.cc/WG69-ZF6X]. As Bryan Stevenson has observed, while society has paid attention to diversity in policing, "we haven't paid much attention to prosecutors. And that role is a role that has largely been occupied by white men and that has changed almost not at all in the last 30 years." *Report Highlights Lack of Racial Diversity Among U.S. Prosecutors*, NPR (July 7, 2015, 4:35 PM), https://www.npr.org/2015/07/07/420913863/report-highlights-lack-of-racial-diversity-among-u-s-prosecutors [https://perma.cc/AUQ5-ECMG] (interviewing Bryan Stevenson).

"skews [the] decision-making"[215] and leaves little room for racial empathy or for consideration of how prosecution and punishment may positively or negatively impact black and brown communities.[216] In contrast, to the extent a victim brings the case herself and confronts the person who harmed her—again, most crimes are intra-racial—she is likely to confront a member of her own community, someone who looks like her, someone of whom she might say, regardless of her religious or nonreligious belief, "but for the grace of god." Given that sixty-three percent of blacks and forty-eight percent of Latinx have a family member who has been in jail or prison,[217] she is likely to know firsthand the harm that prisons can do, not just to the incarcerated but also to their families.[218] She is likely to intuitively grasp the "legal estrangement" communities suffer as a result of over-policing.[219] She is likely to know too that a felony conviction may mean the disenfranchisement not only of the perpetrator but the decreased voting power of her community, especially given statistics that "one in every 13 black adults could not vote as the result of a felony conviction."[220] In large cities where prosecutor's offices dole out what has been called "assembly-line justice,"[221] shifting the decision to prosecute to victims may finally allow room for alternatives to prosecution—including a demand for greater community resources to prevent crime in the future.[222] Even more radically, it may begin a

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215 Jessica Brown, *If It Pleases the Prosecution*, KNOWABLEMAGAZINE.ORG (May 22, 2019) (quoting David Alan Sklansky). Danielle Sered makes a similar point. "One way that racial inequity manifests is in shaping who gets to decide what happens in response to harm." SERED, *supra* note 167, at 153.

216 *See, e.g.*, Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1281–97 (2004) (exploring the collateral consequences of mass imprisonment of African-Americans).

217 Peter K. Enns et al., *What Percentage of Americans Have Ever Had a Family Member Incarcerated?: Evidence from the Family History of Incarceration Survey (FamHIS)*, 5 SOCIUS 1, 1 (2019).

218 For an exploration of the impact of incarceration on the families of prisoners, see generally DONALD BRAMAN, DOING TIME ON THE OUTSIDE: INCARCERATION AND FAMILY LIFE IN URBAN AMERICA (2007).

219 *See* Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2066–68 (2017).

220 Jean Chung, THE SENTENCING PROJECT, *Felony Disenfranchisement: A Primer* 6 (2019), https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/ [https://perma.cc/UAK9-YRXL].

221 Argersinger v. Hamlin, 407 U.S. 25, 36 (1972).

222 As James Forman documents, high crime communities often want a range of options to address crime—not just more police but also more jobs, better schools, and better housing. Those requests are usually answered by jurisdictions providing more police or tough-on-crimes laws, but little else. *See* FORMAN, *supra* note 196, at 12–13. For a discussion of some of the promising programs

conversation about the state's role in creating the conditions of crime—through structural oppression and wealth inequality—in the first place.[223]

I have initially focused on the racial gap between most black and brown communities and most prosecutors because it most clearly illuminates the possibility of mercy, but a similar possibility may exist even absent a racial gap between communities and prosecutors. This is because even where both victim and perpetrator are white—again, most crime is intra-racial—it is still likely that they are from the same community, and that this community may very well be different—in terms of median wealth, educational attainment, and social capital—from the one to which the prosecutor belongs. Indeed, there is one other factor that is also likely to be similar. While the percentage of blacks (63%) who have had an immediate family member incarcerated may seem staggering, the fact is that we have incarcerated so many in this country that the number is also staggering for whites, 42% of whom have had an immediate family who was incarcerated.[224] All of this opens up the possibility of empathy. Indeed, when a victim has the right to confront his offender—in short, when a victim has a counterpart to the right a defendant has under the Sixth Amendment to confront his accuser—it is not only the possibility of empathy that opens up. It is also the possibility for recognition and even connection.[225] All of this can contribute to a re-imagination and per-

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high crime communities are currently pursuing, see Hannah Sassaman, *To Heal Violence, Divest from Police and Jails, and Invest in Proven Community Solutions*, PHIL. INQUIRER (July 10, 2019, 7:10 AM), https://www.inquirer.com/opinion/commentary/philadelphia-homicides-summer-2019-policing-incarceration-20190710.html [https://perma.cc/VUE2-SWDD]; Elizabeth Van Brocklin, *What Gun Violence Prevention Looks Like When it Focuses on the Communities Hurt the Most*, THETRACE.ORG (July 10, 2019), https://www.thetrace.org/2019/07/gun-violence-prevention-communities-of-color-funding/ [https://perma.cc/4FD6-XLHT].

223 For example, a recent study revealed that boys who grow up at the bottom ten percent of the income distribution are twenty times more likely to be incarcerated than children born in top ten percent. ADAM LOONEY & NICHOLAS TURNER, WORK AND OPPORTUNITY BEFORE AND AFTER INCARCERATION 11–13 (. 2018), https://www.brookings.edu/wp-content/uploads/2018/03/es_20180314_looneyincarceration_final.pdf [https://perma.cc/4X6Q-YPAD]. That same study revealed that "[t]hree years prior to incarceration, only 49 percent of prime-age men are employed, and, when employed, their median earnings were only $6,250. Only 13 percent earned more than $15,000." *Id.* at 1. S*ee also* Angela P. Harris, *Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation*, 37 WASH. U. J.L. & POL'Y 13, 58 (2011) ("[E]ach incident of personal violence should be understood in a larger context of structural violence.").

224 Enns et al., *supra* note 217, at 1.

225 One can think of this as a practical application of social network theory, or the notion that most people are connected by about six degrees of separation. *See* Stanley Milgram, *The Small-World Problem*, 1 PSYCHOL. TODAY 61, 64–65 (1967)

haps confluence of what justice will restore the victim, what justice will benefit us all, what justice is truly transformative,[226] and what justice is just. To be sure, not every victim will be inclined to show mercy to someone who harmed her, even if that person is from her community. But a few will.[227] And these acts of mercy may very well have a signaling effect that encourages others to do the same.[228]

There is one more thing to say about mercy and that is this: just as some victims may be inclined to show mercy, others will be inclined in the opposite direction. They will insist on retribution, and more.[229] These victims may subscribe to the notion that "it [is] highly desirable that criminals should be hated, [and] that the punishments inflicted upon them should be so contrived as to give expression to that hatred."[230] But even here, there is hope for mercy at the societal level. A society that learns that the owner of a bakery, after being robbed of $50.75, sought and obtained a sentence of life imprisonment without the possibility of parole because he could—i.e., because the crime of theft allows for a sentence of life without parole[231]—

(finding that random residents of Omaha, Nebraska could be connected to a target person in Boston, Massachusetts through a median of five individuals). A prerequisite for finding these connections is communication. Assuming nonexceptionalism, a victim who actually communicates with a defendant is likely to find a similar chain of connections, whether it be that they attended the same elementary school, or that their mothers went to the same church, or something else. Any connection can change how the victim thinks about justice. Tellingly, in John Guare's play *Six Degrees of Separation*, which was based on true events, it is the fact that the protagonists recognize a connection to the man that has deceived them that motivates their decision to attempt to help him. JOHN GUARE, SIX DEGREES OF SEPARATION 102–116 (1990).

226 On transformative justice, see Mingus, *supra* note 209.

227 A recent example is that of the family of Ann Margaret Grosmaire. After arguing with Grosmaire on and off for nearly two days, her boyfriend of three years shot her in the face, then walked into a police station to confess to the crime. Although the prosecutor charged the boyfriend with first-degree murder, exposing him to a mandatory life sentence, the victim's family pleaded for less. In short, the victim's family asked for mercy. *See* Paul Tullis, *Can Forgiveness Play a Role in Criminal Justice?*, N.Y. TIMES MAG. (Jan. 4, 2013), https://www.nytimes.com/2013/01/06/magazine/can-forgiveness-play-a-role-in-criminal-justice.html [https://perma.cc/MY3M-C56S].

228 *Cf.* Daniel T. Kobil, *Should Mercy Have a Place in Clemency Decisions?*, *in* FORGIVENESS, MERCY, AND CLEMENCY 36, 39 (Austin Sarat & Nasser Hussain eds., 2006) (defining mercy as "an act of benevolence or compassion that reduces what is owed").

229 Put differently, they will disregard *negative* retributivism, the theory that no one should be punished more than he deserves; i.e., that retribution also functions as an upper limit on punishment.

230 2 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 82 (1883).

231 This is a reference to the recent case of Alvin Kennard, freed after being sentenced to life without parole and serving 35 years in prison for stealing $50.75

may very well revisit its penal code to reduce the maximum penalty. In other words, isolated acts of punitiveness may prompt a societal move to adjust maximum penalties downward across the board. This too is a type of mercy.

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The benefits described above are not the only benefits that will flow from ending the monopoly public prosecutors have on criminal cases and from restoring agency to victims of crime, and by extension, to all of us. One can readily think of other benefits, such as enhancing participatory citizenship[232] in a way that merely electing prosecutors does not.[233] There is even reason to believe that ending the monopoly public prosecutors have on justice may have a deterrent effect when it comes to criminal offending.[234] Restoring agency to victims can even have an impact on policing.[235] And these are just some of the benefits. Again, "[s]ince subject position is everything in my analysis of the law,"[236] allow me to add two more that resonate with my own work: This project is deeply feminist and this project is consonant with Critical Race Theory. At this time, when female victims of crime are less likely to be granted

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from as bakery. *See* Antonia Noori Farzan, *He Stole $50 and Got Life Without Parole. 35 Years Later, He's Coming Home*, WASH. POST (Aug. 29, 2019, 6:34 AM), https://www.washingtonpost.com/nation/2019/08/29/alvin-kennard-theft-years-alabama/ [https://perma.cc/QW6G-YDVF].

232 As Nils Christie observes, the ability to exercise agency in seeking justice after victimization represents "a *potential for activity, for participation*." Christie, *supra* note 118, at 7.

233 *See* Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 582 (2009) (noting that incumbent prosecutors rarely face challengers; this means voters rarely "learn about the incumbent's performance in office . . . to make an informed judgment about the quality of criminal enforcement in their district"). Consider too the recent revelation that a union representing corrections officers is the biggest contributor to the election campaign of District Attorney Darcel Clark in New York. *See* Ese Olumhense & Josefa Velasquez, *Correction Officers Are Top Donors to Unopposed Bronx DA Darcel Clark*, CITY (Nov. 4, 2019), https://thecity.nyc/2019/11/correction-officers-are-top-donors-to-bronx-da-darcel-clark.html [https://perma.cc/2ZC6-J55J].

234 Consider, as but one example, the problem of sexual assault. One reason so few victims come forward is because of their justified skepticism that anything will be done. *See* discussion *supra* accompanying notes 18–21. Perpetrators of sexual violence likely know this. However, this dynamic could change if perpetrators realized that victims themselves could make a showing of probable cause to a judge to secure an arrest warrant, could make their case before the grand jury to pursue an indictment—in short, that victims could seek justice directly.

235 A system in which victims can bring cases has the potential to redirect police resources to crimes that actual victims care about, rather than merely following the agenda of an elected prosecutor who need only appeal to a fraction of her constituents.

236 WILLIAMS, *supra* note 11, at 3.

agency to make their own decisions, this project gives power to them. At a time when minority victims are rarely heard, this project gives power to them. It demonstrates a "commitment to radical critique of the law . . . and . . . radical emancipation by the law."[237] It recognizes that true change is possible only through a "fundamental interrogation of all power."[238] These too are benefits, and we should take them seriously. And we should recognize that all of these benefits bring direct democracy to criminal justice; and that in itself is a good thing.

One can imagine other benefits as well once we empower people to reclaim prosecutorial agency. To seek direct criminal recourse to vindicate harms to them. To contest who is a victim and who is a perpetrator. To contest what should be criminalized and what should not. Especially when we think of "the people" as meaning *all* of "the people," including minorities and other individuals who have historically been relegated to the margins and who, even now, are not necessarily represented by majority rule. There is a long history of marginalized individuals, through their own initiative, challenging the state and the status quo, pushing the law to "make America what America must become."[239] One has only to recall the many slaves such as Elizabeth Freeman, also known as Mum Bett, who acting on their own petitioned courts for their freedom. Mum Bett was not only successful; her case also set in motion the abolishment of slavery in Massachusetts.[240] There is Homer Plessy, who deliberately sat in a white only car in Louisiana to challenge de jure racial segregation,[241] and Fred Korematsu, who refused to report to a Japanese internment camp.[242] There are people who acted individually and people who acted collectively. There are the women who in 1872 marched to the polls and voted knowing they would be arrested; and the hundreds of drag queens and gay men and women who on June 28, 1969, refused police orders to disperse the Stonewall Inn.[243] Even on

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237 Derrick A. Bell, *Who's Afraid of Critical Race Theory?*, 1995 U. ILL. L. REV. 893, 899 (1995).

238 Capers, *supra* note 192, at 27.

239 JAMES BALDWIN, FIRE NEXT TIME 24 (1963) ("[G]reat men have done great things here, and will again, and we can make America what America must become.").

240 *See Massachusetts Constitution and the Abolition of Slavery*, MASS.GOV, https://www.mass.gov/guides/massachusetts-constitution-and-the-abolition-of-slavery [https://perma.cc/F74N-4KC2] (last visited Feb. 19, 2020).

241 *See* Plessy v. Ferguson, 163 U.S. 537 (1896).

242 *See* Korematsu v. United States, 323 U.S. 214 (1944).

243 *See* Symposium, *Stonewall at 25*, 29 HARV. C.R.-C.L. L. REV. 277, 277–78 (1994).

the criminal side, we are the beneficiaries of individuals who refused to accept the law from on high and instead insisted on the right to shape the law themselves. Consider Clarence Gideon, of *Gideon v. Wainwright*[244] fame, who handwrote his petition to appeal saying how unfair it was he'd been tried without the assistance of counsel.[245] Or consider Dollree Mapp, of *Mapp v. Ohio*, who insisted that police should have a warrant before searching her home.[246] To be sure, these individuals were reacting to state action. But what if these individuals, indeed everyone, had the power to seek justice without the intermediary—or more bluntly, without the court blocking—of a public prosecutor. Imagine if Dollree Mapp had been empowered not just to verbally protest the warrantless search of her home but also to argue that the officer's reaching into her bosom was a battery. Imagine if she was empowered to argue that the warrantless search should itself be criminal. Imagine too if Epstein's sexual assault victims—all outsiders, all relatively powerless—had been empowered to demand account of him and to say themselves what they thought was criminal. All of this could contribute to what Lani Guinier and Gerald Torres call "demosprudence," meaning action instigated by "ordinary people" to change "the people who make the law and the landscape in which that law is made."[247] In her examination of criminal cases in North Carolina and South Carolina in the decades after the Revolutionary War, Laura Edwards found something that to modern readers may sound strange: "Everyone participated in the identification of offenses, the resolution of conflicts, and the definition of law."[248] Indeed, she found that even those most marginalized—women, children, poor whites, and slaves—had direct access to localized law and could shape that law.[249] I said earlier that my goal is not to pay

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244 372 U.S. 335 (1963) (establishing a state's obligation to provide counsel for those criminal defendants who cannot afford it.)

245 *Facts and Case Summary – Gideon v. Wainwright*, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, https://www.uscourts.gov/educational-resources/educational-activities/facts-and-case-summary-gideon-v-wainwright [https://perma.cc/PA4A-57HQ] (last visited Apr. 6, 2020).

246 367 U.S. 643, 644–46 (1961) (making the Fourth Amendment exclusionary rule binding on the states).

247 Lani Guinier & Gerald Torres, *Changing the Wind: Notes Towards a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2749–50 (2014).

248 EDWARDS, *supra* note 173, at 7.

249 *Id.* at 7, 82; *see also id.* at 65–66 ("'The people' did not exist as the abstraction that provided the basis for government . . . . They figured as flesh-and-blood individuals, whose presence and opinions informed the entire process: people constituted the legal process, and law was what emerged through their interactions with one another. . . . [They saw] the legal system as something directly

obeisance or offer blind fealty to the past. But clearly there are aspects of this past that are worth pursuing.

Importantly, as we think about restoring prosecutorial agency to ourselves, we should be open to other changes that might follow. For starters, we can imagine a corresponding expansion of the role of juries.[250] For example, Josh Bowers has persuasively argued that grand juries should play a role in charging decisions.[251] We might even see a revival of grand jury reports, a process by which grand juries can issue a report critical of a defendant in lieu of an indictment.[252] Along a similar vein, Laura Appleman has persuasively argued that we should form "bail juries" to play a role in bail determinations[253] and that we should also give juries a role in plea bargaining.[254] And numerous scholars have called for juries to play a bigger role in sentencing,[255] including the role of nullification.[256]

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connected to them, and they expected it to respond as such, wherever it might be located.").

250 *See* Laura I. Appleman, *Local Democracy, Community Adjudication, and Criminal Justice*, 111 NW. U. L. REV. 1413, 1415–19 (2017) (discussing the power of early juries and how the jury trial served as "the conduit for the community's expression of democratic justice"). To be sure, the power of the grand jury has been drastically curtailed, reduced to a "rubber stamp." In a dissenting opinion, Justice Douglas even lamented that the grand jury, "having been conceived as a bulwark between the citizen and the Government, is now a tool of the Executive." United States v. Mara, 410 U.S. 19, 23 (1973) (Douglas, J., dissenting). However, there is no reason why the original power of the grand jury cannot be restored. This vision would also restore the grand jury to its proper screening function. Indeed, it has been said that grand juries during the colonial period exercised more independence than grand juries in England. In brief, it was left "to the grand jury to ferret out wrongdoing and present accusations." Leipold, *supra* note 44, at 283.

251 Josh Bowers, *The Normative Case for Normative Grand Juries*, 47 WAKE FOREST L. REV. 319, 321, 329–35 (2012) (focusing on low-level *mala prohibita* crimes and proposing the use of misdemeanor grand juries to decide not just the technical question of whether probable cause exists but also "the normative question of whether charges are reasonable").

252 Such reports were once common in public corruption cases as a way for a grand jury to note its displeasure with the actions of public officials in a manner short of an indictment. *See* SARA SUN BEALE & WILLIAM C. BRYSON, GRAND JURY LAW AND PRACTICE §§ 3.01, 3.03 (1986).

253 Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1363–66 (2012).

254 Laura I. Appleman, *The Plea Jury*, 85 IND. L.J. 731, 741–50 (2010).

255 *See, e.g.*, Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 312–316 (2003) (arguing that jury sentencing makes sense from a historical, theoretical, and practical perspective); Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 953–56 (2003) (arguing that historical, constitutional, empirical, and policy reasons call for jury sentencing); Adriaan Lanni, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 YALE L.J. 1775 (1999) (arguing that jury sentencing would be the most effective means to implement contemporary sentencing goals).

256 *See* Butler, *supra* note 172, at 679.

Still, one can imagine the push back. To some, the idea of a world with fewer public prosecutors may conjure images of lawlessness or criminals run amok, even if history suggests otherwise. As is the case whenever the status quo is called into question, there is sure to be hesitation. But even that hesitation should prompt us to think "why public prosecutors," and to rethink the power we have given them. Indeed, allow me to go a step further. It is a foundational tenet of Critical Race Theory that we should always "ask the other question."[257] This includes asking, "[w]ho benefits from the status quo . . . ?"[258] Who benefits from the status quo of allowing public prosecutors to decide what cases to pursue? Who benefits when the predominance of public prosecutors enables the state to create a swath of victimless crimes and claim itself as the victim? Who benefits? And who does not?

Of course, there will be much work in implementing the change I have proposed. But it is not impossible work. There are examples elsewhere that we can look to and build on. England and Wales provide mechanisms by which victims can seek administrative and judicial review of a public prosecutor's decision to prosecute or not.[259] Separate and apart from this ability to challenge prosecutorial decision making, England and Wales still permit citizens to initiate private prosecutions. In Poland and Germany, victims can function as secondary prosecutors to directly oversee public prosecutions.[260] Both countries allow for victims to apply for legal aid so that they can be assisted by counsel. Spain allows citizens to bring an *acusación popular* to prosecute *delito público*.[261] There are countries where the families of homicide victims are the ones who decide whether to seek punishment, financial compensation, or forgiveness.[262] In short, there are models to borrow from or to improve upon. There is certainly interest.[263] There

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257 Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183, 1189 (1991).

258 Bennett Capers, *Evidence Without Rules*, 94 NOTRE DAME L. REV. 867, 905 (2018).

259 Manikis, *supra* note 87, at 260–61.

260 *See* Johanna Göhler, *Victim Rights in Civil Law Jurisdictions*, *in* THE OXFORD HANDBOOK OF CRIMINAL PROCESS, *supra* note 87, at 267, 277–78.

261 *Id.* at 277 n.65.

262 *See* Manikis, *supra* note 87, at 257; *see also* M. Cherif Bassiouni, *Quesa Crimes*, *in* THE ISLAMIC CRIMINAL JUSTICE SYSTEM 203, 203–08 (M. Cherif Bassiouni ed., 1982) (describing *Quesas* and *Diyya* systems where the victim, or his family, can demand punishment).

263 For example, the Vera Institute of Justice is exploring the possibility of providing funding to select prosecutors' offices so that those offices can explore implementing more radical, community-oriented ways of effecting justice. (Phone

are examples here.[264] There is precedent. Again, private prosecution is in our cultural DNA. It is part of who we are. More importantly, it is part of who we are capable of becoming.

CONCLUSION

Clearly, all is not right in our criminal system. Our prisons are shockingly overcrowded. Millions of people cycle through jails each year, the overwhelming majority for victimless crimes. One in every three adults has a criminal record. Yet at the same time, so many of the crimes that matter to victims go unaddressed. One in three homicides in this country go unprosecuted. Sexual assaults are hardly prosecuted at all. One wonders if the word "justice" should be applied at all. The question—really, the *pressing* question—is what can we do about it.

The ambition of this Article has been to argue for a different way. It has been to turn attention to the public prosecutors who wield power that can only be described as monopolistic, and surface how recent, indeed how contingent, public prosecutors are. It has been to recall a time when victims, and by extension all of us, had the power to choose when to prosecute, and when to not. And it has been to suggest that, in this criminal justice moment, we open ourselves up to the possibility of real change. Radical change. It is time to consider shifting power from prosecutors to the people they purport to represent. The benefits, after all, are manifold.

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call with Joseph Margulies, Professor of Law and Gov't, Cornell University, regarding Vera Institute project (Sept. 3, 2019).

264 *See supra* notes 157–58, 169, 193, 250–56, 259–62.