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SUBCONSTITUTIONAL CHECKS

*Shima Baradaran Baughman**

ABSTRACT

Constitutional checks are an important part of the American justice system. The Constitution demands structural checks where it provides commensurate power. The Constitution includes several explicit checks in criminal law. Criminal defendants have rights to counsel, indictment by grand jury, and trial by jury; the public or executive elects or appoints prosecutors; legislatures limit actions of police and prosecutors; and courts enforce individual constitutional rights and stop executive misconduct. However, these checks have rarely functioned as intended because the Constitution and criminal law have failed to create—what I call—“subconstitutional checks” to adapt to the changes of the modern criminal state. Subconstitutional checks are stopgaps formed in the three branches of government to effectuate the rights in the Constitution when the system is stalled in dysfunction, when one branch has subjugated the others, or when two or more branches have colluded with one another. The need for subconstitutional checks is evident in the criminal arena. In the modern criminal state, plea agreements have virtually replaced jury trials, discipline and electoral competition between prosecutors is rare, separation of powers does not serve its purpose because the interests of all branches are often aligned, and individual constitutional rights have little real power to protect defendants from the state. As a result, the lack of structural constitutional checks in criminal law has led to constitutional dysfunction. Though never recognized as such, constitutional dysfunction in criminal law is evidenced by mass incarceration, wrongful convictions, overly harsh legislation, and an inability to stop prosecutor and police misconduct. This Article sheds light on the lack of constitutional checks by performing an external constitutional critique of the criminal justice system to explore

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* Shima Baradaran Baughman, Professor of Law, University of Utah College of Law. Thanks to Carissa Hessick, Andy Hessick, Christopher Slobogin, Andrew Ferguson, Jeffrey Bellin, L. Song Richardson, David Harris, Jane Bambauer, Elizabeth Joh, Pamela Metzger, Robert Mosteller, Russell Covey, Richard Frase, Ronnell Anderson Jones, Lisa Grow Sun, Michaelyn Steele, Carolina Nunez, Brigham Daniels, David Moore, Fred Gedicks, Brett Scharffs, Carl Hernandez, Maybell Romero, Eric Jensen, Christine Hurt, G. Jack Chen, Ion Meyn, Meghan Ryan, Daniel Epps, Ben Levin, Beth Colgan, Eric Miller, Michael Mannheimer, Jenn Kreder, Eric Alden, John Valauri, Ken Katkin, Sherlene Boltz, Matt Tokson, Jennifer Kinsley, and John Bickers. I appreciate the comments from the Vanderbilt Criminal Justice Roundtable, Rocky Mountain Junior Conference, Southwest Criminal Law Conference, BYU law faculty, NKU Law School, and the University of Utah faculty grant for making this research possible. I am grateful for research and editing help from Laura Martinez, Cole Crowther, Stina Peterson, Ross McPhail, Charlotte Kiefer, Madeline Aller, Curt Trickett, and Audrey Beck.

this structural gap in the three branches and concludes that creating subconstitutional checks has the potential of reducing criminal dysfunction and creating a more balanced criminal justice system.

INTRODUCTION

Constitutional checks are integral to the American constitutional system.¹ State and federal constitutions explicitly protect criminal defendants with individual rights that act as “checks” against government power.² The federal Constitution and most state constitutions provide individual constitutional rights, including the right to counsel,³ the right to trial by jury,⁴ the right to a grand jury,⁵ the right against self-incrimination,⁶ the right against excess bail,⁷ the right against cruel and unusual punishment,⁸ and due process protections.⁹ These constitutions also provide structural checks from each branch. From the executive branch, police and prosecutors enforce the law with some autonomy but are subject to appointment, sometimes election by the public, and to the limits and priorities of the chief enforcer, the president or state governor.¹⁰ The legislature enacts criminal statutes that clearly indicate when a person has broken the law, and is also subject to elections and legislation priorities, partially based on an assessment of the laws it has

1 Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2314, 2348–49 (2006) [hereinafter Katyal, *Internal Separation of Powers*] (proposing “a set of mechanisms that can create checks and balances within the executive branch in the foreign affairs area” because “[t]he pendulum today has begun to swing so far toward executive branch vigor that one must fear that the principles of divided government embraced by our Founders are no longer working”); Neal Kumar Katyal, *Stochastic Constraint*, 126 HARV. L. REV. 990, 991 (2013) (reviewing JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11* (2012)) (arguing that “new” systems of checks and balances have “more costs . . . than the traditional, constitutionally envisioned system”); see Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 517–19 (2015) (discussing the framers’ constitutional commitment to checking state power, its evolution, and a need to reaffirm this commitment in our generation and subsequent ones).

2 William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 599 (2001) (arguing that the image of checks and balances created by legislatures, courts, constitutions, and prosecutors is an “illusion” because power is concentrated in prosecutors).

3 U.S. CONST. amend. VI.

4 *Id.*

5 U.S. CONST. amend. V.

6 *Id.*

7 U.S. CONST. amend. VIII.

8 *Id.*

9 U.S. CONST. amend. V, amend. XIV, § 1.

10 Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 961 (2009) (noting that “[w]hile in theory the separation of powers should check prosecutors, in practice it does not . . . Governors and Presidents exercise little or no control over line prosecutors’ decisions” (footnote omitted)); Michael J. Ellis, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1528, 1530 (2012) (“The United States is the only country in the world where citizens elect prosecutors.”).

passed.¹¹ Finally, the judicial branch interprets the law fairly and ensures that executive officers respect individual constitutional rights and that legislatures enact clear statutes.¹² All of these constitutional checks, if functioning correctly, provide a structural balance in state and federal criminal justice.

Unfortunately, these constitutional checks are not functioning, most markedly in the criminal justice system. First, checks and balances are not functioning in constitutional criminal procedure because often the branches' interests are aligned.¹³ For instance, legislatures especially in the last fifty years have not acted as a check to executive power but instead have colluded to enlarge the executive branch and pass harsher laws to punish criminal defendants.¹⁴ In general, the branches work together exclusively to protect against crime, as opposed to balancing community safety while upholding the individual rights of the accused. Second, most of the individual constitutional rights to be enforced by the courts are trial rights, and trials have been replaced by a plea system that lacks a judicial enforcement

11 *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (holding that vague statutes should be stricken because they “fail[] to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute” and “encourage[] arbitrary and erratic arrests and convictions” (internal quotation marks omitted) (citations omitted) (quoting *United States v. Harriss*, 347 U.S. 612, 617 (1953))); *see also* 17 OHIO JUR. 3D *Constitutional Law* § 501 (2015) (finding that “statutes which do not fairly inform a person of what is prohibited will be found unconstitutional as violative of due process”).

12 Irving R. Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671, 687 (1980) (“The historical genesis of article III confirms the Framers’ resolve to vest ‘the judicial power of the United States’ in an *independent* department of government. The Framers conceived the grant of power to hear all cases ‘arising under the Constitution and laws of the United States,’ as a mandate to the judiciary to check abuses of constitutional limitations by the other two branches. More than an affirmative grant of authority to the judiciary, however, article III is a positive prohibition of interference with the exercise of the judicial power by the legislative and executive branches.”).

13 William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781, 782 (2006) (“Political incentives are the mechanism. Constitutional law creates a series of political taxes and subsidies, making some kinds of legislation and law enforcement more expensive and others cheaper. Since the 1960s, the Supreme Court has regulated policing and trial procedure aggressively, while leaving substantive criminal law and (until the past few years) noncapital sentencing to the politicians. Consequently, legislators find it easy to expand criminal codes and raise sentences but harder to regulate policing and the trial process. These incentives apply to spending as well. Prison budgets receive a constitutional subsidy. Budgets for criminal adjudication and (especially) local police are subject to a constitutional tax.” (footnote omitted)).

14 *See* Michael Buescher, Note, *Rebuilding the Safety Mechanism: Does 18 U.S.C. § 3553(e) Violate the Separation of Powers?*, 76 FORDHAM L. REV. 1065, 1065 (2007) (arguing that “in order to protect the perception of integrity in the criminal justice system, Congress should revisit current sentencing policy and address perceived shortcomings in the allocation of sentencing power between judges and prosecutors” (emphasis omitted)); *see also* *United States v. Batchelder*, 442 U.S. 114, 125–26 (1979) (acknowledging, but not agreeing with, the Seventh Circuit’s suggestion that dual provisions “might impermissibly delegate to the Executive Branch the Legislature’s responsibility to fix criminal penalties”); Michael Edmund O’Neill, *When Prosecutors Don’t: Trends in Federal Prosecutorial Declinations*, 79 NOTRE DAME L. REV. 221, 233 (2003).

valve for these rights. Third, public elections of prosecutors are pro forma and lack substantive checks on executive power, and legislative elections provide little accountability for criminal legislation passed. And as a result, structural checks are lacking in criminal justice.

The lack of constitutional checks in criminal justice is considerable. Without limits on the executive power to enforce the law and with an increased efficiency in plea bargaining, arrest rates, conviction rates, and detention rates (for both felonies and misdemeanors) have skyrocketed in federal and state systems.¹⁵ This has been aided by the legislature's increasing the executive's ability to punish with harsher laws and by the lack of public knowledge about the effects of these laws on incarceration rates. These increases have led to mass incarceration, with the highest imprisonment rates America has ever experienced, and an "epidemic" of prosecutorial misconduct.¹⁶ Indeed, the result of a lack of structural constitutional checks has been alarming.

In other areas, where constitutional checks are missing or failing, what I call "subconstitutional" checks have been formed by the courts or legislature, including 42 U.S.C. § 1983 and the Administrative Procedure Act (APA) as two key examples. Subconstitutional checks are stopgaps formed to effectuate the rights in the Constitution when the system is stalled in dysfunction, when one branch has subjugated the others, or when one branch has collided with another. Subconstitutional checks are not derived explicitly from

15 See HOWARD N. SNYDER, U.S. DEP'T OF JUSTICE, ARREST IN THE UNITED STATES, 1990–2010, at 1 (2010), <http://www.bjs.gov/content/pub/pdf/aus9010.pdf> (noting that the number of arrests for violent crimes, such as murder, rape, and aggravated assault, fell significantly between 1990 and 2010, but "[t]here were 80% more arrests for drug possession or use in 2010 than in 1990"); John F. Pfaff, The Causes of Growth in Prison Admissions and Populations 3 (July 12, 2011) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1884674 (finding that felony filings rose thirty-five percent from 1994 to 2008). See generally Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 497 (2012); Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision to Prosecute*, 110 COLUM. L. REV. 1655, 1698 n.195 (2010) ("The broken windows theory, aggressive misdemeanor arrests, and intensive stop and frisks have become not a *substitute* [for existing severe criminal penalties] but a *supplement*—a supplement that . . . itself produces a dramatic increase in detentions, arrests, and criminal records." (alterations in original) (internal quotation marks omitted) (quoting BERNARD E. HARCOURT, *ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING* 6 (2001))); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1320 (2012) (using data to show that misdemeanors make up eighty to ninety percent of criminal cases and arguing that the high number of misdemeanor arrests creates dysfunction in criminal justice).

16 See William T. Pizzi, *Understanding the United States' Incarceration Rate*, 95 JUDICATURE 207, 207–08 (2012) (discussing factors that have caused a rise in the incarceration rate in the United States); Josh Keller, *Why It Will Be Hard for Obama to Downsize Prisons*, N.Y. TIMES (July 21, 2015), <http://www.nytimes.com/interactive/2015/07/21/us/politics/obama-downsize-prisons-mass-incarceration.html> (discussing why it will be difficult to downsize the number of prisoners in the United States when our criminal justice system is primarily run by state and local governments).

constitutional language but from an interest in protecting explicit constitutional structure and to give substance to specifically enumerated constitutional rights. For instance, in the civil arena, where the Constitution provides that the executive branch may appoint inferior officers, the APA has come into play to provide limits on the actions of these inferior officers and administrative bodies.¹⁷ Similarly, the Fourteenth Amendment provides protection against discrimination, and legislation under § 1983 provides an avenue for these rights to be enforced.¹⁸ Basically, subconstitutional checks fill constitutional gaps to actualize existing rights. To be clear, subconstitutional checks are not *carte blanche* criminal justice reform. Subconstitutional checks are not an effort simply to reign in prosecutorial power or reinvigorate judicial enforcement of rights. Subconstitutional checks are substitute checks to help fill constitutional gaps in all three branches.

While many scholars have lamented the broken state of the criminal justice system¹⁹ and have prescribed single branch solutions to these problems,²⁰ scholarship to date has failed to appreciate the deep constitutional roots of criminal justice dysfunction that involve all three branches. It has also failed to recognize that the Constitution protects individuals through trial rights and we are operating in a system made up of pleas and implementing these rights in today's system requires constitutional adjustments. While my aim is broader than simple acknowledgment of the root of criminal justice dysfunction being a constitutional one, this alone is an important recognition.

My goal in this project is to begin a study of how subconstitutional checks can be created in criminal law. It is a project that will extend past this

17 5 U.S.C.A. § 553 (West 2016) (governing federal administrative agencies and how they may propose and create regulations under executive power).

18 42 U.S.C. § 1983 (2012) (allowing civil actions against state government officials for violating rights in the Constitution).

19 See Doug Lieb, Note, *Vindicating Vindictiveness: Prosecutorial Discretion and Plea Bargaining, Past and Future*, 123 YALE L.J. 1014, 1018–19 (2014) (pointing out that a flaw in the criminal justice system comes from prosecutors having excessive discretion); see also WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 1 (2011); Gabriel J. Chin, *Race and the Disappointing Right to Counsel*, 122 YALE L.J. 2236, 2240 (2013) (recognizing flaws in the criminal justice system and arguing the critical problem “is a lack of fairness in deciding what to criminalize and how to enforce those prohibitions”); Nicola Lacey, *Humanizing the Criminal Justice Machine: Re-Animated Justice or Frankenstein’s Monster?*, 126 HARV. L. REV. 1299, 1299 (2013) (reviewing STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* (2012)) (arguing the criminal justice system “is in urgent need of reform” because “[t]he American criminal justice system is broken”).

20 See, e.g., Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 873 (2009) (describing how “federal prosecutors’ offices could be designed to curb abuses of power through separation-of-functions requirements and greater attention to supervision”); Lieb, *supra* note 19, at 1068 (“The cleanest and most attractive solutions to the problem [of prosecutorial discretion] may also be the most far-reaching: eliminating overlapping provisions of substantive criminal law, reducing overall sentence lengths, promulgating stricter and more objective charging guidelines within the executive.” (footnote omitted)).

initial Article, and that will hopefully invite future research. Here, I start to lay the foundation. I endeavor to demonstrate that our criminal system is not fulfilling the constitutional goals of the structure set out by the Founders. I describe in some detail the results of this lack of constitutional checks. Then, I begin to briefly explore some potential subconstitutional checks that could provide more balance in the criminal justice system. By no means does this Article aim to provide a full framework that realizes all of the constitutional protections—individual and structural—provided in the Constitution. Instead, it aims to increase the promise of these rights by exploring how subconstitutional checks can be employed in criminal law as they have been in other fields.

My discussion begins in Part I by laying a conceptual foundation. I describe the current constitutional checks provided by the three branches—executive, legislative, and judicial. After carefully enumerating the checks provided, I begin to explain how they are not fulfilling the goals the Constitution set out. Throughout Part I, I explore the notion of subconstitutional checks and how they could fill the gaps left by a lack of structural checks in criminal law.

Part II grounds the discussion in Part I by describing the effects of a lack of structural checks and subconstitutional checks in criminal justice. To avoid abstraction, this Part describes one of the many constitutional dysfunctions caused by a lack of subconstitutional checks—what I call the “Prosecutor Problem.”²¹ In brief, the Prosecutor Problem is what modern scholars claim is responsible for the astronomical increase in incarceration in America in the last fifty years.²² While scholars have recognized the Prosecutor Problem, none have satisfactorily explained why prosecutors have increased charging and sentencing so dramatically. The constitutional critique provided by this Article puts these charging decisions into perspective. Without functioning checks, prosecutors have used harsh legislation without accompanying limits to increase charging and individual sentences and have retained immunity from accountability or, in large part, from the responsibil-

21 See *infra* Part II.

22 John F. Pfaff, *Escaping from the Standard Story: Why the Conventional Wisdom on Prison Growth Is Wrong, and Where We Can Go from Here*, 26 FED. SENT’G REP. 265, 269–70 (2014) (suggesting that “it is clear that our attention should be on figuring out what is driving up felony filings and thus admissions,” questioning whether it is “simply a change in prosecutorial attitudes” or that “prosecutors use massively longer sentences as effective hammers to bang out more pleas,” and continuing on to say that “[r]eforming penal practices in the United States is impossible without a solid, rigorous understanding of the key forces at play”); John F. Pfaff, *The Micro and Macro Causes of Prison Growth*, 28 GA. ST. U. L. REV. 1239, 1272–73 (2012) [hereinafter Pfaff, *Micro and Macro Causes*] (stating that prosecutors are responsible for prison growth in the United States because “at least since the crime drop began in the early 1990s[,] [c]rime has been falling, arrests per crime have been relatively flat (with a slight rise in the 2000s due to drug arrests), admissions per felony filing have not budged, and time served has been relatively stable. But felony filings per arrest have soared during the 1990s and 2000s” but that the question of why prosecutors are responsible “remains particularly unclear”).

ity of fulfilling individual constitutional rights with a lack of judicial intervention, all while contradicting the articulated executive agenda without any recourse. This Part uses the Prosecutor Problem as a case study, demonstrates the results of a lack of constitutional checks or subconstitutional checks, and demonstrates how dealing with the symptoms of the problem is inadequate.

In Part III, I explore how subconstitutional checks can solve the constitutional dysfunction caused by the inadequate existing constitutional checks in the modern criminal justice system. This Part envisions a potential for a fair criminal justice system despite the prevalence of plea bargaining, the lack of real executive elections, and the aligned interests between the branches. I provide here an initial blueprint that needs to be fully explored with future work.

My claim here is certainly not that these changes alone would rehabilitate the criminal justice system of all dysfunction. Nor is my claim that even by addressing all of the existing constitutional gaps, each criminal defendant in the system would experience a fair trial. I certainly do not contend that the subconstitutional checks provided here alone will rehabilitate the criminal justice system or provide for the lack of appreciation of individual constitutional rights or structural protections provided in the Constitution. I do, however, believe—against the weight of modern criminal justice scholarship—that a constitutional critique is necessary to provide a more complete solution rather than a piecemeal solution to criminal justice problems. Moreover, I contend that recognizing that there is a constitutional gap that has led to many individual—and seemingly unconnected—problems helps avoid the trap of blaming individual branches or looking for a simple reform to resolve criminal justice dysfunction.

I. CONSTITUTIONAL CHECKS IN CRIMINAL LAW

The U.S. Constitution was intended to be a slow-moving apparatus. The Montesquieuian structure of government divides power so that one branch cannot control the other.²³ The Constitution's founding premise posits that ambition should counteract ambition. Constitutional checks and separation

23 1 BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* 216 (Thomas Nugent trans., London, J. Nourse & P. Vaillant 1750) (“When the legislative and executive powers are united in the same person, or in the same body of magistracy, there can be then no liberty Again, there is no liberty, if the power of judging be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor. Miserable indeed would be the case, were the same man, or the same body whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and that of judging the crimes or differences of individuals.”).

of powers—if working properly—require slow, deliberate change.²⁴ Constitutional checks prevent domination by one branch and provide internal checks within each branch. Separation of powers carefully divides power between the three branches and allows the three branches to counterbalance each other.²⁵ The civil system, particularly the political process, largely functions with the branches counterbalancing and often stalling the ability of the government to act when their interests are not aligned. However, the criminal justice system has changed from what was envisioned as a slow-moving apparatus—where divergent interests balanced each other—to a machine that processes many individuals extremely quickly.²⁶ This Part discusses the historical and existing individual and structural constitutional rights in criminal justice in order to understand the constitutional problem in criminal law.

The Federal Constitution provides several individual constitutional rights, including the right to counsel, the right to trial by jury, the right to a grand jury, the right against self-incrimination, the right against excessive bail, the right against cruel and unusual punishment, and the right to due process.²⁷ Historically, the Constitution has never functioned perfectly. The public acted as a democratic check on criminal charging; it was important that charges were public and that a defendant received notice to protect due

24 It is important to note here that the discussion of separation of powers throughout this Article is relevant to the federal government and the forty out of fifty state governments that require three separate branches. See *Dreyer v. Illinois*, 187 U.S. 71, 83–84 (1902).

25 See Katyal, *Internal Separation of Powers*, *supra* note 1, at 2318 (pointing out that “[i]n many ways, the status quo is the worst of all worlds because it creates the façade of external and internal checks when both have withered”).

26 This is not to say that the early criminal justice system functioned in accord with constitutional principles. There is an argument to be made that the early criminal justice system in America conducted many trials a day and processed individuals quickly. However, these individuals were subject to a jury trial. CONG. RESEARCH SERV., *THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION*, S. DOC. NO. 112-9, at 1400–01 (2013) (“The right to a speedy trial may be derived from a provision of Magna Carta and it was a right so interpreted by Coke. Much the same language was incorporated into the Virginia Declaration of Rights of 1776 and from there into the Sixth Amendment.” (footnotes omitted)); see also U.S. CONST. amend. VI; LAWRENCE M. FRIEDMAN, *THE HISTORY OF AMERICAN LAW* 436 (3d ed. 2005) (“[T]he real criminal justice system was made up of many overlapping layers, none of which resembled very closely the ideal picture of criminal justice. There were at least three of these layers: the bottom layer, where courts handled tens of thousands of petty cases rather roughly and informally; a middle layer, for serious but ordinary cases . . . and a top layer, made up of a few dramatic cases—cases where the crime was especially lurid or the defendant a prominent or unusual person, or both of these.”); Natalia Nicolaidis, *The Sixth Amendment Right to a Speedy and Public Trial*, 26 AM. CRIM. L. REV. 1489, 1489–98 (1989).

27 U.S. CONST. amend. V (right to counsel, right to a grand jury, right against self-incrimination, and right to due process, applied to the federal government); *id.* amend. VI (right to trial by jury and right to counsel); *id.* amend. VIII (excessive bail); *id.* amend. XIV, § 1 (right to due process, applied to states).

process rights.²⁸ In addition, grand juries were used regularly as a barrier to charging innocent members of the public and as a check against a powerful government.²⁹ Juries—the conscience of the community—were also important historically to prevent injustice in criminal charging or prosecution.³⁰ Certainly, historically the criminal system processed much fewer people in a much less complicated statutory scheme. And while undoubtedly the early criminal justice system processed much fewer people for only a handful of crimes, these trials were often done very quickly and without all of the intended constitutional rights.³¹ At the time of the Founding, there was a simple criminal justice system, and so simple structural protections functioned, including a robust grand jury and a jury trial. However, right to counsel applied only if an individual could afford an attorney.³² The right against self-incrimination allowed brutality in interrogations.³³ Punishment was cruel by today's standards of due process.³⁴ So, while constitutional protections existed, they were not robust or inclusive in practice.³⁵ In other words, imperfections have always existed in effectuating criminal rights.

28 Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 768–69 (2011).

29 Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 918–20 (2006) (“Lay magistrates, lay constables, and lay juries ran criminal justice. Jurors were prized as popular local voices who could represent and express the community’s sense of justice.” (footnote omitted)); see also Niki Kuckes, *The Democratic Prosecutor: Explaining the Constitutional Function of the Federal Grand Jury*, 94 GEO. L.J. 1265, 1299–1306 (2006).

30 LAURA I. APPLEMAN, *DEFENDING THE JURY: CRIME, COMMUNITY, AND THE CONSTITUTION* 1–5 (2015); see also GEORGE JOHN EDWARDS, *THE GRAND JURY* 16 (1906).

31 See FRIEDMAN, *supra* note 26, at 437 (“Here, ordinary cases of assault, theft, burglary, and similar crimes were prosecuted. The trial courts, as far as we can tell, were by no means kangaroo courts; but there were no long, drawn-out trials. The ‘hypertrophy’ of due process had no role in these courts. For many defendants, there was no trial at all.”).

32 *Gideon v. Wainwright*, 372 U.S. 335 (1963).

33 Lawrence Herman, *The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule (Part II)*, 53 OHIO ST. L.J. 497, 546–47 (1992) (“Indeed, the remnants of physical brutality in modern interrogation practice are more likely to occur in police interrogation than in any other governmental setting.”); see also Paul G. Kauper, *Judicial Examination of the Accused—A Remedy for the Third Degree*, 30 MICH. L. REV. 1224, 1255 (1932).

34 Arthur E. Sutherland, Jr., *Due Process and Cruel Punishment*, 64 HARV. L. REV. 271, 271 (1950) (“A search through the rather extensive judicial literature devoted to cruel and unusual punishment turns up few cases where men have been set at liberty by the Eighth Amendment or by the Fourteenth incorporating the prohibition of the Eighth.” (footnote omitted)); Robert J. McWhirter, *Baby, Don’t Be Cruel: What’s So “Cruel & Unusual” About the Eighth Amendment? Part 1*, ARIZ. ATT’Y, Dec. 2009, at 13, 14 (noting that “the Eighth Amendment was part of a movement of punishment reform” and that “[m]ore pertinent to constitutional interpretation is that the words are also relative to the age. What is cruel at one point in history is not so in another”).

35 Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1279 (2000) (“The significance of the battle over the presence of people of color on juries

Though individual constitutional rights for criminal defendants are explicit in the Constitution, and provide more expansive criminal rights than civil rights, these constitutional rights provided little protection for defendants until the 1960s. The constitutional criminal justice system was examined closely by the Supreme Court in the 1960s rights revolution.³⁶ During that time, new constitutional protections—or what can be identified as the first subconstitutional checks—gave life to constitutional structure by adding judicial checks to protect constitutional rights. The 1960s Warren Court insisted that the judiciary needed to take a more active role in enforcing existing constitutional protections.³⁷

Some of these subconstitutional checks were referred to as prophylactic checks to protect explicit constitutional rights during trial.³⁸ For instance, *Miranda v. Arizona*³⁹ protected the explicit rights in the Fifth and Sixth Amendments during a time when the Court believed these individual rights were not being honored.⁴⁰ *Gideon v. Wainwright*⁴¹ enlarged the constitutional right to counsel by requiring states to provide counsel to those who could not afford their own attorneys.⁴² *Brady v. Maryland*⁴³ added a subconstitutional check on executive power by requiring that prosecutors turn over exculpatory information to defendants.⁴⁴ These rights have enforced a belief that the modern constitutional criminal justice system provides defendants with a fair trial.

Unfortunately, though, the modern Supreme Court has since eroded these new constitutional protections.⁴⁵ And these protections largely func-

should not be underestimated. Throughout most of this country's history, courts excluded people of color from jury service.”).

36 William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 2003 (2008) (noting that “criminal liability grew both broader and more rule-like after the Warren Court decisions of the 1960s, and severe sentencing rules multiplied”).

37 See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 439 (1966) (“The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime.”).

38 Brian K. Landsberg, *Safeguarding Constitutional Rights: The Uses and Limits of Prophylactic Rules*, 66 TENN. L. REV. 925, 940 (1999) (noting that *Miranda* rights have been called prophylactic).

39 384 U.S. 436.

40 *Id.* at 442 (stating that the Court's holding “is an application of principles long recognized” and the Fifth and Sixth Amendments are “precious rights [that] were fixed in our Constitution only after centuries of persecution and struggle”).

41 372 U.S. 335 (1963).

42 *Id.* at 344 (finding that “any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him”).

43 373 U.S. 83 (1963).

44 *Id.* at 87 (holding that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution”).

45 Miriam H. Baer, *Timing Brady*, 115 COLUM. L. REV. 1, 5 (2015) (stating that “[t]here is . . . little doubt that *Brady* transgressions have become salient” in both state and federal

tion only if there is a trial, which is how most cases were handled in the 1960s. *Miranda* is a right that protects a defendant against evidence introduced at trial.⁴⁶ *Brady* is a post-plea issue.⁴⁷ And even *Gideon* does not guarantee an attorney in key pretrial stages.⁴⁸ Indeed, the subconstitutional checks of the 1960s gave life to the constitutional structure by adding checks to the process. However, these checks have since been eroded, and many do not apply to the modern plea system—plea negotiations were first approved broadly in 1967 and began to dominate the system in the 1980s and 1990s.⁴⁹

prosecutions); Pamela S. Karlan, *Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel*, 105 HARV. L. REV. 670, 670 (1992) (“As courts have begun to face large numbers of drug and organized crime cases, they have increasingly encountered a new form of attorney-client relationship that has prompted the judiciary to curtail the reach of right-to-counsel protections.” (emphasis omitted)); William J. Stuntz, *Miranda’s Mistake*, 99 MICH. L. REV. 975, 978 (2001) (discussing the *Miranda* doctrine and why this solution to regulatory problems has “unraveled,” as well as “the distributive consequences of the unraveling”).

46 *Miranda v. Arizona*, 384 U.S. 436, 460 (1966) (“[O]ur accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth.” (citation omitted)).

47 *Brady*, 373 U.S. at 86 (“It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.” (quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (internal quotation marks omitted))).

48 *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (discussing that in our country “[t]he right of one charged with crime to counsel [is] deemed fundamental and essential to fair trials”).

49 Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 6, 38, 40 (1979) (“In the decades following the 1920’s, American criminal courts became even more dependent on the guilty plea. . . . The ‘due process revolution’ also led directly to more intense plea negotiation. . . . By 1970, the due process revolution had run its course, and the Supreme Court, which bore a share of responsibility for the dominance of the guilty plea, was ready at last to confront this central feature of American criminal justice. In a series of decisions which implied that any other course would be unthinkable, the Court upheld the propriety of plea bargaining. It insisted that plea bargaining was ‘inherent in the criminal law and its administration’” (footnotes omitted) (quoting *Brady v. United States*, 397 U.S. 742, 751 (1970))); George Fisher, *Plea Bargaining’s Triumph*, 109 YALE L.J. 857, 864 (2000) (“In the last quarter of the century, as judges converted to the cause, plea bargaining most often took the form of *sentence bargaining*, in which the defendant’s plea won a reduced sentence. Backed by judges as well as prosecutors, plea bargaining now broke the narrow hold of liquor and murder prosecutions and conquered the whole penal territory—so that by century’s close, guilty pleas accounted for some eighty-seven percent of criminal adjudications in Middlesex County.”); Note, *Plea Bargaining and the Transformation of the Criminal Process*, 90 HARV. L. REV. 564, 564 (1977) (“[T]he locus of the criminal process has shifted largely from trial to plea bargaining. In the vast majority of cases, guilt and the applicable range of sentences are determined through informal negotiations between the prosecutor and the defense attorney.”).

In addition, since the 1960s, increased criminal legislation,⁵⁰ increased charging and sentencing,⁵¹ and increased efficiency call for a reevaluation of the constitutional rights with the modern system. And indeed many scholars would agree that the individual constitutional protections, including the right to counsel,⁵² the grand jury right, the excessive bail clause, the jury trial right, and the due process rights of defendants, are regularly violated in our current criminal justice system.⁵³

50 Stuntz, *supra* note 13, at 800–01 (discussing “the mountain of state and federal legislation dealing with sentencing procedure, nearly all passed since the mid-1970s. Of all aspects of the criminal process, sentencing has seen the most legal innovation over the past three decades,” and noting that the examples referred to in the article “are recent; the legislation in question has been enacted since the late 1960s, much of it in the past decade” (footnote omitted)); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 26 (1987) (noting that “[t]he last three decades’ expansion of the law of criminal procedure has taken place against the backdrop of [the] rise in prosecutorial budget constraint”).

51 In 1967, the American Bar Association and the President’s Commission on Law Enforcement and Administration of Justice approved the concept of plea bargaining, though before this time it was viewed as a disfavored and lazy prosecution practice that was ignored by the courts. Albert W. Alschuler, *The Prosecutor’s Role in the Plea Bargaining*, 36 U. CHI. L. REV. 50, 50–52 (1968).

52 Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After Gideon v. Wainwright*, 122 YALE L.J. 2150, 2152–53 (2013) (describing the failure of the modern right to counsel, with many defendants not receiving adequate or timely representation and pleading guilty before even consulting with a lawyer); Lincoln Caplan, *The Right to Counsel: Badly Battered at 50*, N.Y. TIMES (Mar. 9, 2013), <http://www.nytimes.com/2013/03/10/opinion/sunday/the-right-to-counsel-badly-battered-at-50.html> (describing that, in ninety-five percent of criminal cases, and with eighty percent of criminal defendants who cannot afford to pay for lawyers, the promise of the right to counsel is largely unmet).

53 The jury right is weak today; in state and federal court only five percent of cases or fewer go to a jury. See Laura I. Appleman, *The Lost Meaning of the Jury Trial Right*, 84 IND. L.J. 397, 398, 399 (2009) (arguing the right to jury trials “has been lost” and that today’s “interpretations have shifted the meaning of the jury trial right well away from its original meaning”); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459–60 (2004) (tracing the decline in cases going to jury trials in federal and state courts). The grand jury right is not more than a rubber stamp today, and does not protect defendants as it historically did. George H. Dession, *From Indictment to Information—Implications of the Shift*, 42 YALE L.J. 163, 163 (1932) (stating that “the grand jury is seldom better than a rubber stamp of the prosecuting attorney and has ceased to perform or be needed for the function for which it was established”). Also, the Excessive Bail Clause has no real meaning in the modern day criminal justice system. Scott W. Howe, *The Implications of Incorporating the Eight Amendment Prohibition on Excessive Bail*, 43 HOFSTRA L. REV. 1039, 1039–40 (2015) (finding the Excessive Bail Clause means nothing in modern criminal law as the Supreme Court “has not issued an opinion applying the *Excessive Bail Clause* in more than 25 years and has rendered only two others in its history” (footnotes omitted)). And the Cruel and Unusual Punishment Clause also provides no substantive rights in modern criminal law. Comment, *Rummel v. Estelle: Leaving the Cruel and Unusual Punishments Clause in Constitutional Limbo*, 15 VAL. U. L. REV. 201, 209 (1980) (finding that although the Supreme Court acknowledges the Cruel and Unusual Punishments Clause, “[it] has rarely invoked the [Cruel and Unusual Punishments] clause to invalidate harsh sentences”).

The Constitution also provides structural constitutional rights in criminal law. However, many of these checks are not functioning—and arguably have never functioned—as actual checks on executive power. The Constitution provides that the legislature is to enact criminal statutes that clearly indicate when a person has broken the law in order for a person to be punished.⁵⁴ The legislature must also provide a check on the executive by giving the power to punish individuals only for crimes that the public believes violate the conscience of the community. Another legislative check is confirmation of the head federal executive officer, like a U.S. Attorney General by the Senate, and that the Attorney General must answer to hearings in Congress.⁵⁵ The Constitution provides that if there are abuses in the executive branch, inferior officers (such as prosecutors) may be impeached.⁵⁶ As agents of the executive, prosecutors have autonomy to enforce the law, with guidance from the chief enforcer, the president.⁵⁷ Often the president and the executive branch do not have to give information to the other branches about how they enforce the law in the criminal realm like they do in the civil realm.⁵⁸ Finally, the judicial branch should provide a serious constitutional check on prosecutorial discretion by stopping the law from applying in an unjust or unconstitutional manner.⁵⁹ However, in a system dominated by pleas, judges do not enter the rooms where criminal justice decisions are

54 See *supra* note 11.

55 153 CONG. REC. 7651 (daily ed. Mar. 26, 2007).

56 U.S. CONST. art. II, § 4.

57 Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 521 (2005).

58 The Federal Advisory Committee Act (FACA) governs the creation and operation of advisory committees in the executive branch of the government. See 37A AM. JUR. 2D *Freedom of Information Acts* § 35 (2016). Congress enacted the FACA as a means to control the establishment of advisory committees to the executive branch and to allow the public to monitor their creation, activities, and cost, thus enhancing their public accountability. *Id.* Under the FACA, for example, advisory committees “must . . . open their meetings to the public and make their minutes, records and reports publicly available.” *Judicial Watch, Inc. v. U.S. Dep’t of Commerce*, 736 F. Supp. 2d 24, 28 (D.D.C. 2010). Advisory committees subject to the Act, however, are closed to the public when their meetings involve matters qualifying under an exemption listed within the Freedom of Information Act. See 5 U.S.C. § 552(b) (2012); see also, e.g., *Aftergood v. Cent. Intelligence Agency*, 355 F. Supp. 2d 557, 562 (D.D.C. 2005) (stating that the Central Intelligence Agency’s budget information is protected from disclosure because it “relates to intelligence methods, namely the allocation, transfer and funding of intelligence programs” (quoting *Aftergood v. Cent. Intelligence Agency*, No. 02-1146, slip op. at 6 (D.D.C. Sept. 29, 2004))). *But see* *Gates v. Schlesinger*, 366 F. Supp. 797, 801 (D.D.C. 1973) (requiring officials from the Department of Defense to open to the public a meeting of the Defense Advisory Committee on Women in the Services).

59 Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 801 (2003) (arguing that the U.S. Supreme Court has consistently rejected government attempts to condition the receiving of benefits on waiver of constitutional protections, but suggesting the Court has ignored this approach within the criminal law context by allowing waiver of “the Fourth Amendment right to be free from unreasonable searches and seizures, the Fifth Amendment right against self-incrimination, and the Sixth Amendment rights to a jury trial, to confrontation of witnesses, and to the assistance of counsel. . . in exchange for reduced

made, and the constitutional protections for criminal defendants are of little worth. State separation of powers works differently and depends on whether prosecutors are elected at a state level, elected at a county level, or appointed.⁶⁰ While the principles from the federal system do not directly apply, the principles are the same and many states struggle with the lack of structural checks. This is particularly a problem where there are no elected prosecutors or even where counties elect prosecutors; often those prosecutors have no accountability to the state executive branch. County and city prosecutors also have near unlimited discretion; they take little direction and often lack accountability to higher executive leaders.⁶¹

The next three Sections discuss how the three government branches have carried out their mission of providing checks in criminal law. They explain the weaknesses of the existing explicit constitutional checks: elections and confirmations, judicial review of constitutional rights, and limiting legislation. They also explore subconstitutional checks in the civil arena: the Freedom of Information Act (FOIA),⁶² § 1983 actions,⁶³ and the APA,⁶⁴ which were created to add checks where they do not exist in the Constitution and where the ordinary checks were inadequate or outmoded. These subconstitutional checks provide balance in other areas but are either absent or anemic in criminal justice.

A. *Executive Checks*

The Constitution provides for several explicit checks on the executive branch.⁶⁵ These include the power of the executive branch to appoint inferior officers, including prosecutors.⁶⁶ The executive branch also enjoys the power to provide clemency to those who are prosecuted.⁶⁷ While the executive branch does provide some checks to its inferior officers—particularly prosecutors—these checks are anemic or nonfunctional. Rachel Barkow has carefully articulated some of these key arguments.⁶⁸ A key element to a lack

sentences, dismissal of additional charges, or other benefits, when defendants plead guilty pursuant to plea agreements” (footnote omitted)).

60 The three branches of government exist in the federal system and in most states, though ten states do not require separation of powers in their constitutions. *See supra* note 24.

61 *See* Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 773 (1996) (“In fact, current prosecutorial discretion is virtually unlimited . . .”).

62 5 U.S.C. § 552 (allowing for the disclosure of previously unreleased information controlled by the federal government).

63 42 U.S.C. § 1983 (2012).

64 5 U.S.C. §§ 551–559.

65 U.S. CONST. art. II.

66 *Id.* art. II, § 2.

67 *Id.* (stating that the president “shall have Power to grant Reprieves and Pardons for Offenses against the United States”).

68 *See* Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 342 (2013) (arguing the need for a “sound criminal justice administration . . . from many sources, not just those charged with prosecuting cases”); *see*

of executive checks is that the courts have worked hand-in-hand with prosecutors to make prosecutors more efficient and have helped them achieve easier criminal convictions in several areas,⁶⁹ including the Fourth Amendment⁷⁰ and the Confrontation Clause.⁷¹

Prosecutors are the executive's agents, charged with enforcing the law under the direction of the executive branch's prerogative.⁷² The Constitution protects executive privilege⁷³ and explicitly requires the executive to disclose little to the other branches, except for the state of the union.⁷⁴ Executive privilege may be claimed where secrecy avoids a greater harm.⁷⁵

And in the criminal arena, the executive branch provides the least guidance and most discretion to prosecutors compared to other inferior officers.⁷⁶ First, the criminal justice system does not have the typical subconstitutional checks that other agencies must comply with, including providing information about their enforcement priorities, FOIA requests, or other APA obligations. Second, the criminal justice system lacks formal guidance or goals that are dictated from the executive to guide decisionmaking more broadly, which provides them more discretion than other executive actors.

also Barkow, *supra* note 20, at 885 (analyzing the lack of administrative checks on prosecutors and their decisionmaking); Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989 (2006) [hereinafter Barkow, *Separation of Powers*] (arguing that “unlike the administrative law context,” where agencies’ decisions are subject to judicial review and political oversight, there are no institutional checks when it comes to matters in criminal law).

69 Pamela R. Metzger, *Confrontation as a Rule of Production*, 24 WM. & MARY BILL RTS. J. 995, 1009 (2016) (explaining that the Supreme Court, with its Confrontation Clause jurisprudence, openly attempted to balance the interests of the accused with the interest in effective law enforcement and that as “prosecutors and their allies grew bolder, [they] urg[ed] the Court to limit [the Confrontation Clause’s] production mandate in order to facilitate faster, cheaper, and easier criminal convictions”).

70 Shima Baradaran, *Rebalancing the Fourth Amendment*, 102 GEO. L.J. 1, 1 (2013) (demonstrating that the Supreme Court sides with prosecutors eighty percent of the time when it is “balancing,” and focuses largely on effective law enforcement over citizen privacy when it comes to the Fourth Amendment).

71 Metzger, *supra* note 69, at 1009 (“Eventually, confrontation’s effects on case outcomes, prosecutorial resources, and larger societal interests came to dominate the Court’s confrontation jurisprudence.”).

72 See, e.g., *United States v. Cox*, 342 F. 2d 167, 171 (5th Cir. 1965); *Frenzel v. State*, 963 S.W. 2d 911, 916 (Tex. Ct. App. 1998).

73 *Black v. Sheraton Corp. of Am.*, 371 F. Supp. 97, 100 (D.D.C. 1974) (stating that recognition of executive privilege requires “a delicate balancing of competing interests: the public’s interest in preserving confidentiality to promote open communication necessary for an orderly functioning of the government, and the individual’s [or government’s] need for disclosure of particular information”).

74 U.S. CONST. art. II, § 3, cl. 1 (requiring that the president “from time to time give to the Congress Information of the State of the Union”).

75 See 81 AM. JUR. 2D *Executive Privilege* § 487 (2016).

76 U.S. CONST. art. II, § 3 (stating that the president “shall take Care that the Laws be faithfully executed”).

The criminal justice system is not subject to normal executive constraints like FOIA, the APA, or other reviews to which executive agencies usually have to answer.⁷⁷ FOIA is founded in First Amendment principles that encourage transparency.⁷⁸ FOIA enables the public to request documents and policy procedures.⁷⁹ But some executive officers in the criminal arena are exempt from FOIA requirements.⁸⁰ For instance, federal prosecutors do not have to answer FOIA requests and are not required to provide information that other agencies have to provide that explain their decisionmaking.⁸¹ And in state prosecutor offices, there is even less control or oversight, as there are different elected officers who have no accountability to higher officials, and the system is much less centralized. As just one example of this issue, the National Association of Criminal Defense Lawyers sued to obtain a copy of the “Blue Book,” an internal document that instructs federal prosecutors on discovery matters,⁸² and was denied this internal guide.⁸³ The U.S. Attorney refused to release this manual, claiming that it violated separation of powers.

77 Although the Freedom of Information Act and the Administrative Procedure Act technically apply to all executive administrations and departments, they contain exemptions that largely protect all federal criminal justice agencies from disclosure. See 5 U.S.C. § 552(b)(7) (2012); see also U.S. Dep’t of Justice, *Frequently Asked Questions*, FOIA.GOV, <https://foia.gov/faq.html> (last visited Jan. 4, 2017) (Congress has created an exclusion for “criminal law enforcement agencies” and thus, relevant records “are not subject to the requirements of the FOIA”). In discussing this exemption, the D.C. Circuit has held that there is “a relatively low bar for [an] agency to justify withholding [information under FOIA] exemption 7(E).” *Blackwell v. Fed. Bureau of Investigation*, 646 F.3d 37, 42 (D.C. Cir. 2011) (quoting *Mayer Brown LLP v. Internal Revenue Serv.*, 562 F.3d 1193, 1194 (D.C. Cir. 2009)).

78 See David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 295 (2010). The negative rights in the First Amendment permit “Americans to be free from certain forms of government intervention” and “to obtain information.” *Id.*

79 See Mark Fenster, *Seeing the State: Transparency as Metaphor*, 62 ADMIN. L. REV. 617, 639, 646–47 (2010) (noting that the Freedom of Information Act, Sunshine Act, Federal Advisory Committee Act, and Presidential Records Act allow citizens and interest groups to access information previously kept secret).

80 *Id.* at 644–45 (listing the different executive offices and officers that are exempt from FOIA).

81 FOIA requests made to U.S. Attorneys’ offices must be answered; even if the answer is only to invoke an exemption. However, the federal prosecutors never personally respond. Federal prosecutors do not personally handle FOIA requests; they are instructed in the U.S. Attorneys’ Manual that upon receipt of a FOIA request, it should be “forwarded to the FOIA/PA Unit of the Executive Office for United States Attorneys.” OFFICE OF THE U.S. ATTORNEYS, U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 3-17.130 (1997) [hereinafter U.S. ATTORNEYS’ MANUAL].

82 Nat’l Ass’n of Criminal Def. Lawyers v. Exec. Office for U.S. Attorneys, 75 F. Supp. 3d 552, 561 (D.D.C. 2014) (holding that the FOIA request for the Federal Criminal Discovery Blue Book should be denied as the book is attorney work-product), *aff’d*, 829 F.3d 741 (D.C. Cir. 2016).

83 In response to a controversy that led many federal prosecutors’ offices to release copies of their offices’ policies on discovery in criminal cases, the Justice Department prepared a detailed guide for prosecutors known as the Blue Book. It has refused to make this handbook public. Brad Heath, *Rules to Keep Federal Prosecutors in Line Revealed*, USA TODAY

I do not argue here that the Blue Book should be distributed by the executive to the public, but it should be shared with members of the legislative branch. This example is simply to illustrate the difference in treatment between prosecutors and other executive branch officers, who are routinely required to provide specific information on their internal decisionmaking, for instance, under the APA. Indeed, other executive agencies routinely report to the executive and other branches on their internal discovery protocols, without violating separation of powers.⁸⁴ Needless to say, no other administrative agency would be permitted to write an agency handbook about how it enforces the laws but refuse to share it with the other branches or the public. These would certainly have to be released to the public due to the APA,⁸⁵ though because of the *Armstrong* doctrine, prosecutors are exempt from these requirements in criminal cases.⁸⁶

Some scholars have argued that prosecutors are special executive actors who should be treated differently, and that prosecutorial discretion is necessary and efficient.⁸⁷ The argument goes: prosecutors have in-depth institutional knowledge of the criminal justice system, which often puts them in the best position to make decisions.⁸⁸ Prosecutors speak legalese. They are familiar with criminal procedure and the different circumstances that arise during litigation.⁸⁹ Given prosecutors' "distinct perspective" on how the criminal justice system works, it is often practical to defer to them. However, this argument does not set prosecutors apart from any other agency. All agency actors have special knowledge of their field. For instance, EPA officers have a distinct perspective on environmental regulation and the laws that dictate air quality protection. This does not shield them from providing the handbooks they use to guide their decisionmaking in enforcing statutes

(Mar. 30, 2015), <http://www.usatoday.com/story/news/2015/03/03/justice-department-discovery-policies-released/24239225/>.

84 See, e.g., Act of Mar. 4, 2015, Pub. L. No. 114-4, 129 Stat. 39 (containing a comprehensive list of required reports to Congress from, among other departments, the judicial branch, the President of the United States, and cabinet-level departments within the executive branch and the corresponding authority and nature of such reports).

85 See 5 U.S.C. § 552(a) (2012).

86 *Id.* § 552(b)(7). See generally *United States v. Armstrong*, 517 U.S. 456, (1996) (holding that for a defendant to establish entitlement to discovery on a claim of selective prosecution based on race in a criminal case, the defendant must produce credible evidence that similarly situated defendants of other races could have been prosecuted but were not).

87 Shelby A. Dickerson Moore, *Questioning the Autonomy of Prosecutorial Charging Decisions: Recognizing the Need to Exercise Discretion—Knowing There Will Be Consequences for Crossing the Line*, 60 LA. L. REV. 371, 376 (2000) ("[S]ome prosecutorial discretion is necessary for an efficient and effective criminal justice system."); see Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 289 (1983) (arguing that prosecutorial discretion is a necessary element of a "well-functioning market system").

88 Moore, *supra* note 87, at 379 ("The prosecutor is in the best position and has the expertise to make the complex charging decisions that are necessary in an individualized criminal justice system.")

89 *Id.*

Congress has passed with regard to air quality.⁹⁰ Indeed, prosecutors have special privileges even among other executive branch officers that allow them to provide less information and obtain little review.

Second, prosecutors do not receive guidance in the same way from the executive on enforcement priorities and expectations like other branches or, more importantly, periodic review of the charging and prosecution decisions they make. Many branches of the executive receive directives from the executive to follow central enforcement objectives in their particular area. For instance, if a particular president wants to heavily enforce a prohibition of animal grazing on federal lands, or designate an area of land as a wilderness study area, the Bureau of Land Management (BLM) would be instructed of that and would enforce it strictly throughout the area.⁹¹ If, rather, the president prefers to encourage economic development on public lands, he or she will encourage the agency to issue more mining permits on federal land.⁹² These objectives are all within statutory rights of the agency, but depending on who the president is, the enforcement priorities will change and the agency will make different decisions throughout the country. These decisions are tracked and the agency head is accountable for following the guidance of the executive and achieving his or her goals. This kind of coordinated guidance from the executive is largely missing in criminal law.

Criminal justice enforcement priorities and outcomes are often indirectly affected at the federal and state levels through budget allocations and staffing. For instance, if drug prosecutions are a focus of the executive, the Department of Justice (DOJ) provides a larger budget and more staff attorneys in that section.⁹³ Similarly, if the county sexual-assault crimes division has five attorneys and the white-collar crime division has ten, this may represent the relative number of cases brought by the respective divisions. Overall, the growth in numbers of prosecutors can be one contributing factor to an overall increase in felonies and misdemeanors charged.⁹⁴ However,

90 See, e.g., MONICA NEES, U.S. ENVTL. PROT. AGENCY, EPA/600/R-94/038a, *QUALITY ASSURANCE HANDBOOK FOR AIR POLLUTION MEASUREMENT SYSTEMS: VOLUME 1—A FIELD GUIDE TO ENVIRONMENTAL QUALITY ASSURANCE* (1993).

91 See, e.g., California Desert Protection Act of 1994, Pub. L. No. 103-433, 108 Stat. 4471; Colorado Wilderness Act of 1993, Pub. L. No. 103-77, 107 Stat. 756; San Rafael Swell National Heritage and Conservation Act, H.R. 3625, 105th Cong. (1998).

92 James William Gibson, *Cleaning Up Bush's Mess on Public Land*, L.A. TIMES (Apr. 2, 2009), <http://www.latimes.com/opinion/la-oe-gibson2-2009apr02-story.html> ("During the Bush era, millions of acres of public land were leased for oil and gas drilling and logging."); see, e.g., *The Bush Record*, NAT. RES. DEF. COUNCIL, <http://www.laondaverde.org/bushrecord/wildlife.asp> (last visited Jan. 4, 2017) (follow Wildlands & Wildlife hyperlink, then see the Energy and Public Lands heading) (giving examples of where President Bush issued permits to drill and mine on public land).

93 Shima Baradaran, *Drugs and Violence*, 88 S. CAL. L. REV. 227, 231 n.11 (2015) (noting that during President Ronald Reagan's first term in office, the Drug Enforcement Agency's spending drastically increased from \$86 million to over \$1 billion).

94 The latest data for prosecutors in state courts is from 2007 and is limited to prosecutors' offices with general felony responsibility—excluding both municipal and county offices prosecuting misdemeanors and attorneys assigned to criminal matters within their

often these decisions to charge a certain number of crimes or certain crimes over others are not coordinated or reviewed by the executive. And in state surveys, prosecutors reported submitting reports to federal, state, or local bodies on their case dispositions (including felony convictions, guilty pleas, and declinations) about forty-seven percent of the time.⁹⁵ Thus, reporting of declinations and convictions is not happening with the frequency that is ideal for the executive to appropriately review the decisions of its inferior officers. And to the extent these decisions are reviewed, there is no widespread or consistent feedback provided from higher executive officers (president or state governor) to inferior officers (like prosecutors).

For instance, the goal of decreasing incarceration rates was a stated goal of President Obama.⁹⁶ He has remarked quite famously about the injustice reflected in the number of Americans who are incarcerated and particularly the disproportionate number of black Americans who are incarcerated in the United States.⁹⁷ Based on this, it would seem that decreasing incarceration rates would have been a priority for President Obama. However, U.S. prosecutors do not have a coordinated policy of considering high incarceration rates when making decisions. In fact, the U.S. Attorneys' Manual contains no

respective state attorney general's office. The 2330 prosecutors' offices reported employment of 32,622 attorneys bearing some responsibility for criminal cases. See STEVEN W. PERRY & DUREN BANKS, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PROSECUTORS IN STATE COURTS, 2007—STATISTICAL TABLES (2011), <http://www.bjs.gov/content/pub/pdf/psc07st.pdf>. This is an increase of approximately nine to eleven state felony prosecutors per 100,000 U.S. residents from the 22,234 prosecutors employed in 1990. See JOHN M. DAWSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PROSECUTORS IN STATE COURTS, 1990, at 9 (1992), <http://www.bjs.gov/content/pub/pdf/psc90.pdf>. For U.S. population growth data between 1990 and 2007, see *1990 Census*, U.S. CENSUS BUREAU (1990), <http://www.census.gov/main/www/cen1990.html> (last visited Jan. 4, 2017), and *Vintage 2007: National Tables*, U.S. CENSUS BUREAU (2007), http://www.census.gov/popest/data/historical/2000s/vintage_2007/ (last visited Oct. 25, 2016).

95 PETER BRIEN, BUREAU OF JUSTICE STATISTICS, REPORTING BY PROSECUTORS' OFFICES TO REPOSITORIES OF CRIMINAL HISTORY RECORDS 1 (2005), <https://www.bjs.gov/content/pub/pdf/rporchr.pdf> (stating that the overwhelming majority of prosecutors who responded to this survey claimed that another agency was responsible for reporting dispositions of cases).

96 Kevin Liptak, *Obama Looks Beyond Commutations in Justice Reform Bid*, CNN (July 15, 2015), <http://www.cnn.com/2015/07/14/politics/obama-naacp-speech-philadelphia-justice-reform/>.

97 *Remarks by the President at the NAACP Conference*, WHITE HOUSE (July 14, 2015), <https://www.whitehouse.gov/the-press-office/2015/07/14/remarks-president-naacp-conference> (stating, "our criminal justice system isn't as smart as it should be" and "[m]ass incarceration makes our country worse off, and we need to do something about it"); see also Keller, *supra* note 16 (explaining that in an attempt to reduce incarceration rates, "Mr. Obama has proposed reducing the sentences of nonviolent offenders, saying last week that nonviolent drug offenders are 'the real reason our prison population is so high'" (quoting *Remarks by the President at the NAACP Conference, supra*)); *Remarks by the President at the NAACP Conference, supra* ("African Americans and Latinos make up 30 percent of our population; they make up 60 percent of our inmates. About one in every 35 African American men . . . is serving time right now. Among white men, that number is one in 214.").

discussion of prison populations or executive objectives to reduce mass incarceration.⁹⁸ Rather, prosecutors have the latitude to charge a wide range of crimes and to seek a wide range of penalties as long as the prosecutor believes the charges and sought-after penalties are “consistent with the nature of the defendant’s conduct”⁹⁹ or the likelihood of success at trial is high, without regard to the incarceration effect of the charges. This similar situation happens in other parts of government. In the same week that a government report revealed that government detentions of immigrants were failing on several fronts, U.S. Immigration and Customs Enforcement (ICE) renewed its contract with the same company that had been accused of mismanagement.¹⁰⁰

Certainly, there are some important counterexamples that demonstrate areas where the president guides inferior executive officers. In the immigration arena, President Obama made it a priority to enforce immigration during his term and there were increases in detention of illegal immigrants during his term, demonstrating coordination by prosecutors.¹⁰¹ Similarly, President Obama’s focus on enforcing tariffs and the DOJ’s recent statement to all U.S. attorneys about the more coordinated and strict enforcement of white-collar crime demonstrate some coordinated guidance.¹⁰²

But at times, when executive attorneys do receive guidance, it is conflicting. For instance, guidance from the president and attorneys general in

98 U.S. ATTORNEYS’ MANUAL, *supra* note 81, § 9.

99 *Id.* § 9-27.300. When prosecutors decide to charge a crime, the handbook instructs them to charge “the most serious offense that is consistent with the nature of the defendant’s conduct, and that is likely to result in a sustainable conviction.” *Id.* “Most serious offense” generally means the crime that yields the highest range of incarceration. But the handbook also instructs prosecutors to take an “individualized assessment” of each defendant to determine which charges further the “purposes of the criminal law [such] as punishment, protection of the public, specific and general deterrence, and rehabilitation.” *Id.*

100 Michael Barajas, *ICE Awards Contract to Private Prison Company That Was Just Slammed in Federal Report*, HOUSTONPRESS (Sept. 22, 2015), <http://www.houstonpress.com/news/ice-awards-contract-to-private-prison-company-that-was-just-slammed-in-federal-report-7785696>; Mike Lillis, *Progressive Rips DHS for Tasking Prison Company with Immigrant Oversight*, HILL (Sept. 23, 2015), <http://thehill.com/homenews/house/254648-progressive-rips-dhs-for-asking-prison-company-to-run-immigrant-oversight> (reporting that Rep. Raúl Grijalva criticized a decision by ICE to award Geo Group, a for-profit prison company, an \$11 million-a-year contract to run a newly launched program to manage immigration cases for families, announced on the same day that the U.S. Commission on Civil Rights issued a report on the treatment of detainees held in Geo Group-managed immigration detention centers).

101 Alejandra Marchevsky & Beth Baker, *Why Has President Obama Deported More Immigrants than Any President in US History?*, NATION (Mar. 31, 2014), <https://www.thenation.com/article/why-has-president-obama-deported-more-immigrants-any-president-us-history/> (“Since taking the oath of office, Obama has deported immigrants at a faster rate than any other president in US history, nearly a record 2 million people.”).

102 See Memorandum from Sally Quillian Yates, Deputy U.S. Attorney Gen., to all U.S. Attorneys (Sept. 9, 2015) (explaining that fighting corporate fraud is a top priority of the DOJ and explaining a more coordinated approach by the DOJ on these issues).

recent years laments increased incarceration rates,¹⁰³ yet the U.S. Attorney's Manual continues to advise prosecutors to bring the highest sentence range possible in every case.¹⁰⁴ Indeed, the U.S. Attorneys' Manual advises prosecutors to charge the "most serious offense," with the highest range under the Sentencing Guidelines.¹⁰⁵ The Manual makes it very clear that mandatory minimums should be applied whenever applicable, if the defendant does not enter a plea.¹⁰⁶ And even with plea deals, the Manual makes clear that the defendant should plead to the charge that is the "most serious readily provable charge."¹⁰⁷ The federal handbook recommends the harshest possible course, though individual prosecutors retain a wide degree of discretion and little accountability to fulfill broader executive directives or guidance.¹⁰⁸ Indeed, though at the top the president and attorney general demand decreased incarceration, line federal prosecutors are encouraged to bring the harshest sentences and as many cases as they can.¹⁰⁹ This conflicting guidance does not provide coordinated executive guidance.

State prosecutors' offices have even less guidance. Often these offices lack any handbook of instructions at all. In a small pilot study of a mid-size prosecutors' office I conducted, there were mixed reviews on whether the office had a handbook or whether there were procedures for the prosecutors

103 On several occasions, former U.S. Attorney General Eric Holder discussed his disapproval of the high levels of incarceration and his "Smart on Crime" initiative to reduce the federal prison population and penalties for low-level, nonviolent drug offenders. See Eric Holder, Former U.S. Attorney Gen., Remarks at the Annual Meeting of the American Bar Association's House of Delegates (Aug. 12, 2013), <http://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-annual-meeting-american-bar-associations>; see also Eric Holder, Former U.S. Attorney Gen., Remarks at the Fourth Meeting of Ministers Responsible for Public Security in the Americas (Nov. 21, 2013), <http://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-fourth-meeting-ministers-responsible-public>; Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, One Year After Launching Key Sentencing Reforms, Attorney General Holder Announces First Drop in Federal Prison Population in More than Three Decades (Sept. 23, 2014), <http://www.justice.gov/opa/pr/one-year-after-launching-key-sentencing-reforms-attorney-general-holder-announces-first-drop-0>.

104 Cf. U.S. ATTORNEYS' MANUAL, *supra* note 81, § 9-27.300.

105 *Id.*

106 *Id.*

107 *Id.* § 9-27.430. The handbook directs prosecutors to "assist the sentencing court by: 1. Attempting to ensure that the relevant facts are brought to the court's attention fully and accurately; and 2. Making sentencing recommendations in appropriate cases." *Id.* § 9-27.710. Prosecutors should make a sentencing recommendation when "[t]he terms of a plea agreement so require it" or when "[t]he public interest warrants an expression of the government's view concerning appropriate sentence." *Id.* § 9-27.730(A). When deciding which charges and sentences to seek, the handbook directs prosecutors to consider "whether the penalty yielded by such sentencing range (or potential mandatory minimum charge, if applicable) is proportional to the seriousness of the defendant's conduct, and whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation." *Id.* § 9-27.300(A).

108 *Id.* § 9-27.110.

109 *Id.* § 9-27.300.

to follow.¹¹⁰ Some attorneys claimed there was a handbook and others claimed that the office did not have one. Prosecutors' opinions also differed on what they should do in charging similar cases, even within an office. For instance, with the same exact simple assault case, the prosecutors (ranging from veteran to beginner) suggested everything from no charges for the particular offense to up to 720 days in jail.¹¹¹ Their survey results echoed what informal conversations with prosecutors often confirm: that the culture of a prosecutors' office,¹¹² the individual in charge of that office, and a prosecutor's mentor in the office impact the decisions that prosecutor makes more than any handbook or other guidelines from the executive.¹¹³ And state prosecutors, like federal prosecutors, if they are given instruction, often are guided by a standard of likelihood of success at trial or a probability of conviction. The standard is not necessarily influenced by the prerogative of the state executive, or by broader justice goals, allowing prosecutors not to consider the impact their work is having on the larger criminal justice system. For instance, studies show that guidance and review from the executive can improve inconsistencies in treatment,¹¹⁴ based on the location of the prosecutors' office,¹¹⁵ race,¹¹⁶ victim characteristics,¹¹⁷ individual district attorney's office standards,¹¹⁸ sexual orientation,¹¹⁹ and the prosecutor's individual moral standards,¹²⁰ among other factors. Many of these factors have little to do with the facts of a particular case, but introduce inconsistencies and potential biases that may be prevented with more executive guidance and review.

110 Results of the study are on file with the author.

111 *Id.*

112 See generally Kay L. Levine & Ronald F. Wright, *Prosecution in 3-D*, 102 J. CRIM. L. & CRIMINOLOGY 1119, 1121 (2012) (discussing the impact that cultures in prosecution offices have on attorneys and on fulfilling their duties).

113 Results of the study are on file with the author.

114 See, e.g., Bibas, *supra* note 10, at 978; James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1562 (1981).

115 See generally Stephanos Bibas, *Regulating Local Variations in Federal Sentencing*, 58 STAN. L. REV. 137, 139 (2005); Michael Edmund O'Neill, *Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predictive Factors*, 41 AM. CRIM. L. REV. 1439, 1440 (2004).

116 Harry Litman, *Pretextual Prosecution*, 92 GEO. L.J. 1135, 1149–50 (2004).

117 See, e.g., Ellen S. Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 FORDHAM L. REV. 1511, 1533 n.154 (2000).

118 Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010, 1029–30 (2005).

119 Michael H. Meidinger, Note, *Peeking Under the Covers: Taking a Closer Look at Prosecutorial Decision-Making Involving Queer Youth and Statutory Rape*, 32 B.C. J. L. & SOC. JUST. 421, 421 (2012).

120 Podgor, *supra* note 117, at 1513–14.

B. *Judicial Checks*

The judicial branch should act as a check on the executive branch in criminal issues, but given the realities of our modern criminal justice system, it does not. Indeed, due to the system of pleas that dominates, as discussed later, there is little role for the courts in the criminal process. Judges only review prosecutorial decisions with high standards of appellate review and rarely punish prosecutors or uphold their role of interpreting and applying statutes to individual cases.¹²¹ Also, criminal defendants cannot use the courts to bring individual suits against prosecutors due to § 1983 prohibitions.¹²² And even when courts do take criminal cases—which is rare—on appeal at the highest levels, the executive branch wins eighty percent of the time or more.¹²³ And most often it is due to a judicial deference to safety.¹²⁴ Therefore, there is no robust review of executive branch decisions by the judiciary. The remainder of this Section discusses the constitutional checks that the judiciary has the opportunity to use to check the executive branch.

First, Article III provides for judicial review of criminal cases,¹²⁵ and courts have always maintained the role of interpreting and applying statutes to individual criminal justice cases. However, the judiciary has ceded this role almost wholesale. The judicial branch actively protects the executive branch from any judicial review or scrutiny in many criminal contexts. Judges do not have the constitutional authority to dictate an executive's policy agenda.¹²⁶ The judiciary, according to *United States v. Cox*,¹²⁷ is not to interfere with the “discretionary powers of the attorneys of the United States in their control over criminal prosecutions.”¹²⁸ In adopting this deferential approach, subsequent decisions have provided that courts cannot compel prosecutors to file charges,¹²⁹ that prosecutors are not required to bring

121 See Andrew B. Loewenstein, *Judicial Review and the Limits of Prosecutorial Discretion*, 38 AM. CRIM. L. REV. 351, 372 (2001) (discussing the limited instances in which the judiciary can review prosecutorial decisions).

122 42 U.S.C. § 1983 (2012); see also *Van de Kamp v. Goldstein*, 555 U.S. 335, 341 (2009) (“[T]he ‘same considerations of public policy that underlie’ a prosecutor’s common-law immunity ‘countenance absolute immunity under § 1983.’” (quoting *Imbler v. Pachtman*, 424 U.S. 409, 424 (1976))).

123 This is based on my own study of criminal Supreme Court appeals from 1990 to 2010. See Baradaran, *supra* note 70, at 43.

124 *Id.* at 17–18 (explaining that the Supreme Court expresses deference to safety—officer and public—twenty-eight percent of the time it rules against defendants on appeal).

125 See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); see also U.S. CONST. art. III, § 2 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . .”).

126 U.S. CONST. art. I, § 1; *id.* art. III, § 1.

127 342 F.2d 167 (5th Cir. 1965).

128 *Id.* at 171.

129 *Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375, 380–81 (2d Cir. 1973).

charges as soon as probable cause has been established,¹³⁰ that private citizens lack standing against prosecutors who decide not to prosecute,¹³¹ that courts cannot direct prosecutors to select certain charges,¹³² that prosecutorial discretion is “not reviewable for a simple abuse of discretion,”¹³³ and that there is no judicial remedy for arbitrary prosecutorial action.¹³⁴ Both federal and state courts have found that prosecutorial discretion is protected by separation of powers.¹³⁵

But at the same time, the judiciary has the constitutional responsibility of checking executive power and enforcing individual constitutional rights. For instance, judges should stop convictions where there is not sufficient evidence, discipline prosecutors who hide exculpatory evidence and submit false witness testimony or evidence, and closely examine police behavior rather than trust them implicitly when they violate constitutional rights. But in the current system, appellate review of prosecutorial decisions is almost irrelevant because “harmless error” review requires a court to uphold a criminal conviction unless there is clear misconduct.¹³⁶ Prosecutors are also immune from civil suit as government officials, so even clear misconduct is not punished.¹³⁷ Cases of prosecutors being punished internally are rare, and prosecutors often are not punished by another office or by federal or

130 *United States v. Lovasco*, 431 U.S. 783, 791 (1977).

131 *Cf. Tonkin v. Michael*, 349 F. Supp. 78, 83 (D.V.I. 1972) (holding, *inter alia*, that “where the Attorney General exercises his discretion not to have the cause prosecuted by his office or by anyone else, then the Court should not appoint or accept any proffered private prosecution”).

132 *United States v. Zabawa*, 39 F.3d 279, 284 (10th Cir. 1994).

133 *United States v. Giannattasio*, 979 F.2d 98, 100 (7th Cir. 1992).

134 *United States v. Armstrong*, 517 U.S. 456 (1996), *overruling* *United States v. Armstrong*, 48 F.3d 1508, 1515 (9th Cir. 1995).

135 *See, e.g., State v. Kruczek*, No. CI-97-2140, 1998 WL 170115, at *1 (Minn. Ct. App. Apr. 14, 1998) (“District courts should only rarely interpose on prosecutorial discretion: ‘Under established separation of powers rules, absent evidence of selective or discriminatory prosecutorial intent, or an abuse of prosecutorial discretion, the judiciary is powerless to interfere with the prosecutor’s charging authority.’” (quoting *State v. Krotzer*, 548 N.W. 2d 252, 254 (Minn. 1996))); *Frenzel v. State*, 963 S.W. 2d 911, 916 (Tex. Ct. App. 1998) (finding a statute violative of the Texas Constitution under the separation of powers doctrine because the statute infringed on prosecutorial discretion). To be clear, most jurisdictions find that separation of powers protections apply to “inherently executive” functions such as charging and dismissing. *State v. Montiel*, 122 P.3d 571, 580–81 (Utah 2005). This “does not limit judicial discretion in considering [a plea bargain].” *Id.*

136 Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 669 (1972) (describing the difficulty in proving prosecutorial misconduct because if a prosecutor “act[s] at all like a prosecutor . . . (even a vicious, lawless, and dishonest prosecutor), he apparently remains immune” to discipline); Steven H. Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. CRIM. L. & CRIMINOLOGY 421, 441–42 (1980) (arguing that the “harmless error” doctrine should not apply to constitutional rights, but “[c]ourt[s] should adopt a rule of automatic reversal . . . and make [their] judgments in full light of the undiluted effect of the rules [they] make[]”).

137 *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976) (holding that a prosecutor was immune from civil suit).

state disciplinary bodies.¹³⁸ Additionally, individuals have no recourse through the courts against prosecutors or police as § 1983 bars such suits.¹³⁹ Police violations of constitutional rights are rarely addressed by the judiciary as there is a great amount of modern-day deference to the executive to effectively administer the law.¹⁴⁰

And where the judiciary has not voluntarily ceded its power to provide judicial review, due to modern criminal justice adjudication now being primarily done by pleas rather than trial, judges now lack this opportunity. Prosecutors interpret statutes (even in close cases or with vague statutes), and defendants must often rely on the prosecutor's interpretation of the law because they never get the chance to have a judge decide how a statute may apply to the crime they allegedly committed.¹⁴¹ In 2015, the Supreme Court,

138 See Charlie Savage, *Prosecutors Face Penalty in '08 Trial of a Senator*, N.Y. TIMES (May 24, 2012), <http://www.nytimes.com/2012/05/25/us/politics/2-prosecutors-in-case-of-senator-ted-stevens-are-suspended.html> (describing how the prosecutors "failed to turn over information . . . that might have helped Mr. Stevens at his trial" and subjected the prosecutors to suspensions). In New York, a prosecutor was rebuked by state and federal courts in six separate trials for his misconduct; four of these cases resulted in reversals. He was never disciplined. Bennett Gershman, *How to Hold Bad Prosecutors Accountable: The Case for a Commission on Prosecutorial Misconduct*, DAILY BEAST (Aug. 31, 2015), <http://www.thedailybeast.com/articles/2015/08/31/how-to-hold-bad-prosecutors-accountable-the-case-for-a-commission-on-prosecutorial-conduct.html>. There are also several reports of prosecutorial misconduct in prosecutors who worked under Brooklyn District Attorney Charles Hynes; there has been no discipline of any prosecutors. Joaquin Sapien, *For Brooklyn Prosecutor, A Troubled Last Term, and a Trail of Lingering Questions*, PROPUBLICA (Dec. 30, 2013), <https://www.propublica.org/article/for-brooklyn-prosecutor-a-troubled-last-term-and-a-trail-of-lingering-quest>.

139 42 U.S.C. § 1983 (2012); *Culbertson v. Lykos*, 790 F.3d 608, 627 (5th Cir. 2015) (holding that "prosecutors enjoy absolute immunity from suit for performing actions associated with the judicial process"); see *Imbler*, 424 U.S. at 427, 431.

140 Baradaran, *supra* note 70, at 15–20.

141 In oral arguments regarding a case where the appellant claimed a statute was overbroad, Justice Roberts stated:

[T]he problem is not what the government argues when it gets into court. The problem is what the prosecutor threatens when he's entered into plea bargain negotiations You are putting the defense counsel in a position where they have to interpret the vagueness in making the decision [of] whether they want to plead to five years or risk the mandatory minimum of . . . 15.

Transcript of Oral Argument at 42, *Johnson v. United States*, 135 S. Ct. 2551 (2015) (No. 13–7120). And in *Yates v. United States*, the appellant argued that the prosecutors too broadly interpreted the statute upon which his conviction was based. Both parties agreed that the maximum sentence of twenty years for the charge would be too severe for the appellant's actions. In response to the government claiming that U.S. Attorneys are generally instructed to charge the defendant with the offense that is most severe under the law, Justice Roberts stated:

[E]very time you get somebody who is throwing fish overboard, you can go to him and say: Look, if we prosecute you you're facing 20 years, so why don't you plead to a year, or something like that. It's an extraordinary leverage that the broadest interpretation of this statute would give Federal prosecutors.

in the oral arguments of *Johnson v. United States*¹⁴² and *Yates v. United States*,¹⁴³ highlighted the injustice of prosecutors interpreting statutes while negotiating pleas, thus demonstrating that the Court may be open to reinvigorating unconstitutional checks of the executive and taking back the role of courts in interpreting criminal statutes. While some agency decisionmaking is not reviewable,¹⁴⁴ and there are exceptions to FOIA,¹⁴⁵ in general other executive agencies receive more judicial review than criminal agencies.¹⁴⁶ But before the APA, the judiciary provided strict judicial review of executive agencies, but now they exercise deference in the criminal context.¹⁴⁷

Second, the judiciary maintains power to check the executive branch through *Brady v. Maryland*,¹⁴⁸ which should act as a unconstitutional check. As a result of the Supreme Court's opinion in *Brady* and its progeny, prosecutors must disclose certain material evidence and information that is favorable to the accused.¹⁴⁹ Courts may nevertheless decline to review a prosecutor's

Transcript of Oral Argument at 31, *Yates v. United States*, 135 S. Ct. 1074 (2015) (No. 13-7451).

142 Transcript of Oral Argument at 42, *Johnson*, 135 S. Ct. 2551 (No. 13-7120).

143 Transcript of Oral Argument at 31, *Yates*, 135 S. Ct. 1074 (No. 13-7451).

144 For instance, when the EPA charges many environmental violations, these decisions are often not reviewable by the judicial branch. *See, e.g.*, *Luminant Generation Co., LLC v. Envtl. Prot. Agency*, 757 F.3d 439 (5th Cir. 2014) (holding that notices of violations issued by the EPA are not judicially reviewable). *But see Sackett v. Envtl. Prot. Agency*, 132 S. Ct. 1367, 1373-74 (2012) (explaining that issues are not judicially reviewable when the statute precludes review, and giving examples of cases in which the Supreme Court enforced this principle).

145 5 U.S.C. § 552(a)(6)(E)(iv) (2012) ("A district court of the United States shall not have jurisdiction to review an agency denial of expedited processing of a request for records after the agency has provided a complete response to the request."); *id.* § 552(a)(4)(A)(vii) ("In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: *Provided*, That the court's review of the matter shall be limited to the record before the agency.").

146 Barkow, *Separation of Powers*, *supra* note 68, at 991 (stating that the APA's "requirements of notice and comment, of separation between law enforcers and adjudicators, and of judicial review were designed to perform the same functions as the Constitution's separation of powers safeguards" (footnotes omitted)). However, as Barkow points out, these requirements are absent in the criminal context. *Id.* at 1028.

147 After the inception of executive agencies during the New Deal era, the principle of checks and balances—particularly the idea that it is the judiciary's job to interpret law, not the executive's—was pervasive, leading to courts consistently restraining administrative agencies' power. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court moved away from strict judicial review towards granting greater deference to agencies by establishing a two-part test: (1) if congressional intent is clear, the court and agency must give effect to it; and (2) if congressional intent is not clear, the court must determine "whether the agency's answer is based on a permissible construction of the statute." 467 U.S. 837, 842-43 (1984); *see also* Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2078-82 (1990) (describing the evolution and providing examples of judicial review over executive agencies since they were established).

148 373 U.S. 83, 87 (1963).

149 *See Giglio v. United States*, 405 U.S. 150, 154 (1972); *Brady*, 373 U.S. at 87; Bruce A. Green, *Federal Criminal Discovery Reform: A Legislative Approach*, 64 MERCER L. REV. 639, 644

actions where there is no touchstone to assess abuse or where tradition has remained silent.¹⁵⁰ Moreover, every state has ethical codes of conduct in place to sanction prosecutors who engage in *Brady* violations.¹⁵¹ Prosecutors have a duty to not use improper methods but are required to do every legitimate act to win a conviction.¹⁵² However, prosecutors seem to be immune to discipline when they breach that duty and the courts justify prosecutorial immunity due to the availability of professional discipline.¹⁵³ For this reason, the judiciary tends to allow broad discretion to prosecutors' judgments,¹⁵⁴ and prosecutors almost never face discipline for misconduct or *Brady* violations.¹⁵⁵ For example, in over 2000 cases from 1970 to 2003 where prosecutorial misconduct led to dismissals, sentence reductions, or reversals, prosecutors were disciplined in only forty-four of those cases.¹⁵⁶

(2013); see also Baer, *supra* note 45, at 4 (“*Brady* and its progeny require prosecutors to disclose material, exculpatory evidence in time for use at trial or sentencing.”).

150 See, e.g., Mark D. Villaverde, Note, *Structuring the Prosecutor's Duty to Search the Intelligence Community for Brady Material*, 88 CORNELL L. REV. 1471, 1494–95 (2003) (noting that “circuits do not agree whether a prosecutor’s duty to search for *Brady* material extends to entities that have no interest in the prosecution, whether the duty extends only to law enforcement entities, whether it extends only to persons acting under the direction or control of the prosecutor, and whether the duty extends to *Brady* material outside a prosecutor’s jurisdiction”). If a court becomes aware of a *Brady* violation prior to conviction, available remedies include: exclusion of government evidence, interrupting the proceedings to provide the defense with the opportunity to cross examine a witness with newly discovered evidence, informing the jury of the government’s failure to hand over certain evidence, declaring a mistrial, or dismissing the government’s indictment with prejudice. See Baer, *supra* note 45, at 14; Green, *supra* note 149, at 644.

151 Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 715 (1987).

152 See *Berger v. United States*, 295 U.S. 78, 88 (1935).

153 See Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 722 (2001); see also *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976) (“[A] prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers.”).

154 See *Connick v. Thompson*, 563 U.S. 51, 67 (2011) (holding that a prosecutor was not subject to discipline for failing to comply with *Brady* because “[a] licensed attorney making legal judgments, in his capacity as a prosecutor . . . simply does not present . . . [a] ‘highly predictable’ constitutional danger”).

155 See, e.g., Edward M. Genson & Marc W. Martin, *The Epidemic of Prosecutorial Courtroom Misconduct in Illinois: Is It Time to Start Prosecuting the Prosecutors?*, 19 LOY. U. CHI. L.J. 39, 47 (1987) (citing authorities, and stating that “[d]isciplinary sanctions are rarely imposed against prosecutors”); David Keenan et al., *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203, 220 (2011) (citing multiple studies where prosecutors were not punished for misconduct or *Brady* violations); Kenneth Rosenthal, *Prosecutor Misconduct, Convictions, and Double Jeopardy: Case Studies in an Emerging Jurisprudence*, 71 TEMP. L. REV. 887, 889 (1998) (“[W]hile the prosecutor is theoretically subject to disciplinary codes, there is a notable absence of disciplinary sanctions against prosecutors, even in the most egregious cases.”).

156 Keenan et al., *supra* note 155, at 220.

While *Brady* theoretically limits prosecutorial discretion, it is in practical effect irrelevant. One study between 1980 and 1986 found only nine instances (in all fifty states) of disciplinary action against prosecutors for *Brady* violations.¹⁵⁷ Only in the most egregious cases are prosecutors criticized, or censured, and thus *Brady* is hardly ever enforced.¹⁵⁸ The lack of judicial discipline of prosecutors for misconduct on *Brady* grounds exists, perhaps, for several reasons. First, prosecutors may justify holding evidence, believing that it will not ever come to light in a post-conviction claim.¹⁵⁹ When undisclosed evidence comes to light, a prosecutor can always argue that the evidence had no reasonable probability of affecting the outcome of a trial, and avoid a violation.¹⁶⁰ There are also significant problems in bringing a *Brady* violation to the attention of a disciplinary body. A defendant or defense attorney are the most likely persons to file a complaint against a prosecutor for a *Brady* violation, but due to the fact that defense attorneys and prosecutors work together regularly and rely on each other to plead cases and reduce their workload, it is extremely unlikely for a defense attorney to file a complaint against a prosecutor.¹⁶¹ In larger offices, *Brady* violations may be more rampant than in smaller offices where the individual prosecutor may worry about the reputational concerns of being caught violating the law.

157 Rosen, *supra* note 151, at 720.

158 See Baer, *supra* note 45, at 28 (quoting Rosen, *supra* note 151, at 693 (referring to *Brady* as a paper tiger)).

159 Green, *supra* note 149, at 661–62; see also Janet C. Hoefel & Stephen I. Singer, *Activating A Brady Pretrial Duty to Disclose Favorable Information: From the Mouths of Supreme Court Justices to Practice*, 38 N.Y.U. REV. L. & SOC. CHANGE 467, 477 (2014) (claiming that prosecutors are aware that withheld evidence will likely never be discovered, and even if the evidence is discovered, the defense has the high burden of showing a reasonable probability that the evidence would have made a difference); Rosen, *supra* note 151, at 731–32 (noting that the only possible legal consequence of presenting false evidence or suppressing exculpatory evidence is that the defendant may be fortunate enough to discover the evidence and file for post-conviction relief).

160 Hoefel & Singer, *supra* note 159, at 477 (noting that there are so many unknown and unknowable variables, including the theory of defense and the evidence the defense may present); see also Rosen, *supra* note 151, at 731–32 (noting that a prosecutor can take added comfort in the development of strict materiality standards and the general trend towards restricting post-conviction relief in criminal cases).

161 See Rosen, *supra* note 151, at 733–35 (noting that the relationship between a defense attorney and prosecutor is typically a continuing one, and sensible defense attorneys will understandably hesitate to jeopardize a practice by filing complaints that will have little chance of resulting in meaningful discipline). Defendants also rarely file *Brady* violations against prosecutors. Baer, *supra* note 45, at 25, 28 (noting that “most defendants plead guilty and therefore skip the information-forcing benefits of a criminal trial. Criminal defendants often know less about the government’s case than the government itself, and their only means for determining the weakness of the government’s case is by proceeding to trial . . . [and] most defendants lack the resources and fortitude to seek this option [O]nly in the most egregious cases have prosecutors been publicly criticized, censured, or disbarred, leading some scholars to conclude that *Brady*’s primary enforcement mechanism is little more than a ‘paper tiger’” (footnotes omitted) (quoting Rosen, *supra* note 151, at 693, 696–97, 730–31)).

Also, depending on the culture of the office, these violations may be widespread or nonexistent, or somewhere in between.

The judicial branch is largely unable to act as a check to executive power, with the exception of a few situations. Ironically, the judicial branch has willingly surrendered its ability to provide meaningful checks. Courts have cited both public policy and separation of powers as justifications for favoring a hands-off approach.¹⁶² Ironically, separation of powers, which is at the core of the constitutional requirement of checks and balances, has been used to consolidate power in the executive branch rather than maintain balanced power between the three branches.

There are two instances where courts—at least theoretically—act as a check on prosecutorial decisions, and both involve the violation of constitutional rights. The first is selective prosecution, where a prosecutor violates the Equal Protection Clause by prosecuting an individual with improper motivation and disparate treatment.¹⁶³ The second is vindictive prosecution, where a prosecutor violates the Due Process Clause by charging an individual with a crime in retaliation for the individual exercising a constitutional or statutory right.¹⁶⁴ In real terms though, courts rarely punish prosecutors for abusing their discretion, and the Supreme Court requires a standard of “clear evidence” to displace the “presumption that a prosecutor has acted lawfully.”¹⁶⁵ The clearly erroneous standard is also the majority standard for vindictive prosecutions.¹⁶⁶ Here, again courts ironically defer to prosecutors’ decisionmaking in order to protect separation of powers.

162 Courts have typically relied on two arguments for withholding judicial review of executive decisions. The first is a public policy concern. The Supreme Court in *Wayte v. United States* noted that “[t]his broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review.” 470 U.S. 598, 607 (1985). Scholars have also supported increased discretion, the “most commonly cited reasons [being] legislative ‘overcriminalization,’ the need for prosecutors to shepherd limited resources, and the need for individualized justice.” Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 *FORDHAM L. REV.* 851, 863 (1995) (footnotes omitted). Second, the Supreme Court has actually stated that reviewing executive decisions may be a violation of the separation of powers. In *United States v. Armstrong*, the Supreme Court noted that “[t]he Attorney General and United States Attorneys retain ‘broad discretion’ to enforce the Nation’s criminal laws. They have this latitude because they are designated by statute as the President’s delegates to help him discharge his constitutional responsibility to ‘take Care that the Laws be faithfully executed.’” 517 U.S. 456, 464 (1996) (internal quotation marks omitted) (first quoting *Wayte*, 470 U.S. at 607; and then quoting U.S. CONST. art. II, § 3). And historically there have been few judicial checks on any law enforcement agencies or legislators because “attempts to impose any sort of judicial or administrative review on the great majority of the decisions of these offices have been grandly unsuccessful.” Misner, *supra* note 61, at 736. As such, courts have historically shown an unwillingness to check executive power.

163 See, e.g., *Wayte*, 470 U.S. at 608–10.

164 See, e.g., *United States v. Stokes*, 124 F.3d 39, 45 (1st Cir. 1997).

165 *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489 (1999) (quoting *Armstrong*, 517 U.S. at 463–65).

166 Teah R. Lupton, Note, *Prosecutorial Discretion*, 90 *GEO. L.J.* 1279, 1284 (2002).

All of this is not to say that prosecutors have completely unlimited bounds. On occasion, courts call out prosecutors for abusing their powers. Recently, in *Bond v. United States*,¹⁶⁷ the Supreme Court chastised the federal prosecutors who brought charges based on the Chemical Weapons Act against a woman for using household chemicals to injure her husband's paramour.¹⁶⁸ The Court spent ample time in its opinion discussing its concern with the prosecutors' conduct.¹⁶⁹

Additionally, in *United States v. Stevens*,¹⁷⁰ Chief Justice Roberts expressed leering of overly broad executive discretion.¹⁷¹ In *Stevens*, the federal government was defending a statute that outlawed animal crush videos.¹⁷² The Court found that the statute was overbroad because it swept up a large category of publications.¹⁷³ The federal government argued that the statute would only apply to animal crush videos and that federal prosecutors would exercise the appropriate discretion to ensure the statute was not applied in an overly broad fashion.¹⁷⁴ That argument, however, did not satisfy the Court: "The Government hits this theme hard, invoking its prosecutorial discretion several times. But the First Amendment protects against the Government We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly."¹⁷⁵ Again, here the Court seemed to be questioning its blank check and implicit trust of executive discretion.

At times the judiciary has stepped in where there are especially egregious instances of violations of constitutional rights. In *Brown v. Plata*,¹⁷⁶ the Supreme Court informed the state of California that its incarceration numbers were not constitutionally acceptable and violated health standards, and gave it instructions to reduce numbers quickly.¹⁷⁷ And in a recent high-profile account, California courts removed the Orange County District Attorney's Office from a case where prosecutors allegedly participated in a scheme that went back as far as thirty years.¹⁷⁸ A number of prosecutors in the office "elicited illegal jailhouse confessions," failed to turn over favorable evidence

167 134 S. Ct. 2077 (2014).

168 *Id.* at 2092–93.

169 *Id.*

170 559 U.S. 460 (2010).

171 *Id.* at 480.

172 *Id.* at 465.

173 *Id.* at 481–82.

174 *Id.* at 480.

175 *Id.* (citations omitted).

176 563 U.S. 493 (2011).

177 *Id.* at 499, 502, 533–36.

178 Editorial, *Dishonest Prosecutors, Lots of Them*, N.Y. TIMES (Sept. 30, 2015), http://www.nytimes.com/2015/09/30/opinion/dishonest-prosecutors-lots-of-them-in-southern-calif.html?_r=0.

to defendants, and “lied repeatedly in court.”¹⁷⁹ The California court removed all of the prosecutors from the case.¹⁸⁰

Overall, despite the existence of structural constitutional checks by the judiciary on the executive branch and an ability to enforce individual constitutional rights, courts often refuse to limit the executive power of prosecutors and police. The judiciary often refuses to enforce individual constitutional rights and chooses to defer to the executive and often fails to punish prosecutors for even unconstitutional misconduct and violations of individual rights.

C. Legislative Checks

The legislature has the constitutional power to act as a powerful check to the enforcement of criminal law, but it has mostly acted to expand executive power in the criminal context.¹⁸¹ The Constitution vests Congress with all legislative powers in Article I and grants “extensive authority to oversee and investigate executive branch activities.”¹⁸² The executive has recognized this power as “beyond dispute” even though it is not explicitly granted in the Constitution.¹⁸³ One explicit check in the Federal Constitution of the executive branch is congressional refusal to appoint an executive officer. This check is exercised in practice, as Congress in recent years has routinely delayed appointing executive or judicial nominees.¹⁸⁴ Congress has been more effective in blocking judicial nominations, and even when blocking attorney general nominations, they have only been able to block the top officer. Congress has no power to stop the ninety-three other federal United States attorneys all over the country.¹⁸⁵ Additionally, as a practical matter, federal prosecutors across the country are appointed largely by senators in

179 *Id.*

180 *Id.*

181 *See generally* STUNTZ, *supra* note 19, at 6–8 (arguing the criminal system has become more centralized, with state legislators and federal judges given increasing power).

182 FREDERICK M. KAISER ET AL., CONG. RESEARCH SERV., CONGRESSIONAL OVERSIGHT MANUAL 4 (2011); *see also* Andrew McCanse Wright, *Constitutional Conflict and Congressional Oversight*, 98 MARQ. L. REV. 881, 894 (2014) (discussing the relationship between Congress and the executive, and Congress codifying its oversight responsibility over executive agencies in the Legislative Reorganization Act of 1946).

183 Scope of Cong. Oversight and Investigative Power with Respect to the Exec. Branch, 9 Op. O.L.C. 60, 60 (1985); *see also* Wright, *supra* note 182, at 897.

184 *See, e.g.*, Harry Enten, *Obama Has Waited Longer for Cabinet Confirmations than Any Other Recent President*, FIVETHIRTYEIGHT (Apr. 23, 2015), <http://fivethirtyeight.com/datalab/obama-has-waited-longer-for-cabinet-confirmations-than-any-other-recent-president/>.

185 *Executive Office for United States Attorneys*, OFFICES OF THE U.S. ATT’YS, U.S. DEP’T OF JUST. (Aug. 17, 2016), <http://www.justice.gov/usao/eousa> (“The Executive Office for United States Attorneys (EOUSA) provides executive and administrative support for the 93 United States Attorneys located throughout the 50 states, the District of Columbia, Guam, the Marianas Islands, Puerto Rico, and the U.S. Virgin Islands.”).

their respective states, rather than by the president.¹⁸⁶ Thus, they may feel beholden to the priorities of their local senator rather than the directives of the president, the attorney general, or the Department of Justice.¹⁸⁷ One example of this phenomenon is the refusal of federal United States attorney offices in states that ban the death penalty to seek the death penalty in federal cases, where it is permitted.¹⁸⁸

186 Michael J. Nelson & Ian Ostrander, *Keeping Appointments: The Politics of Confirming United States Attorneys*, 37 JUST. SYS. J. 211, 214 (2016) (“[L]ike most federal judicial nominations, U.S. Attorneys are subject to the blue slip process in which home state senators of the president’s party are able to recommend (or block) nominations to positions within their state.”).

187 Susan R. Klein, *Independent-Norm Federalism in Criminal Law*, 90 CALIF. L. REV. 1541, 1558 (2002) (explaining that federal prosecutors “are politically beholden to the state senator, rather than to the President”); Michael M. O’Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 865 (2004) (“United States Attorneys are typically beholden to elected legislative patrons, and legislators are not shy about demanding that federal prosecutors act to address local needs.”); Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 789 (1999) (“The process for selecting U.S. attorneys . . . has long been recognized as a means through which senators influence prosecutorial behavior in their respective states—at least when they are members of the president’s party.”). See generally JAMES EISENSTEIN, COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS 115–16 (1978). Federal prosecutors often do not pursue the death penalty in states that do not allow the death penalty. RACHEL KING, DON’T KILL IN OUR NAMES: FAMILIES OF MURDER VICTIMS SPEAK OUT AGAINST THE DEATH PENALTY 280 n.3 (2003). For example, U.S. District Judge J.P. Stadtmueller in the Eastern District of Wisconsin told a defendant at his sentencing hearing that he “was fortunate he was not tried in Illinois for [his murders], where he could have faced the death penalty.” Dave Daley, *Biker Gets Life Sentences in Mchenry Slayings*, CHI. TRIB. (Oct. 13, 2000), http://articles.chicagotribune.com/2000-10-13/news/0010130357_1_outlaws-murders-life-sentences. United States Attorneys also feel pressure from senators to bring charges against an adverse political party. For example, David Iglesias, former United States Attorney from New Mexico, was pressured by then-New Mexico U.S. Senator, Pete Domenici, to further investigate public corruption allegations against Democrats, and bring voter fraud charges before the November presidential election. U.S. DEP’T OF JUSTICE, AN INVESTIGATION INTO THE REMOVAL OF NINE U.S. ATTORNEYS IN 2006, at 53, 166 (2008), <https://oig.justice.gov/special/s0809a/final.pdf>. Iglesias did not follow his state’s senator’s request, and was subsequently removed as a U.S. Attorney. *Id.* at 53. “Iglesias testified that he believed he was removed as U.S. Attorney because he failed to respond to [Domenici’s] desire to rush public corruption prosecutions.” *Id.*

188 In 1988, the federal government reenacted the death penalty for federal cases. Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice’s Role*, 26 FORDHAM URB. L.J. 347, 349 (1999). Prior to 2000, none of the states that banned the death penalty allowed a federal defendant to receive a death sentence. See, e.g., Richard A. Serrano et al., *At Justice, Life-and-Death Frictions*, L.A. TIMES (Mar. 26, 2007), <http://articles.latimes.com/2007/mar/26/nation/na-death26>; Patricia Wen, *Prosecutors Often Balk at Capital Cases*, BOS. GLOBE (Mar. 15, 2015), <https://www.bostonglobe.com/metro/2015/03/14/some-federal-prosecutors-reluctant-bring-capital-punishment-cases/zl9XailNK05grkbBDXABBP/story.html>.

Another legislative check on the executive is impeachment of a federal officer for misconduct.¹⁸⁹ Impeachment is not a real solution to the problem of wide-scale prosecutorial misconduct because at most, Congress could impeach the head prosecutor, or the attorney general.¹⁹⁰ This is extremely rare.

Another check on the state level is elections for prosecutors. This check is not effective in practice because elections are often pro forma, do not set policy for prosecutors, and lack transparency for voters to decide whether the individual shares their priorities. The United States is unique in that most chief prosecutors are elected into office.¹⁹¹ In fact, all but five states elect their prosecutors at the local level.¹⁹² When one individual has the discretion on what type, and which crimes to prosecute, accountability is important.¹⁹³ Sadly, however, a national sample of outcomes in prosecutor elections reveals that incumbent prosecutors rarely face real accountability.¹⁹⁴ The evidence from a recent national survey of prosecutors shows that the average number of years in office for the chief prosecutor is nine and a half years.¹⁹⁵ Moreover, ninety-five percent of the incumbents who want to return to prosecutorial office are reelected.¹⁹⁶ Of those prosecutors that are reelected, eighty-five percent of the general campaigns in which they run are uncontested.¹⁹⁷ Because incumbent prosecutors often run unopposed, the incumbent prosecutor will win “automatic reelection” without having to explain her decisions to voters in a competitive atmosphere.¹⁹⁸ One reason for the lack of challengers is explained by the nature of the prosecutorial job. A challenger who unsuccessfully runs against an incumbent is likely already

189 *High Crimes and Misdemeanors*, CONST. RIGHTS FOUND., <http://www.crf-usa.org/impeachment/high-crimes-and-misdemeanors.html> (last visited Jan. 5, 2017).

190 U.S. CONST. art. II, § 4 (granting Congress the power to impeach the president, the vice president, and all civil officers of the United States).

191 Ronald F. Wright, *Beyond Prosecutor Elections*, 67 S.M.U. L. REV. 593, 593 (2014).

192 *Id.* at 598–99 (“[E]ven in the five exceptional states . . . voters select prosecutors at one level removed.”).

193 Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 582 (2009) (noting that the methods available for checking the work of prosecutors deserve our close attention and quoting the American Bar Association’s Standards for Criminal Justice that “prosecutor[s] ‘may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction’” (quoting AM. BAR ASS’N, A.B.A. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION § 3-3.9(b) (3d ed. 1993))).

194 *Id.* (noting that prosecutors hardly lose reelections).

195 Wright, *supra* note 191, at 600 (“[O]nly 36% of offices have leaders with less than five years in office.”).

196 *Id.* at 604 (noting that even in the largest and most competitive jurisdictions ninety percent of incumbents are reelected and that the typical incumbent prosecutor will not have to explain their performance to voters).

197 Wright, *supra* note 193, at 593; *see also* Wright, *supra* note 191, at 601 (claiming that over eighty percent of prosecutor incumbents ran unopposed in both general and primary elections).

198 *See* Wright, *supra* note 193, at 596.

employed by the incumbent, or a defense attorney practicing within the incumbent's jurisdiction.¹⁹⁹ This puts challengers to a prosecutor in an awkward position and the incumbent prosecutor in a position of extreme power.²⁰⁰

Even in prosecutorial elections that may be contested, the information provided by candidates often does little to effectively educate the public.²⁰¹ Prosecutorial candidates tend to focus mainly on individual qualifications, rather than the performance of the office they oversee.²⁰² The work of a prosecutor is focused on criminal justice, so in theory, the office could inform the public on how effective the office has been at making the public safer and combatting crime.²⁰³ Moreover, under the current plea bargaining system, it is nearly impossible for a voter to understand all the factors that determine why a prosecutor may have decided to prosecute or not prosecute a given case.²⁰⁴ Certainly, if judges are not privy to this insider information on case dispositions, the public has no access at all.

In some areas, the legislative branch does act as a check, at least when it comes to institutional problems with incarceration. For instance, the U.S. Sentencing Commission (an independent body that serves to provide information to all three branches) approached the DOJ to talk about reducing the Sentencing Guidelines by two levels for all substances, across the board. The sentence reduction became effective November 1, 2014, through Amendment 782 of the U.S. Sentencing Guidelines, often referred to as "Drugs Minus Two."²⁰⁵ In effect, drug trafficking offenses are reduced by two levels on the Drug Quantity Table, which means lower guideline ranges for drug trafficking offenses.²⁰⁶ Moreover, the Sentencing Commission reduced drug sentences this last year for a substantial number of federal prisoners as the

199 See Wright, *supra* note 191, at 603–04 (noting that a challenger working for the incumbent is likely to not get further promotions or meaningful assignments and a defense attorney is likely to face less cooperation in plea negotiations).

200 See Wright, *supra* note 193, at 596.

201 See *id.* at 602 ("The candidates talk a great deal about last year's notorious case. Sometimes the challenger criticizes the incumbent for an overly aggressive investigation in a newsworthy case, such as a political corruption investigation; or perhaps the point of contention involves the failure to bring charges in a big case, or the poor conduct of a trial, or a plea bargain or acquittal that disposed of the charges. Again, this common type of claim offers the voter no real guidance to evaluate the work of the prosecutor. Given the randomness in the strength of evidence and other events at trial, an outcome in one big case tells us little about the quality of prosecution work more generally.").

202 Wright, *supra* note 191, at 604.

203 Wright, *supra* note 193, at 602 (noting that resorting to claims about character provides less information than a discussion about how the prosecutor's office would operate).

204 See Russell M. Gold, *Promoting Democracy in Prosecution*, 86 WASH. L. REV. 69, 78 (2011) (noting that nearly all of the reasons for a prosecutorial decision are carefully kept secret).

205 See U.S. SENT'G COMM'N, AMENDMENT TO THE SENTENCING GUIDELINES I (2014), http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20140718_RF_Amendment782.pdf.

206 *Id.*

amendment had a retroactive effect.²⁰⁷ Also, Congress is working on the Smarter Sentencing Act to reduce sentencing of federal defendants and incarceration rates, particularly for drug offenders.²⁰⁸

There are three other implicit structural checks that could help the legislative branch rein in the power of the executive enforcement arm. First, and importantly, the criminal justice system is set up in an adversarial manner with winners and losers. However, the way it is operated is one where “battle” or trial never occurs. The conflicts are all resolved with negotiations where defendants lack little power if they do not want to risk trial or a longer sentence. The legislature, rather than protecting defendants, has continued to increase mandatory minimums in sentencing and provide an aggressive federal criminal code to give prosecutors more tools to use against criminal defendants.

Second, federal and state sentencing guidelines bolster prosecutorial power.²⁰⁹ Federal prosecutors act as the primary sources to trigger application of the guidelines.²¹⁰ In some states, courts can move sentences down to misdemeanors under certain provisions.²¹¹ Prosecutors also maintain the sole power to provide downward departures.²¹² In recent years, sentencing guidelines have grown more complex, and with more complexity and more harsh guidelines, prosecutors gain more power.²¹³

Third, aggressive federal criminal statutes and state tough-on-crime legislation expand prosecutorial power. It is a well-known phenomenon among criminal experts that state criminal codes continually expand—imposing more harsh sentences for the same crimes and enacting new laws, which essentially punish already punishable offenses.²¹⁴ Prosecutors often have options of several felonies and misdemeanors to charge for any single infrac-

207 *Id.*

208 Jeremy Haile, *Bipartisan Moment for Drug Sentencing Reform*, HILL: CONGRESS BLOG (Mar. 19, 2015, 7:30 AM), <http://thehill.com/blogs/congress-blog/civil-rights/236155-bipartisan-moment-for-drug-sentencing-reform> (stating that the legislation, if passed, “would reduce inflexible mandatory minimum penalties for drug offenses,” “give judges greater discretion in sentencing,” and “would extend the sentencing provisions of the 2010 crack cocaine law retroactively to certain prisoners sentenced under the old law, allowing them to petition courts for sentence reductions consistent with public safety”).

209 Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1337 (2005); see also Steven P. Grossman, *An Honest Approach to Plea Bargaining*, 29 AM. J. TRIAL ADVOC. 101, 111 (2005); Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1253 (2004); Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1422 (2008).

210 Bowman, *supra* note 209, at 1336–37.

211 See, e.g., CAL. PENAL CODE § 1170.18 (West 2016); UTAH CODE ANN. § 76-3-402 (West 2016).

212 Bowman, *supra* note 209, at 1337.

213 See *id.* at 1340.

214 Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 224–25 (2007) (commenting on the pervasive scholarly belief, but ultimately disagreeing); see also Stuntz, *supra* note 2, at 531–32 (noting how a notorious murder during a carjacking led politicians

tion or crime. The range of punishment for a single minor act can include probation up to two years in prison. And the range for more serious crimes can be equally large and provide a lot of discretion. A prosecutor often enters a plea negotiation with a list of felonies and misdemeanors with which she can charge a defendant, and has a lot of bargaining power. Some federal statutes allow stacking of crimes against certain defendants, like drug defendants who possess a gun.²¹⁵ On the other hand, appropriation riders at the federal level prohibit spending money against people violating state drug laws, for instance, and act as a legislative check.²¹⁶ Despite this small check, it is the consensus among criminal justice experts that too many ordinary, functioning members of society that do not need to be incarcerated are processed through prisons.²¹⁷

Empirical evidence certainly supports the argument that legislatures have incentives to expand offenses and enact more severe punishments.²¹⁸ Often, these statutes come about when high-profile, atrocious crimes are

to create carjacking laws even though existing criminal laws—auto theft, robbery, assault, kidnapping, and homicide—already criminalized the relevant behavior).

215 See 18 U.S.C. § 924(c) (2012); see also Molly Booth, Comment, *Sentencing Discretion at Gunpoint: How to Think About Convictions Underlying § 924(c) Mandatory Minimums*, 77 U. CHI. L. REV. 1739, 1741–53 (2010) (discussing the history of § 924(c)); Christopher L. Robbins, Note, *Double-Barreled Prosecution: Linking Multiple Section 924(c) Violations to a Single Predicate Offense*, 49 VAND. L. REV. 1577, 1579, 1581–83 (1996) (discussing whether multiple § 924(c) violations may be linked to a single predicate offense).

216 See Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (blocking the Department of Justice from spending money to prevent medical marijuana states from implementing their laws); see also Alex Kreit, *The 2015 Federal Budget's Medical Marijuana Provision: An "End to the Federal Ban on Marijuana" or Something Less than That?*, 35 N. ILL. U. L. REV. 537, 545–46 (2015) (questioning whether Pub. L. No. 113-235 actually curbs federal medical marijuana regulation).

217 See generally HARVEY A. SILVERGLATE, *THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT* (2009) (commenting on the danger posed by vague and cumbersome criminal statutes that punish seemingly innocuous behavior); see also Darryl K. Brown, *Prosecutors and Overcriminalization: Thoughts on Political Dynamics and a Doctrinal Response*, 6 OHIO ST. J. CRIM. L. 453, 461–63 (2009) (highlighting three ways in which prosecutors exploit overcriminalization: criminalization of conduct that few people think is morally wrong, excessive punishment attached to uncontroversial criminal statutes, and redundant statutes that prohibit conduct that is already criminalized); Glenn Harlan Reynolds, *Ham Sandwich Nation: Due Process When Everything Is a Crime*, 113 COLUM. L. REV. SIDEBAR 102 (2013) (commenting on the problem of prosecutorial discretion when virtually any American bears the risk of being targeted for prosecution).

218 Brown, *supra* note 214, at 232 (noting that scholars argue that “majority preferences lean strongly and consistently in favor of expanded offenses and more severe punishment”); see also Stuntz, *supra* note 2, at 530 (“Voters may know little about criminal law doctrine, but they presumably have some idea of the set of results they would like to see: conviction and punishment of people who commit the kinds of offenses that voters fear. Legislators, one can fairly hypothesize, have an interest in producing those results (or at least taking credit for them), so that voters will continue to support them.” (footnote omitted)); Gregory S. Schneider, Note, *Sentencing Proportionality in the States*, 54 ARIZ. L. REV. 241, 244 (2012) (noting that politicians perceive toughness on crime as politically advantageous).

committed.²¹⁹ Expanding offenses and implementing severer punishment is how legislators show voters that they are tough on crime and that the problem has been addressed.²²⁰

Congress and state legislatures could require subconstitutional checks that allow more strenuous requirements for plea bargaining and rein in legislation that provides prosecutors with too much power to charge defendants. This would help act as a necessary check on the executive and may protect from violating the nondelegation principle.²²¹ Abdication of criminal policy by legislators to the sole duty of the executive may violate the nondelegation principle, if statutes are left vague.²²² In such situations, prosecutors are free to carry out the law as they see fit or to direct their actions as close to the intent of a statute as possible.

* * *

This Part has provided a brief snapshot of the holes in executive, judicial, and legislative checks on the criminal justice system. Criminal enforcement has very few structural checks that function to limit the power of the executive. This Part further demonstrated that subconstitutional checks—in any branch—are either absent or anemic in criminal justice. And with the help of draconian statutory schemes in the federal and state systems, the

219 See Pizzi, *supra* note 16, at 207–08 (“[T]he killing of Jenna Grieshaber in New York by a parolee led to the passage of ‘Jenna’s law,’ which requires that those convicted of violent offenses serve eighty-five percent of their maximum sentence before becoming eligible for parole. ‘Jessica’s law,’ increased sentences for sex offenses in Florida (and inspired similar legislation in many other states) after a nine-year old was abducted, raped, and killed in that state. Finally, the horrific murder of Polly Klaas, a twelve-year old dragged at knifepoint from a slumber party at her mother’s home, paved the way in California for the passage of the so-called ‘three strikes’ law in that state which mandated a life sentence upon a third conviction.” (footnotes omitted)); see also Stuntz, *supra* note 2, at 531–32 (“In 1992, a Maryland woman and her one-year-old daughter had their car hijacked; the mother was killed in the course of the theft. The story made national headlines and created the (mistaken) impression that these ‘carjacking’ cases were common. The public demanded that politicians solve this new problem, notwithstanding that existing criminal laws—auto theft, robbery, assault, kidnapping, and homicide—already covered the relevant behavior. Given any combination of those crimes, offenders could be both convicted and given very severe sentences. In such cases, legislatures tend to create new crimes not to solve the problem, but to give voters the sense that they are doing something about it. This happened with carjacking at both the state and federal levels; the result was a series of new criminal statutes that are almost never invoked, but that served as means of making politically valuable symbolic statements to voters.” (footnotes omitted)).

220 See Stuntz, *supra* note 2, at 525 (“Public concern about crime and public demand that something be done about it are natural. There are two natural legislative responses: harsher punishment and larger law enforcement budgets. One can readily imagine why legislatures are slow to seize on the second of these options—it costs money.”).

221 See Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 413 (2008).

222 See, e.g., *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 472 (2001) (holding that Congress cannot delegate its Article I legislative powers to other branches and must articulate an intelligible principle for the executive to administer a statute).

executive branch and legislative branch have worked seamlessly to charge many Americans for a wide variety of crimes, and have largely settled these cases with pleas that never see the light of judicial review. The judiciary—except in the 1960s when it dutifully enforced defendants’ constitutional rights—has abdicated its judicial function of providing constitutional review in criminal cases. The next Part focuses more closely on the dysfunction resulting from the lack of structural checks in criminal justice, particularly using a case study of the prosecutor.

II. THE PROSECUTOR PROBLEM

The constitutional gap that is the focus of this Article is the lack of adequate checks from the three branches in criminal law. One way to demonstrate this gap is with what I refer to as the “Prosecutor Problem.” It is manifested in that prosecutors have no real checks imposed on them from any of the branches. The members of the executive primarily responsible for enforcing the law include the police officer and prosecutor. The prosecutor, after consultation with a police officer, is the person who determines whether there will be a criminal case. Prosecutors—in particular—are the key to criminal justice. They decide without any transparency whether to initiate criminal proceedings, who and what crimes to charge, and how and when to bring the charges. Prosecutors have broader discretion than any actor in the criminal justice system and very little constitutional oversight. Judges routinely rubber-stamp prosecutor plea requests, rarely discipline them for misconduct, use the most lenient judicial review, and often agree with sentences suggested by the government.²²³ The legislature sets very few statutory limits on prosecutors (unlike administrative agencies that have multiple statutes that guide their actions) and often expands their power by enacting more draconian statutes each term and providing mandatory minimums.²²⁴ Even prosecutors that face elections are often chosen pro forma and without opposition or consideration of whether they are enforcing laws or reducing crime. The executive branch provides even less of a check on prosecutors as there is little guidance from the top or electoral accountability, and advisory manuals are either ignored or do not exist in independent offices that act as silos. Moreover, there is little public transparency with a prosecutor’s decisions, as often little information is released about the charging and negotiation practices of the many prosecutors’ offices across the country. Defense counsel are an internal check but often are criticized for failing to stand up to prosecutorial power because they lack the power to negotiate and have serious incentives to work amicably with the prosecutor.²²⁵

223 ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 8 (2007).

224 *Id.*

225 *Id.* at 56 (“[T]he balance of power in the criminal justice system [is] tilted . . . in favor of prosecutors.”); Stephanos Bibas, *The Feeney Amendment and the Continuing Rise of Prosecutorial Power to Plea Bargain*, 94 J. CRIM. L. & CRIMINOLOGY 295, 299 (2004) (discussing how prosecutors and defense counsel work together but do not necessarily work for the

As important as the prosecutor's decision is, this is a decision that has few real constitutional checks. Several scholars have written about the Prosecutor Problem recently and some have suggested solutions.²²⁶ All of the solutions have in different ways suggested that prosecutors should have less discretion²²⁷ and more transparency in their decisionmaking.²²⁸ None of the branches of government—the executive, legislative, and judicial branches—provide substantial oversight in criminal law, including for prosecutorial decisions.²²⁹ This is particularly a problem in criminal justice

best result in each individual case because “[d]efendants have incentives to fight for the lowest possible sentence, whereas prosecutors may be pushing not to maximize sentences but rather to dispose of their dockets efficiently. Thus . . . prosecutors have no personal stake in stiff sentences and can lessen their workloads by agreeing to lighter dispositions”).

226 See Pfaff, *supra* note 15, at 38 (asserting that prosecutors’ decisionmaking is “the least transparent part of the criminal justice system” and “[p]rosecutors’ offices are to a large extent empirical black boxes”); see also Irwin Schwartz, *Toward Improving the Law and Policy of Corporate Criminal Liability and Sanctions*, 51 AM. CRIM. L. REV. 99, 119 (2014) (arguing for statutory amendments to “mak[e] more transparent the manner in which decisions are made by prosecutors”). See generally Nicci Lovre-Laughlin, *Lethal Decisions: Examining the Role of Prosecutorial Discretion in Capital Cases in South Dakota and the Federal Justice System*, 50 S.D. L. REV. 550, 574 (2005) (discussing prosecutors’ discretion at the federal and state level in capital punishment cases, and stating that “[c]ourt rulings have put limits on the discretionary powers of the sentencing body but left prosecutorial discretion unregulated. . . . [I]ndividual states such as South Dakota must be mindful of the potentially arbitrary factors that may impact a prosecutor’s decision related to seeking the death penalty” (footnotes omitted)); Reynolds, *supra* note 217, at 102 (discussing how there is a problem with the amount of discretion allotted to prosecutors and further discussing the need to limit that discretion as “[p]rosecutorial discretion poses an increasing threat to justice”).

227 See Daniel Epps, *Adversarial Asymmetry in the Criminal Process*, 91 N.Y.U. L. REV. 762, 770 (2016) (“Our system depends heavily on trust in prosecutors to do the right thing.”); Jack M. Kress, *Progress and Prosecution*, 423 ANNALS AM. ACAD. POL. & SOC. SCI. 99, 109, 112 (1976); Stuntz, *supra* note 2, at 547–48 (discussing the process of institutional competition and cooperation between prosecutors and legislators that create strong pressure to expand harsher laws); Vorenberg, *supra* note 114, at 1521 (noting that prosecutors have a large amount of discretion in deciding whom to prosecute and deciding how much punishment to allocate to a particular defendant).

228 See Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 888–89 (2006) (discussing the role of transparency); Jacob E. Gersen & Matthew C. Stephenson, *Over-Accountability*, 6 J. LEGAL ANALYSIS 185, 185–87 (2014) (stating that the general view is that transparency is beneficial in political decisionmaking but presents a more complicated picture); see also Andrea Prat, *The Wrong Kind of Transparency*, 95 AM. ECON. REV. 862 (2005) (talking about the difference between transparency of actions and consequences). And in general, transparency is seen as a good thing in many fields. See, e.g., Anita Bernstein, *Toward More Parsimony and Transparency in “The Essentials of Marriage”*, 2011 MICH. ST. L. REV. 83, 138–39 (asking for more transparency in family law); Ross E. Cheit, *Tort Litigation, Transparency, and the Public Interest*, 13 ROGER WILLIAMS U. L. REV. 232, 283–84 (2008) (asking for more transparency in torts); Fenster, *supra*, at 936–37 (touting the benefits of transparency in the administrative context); Note, *Mechanisms of Secrecy*, 121 HARV. L. REV. 1556, 1557–58 (2008) (discussing the problems of secrecy in a principal-agent relationship).

229 There are limited judicial checks on prosecutorial decisionmaking. For example, prosecutors cannot engage in selective prosecution or vindictive prosecution. See, e.g.,

because the branches of government often have unified interests—i.e., getting criminals—so separation of powers is not alone sufficient.²³⁰ The only explicit constitutional checks in criminal justice are the individual constitutional rights that defendants possess.²³¹

The result of the Prosecutor Problem is unchecked power, which has the potential for abuse. One result is actual instances of abuse. Judge Kozinski recently stated that abuse of the law by prosecutors has reached “epidemic proportions.”²³² These abuses may include overcharging crimes,²³³ bias against minorities,²³⁴ gender bias,²³⁵ plea bargaining abuses,²³⁶ vindictive-

Wayte v. United States, 470 U.S. 598, 608 (1985) (explaining that deciding to prosecute “may not be ‘deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification’” (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978))); *Blackledge v. Perry*, 417 U.S. 21, 28–29 (1974) (holding that increasing punishment upon retrial for reasons of vindictiveness is a violation of due process).

230 Rachel Barkow has argued insightfully that there was a lack of institutional checks in criminal law and pointed to a reinvigoration of separation of powers to compensate for this. Barkow, *Separation of Powers*, *supra* note 68, at 990 (advocating for a “more stringent enforcement of the separation of powers in criminal cases, where it is most needed. This approach would lead to different outcomes in the Court’s major separation of powers cases dealing with criminal matters and would result in a rethinking of its acceptance of unreviewable prosecutorial discretion over charging and plea bargaining” (emphasis omitted)). While I agree wholeheartedly with her diagnosis of the problem, I do not believe that separation of powers is sufficient in criminal law since the interests of the branches are too often aligned. Barkow contributes to this analysis by recognizing that pervasiveness of plea bargaining and the lack of strict enforcement of individual rights by courts and harsh legislation are a problem, but she does not address this problem on a state level and mostly argues that a flexible balancing test should not be used in criminal matters. I argue instead that intrabranch subconstitutional checks are necessary to avoid the lack of checks in criminal law because it is unlikely that the branches will cede power to the other branches, but they may agree to intrabranch checks.

231 *Id.* at 993 (“The only safeguards come from the individual rights provisions of the Constitution, but those checks act as poor safeguards against *structural* abuses and inequities.”).

232 Judge Kozinski commented that suppression of evidence by prosecutors “ha[s] reached epidemic proportions.” *United States v. Olsen*, 737 F.3d 625, 631, 632 (9th Cir. 2013) (Kozinski, J., dissenting) (arguing harsh consequences for prosecutors are critical to curb the problem of *Brady* violations); *see also* Gershman, *supra* note 138 (“One of the most pervasive violations, depicted in numerous cases including each of the above cases, involves a prosecutor hiding evidence that might prove a defendant’s innocence.”).

233 Alschuler, *supra* note 51, at 85 (arguing the rise of plea bargaining incentivizes prosecutors to overcharge).

234 Anthony V. Alfieri, *Community Prosecutors*, 90 CALIF. L. REV. 1465, 1466 (2002) (stating that these decisions shape the identities of both defendants and victims); Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 368–69 (2001) (observing that African Americans account for an incredibly disproportionate amount of the prison population); *Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1525 (1988) (presenting empirical studies that indicate that minority defendants because of their race and the race of their alleged victims “receive disproportionately harsher treatment at each stage of the prosecutorial decisionmaking process”).

ness,²³⁷ coercive dismissals,²³⁸ immunity violations,²³⁹ wrongful confessions²⁴⁰ and convictions,²⁴¹ coercing witnesses,²⁴² offering perjured testimony,²⁴³ inconsistent sentences,²⁴⁴ and failing to disclose exculpatory evidence.²⁴⁵ Many others have described the rampant prosecutorial miscon-

235 BRUCE FREDERICK & DON STEMEN, *THE ANATOMY OF DISCRETION: AN ANALYSIS OF PROSECUTORIAL DECISION MAKING—TECHNICAL REPORT* iii, 5 (2012) (“While prosecutorial discretion is generally seen as very broad and unconstrained, prosecutors often rely on a fairly limited array of legal and quasi-legal factors to make decisions, and their decision making is further constrained by several contextual factors.”); Terance D. Miethe, *Charging and Plea Bargaining Practices Under Determinate Sentencing: An Investigation of the Hydraulic Displacement of Discretion*, 78 J. CRIM. L. & CRIMINOLOGY 155, 175–76 (1987) (discussing that “[e]ven when sentencing guidelines do not explicitly regulate prosecutorial discretion, various mechanisms of social control still operate to limit its use and possible abuse,” but results of a study showed that Minnesota guidelines “have been a successful experiment in criminal justice reform”).

236 *North Carolina v. Alford*, 400 U.S. 25, 39 (1970) (holding that a plea deal agreed to out of fear of the death penalty is still valid); *Brady v. United States*, 397 U.S. 742, 747 (1970) (holding that a guilty plea need not be invalidated because fear of imposition of the death penalty was a factor in the plea).

237 *United States v. Goodwin*, 457 U.S. 368, 384 (1982) (holding that a prosecutor’s decision to charge more seriously on retrial violates due process rights if the decision is motivated by vindictiveness).

238 See *Town of Newton v. Rumery*, 480 U.S. 386, 393–94 (1987); *MacBoyle v. City of Parma*, 383 F.3d 456, 459 (6th Cir. 2004) (finding no prosecutorial misconduct regarding arrestee’s release-dismissal agreement); Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 408 (1992).

239 *Ricketts v. Adamson*, 483 U.S. 1, 12 (1987) (holding that the defendant’s breach of a plea agreement removed the prosecution’s bar of double jeopardy); *United States v. Mandujano*, 425 U.S. 564, 564 (1976) (a prosecutor failing to give a defendant his *Miranda* rights prior to his testifying before a grand jury is not grounds for suppression of testimony).

240 *Wilson v. Lawrence Cty.*, 154 F.3d 757, 759 (8th Cir. 1998) (describing the pardon of an innocent man who was coerced into a wrongful confession that led to eight years of imprisonment). See generally Gail Johnson, *False Confessions and Fundamental Fairness: The Need for Electronic Recording of Custodial Interrogations*, 6 B.U. PUB. INT. L.J. 719 (1997) (citing other examples of wrongful confessions).

241 See generally Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 291–92; Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 401 (discussing the “recurrent issue of prosecutorial misconduct as a factor leading to wrongful convictions”).

242 See Barbara O’Brien, *A Recipe for Bias: An Empirical Look at the Interplay Between Institutional Incentives and Bounded Rationality in Prosecutorial Decision Making*, 74 MO. L. REV. 999, 1007 (2009).

243 *Id.*

244 See Geraldine Szott Moohr, *Prosecutorial Power in an Adversarial System: Lessons from Current White Collar Cases and the Inquisitorial Model*, 8 BUFF. CRIM. L. REV. 165, 211 (2004) (“The emphasis on investigation, coupled with the federal prosecutor’s power to arrange guilty pleas, can easily result in inconsistent sentences.”).

245 O’Brien, *supra* note 242, at 1008.

duct and the failure of courts to intervene.²⁴⁶ In my own pilot study of a mid-size prosecutors' office,²⁴⁷ discussed below, the prosecutors demonstrated a few of these problems of discretion, including inconsistent sentences and overcharging of crimes.

A second result of the Prosecutor Problem is that the sheer number of charges is increasing, which has led to mass incarceration. Prosecutors are charging more people with more felonies for longer periods of time. According to recent studies, prosecutors are the single greatest cause of mass incarceration in America, without concomitant decreases in crime rates.²⁴⁸ Increasing numbers of charges and requests for longer sentences by prosecutors account for major spikes in prison rates.²⁴⁹

This Part first discusses alarming trends in prosecutorial charging, which demonstrate that prosecutors are a large contributing factor to mass incarceration. This is relevant not just to support that there is a live problem with prosecutors in America, but also to demonstrate that the lack of structural checks has real impacts in criminal law. Both federal and state systems have witnessed dramatic increases in criminal filings over the last few decades. The lack of constitutional checks has enabled this problem to grow out of control. Second, this Part describes the plea bargaining problem as a contributing factor to mass incarceration and a lack of separation of powers. All of these are symptoms of the lack of structural constitutional checks on prosecutors. This Part also demonstrates broadly the dysfunction resulting in criminal justice when executive power is not checked.

A. *Federal and State Filing Trends*

This Section simply describes the increase in filings in federal and state courts. What this Section is noticeably missing is a data-backed explanation as to *why* prosecutors are bringing more state and federal charges now than they have historically. What we do know, though, is that prosecutors' decisionmaking processes are largely unknown to the public. It is often referred to as the "black box"²⁵⁰ of criminal justice. How prosecutors decide whether to charge individuals, which individuals to charge, and what charges to bring

246 See Editorial, *supra* note 178 (citing examples of prosecutors "break[ing] the rules to win a conviction" but never facing punishment for it); Editorial, *Rampant Prosecutorial Misconduct*, N.Y. TIMES (Jan. 4, 2014), <http://www.nytimes.com/2014/01/05/opinion/sunday/rampant-prosecutorial-misconduct.html> (stating that "far too rarely do courts hold [prosecutors] accountable" for failing to fulfill their constitutional duties). See generally Sonja B. Starr, *Using Sentencing to Clean Up Criminal Procedure: Incorporating Remedial Sentence Reduction into Federal Sentencing Law*, 21 FED. SENT'G REP. 29, 30–31 (2008) (recognizing that courts fail to intervene when faced with prosecutorial misconduct and offering solutions, such as sentence reduction, to "serve as an effective deterrent remedy").

247 Specific information about the office will not be made public due to the agreement made with the office. It is a prosecutors' office of fewer than 150 attorneys.

248 See Pfaff, *Micro and Macro Causes*, *supra* note 22.

249 *Id.*

250 BRIAN D. JOHNSON, NAT'L INST. OF JUSTICE, *THE MISSING LINK: EXAMINING PROSECUTORIAL DECISION-MAKING ACROSS FEDERAL DISTRICT COURTS* 1 (2014) (quoting

is a mystery to those outside of a particular office. Instruction given to prosecutors on charging is also unwritten and a mystery to those outside of the office. However, as discussed in Part I, this Article focuses on the theoretical and structural reasons why prosecutors are bringing additional charges. Part I discusses additional crimes created by a tough-on-crime legislature, mandatory sentencing guidelines, a deferential judiciary and the decline of constitutional criminal rights enforcement, the growth and dominance of plea negotiations, and pro forma prosecutor elections. Not surprisingly, after the other branches have deferred, criminalized, or encouraged prosecution, the one entity tasked with the job, and not beholden to anyone, went ahead and did what it was encouraged to do. Indeed, the combination of these factors provides a plausible explanation as to why prosecutors may be bringing more charges today than they historically ever have. This provides all the more support for the necessity of the other branches checking executive power.

1. Federal Filings

Federal prosecutors are prosecuting more cases today than even ten years ago. In 2012, United States Attorneys received 163,831 criminal matters, of which 23,424 were declined for, *inter alia*, evidentiary purposes, lack of criminal intent, prosecution by another authority, agency request, and minimal federal interest.²⁵¹ Thus, only 14% of cases were disposed of without the filing of charges. In 2002, 31.2% of criminal matters received were disposed of for those same reasons.²⁵² These numbers indicate that in 2012, federal prosecutors entertained about 15% more cases than they did in 2002.

Federal prosecutors also bring a larger number of charges now than they did ten years ago. In 2002, 56,658 charges were filed, which represented a 6% increase from the year before.²⁵³ In 2012, United States Attorneys filed 63,118 charges.²⁵⁴ Thus, in 2012, federal prosecutors filed 6460 more charges than ten years previously. Again, prosecutors are filing more charges now than ten years ago.

As presented by Figure 1 below, the high-water mark for federal filings over the last ten years was in 2011 when United States Attorney's offices filed

Lauren O'Neill Shermer & Brian D. Johnson, *Criminal Prosecutions: Examining Prosecutorial Discretion and Charge Reductions in U.S. Federal District Courts*, 2009 JUST. Q. 1, 2).

251 OFFICES OF THE U.S. ATTORNEYS, U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT: FISCAL YEAR 2012, at 6, 85 (2012) [hereinafter DOJ EXEC. OFFICE STATISTICS 2012], <https://www.justice.gov/sites/default/files/usao/legacy/2013/10/28/12statrpt.pdf>.

252 See *id.* at 6–7; see also EXEC. OFFICE FOR U.S. ATTORNEYS, U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT: FISCAL YEAR 2002, at 6–7 (2002) [hereinafter DOJ EXEC. OFFICE STATISTICS 2002], https://www.justice.gov/sites/default/files/usao/legacy/2006/09/21/02_stat_book.pdf (explaining that of the 109,173 criminal matters received in 2002, the U.S. Attorneys' offices declined 34,115 matters).

253 DOJ EXEC. OFFICE STATISTICS 2002, *supra* note 252, at 8.

254 DOJ EXEC. OFFICE STATISTICS 2012, *supra* note 251, at 6.

68,926 charges.²⁵⁵ Prior to 2011, there was a relative increase from one year to the next, with 2009 and 2010 fairly indicating the apex reached in 2011.²⁵⁶ It is possible that the high numbers over the past few years could be indicative of presidential policy as reflected by the United States Attorney General. Vice President Joe Biden swore in Eric Holder on February 3, 2009.²⁵⁷ It is possible that this spike represents Attorney General Holder's prosecutorial approach, or President Obama's approach, to criminal matters. However, ironically, President Obama and Holder himself decried the number of minorities who were incarcerated when their prosecutors increased the number of charges each year, and spoke repeatedly during this same period about how incarceration rates needed to be cut.²⁵⁸ And while the DOJ—likely under the directive of the President—did create policies that encouraged a less harsh approach to drug prosecutions,²⁵⁹ overall federal criminal filings did not decrease.²⁶⁰

255 EXEC. OFFICE FOR U.S. ATTORNEYS, U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT: FISCAL YEAR 2013, at 8 (2013) [hereinafter DOJ EXEC. OFFICE STATISTICS 2013], <https://www.justice.gov/sites/default/files/usao/legacy/2014/09/22/13statrpt.pdf>.

256 *Id.*

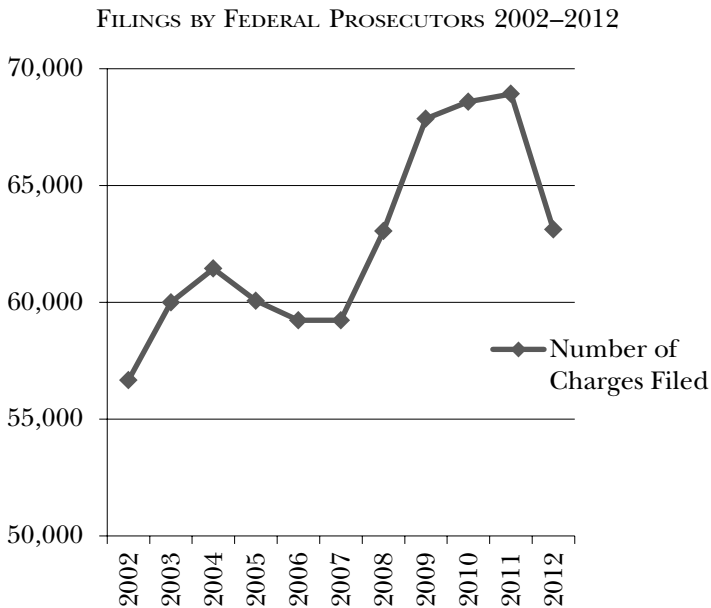
257 Carrie Johnson, *Holder Sworn in as Attorney General*, WASH. POST (Feb. 3, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/02/03/AR2009020300997.html>.

258 Charlie Savage, *Justice Dept. Seeks to Curtail Stiff Drug Sentences*, N.Y. TIMES (Aug. 12 2013), <http://www.nytimes.com/2013/08/12/us/justice-dept-seeks-to-curtail-stiff-drug-sentences.html> (citing Attorney General Holder's statements regarding the need to reduce incarceration rates). However, that does not explain the dip in 2012. See DOJ EXEC. OFFICE STATISTICS 2013, *supra* note 255, at 8. There is likely another force that drove filings to a four-year low in that year.

259 Savage, *supra* note 258 (stating that the DOJ decided to stop pursuing mandatory minimum sentences for certain low-level, nonviolent drug offenders).

260 Filings were 56,658 in FY02, 59,998 in FY03, 61,443 in FY04, 60,062 in FY05, 58,702 in FY06, 59,228 in FY07, 63,042 in FY08, 67,864 in FY09, 68,591 in FY10, 68,926 in FY11, and 63,118 in FY12. DOJ EXEC. OFFICE STATISTICS 2013, *supra* note 255, at 8; EXEC. OFFICE FOR U.S. ATTORNEYS, U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT: FISCAL YEAR 2005, at 9 (2005), <https://www.justice.gov/sites/default/files/usao/legacy/2006/12/07/05statrpt.pdf>.

FIGURE 1



This trend of increased federal filings is not just representative of the last ten years but is consistent with the past thirty years. While there are occasional declines, such as in 1992, 1994, 2006, and 2012,²⁶¹ the theme is clear: each year federal prosecutors file more charges than the year before.²⁶² If the filings trend is considered in tandem with prison population growth, there is a strong inference that executive branch decisions (including decisions of police to arrest and prosecutors to file charges) play a key role in the rise of incarceration rates. And there is evidence of increased incentives to arrest and prosecute in recent years where there are grants or other programs designed to drive up numbers.²⁶³

2. State Trends

State prosecutorial trends are more difficult to track than their federal counterparts, but demonstrate large increases in charging after close review. The difficulty in tracking state prosecutions is due to the fact that most states delegate prosecutorial responsibilities to individual counties and some coun-

261 See DOJ EXEC. OFFICE STATISTICS 2013, *supra* note 255, at 8; EXEC. OFFICE FOR U.S. ATTORNEYS, U.S. DEP'T OF JUSTICE, STATISTICAL REPORT UNITED STATES ATTORNEYS' OFFICES: FISCAL YEAR 1994, at 6 (1994), https://www.justice.gov/sites/default/files/usao/legacy/2009/07/31/STATISTICAL_REPORT_FISCAL_YEAR_1994.pdf.

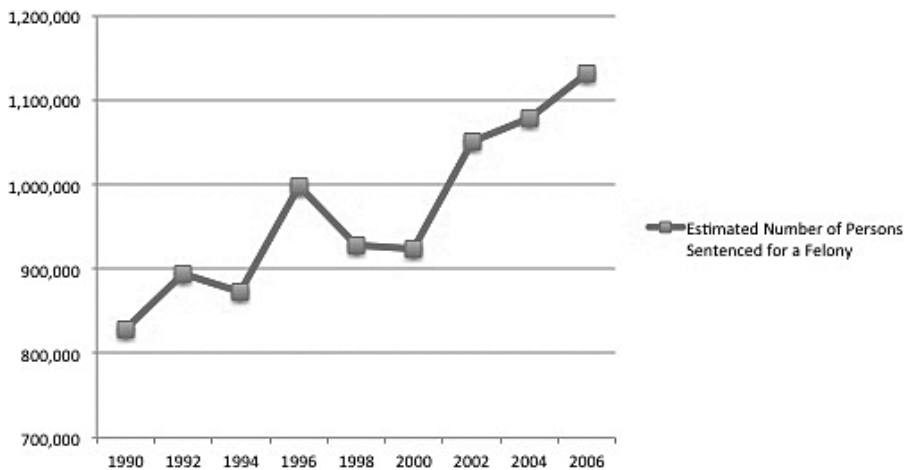
262 See *supra* notes 253–61 and accompanying text.

263 Rachel Godsil & L. Song Richardson, *Racial Anxiety in Policing and Healthcare*, 102 IOWA L. REV. (forthcoming 2017) (manuscript at 13) (on file with author).

ties do a better job of tracking and reporting statistics than others.²⁶⁴ Despite this difficulty, John Pfaff observes that filing rates in state prosecutors' offices grew 37.4% from 1994 to 2008.²⁶⁵ Indeed, other research supports the conclusion that felony filing rates are increasing in state courts. In 1993, the Court Statistics Project partnered with the National Association for Court Management to create a network of courts ("the NACM Network") to gather data on state court caseloads.²⁶⁶ The NACM Network was comprised of twenty-three state courts, located throughout twelve different states and the District of Columbia.²⁶⁷ In the ten years following the establishment of the NACM Network, seventeen of twenty-two reporting courts showed an increase in the number of felony filings.²⁶⁸ The average growth among the seventeen courts was 39%.²⁶⁹ Most notable among these courts were Maricopa County, Arizona, which had a growth of 131%,²⁷⁰ and Jackson County, Missouri, which had an increase in felony cases filed per 1000 people of 77%.²⁷¹

FIGURE 2

ESTIMATED NUMBER OF PERSONS SENTENCED FOR A FELONY
IN STATE COURTS



264 See Pfaff, *Micro and Macro Causes*, *supra* note 22, at 1250 (identifying these difficulties in working with state filing data).

265 *Id.* (observing this fact and noting that prison admissions during this same time also increased at a rate of forty percent).

266 Cynthia G. Lee & Robert C. LaFountain, *Felony Caseloads in the NACM Network*, 12 CASELOAD HIGHLIGHTS 1 (2005), <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/ctadmin/id/665>.

267 *Id.*

268 *Id.*

269 *Id.*

270 *Id.*

271 *Id.*

Similarly, in Figure 2 above,²⁷² reporting on 300 nationally representative counties we learn that between 1990 and 2006, the number of persons sentenced for felonies increased dramatically.²⁷³ Overall, states show an even more dramatic increase in charging rates than what we see in the federal system.

The reason for the growth in cases filed is likely similar to the trend in federal cases. Part I addressed the lack of checks for both state and federal prosecutors as a broad explanation for this dramatic increase in cases filed.

272 Figure 2 was compiled using data generated from the National Judicial Reporting Program (NJRP). NJRP surveys have been conducted every two years since 1986. The surveys collect detailed information on the sentences and characteristics of convicted felons. Each survey is based on a sample of roughly 300 counties selected to be nationally representative. For example, the 1994 survey included at least one county from each state, except Vermont. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL JUDICIAL REPORTING PROGRAM, 1994: CODEBOOK 12–13 (1994) [hereinafter NJRP CODEBOOK 1994]. The 1996, 1998, and 2000 surveys were based on a sample of 344 counties and included at least one county from each state except for Delaware, Montana, and Wyoming. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL JUDICIAL REPORTING PROGRAM, 2000: CODEBOOK 1 (2000) [hereinafter NJRP CODEBOOK 2000]; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL JUDICIAL REPORTING PROGRAM, 1998: CODEBOOK 1 (1998) [hereinafter NJRP CODEBOOK 1998]; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL JUDICIAL REPORTING PROGRAM, 1996: CODEBOOK i (1996) [hereinafter NJRP CODEBOOK 1996]. The 2006 survey was based on the same 300 counties as the 2002 and 2004 surveys. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL JUDICIAL REPORTING PROGRAM, 2006: CODEBOOK 5 (2006) [hereinafter NJRP CODEBOOK 2006]. The total number of case-level data varied each year. The lowest number of case-level data was 85,191 cases in 1994. See NJRP CODEBOOK 1994, *supra*, at 4. The highest number of case-level data was 494,055 cases in 2006. See NJRP CODEBOOK 2006, *supra*, at 5. Most years saw individual case-level data around 450,000. See NJRP CODEBOOK 2004, *supra*, at 4 (471,645 cases); NJRP CODEBOOK 2002, *supra*, at 1 (455,690 cases); NJRP CODEBOOK 2000, *supra*, at 1 (429,471 cases); NJRP CODEBOOK 1998, *supra*, at 1 (446,682 cases); NJRP CODEBOOK 1996, *supra*, at i (414,969 cases). The sources of data vary between survey years. Depending on the year, state courts were the source of NJRP data for about forty percent to eighty-five percent of the counties sampled. *E.g.*, SEAN ROSENMERKEL ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2006–STATISTICAL TABLES 31 (2009) (indicating that in 2006 “[s]tate courts were the source of NJRP data for about 44% of the counties sampled”). For other counties, sources included prosecutors’ offices, sentencing commissions, departments of public safety, probation departments, and correctional departments. *Id.*

273 JODI M. BROWN ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 1996, at 1 (1999); MATTHEW R. DUROSE & PATRICK A. LANGAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2004, at 1 (2007); MATTHEW R. DUROSE & PATRICK A. LANGAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2002, at 1 (2004); MATTHEW R. DUROSE & PATRICK A. LANGAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2000, at 1 (2003); MATTHEW R. DUROSE ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 1998, at (2001); PATRICK A. LANGAN & JODI M. BROWN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 1994, at 1 (1997); ROSENMERKEL ET AL., *supra* note 272, at 1.

Several other questions still remain as far as why prosecutors are charging more felonies and asking for longer sentences than they have historically sought. Have prosecutors become more aggressive, or more adversarial, in the last thirty years? What impact has the proliferation of criminal statutes and increased sentences had on the willingness of defendants to go to trial? Is it easier to convict individuals now? Has law enforcement improved in ferreting out crime and how much does this increase in arrests or convictions result from the war on drugs? These questions are not addressed in this Article, but what is clear is that prosecutors and legislatures are contributing to mass incarceration with increased felonies charged and increasing numbers of harsh statutes. Indeed, incentives exist for prosecutors not to decrease the number of cases they bring but to increase them. What is also clear is that there is a Prosecutor Problem in criminal justice.

B. *The Plea Problem*

The structural checks in the U.S. Constitution and state constitutions are intended for a criminal justice system that relies on trials. Most of the individual rights in these constitutions are trial rights. The modern criminal justice system exclusively functions on pleas, and this is a change that has grown steadily in the last forty to fifty years.²⁷⁴ Due to the lack of constitutional changes as a result, there is a gap of rights. Subconstitutional checks could help fill that gap. Before the discussion of those checks, it is important to learn more about the plea system and how it affects executive power. To do so, we again rely on our example of the Prosecutor Problem and how the plea system contributes to the imbalance of executive power due to missing constitutional checks.

Prosecutorial power is at its peak when a prosecutor engages in plea bargaining,²⁷⁵ and the plea bargaining system best illustrates the problems of a lack of structural checks. About ninety-five percent of criminal convictions today are obtained through plea bargaining,²⁷⁶ so the criminal justice system is basically a system of pleas, not of trials. During the plea process, the prosecutor is able to set the parameters of the case by selecting the charges and applicable sentencing guidelines to use as leverage. Given the wide breadth of modern criminal codes, the prosecutor essentially holds all of the cards.²⁷⁷ After all, if the defendant chooses not to settle, the sentencing guidelines corresponding to the charges selected by the prosecutor will come into effect

274 See Bibas, *supra* note 29, at 912.

275 See Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CALIF. L. REV. 1471, 1475–76 (1993) (discussing the power prosecutors have during plea bargaining, which neither judge nor jury oversees).

276 Bibas, *supra* note 29, at 912.

277 See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2475–76 (2004) (explaining that plea results diverge from likely trial outcomes because they are hidden from public view and that plea bargaining is a secret area of law in which there are no clear rules); *id.* at 2491 (“[T]he lumpiness of the Sentencing Guidelines and mandatory minima reinforces the pressure to cooperate . . .”).

post-trial.²⁷⁸ Such disproportionate bargaining positions, coupled with a lack of oversight and consequences for an unsuccessful negotiation, lead many prosecutors to overcharge because they have nothing to lose by doing so.²⁷⁹ And, if the case is weak, a plea bargain may boost the prosecutor's win-to-loss statistics without his ever having to prove the defendant's guilt beyond a reasonable doubt.

For many years we have assumed that plea bargaining was an inevitable part of the criminal justice system. We assumed that since there were so many cases filed each year, there would be no way for the system to be able to handle the volume if most of these cases were not plead away. However, recent, thought-shifting work by Darryl Brown²⁸⁰ shows that we may be looking at this backwards. Maybe it is *because* prosecutors plead so many cases that we have so many convictions. If prosecutors were forced to hold trials or had more strenuous requirements in plea bargaining, prosecutors would be more likely to pick only the most important cases to prosecute and have less of an impact on increases in convictions and prison rates. This line of research at least requires us to think whether it is making society safer or the system any fairer to process so many people for crimes.

It is no secret that prosecutors handle daunting caseloads and are interested in disposing of many cases quickly.²⁸¹ Legislatures' tough-on-crime policies and police departments' zero-tolerance approaches, as well as prosecutorial incentives to win all the cases they can win, ensure that prosecutors' caseloads remain large.²⁸² Plea bargaining provides a tool to reduce caseloads by disposing of cases without having to prepare for trial. And

278 *Id.* at 2485 (noting that the Federal Sentencing Guidelines put a "huge premium" on cooperating with the government because doing so can lead to an agreement below the mandatory minimum, whereas failure to cooperate leaves the defendant to gamble with "stiff sentences" and no parole).

279 *Id.* at 2475–76 (comparing the pressures of trial, which include pursuing every lead and pressing every advantage in concern for one's reputation as a prosecutor, with less intense plea bargains).

280 Darryl K. Brown, *The Perverse Effects of Efficiency in Criminal Process*, 100 VA. L. REV. 183, 195 (2014) ("The question is whether caseload increases are in fact exogenous to adjudication. With a better understanding of efficiency's effects, we can see the possibility that they are not. Criminal prosecutions are a variable that may be partially *dependent* on adjudicative capacity. If so, efficiency gains in some part *contribute* to the rise in caseloads, rather than the rise in caseloads creating a need for greater efficiency. Rising caseloads can be partly a *consequence* of more plea bargaining—a rebound effect—rather than a cause. Criminal charging may be a response to the reduced costs of court judgments as much as it is a function of crime rates. Do we plea bargain because we have more cases, or do we have more cases because we plea bargain?").

281 Bibas, *supra* note 10, at 961–62.

282 K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 GEO. J. LEGAL ETHICS 285, 290–91 (2014). Professor Howell describes "[z]ero-tolerance policing" as the approach of arresting individuals for minor offenses rather than issuing warnings or summonses. *Id.* at 286 n.2. This includes arresting individuals for minor, victimless offenses. *Id.* The zero-tolerance approach began in New York in the mid-nineties and has spread to a number of jurisdictions. *Id.*

reducing caseloads reduces workload and stress.²⁸³ Indeed, the prosecutor is not immune to the desire for the path of least resistance.²⁸⁴ And individuals who decide to go to trial are punished for it, as there is a “trial penalty” of upwards of thirty percent if a defendant decides to exercise her right to trial rather than choosing a plea bargain.²⁸⁵

What is more, prosecutors can use plea bargaining to incentivize defendants to divulge information about or testify against other defendants. Defendants often receive a lesser sentence when they provide valuable information or testimony to prosecutors. Defense attorneys are the only real check on prosecutors in the current criminal justice system, and often they have no power since they have repeat interactions and would not want to disrupt the flow of pleas with a prosecutor. Studies show that defendants’ sentences are in large part due to other cases before prosecutors (and the group of cases negotiated), rather than the relative culpability of the defendant.²⁸⁶ For example, one recent study of prosecutions of individuals involved in mortgage fraud shows that often the worst offenders got the lowest sentences in exchange for their testimony against several others.²⁸⁷ The study examined one hundred completed cases and found that individuals with deep involvement in the fraud often received lesser sentences due to their ability and willingness to help prosecutors.²⁸⁸ Put simply, the most prolific fraudsters had a greater incentive to cooperate with prosecutors in exchange for lower sentences. Of the one hundred cases, the study found that at least thirty defendants received such reduced sentences (only three months on average) or no time at all.²⁸⁹ Those who did not provide substantial assistance to prosecutors received an average sentence of three years in

283 Bibas, *supra* note 29, at 913.

284 *Id.* at 922 (“The sooner each pending case goes away, the earlier the lawyer . . . can go home to have dinner with friends and family.”).

285 Andrew Chongseh Kim, *Underestimating the Trial Penalty: An Empirical Analysis of the Federal Trial Penalty and Critique of the Abrams Study*, 84 Miss. L.J. 1195, 1252 tbl.3 (2015) (finding a trial penalty of four times the usual penalty, as federal defendants convicted at trial receive sentences sixty-four percent longer than if they had instead plead guilty).

286 See, e.g., Rich Lord, *Mortgage Fraud Assault a Pyrrhic Victory*, PITTSBURGH POST-GAZETTE (May 24, 2014), <http://www.post-gazette.com/business/2014/05/25/Mortgage-fraud-assault-a-Pyrrhic-victory/stories/201405250140>.

287 *Id.* (summarizing findings from a study carried out by the *Pittsburgh Post-Gazette* and students from the Duquesne University School of Law). Although the U.S. Attorney’s Office in Pittsburgh used the worst offenders to gain information about lesser offenders, not all prosecutors do so. As Michael Simons, dean of St. John’s University School of Law, put it,

The general principle is you want to make deals with the little fish to catch the big fish. You also in theory want to make deals with as few people as possible to get the maximum result possible It’s not ideal to use a big fish to make a case against a small fish. . . . But it nevertheless will happen.

Id. (second omission in original).

288 *Id.*

289 *Id.* It is important to note that the rate of defendants granted lesser sentences for substantial assistance—thirty of one hundred—is almost twice the national average. *Id.*

prison. Those who went to trial received an average sentence of six and a half years.²⁹⁰ As the study shows, prosecutors often provide incentives for defendants to cooperate in plea bargaining—and plead guilty—and provide substantial assistance, regardless of culpability. And due to the prosecutor’s incentive to win as many cases as possible, rather than punish the most deserving, prosecutors choose to convict a larger number of people over punishing those who may have been more culpable. This quantity over quality phenomenon is not unique to this study but happens in many instances of charging.

Plea bargaining today is a dangerous display of executive power. Prosecutors have almost unlimited power to charge whomever, with a plethora of crimes, without any constitutional accountability. Not only has this led to increases in charging, but often individuals who are charged are not the most deserving and, due to incentives, prosecutors choose quantity of convictions over quality of convictions. Structural checks and more internal review from subconstitutional checks of the three branches could prevent this problem. Specific subconstitutional checks are discussed in Part III. Overall, though, having all three branches of government independently and internally overseeing the Prosecutor Problem would bring the system back to its constitutional roots.

The next Part explains how subconstitutional checks in criminal justice may provide the right balance of power in criminal justice, reducing the Prosecutor Problem as well as the other dysfunctions in criminal justice, including mass incarceration and overcriminalization.

III. SUBCONSTITUTIONAL CHECKS IN CRIMINAL LAW

Subconstitutional checks may fill constitutional holes and solve criminal justice dysfunction. Part I explained, at a high level of abstraction, how the three branches of government fail to provide the constitutional checks set forth in the Constitution. The executive branch largely fails to ensure adherence to broad goals of the executive and provides conflicting orders; the legislature demands little accountability and has increased executive power with harsh statutes; and the judiciary often fails to hold prosecutors accountable when abuses result and has largely been absent in ensuring individual constitutional rights due to the dominance of plea bargaining. Part II described the constitutional dysfunctions that have resulted due to the lack of functioning structural constitutional checks and undeveloped subconstitutional checks in criminal law. One such example is the Prosecutor Problem, which describes how one important type of executive actor has—without adequate checks—single-handedly increased incarceration rates to epidemic proportions at both the state and federal levels, and has reportedly been responsible for abuses, including wrongful convictions, with impunity.

This Part, putting together the structural gaps explained in Part I and an understanding of a case study of the Prosecutor Problem in Part II, begins to

explore the types of subconstitutional checks that may address our current state of constitutional dysfunction. To be sure, this is not an exhaustive list of subconstitutional checks, nor even the best list. As described above, this is an important ground for future work.²⁹¹ What is provided below is a simple start to exploring what subconstitutional checks in the three branches may compensate for the lack of functioning structural checks in modern criminal justice. It is again grounded with examples of how subconstitutional checks can address the Prosecutor Problem.

A. *Executive Subconstitutional Checks*

One key aspect to solving dysfunction is executive subconstitutional checks. This is also the largest hurdle presented of all subconstitutional checks. Obtaining agreement from any executive officers—including police or prosecutors—to cede power and be subject to checks that will inevitably slow their work will be difficult, to say the least. But both officers and prosecutors are beholden to the executive or to the public—that can put pressure on them after understanding the power imbalance that currently exists. There is mounting public pressure against police and prosecutorial discretion with high-profile police shootings and prosecutorial missteps. The climate may be right to impose some checks on the executive branch, particularly since the highest executive officers on both the federal level (the president and attorney general) and in the state (the governor and state attorney general) often have no direct review of data of arrest, charging, and conviction trends and require little accountability of line prosecutors under their discretion. Direct review from within the highest levels of the executive branch as well as transparency of large-scale criminal justice decisions by the public would create the subconstitutional checks necessary in the executive branch.

1. Executive Guidelines and Approval

One important subconstitutional check is the issuing of executive guidance and approval requirements that do not exist on a national or consistent state and local basis for federal and state executive criminal branches. For instance, prosecutors, head state prosecutors (state and county levels), and federal executive officers (namely the president and attorney general) could provide broad internal guidelines advising offices of their goals for their jurisdiction. The executive officers could then require some level of approval of decisions to bring charges according to these standards. This would help prevent the lack of an internal check on prosecutors who can

²⁹¹ And it neglects to discuss the role of non-profit organizations or other government watchdog groups and independent third-parties in providing a check to the government. Certainly they have a major role in providing meaningful checks on the government or even helping to form subconstitutional checks within the three branches. Some examples are the National Center for Non-Convictions, Institute for Justice, the Innocence Project, and the Center for Prosecutor Integrity.

make decisions based on their own intuition rather than coordinated decisions in line with office policy objectives. Approval should not be case-by-case, but given periodically, and guidelines should be loosely based on a statistical analysis of what arrests, declinations, charges, and convictions were brought in a particular year. This executive guidance should not be released to the public and there should not be negative consequences, if, for instance, a prosecutor had a high number of declinations, as the overall goals should be fair decisions or community safety rather than convictions. In order to mitigate mass incarceration, these central goals could clearly not articulate a goal to win as many cases as possible or get as many felony counts or as much prison time as possible. As laughable as this sounds, the U.S. Attorneys' Manual instructions are not too far off from this in instructing prosecutors to bring the cases they believe they can win rather than those that increase public safety, while at the same time presidential and attorney general statements massively contradict these goals with an aim to reduce U.S. mass incarceration.

With careful executive guidance on all charging and conviction decisions, hopefully prosecutors would be more careful in charging, as theoretically they would receive negative feedback for bringing a large number of convictions against low-level individuals and fail to increase public safety in the process. Moreover, executive guidelines should challenge individual offices to make internal charging changes to account for the contributions they are each making to this broader problem. Specific principles could be set in place that would account for this problem. For instance, one such principle includes considering incarceration priorities, like reserving more serious sentences for violent offenders than nonviolent offenders. Another could include reducing incarceration for drug crimes and increasing drug treatment and alternatives to incarceration. For white-collar crime, restitution can be placed as an office priority over prison time. Offices should have quarterly internal review procedures to determine whether individual prosecutors are meeting office goals.

Under the current system, obtaining convictions is how prosecutors are advanced, and their internal incentives are to achieve more convictions for a larger number of individuals.²⁹² Many prosecutors tend to assume that defendants are guilty,²⁹³ and according to Erwin Chemerinsky, operate in a

²⁹² See Bowers, *supra* note 15, at 1711 (noting that conviction rates are the principal measure of a prosecutor's job performance and that every dismissal lowers that rate, but every guilty plea raises it); Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1589–90 (2006) (describing the story of Earl Washington and noting that the injustice he suffered was due in part to a prosecutorial culture that emphasizes winning); Litman, *supra* note 116, at 1152 (stating that some prosecutors even go so far as to charge someone who holds useful information just to intimidate the person into divulging that information regardless of the individual's independent blameworthiness).

²⁹³ Smith, *supra* note 234, at 384 (discussing how the culture causes many prosecutors to develop cynicism, be suspicious, untrusting, and disbelieving rather than be labeled a "sucker," which leads prosecutors to develop the presumption that everyone is guilty).

pro-police culture that discourages asking questions about misconduct.²⁹⁴ When prosecutors win and obtain convictions they receive praise and favorable career outcomes.²⁹⁵ Guilty pleas or verdicts help advance a prosecutor's career. If convictions are tantamount to success, prosecutors naturally feel pressure to obtain more. These incentives likely cause more plea bargains, aimed at convictions, not at determining the correct punishment for the crime that will render the most public good.²⁹⁶

Guidance and instruction from the executive branch would change incentives for prosecutors. Recent scholarship supports the intuitive premise that prosecutors—like other rational employees—make decisions based on what they believe will help them advance in their career.²⁹⁷ For example, one factor as to whether or not a prosecutor is promoted in the Los Angeles District Attorney's Office depends on conviction rates, which encourages more convictions.²⁹⁸ Indeed, in some state prosecutors' offices, winning a conviction is such a close proxy to quality of work that a prosecutor has to file a report explaining an acquittal but never a conviction.²⁹⁹ This has impacts

294 Erwin Chemerinsky, *The Role of Prosecutors in Dealing with Police Abuse: The Lessons of Los Angeles*, 8 VA. J. SOC. POL'Y & L. 305, 315–16 (2001); see Burke, *supra* note 292, at 1603 (“The phenomenon of confirmation bias suggests a natural tendency to review the reports not for exculpatory evidence . . . but instead for inculpatory, confirming evidence.”); Alafair Burke, *Neutralizing Cognitive Bias: An Invitation to Prosecutors*, 2 N.Y.U. J.L. & LIBERTY 512, 517–18 (2007) (discussing the “tunnel vision” that prosecutors suffer when they hone their sights on one suspect (quoting Findley & Scott, *supra* note 241, at 292)); Myrna Raeder, *What Does Innocence Have to Do with It?: A Commentary on Wrongful Convictions and Rationality*, 2003 MICH. ST. L. REV. 1315, 1327. *But cf.* MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 219 (1990) (arguing that ethical prosecutors are able to review objectively the evidence and start the criminal process only when they are satisfied that the suspect is guilty beyond a reasonable doubt).

295 See Bibas, *supra* note 277, at 2471–72 (“Favorable win-loss statistics boost prosecutors' egos, their esteem, their praise by colleagues, and their prospects for promotion and career advancement.”).

296 Bibas, *supra* note 29, at 921–22.

297 See Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 129 (2008) (arguing that a change to the inner workings of prosecutors' offices can improve prosecutorial transparency); see also Bibas, *supra* note 29, at 935 (contending that because district attorneys are elected “they face electoral pressure to maximize convictions [and] push their unelected subordinates to increase conviction rates”); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 182 (2004) (“[T]he institutional culture of most prosecutors' offices treasures convictions, and an attorney's conviction rate may serve as a barometer of that person's stature within the organization and a key factor in determining that person's chances for internal advancement.”); O'Brien, *supra* note 242, at 1010 (stating that “[h]igh conviction rates bolster re-election campaigns” and “help an individual prosecutor advance within the office”); Smith, *supra* note 234, at 390 (“The same pressure [to win] is present in ordinary, run-of-the-mill cases. The pressure is both external, the result of the inherently political nature of prosecution, and internal, the result of policies relating to salary and promotion.” (footnote omitted)).

298 O'Brien, *supra* note 242, at 1010 n.40 (citing Chemerinsky, *supra* note 294, at 321).

299 *Id.* at 1010 (citing Medwed, *supra* note 297, at 137, 153).

on charging and plea bargaining practices among prosecutors. If the executive leaders instructed a prosecutors' office to define success apart from just "winning" a case by obtaining a conviction and rewarded them based on that metric, a prosecutor would have different incentives. Thus, the desire to succeed alone does not cause prosecutorial misconduct—when success is synonymous with "seeking justice," or promoting public safety, it is less likely to incentivize misconduct. When success is synonymous with convictions, however, it is more likely to lead to misconduct. If success includes cutting costs, however, prosecutors may be praised for seeking more community service sentences, more restitution and fines, and less incarceration for less serious crimes. For instance, just in the drug context, federal defendants serve an average of three years for drug possession and six years for drug trafficking,³⁰⁰ despite efforts by executive leaders to reduce the focus on drug convictions. If executive leaders provided instruction that offices were accountable to comply with these reductions, prosecutors would be forced to change charging practices. This would likely lead to more consistency in charging within and between offices throughout the country, and ultimately reductions in incarceration.

Two potential concerns with executive review are efficiency and costs. The first concern about a decrease in efficiency, though, may actually provide a benefit. While a dramatic shift in prosecutor goals of obtaining as many convictions as possible is a lofty goal at this point, at the very least, this executive check would slow down the prosecutorial charging process, which would likely reduce the number of convictions and force prosecutors to prioritize which cases they want to bring. This is how prosecutors used to function in the 1960s and 1970s when they still brought most cases to trial, and when convictions were slower and judges and jurors acted as checks.³⁰¹ Adding a layer of review to today's plea system could artificially recreate the slower and more deliberate prosecutor of the 1970s. As far as the concern for costs, internal executive reviews do not have to cost more. For instance, prosecutors can be reassigned or take rotating shifts reviewing cases for the office or other offices to determine whether the decisions that were made were in line with policy directives. This may also have the added side benefit of bringing fewer cases as a whole, potentially because some prosecutors would be focused on internal checks of charging rather than bringing new charges. Blind review should be practiced, whenever possible.³⁰²

300 U.S. SENT'G COMM'N, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.13 (2012), <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2012/Table13.pdf>; *Drugs and Crime Facts*, BUREAU OF JUST. STAT., <https://www.bjs.gov/content/DCF/ptp.cfm> (last visited Jan. 4, 2017).

301 See Andrew M. Siegel, *When Prosecutors Control Criminal Court Dockets: Dispatches on History and Policy from a Land Time Forgot*, 32 AM. J. CRIM. L. 325, 337, 375 (2005).

302 Sunita Sah, Christopher T. Robertson & Shima B. Baughman, *Blinding Prosecutors to Defendants' Race: A Policy Proposal to Reduce Unconscious Bias in the Criminal Justice System*, 1 BEHAV. SCI. & POL'Y 69 (2015).

2. Executive Review and Data Collection

An executive review (annual or biannual) of prosecutorial decisions based on data regarding charging and declinations would help provide a sub-constitutional check in criminal justice. While transparency in the reasoning of an individual prosecutorial or judicial decision for the public may be problematic, as sometimes the nuances of criminal defendants' rights or victims' situations can be misunderstood, transparency in prosecutorial decisionmaking in bulk (where prosecutors' charging decisions are reviewed as a whole over a six- or twelve-month period rather than individually) is not problematic and may satisfy the tension between the public's wanting more information and prosecutors' desires to maintain discretion for difficult individual decisions.

Bulk data on charging and convictions of prosecutors would help executive leaders and the public scrutinize prosecutor decisions. As a police parallel, many people knew anecdotally that New York police were disproportionately focused on minority communities and stopped African Americans more often than whites.³⁰³ However, it was only when New York Police Department (NYPD) data was released and confirmed that New York police were stopping a disproportionate number of African Americans with their stop-and-frisk policy and that only 0.1% of these individuals possessed illegal drugs or weapons, that things changed.³⁰⁴ Making available this broad, high-level data on police stops changed the policy of the New York police. Public data of broad trends in state and federal prosecution, charging, conviction, and other data could have a similar effect with prosecution.

Even internal reviews within offices could provide some helpful checks. Marc Miller and Ronald Wright contend that when prosecutors build data systems and have to state reasons for the record and monitor trends in discretionary choices, even regulation from within the office can be effective.³⁰⁵ While some jurisdictions provide public reports, they do not come with high-level executive review, public oversight, or independent review. New York recently attempted to legislate an independent review board to review prosecutorial decisions.³⁰⁶ In other fields, this is a standard procedure. For

303 Press Release, Ctr. for Constitutional Rights, *Landmark Decision: Judge Rules NYPD Stop and Frisk Practices Unconstitutional, Racially Discriminatory* (Aug. 12, 2014), <https://ccrjustice.org/home/press-center/press-releases/landmark-decision-judge-rules-nypd-stop-and-frisk-practices>.

304 *Id.* ("In 2011, the NYPD reported a record 685,724 stops—a 600 percent increase since Raymond Kelly took over as NYPD Commissioner in 2002. Eighty-four percent of those stopped were Black or Latino, and 88 percent of the people stopped were neither arrested nor received summonses. Despite the stated purpose of the policy, weapons and contraband were recovered less than 2 percent of the time."); *see also* *Floyd v. City of New York*, 959 F. Supp. 2d 668, 671 (S.D.N.Y. 2013) (discussing African-American and Latino residents filing § 1983 actions alleging that the City's police department's stop-and-frisk policy violated their constitutional rights).

305 *See* Miller & Wright, *supra* note 297, at 133, 159, 162–65.

306 S.B. 24-B, 2015 Leg., Reg. Sess., at 1–2 (N.Y. 2015) ("A state commission of prosecutorial conduct is hereby established. The commission shall have the authority to

instance, some hospitals perform monthly “mortality and morbidity” reviews where they discuss bad outcomes with patients and try to learn from the decisions that were made.³⁰⁷ Members of the public are not permitted into these review meetings and are not allowed for the purpose of litigation.³⁰⁸ Indeed, internal periodic review without public oversight can be useful to help change systems and help individuals learn from mistakes. Although medicine is different from law, an individual’s health is as important as her liberty. When removing the liberty of many individuals as a wholesale matter, it is important to review these decisions to ensure that justice prevails.

Internal executive reviews are already starting to take place in the legal field, though not in a uniform or formal manner. For instance, in Los Angeles, teams of prosecutors practicing within the office but not assigned to the case are assigned to review files.³⁰⁹ Also, several years ago, the Santa Clara County District Attorney invited outside advocates to look at the racial disparities in convictions within the office to provide feedback.³¹⁰ And Brooklyn has wrongful-conviction units to review the work of its prosecution teams. In the federal system, the DOJ has internal and blind review by lawyers not involved in the particular capital cases at issue.³¹¹ Indeed, internal review can serve as an important subconstitutional check.

review the conduct of prosecutors . . . to determine whether [prosecutors’] conduct . . . departs from the applicable statutes, case law, New York Rules of Professional Conduct . . . including but not limited to Rule 3.8 (Special Responsibilities of Prosecutors and Other Government Lawyers)” (citation omitted); *see also* Gershman, *supra* note 138 (asserting a need for an independent review board “to investigate and discipline prosecutors for misconduct” because under the current situation prosecutors have unlimited discretion and “are essentially exempt from any outside supervision, oversight, or accountability”).

307 *See generally* Juliet Higginson et al., *Mortality and Morbidity Meetings: An Untapped Resource for Improving the Governance of Patient Safety?*, 21 *BMJ QUALITY & SAFETY* 576 (2012); Betty Tuong et al., *The Experience of Conducting Mortality and Morbidity Reviews in a Pediatric Interventional Radiology Service: A Retrospective Study*, 20 *J. VASCULAR & INTERVENTIONAL RADIOLOGY* 77 (2009).

308 *See* Tuong et al., *supra* note 307, at 577 (“Historically, [mortality and morbidity] meetings have been led and attended only by the medical profession and have remained autonomous, with knowledge not being available or shared with other professions or across the wider hospital governance framework.”).

309 Jackie Lacey, Opinion, *Why A Conviction Review Unit Is Needed*, *INSIDE LADA* (June 29, 2015), <http://da.co.la.ca.us/about/inside-LADA/opinion-why-conviction-review-unit-needed> (briefing the media, announcing that “the Board of Supervisors approved funding for a Conviction Review Unit comprised of three experienced deputy district attorneys, one senior investigator and one paralegal” and that “[p]rosecutors assigned to the new unit will be selected by the management team to handle this important responsibility”).

310 Press Release, *Cty. of Santa Clara, County of Santa Clara Juvenile Justice Team Recognized for Services to Minority Communities* (Oct. 1, 2014), <https://www.sccgov.org/sites/opa/nr/Pages/County-of-Santa-Clara-Juvenile-Justice-Team-Recognized-for-Services-to-Minority-Communities.aspx> (noting that the juvenile justice system is “tackling the issue of overrepresentation of youth of color in the juvenile justice system”).

311 *See* Sah, Robertson & Baughman, *supra* note 302 (proposing a policy change where identification of race should be omitted from criminal proceedings wherever possible).

It is critical to point out here that internal reporting is not the panacea of subconstitutional checks and must be performed with careful consideration of incentives and must consider the right data. Depending on what data is collected, individual incentives can change as well as behavior. Pam Metzger and Andrew Ferguson discuss in a recent article how data collection goals actually impact attorney action.³¹² Employees respond to what is measured. Improper reporting or focusing on the wrong data can actually increase prosecutorial charging. Often DOJ members have to report their declinations (or decisions not to prosecute) internally,³¹³ and depending on the heads of office there can be pressure to bring more cases so that declination percentages are not too high. Indeed this current DOJ policy has, by some confidential reports of staff, actually encouraged attorneys to increase charging in order to “keep numbers up” from year to year to justify employment.³¹⁴ However, incentives can be used to encourage positive results. For instance, if prosecutors’ offices had to try a certain number of cases, the number of pleas could be reduced. If prosecutors’ offices had to pay the cost of prison, this would discourage a reflexive sentence including jail time. If prosecutors’ offices were financially rewarded by reducing recidivism rather than crime rates, there may be a greater emphasis on treatment. Measuring those outcomes might alter behavior along the continuum. Overall, it is important to carefully consider the types of data that should be gathered and relied on in determining the performance of executive officers.

Another internal executive subconstitutional check is an internal whistleblower mechanism for prosecutors. One of the reasons prosecutors may not listen to higher executive instructions (for instance the attorney general or governor) is that they are beholden to their immediate supervising attorneys and subject to their reviews for advancement. Some prosecutors feel pressure from leadership to bring unjustified cases, overcharge cases, or make unfair plea deals due to pressure or advice from superior prosecutors. Worse yet, some prosecutors are pressured not to reveal exculpatory information or break constitutional laws. There is no current internal mechanism within state and local government to provide prosecutors an avenue to safely report this information. An internal mechanism, like a confidential whistleblower mechanism in state and federal offices where an attorney who feels pressure to bring charges when they are not justified or against state or federal policy can report these instances, would serve as an important sub-

312 Pamela Metzger & Andrew Guthrie Ferguson, *Defending Data*, 88 S. CAL. L. REV. 1057, 1057 (2015) (“Building off of the successful implementation of system-based approaches in other complex, high-risk industries such as aviation and medicine, *Defending Data* explains how defenders can develop a data-driven systems approach to public defense.”).

313 U.S. ATTORNEYS’ MANUAL, *supra* note 81, § 9-2.020 (“Whenever a case is closed without prosecution, the United States Attorney’s files should reflect the action taken and the reason for it.”); O’Neill, *supra* note 115, at 1458 (“Presently, the DOJ requires AUSAs to indicate why they have chosen to forgo a prosecution.”).

314 This information comes from confidential interviews with Department of Justice attorneys.

constitutional check.³¹⁵ This could decrease the risk of pressure by supervising attorneys and may increase a law-abiding culture or one where executive demands are followed more closely. Another important result of such a mechanism is that there would be more adherence to executive guidelines and less incentive to make bad political decisions as an office.

Collection of broad data and videotaping of investigations and plea bargaining negotiations for internal review (of individual interrogations and pleas) and public review of overall data on these crucial pieces of investigation are also critical subconstitutional checks on the executive branch. These individual case records should not be released to the public but held internally for review of the actions of prosecutors—by higher executive officials or independent bodies—to make sure the law is followed. Data on charging decisions, declinations, and other relevant case information should be collected on a state and federal basis and reasons for charging, pleas, and declinations should be discussed internally and independently. Attorneys should have to make a case for plea bargaining internally rather than simply being able to resolve plea cases without any oversight.

Data on plea bargains and interrogations could be examined and reviewed. For instance, if an office demonstrated that Bob Prosecutor in a certain year routinely offered pleas that were twice as harsh as the average prosecutor in that county or in that state, it might impact his status at the office. This would not require a set of guidelines indicating what to charge in each individual case, which would remove too much discretion, but it would at least provide broad information on whether prosecutors in a certain office were out of step or what impact individual decisions have on overall incarceration or public safety figures.³¹⁶ Videotaping investigations and plea negotiations, like body cameras with police, would serve as an important

315 This could operate like a government-side Sarbanes-Oxley or confidential human resources reporting of sexual harassment. See 18 U.S.C. § 1514A (2012).

316 More use of existing data, like the DMC (Disproportionate Minority Contact) data and court budget reports that indicate the outcome of cases and how many cases are charged by prosecutors, would also be helpful. See *Disproportionate Minority Contact*, OFF. OF JUV. JUST. & DELINQ. PREVENTION, <https://www.ojjdp.gov/dmc/> (last visited Oct. 27, 2016). A formal requirement to analyze this data on the state and federal level to determine where prosecutors are focusing and whether these decisions are the correct ones given policy objectives of the state or federal executive would create more of a subconstitutional check. Bibas, *supra* note 10, at 960 (“[P]ublishing more data on charges, convictions, plea bargains, and sentences could also improve accountability.” (emphasis omitted)); Brandi L. Byrd et al., *Investigating the Justice System Response to Domestic Violence in Missouri*, 63 J. MO. B. 222, 226 (2007) (illustrating through data analysis that uses an “interdisciplinary investigative approach” that there is “considerable variability among Missouri counties regarding the judicial, prosecutorial, and law enforcement responses to domestic violence” and that “[t]he results of this study have provided a new way to quantify the justice system’s responsiveness to a common crime”); Robert Heller, Comment, *Selective Prosecution and the Federalization of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion*, 145 U. PA. L. REV. 1309, 1314 (1997) (arguing that “the traditional justifications for granting federal prosecutors almost unchecked discretion in making their charging decisions fail to outweigh the important constitutional rights at issue”).

executive check on prosecutorial misconduct. Due to recent pressure, state and federal government leaders have shown some initiative with funding to purchase 50,000 police body cameras in two years.³¹⁷

Another could be to consider the number of felonies charged and incarceration dollars spent per office and whether the defendant was a risk for violent crime or recidivism.³¹⁸ An example of a goal could be to consider the crime clearance cases of a particular office compared to the arrests. For instance, in 2014, according to FBI numbers tracking national arrests, there were 498,666 arrests for violent crimes and eleven million total arrests.³¹⁹ Drug arrests were the largest single category of arrests nationally.³²⁰ In 2014, crime clearance rates for murder were around sixty percent nationwide—leaving forty percent of murders unsolved.³²¹ Similarly, crime clearance rates for arson and motor vehicle theft were both below twenty percent.³²² An explanation for these numbers requires further research but these numbers certainly seem to indicate that drug arrests are the overwhelming focus of police when many violent crimes and property crimes remain unsolved. It is possible that refocusing efforts on solving violent or property crimes rather than arresting individuals for drug crimes may reduce the number of convictions but could lead to increased safety in the community, particularly given the low number of violent crimes committed by drug defendants.³²³ Indeed, tracking of numbers indicating an increase in safety of the community, rather than arrests or convictions, may help the executive achieve its goal of making the public safer.

317 See, e.g., Terry Carter, *\$19.3M in Grants Will Go Toward Body Cameras for Police*, DOJ Announces, ABA J. (Sept. 22, 2015), http://www.abajournal.com/news/article/19.3m_in_grants_will_go_towards_body_cameras_for_police_doj_announces/?utm_source=maestro&utm_medium=email&utm_campaign=tech_monthly (setting up \$19.3 million in grants to various police departments across the country for bodycams).

318 See FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES, 2014: VIOLENT CRIME I (2014), <https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/offenses-known-to-law-enforcement/violent-crime> (“In 2014, an estimated 1,165,383 violent crimes occurred nationwide, a decrease of 0.2 percent from the 2013 estimate.”).

319 FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES, 2014 tbl.29 (2014), <https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-29> (noting that the exact estimated numbers are 11,205,833 total crimes and 498,666 violent crimes).

320 *Id.* (noting that there were an estimated 1,561,231 drug abuse violations and that the next largest category was theft at 1,238,190).

321 *Id.* at tbl.25, <https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-25> (noting that 64.5% of murders and nonnegligent manslaughters were cleared by arrest or exceptional means, and that only 47.4% of violent crimes were cleared by arrest or exceptional means).

322 *Id.* (noting that 12.8% of motor vehicle theft and 21.7% of arson was cleared by arrest or exceptional means).

323 See Baradaran, *supra* note 93, at 234 (“The link between drugs and violence that underlies much of U.S. drug policy lacks sufficient empirical support, but yet pervades modern day legislative statutes and judicial decisions.”).

Providing executive branch leaders (head prosecutors, attorneys general, and others) with data about the charging and sentencing practices of their offices may help them recognize where bias or other abuses occur in the system. Some prosecutors' offices have used this information to implement policies to reduce unjustified racial discrepancies in charging, for instance. Angela Davis recommends collecting and publishing data on the race of the defendant and victim in each case and the prosecutorial action at each stage in the process,³²⁴ in order to find and reduce racial disparities and hold elected prosecutors accountable.³²⁵ For instance, the Prosecution and Racial Justice Program of the Vera Institute of Justice has successfully implemented a modified version of Davis's system in multiple prosecutors' offices across the country.³²⁶ Vera developed a system that analyzed prosecutorial discretion in a number of areas in the prosecutorial process.³²⁷ This system became a useful tool in identifying areas where the offices were unknowingly exhibiting racial bias. When Vera began working in the Mecklenburg County District Attorney's Office in North Carolina, it discovered two alarming statistics.³²⁸ First, the office was prosecuting about ninety-seven percent of all drug cases, while it was only prosecuting seventy percent of all cases combined.³²⁹ Further, of these drug cases, African-American women were prosecuted more vigorously than any other group—one hundred percent of the time.³³⁰ These findings encouraged the District Attorney to make changes in his office that led to significant decreases in these imbalances.³³¹ However a major weakness of these programs acknowledged by Davis³³² is that the program is at the complete discretion of the prosecutor. It requires full access to the offices, granted by the chief prosecutors.³³³ Continued access is also at the will of these prosecutors, and one program was terminated when a new district attorney declined to carry it on.³³⁴ Further, the chief prosecutor is not obligated to act on any finding of racial discrepancy,

324 Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *FORDHAM L. REV.* 13, 54 (1998).

325 Angela J. Davis, *In Search of Racial Justice: The Role of the Prosecutor*, 16 *N.Y.U. J. LEGIS. & PUB. POL'Y* 821, 836 (2013).

326 *Prosecution and Racial Justice Program*, VERA INST. OF JUST., <http://www.vera.org/centers/prosecution-and-racial-justice-program> (last visited Nov. 30, 2016).

327 WAYNE MCKENZIE ET AL., VERA INST. OF JUST., *PROSECUTION AND RACIAL JUSTICE: USING DATA TO ADVANCE FAIRNESS IN CRIMINAL PROSECUTION 1* (2009) <http://www.vera.org/sites/default/files/resources/downloads/Using-data-to-advance-fairness-in-criminal-prosecution.pdf>.

328 *See id.* at 7.

329 *Id.*

330 *Id.*

331 *Id.* Additionally, in Milwaukee, Vera Institute realized that black defendants were charged in prostitution cases nine percent more than white defendants. Davis, *supra* note 325, at 841 & n.106. This prompted the district attorney to seek training for staff to increase cultural competency in dealing with prostitution cases. *Id.* at 843–44.

332 *See* Davis, *supra* note 325, at 846–48.

333 *Id.* at 837.

334 *Id.* at 839.

no matter how blatant. While increased information to the public about prosecutors' internal charging and plea decisions would increase accountability, the Supreme Court has protected this lack of transparency.³³⁵ Thus, without judicial review or legislative requirements that provide necessary checks, the executive branch will not be able to check itself by just collecting data alone. And there must be internal accountability within the executive branch once abuses or deviation from executive policy is detected, and broad public availability of data of executive decisions.

B. *Judicial Checks*

Our constitutional structure envisions criminal trials with juries, grand juries, and judges to provide judicial review of constitutional rights to prevent the unfair punishment of U.S. citizens. The federal judiciary has largely abdicated its duties to the executive branch and deferred in allowing the executive to administer the law without any real checks. Many state courts have similarly adopted a deferential attitude when it comes to executive decision-making in criminal justice. The judiciary should adopt subconstitutional checks including judicial review of plea agreements and oversight of criminal discovery and prosecutorial and police misconduct, in addition to treating more carefully its constitutional duty to provide review of individual constitutional rights.

1. Strict Judicial Review of Pleas and Misconduct

On the judicial front, proper review of plea agreements would help balance the power between the branches. Judges should take a much more active role in reviewing plea agreements and raise the level of difficulty for prosecutors to charge so many cases so quickly without consideration of the consequences.³³⁶ Plea agreements are simple to administer and require very little input from judges. This is a system that has developed over time since the late 1960s and changed the nature of the criminal rights demanded by the Constitution. To effectuate those rights, judges should closely review plea agreements and other executive decisions.

Since plea bargaining is essentially the way criminal cases are dealt with and there are so few trials, a plea may be treated like an administrative adjudication. For instance, judges could be involved as a third party in plea deci-

³³⁵ See DAVIS, *supra* note 223, at 8; Abby L. Dennis, Note, *Reining in the Minister of Justice: Prosecutorial Oversight and the Superseder Power*, 57 DUKE L.J. 131, 135–36 (2007); Lupton, *supra* note 166, at 1287.

³³⁶ See Darryl K. Brown, *Judicial Power to Regulate Plea Bargaining*, 57 WM. & MARY L. REV. 1225 (2016) (giving an originalist analysis that provides that separation of powers does not stop the judiciary from reviewing plea agreements and other prosecutorial decisions); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1997 (1992) (“[J]udicial review of plea agreements is more important and more productive than judicial review of initial charging decisions . . . [and] judicial power to reject lenient plea agreements can serve a useful function and should, if anything, be invoked more frequently.”).

sions. Like in the administrative context, judges can serve as the neutral third party while the prosecutor argues his best case for the harshest sentence and the defendant's counsel argues their best case for their client. The third-party magistrate judge could make the decision that would be subject to judicial review. Because the U.S. criminal justice system is adversarial and not inquisitorial, it requires accountability from all sides regarding legal obligations.³³⁷ Without checks on prosecutors, it is unreasonable to expect prosecutors to turn over evidence to the other side, especially when more than ninety percent of the time judges do not hold them accountable when they do not turn it over.³³⁸ Judicial involvement may provide the necessary checks in an adversarial system by requiring the executive to be accountable to a neutral third party in its decisions.

A core judicial function is interpreting statutes.³³⁹ This is not happening in the criminal context and is necessary as a subconstitutional check. Judges should read statutes and provide a neutral voice in plea negotiations.³⁴⁰ The Supreme Court recently expressed its frustration at the lack of judicial involvement in interpreting criminal statutes in plea negotiations.³⁴¹ As such, judges should take on this role of interpreting criminal statutes before approving plea agreements.

337 See Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 750–51 (2003) (noting that there is a “growing recognition that the road to criminal justice reform lies not through the battleground of defendant rights—where trench warfare has replaced the swift advances of the Warren years and even the advances have generally proved to be just chits to be traded for lower sentences—but through attention to what Jerry Lynch has called the ‘indigenous administrative-inquisitorial structures that in fact process most American criminal cases’” (footnotes omitted) (quoting Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2151 (1998))); David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1635 (2009) (“A broad and enduring theme of American jurisprudence treats the Continental, inquisitorial system of criminal procedure as epitomizing what our system is not; avoiding inquisitorialism has long been thought a core commitment of our legal heritage.”).

338 See Baer, *supra* note 45, at 15 (“Much of the literature critiquing *Brady* presents an unspoken paradox. On the one hand, the doctrine requires too little of prosecutors, forcing them only to turn over ‘material’ evidence in time for trial. At the same time, stories abound of prosecutors who have either intentionally or negligently withheld material exculpatory evidence, often to the great detriment of defendants who have been wrongfully accused and convicted of serious crimes.”); Bibas, *supra* note 10, at 977 (noting that sanctions are rare for prosecutors and “usually amount to a censure or other slap on the wrist,” and describing surveys conducted where “[m]any . . . involved present[] false evidence, withhold[] exculpatory evidence, or l[ie] to or deceiv[e] the court”).

339 See Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537 (2012) (arguing that federal courts should change how they interpret criminal statutes to help overcome overcriminalization).

340 See *id.* at 590–91 (arguing that by narrowly interpreting statutes courts can help overcome overcriminalization).

341 See Transcript of Oral Argument at 42, *Johnson v. United States*, 135 S. Ct. 2551 (2015) (No. 13-7120); Transcript of Oral Argument at 27, *Yates v. United States*, 135 S. Ct. 1074 (2015) (No. 13-7451).

Involving judges in the plea bargaining system would certainly be less efficient. Prosecutors would have to prove cases more thoroughly and judges interpret statutes fairly. However, considering how quickly we convict individuals, maybe a less efficient system where prosecutors have to prove cases more thoroughly and take more cases to trial would be a good thing. For instance, under the military system, pleas are more expensive and difficult to prove than a trial.³⁴² In order to bring a case, prosecutors have to sell their case to a higher officer. Also, judges are required to make extensive findings and the comparative cost of a trial is much less. As a result, it is much more likely that a prosecutor brings a case to trial rather than a plea bargain. We could change our structure to make it more difficult for prosecutors to plea than go to trial if judges were involved.³⁴³ Similarly, the civil law system has a completely different balance of power between the judge, prosecutor, and defense, and should be considered here.

The judiciary could act as a real check on the executive branch if it provided in-depth review of plea decisions and interpreted criminal statutes in plea negotiations. This way, the judicial branch could still enforce the individual constitutional rights demanded for criminal defendants in the Constitution. This subconstitutional check would fill the current gap caused by a lack of criminal trials and the lack of judicial involvement in plea agreements.

342 See Stuntz, *supra* note 36, at 2035 (“Military courts . . . review the factual basis of guilty pleas with great care, and with little deference to the pleas themselves.”); see also CHARLES D. SWIFT & PATRICK K. KORODY, COURT-MARTIAL ADVOCACY: TRYING THE MILITARY CASE § 1:42, Westlaw (database updated Sept. 2016) (“The bases for a military accused’s right to a speedy trial are found in several sources including the Sixth Amendment of the Federal Constitution, the Uniform Code of Military Justice (UCMJ) (§ 810), and the Rules for Courts-Martial (707). Additionally, the Due Process Clause of the Fifth Amendment also assures military accused the right to a speedy trial.”); Edward F. Sherman, *A Special Kind of Justice*, 84 YALE L.J. 373, 375 (1974) (reviewing JOSEPH W. BISHOP, JR., JUSTICE UNDER FIRE: A STUDY OF MILITARY LAW (1974)); Alex Hemmer, Note, *Civil Servant Suits*, 124 YALE L.J. 758, 785–86 (2014) (“As a matter of law, civil servants have been protected for decades—first under the common law, and today by state and federal whistleblower statutes—from being disciplined for disobeying unlawful commands. As a matter of practice, however, it seems clear that the right is rarely exercised, and rarer still . . . where disputes between the government and civil servants turn on the legality of high-profile programs. There is a right to resist, in other words, but we lack a thorough understanding of what it entails.”); Note, *Liability for Torts of Military Personnel*, 55 HARV. L. REV. 651, 653 (1942) (“The rule that is most widely accepted today is a more lenient one: the subordinate is liable for executing an unlawful command only when he believed it was illegal, or when it was so palpably illegal that a reasonable man would have realized its invalidity.”); Note, *Military Justice and Article III*, 103 HARV. L. REV. 1909, 1921 (1990) (“Although the military justice system recognizes the problem of unlawful command influence, the rigid structure of military authority makes avoidance of such problems very difficult.” (footnote omitted)).

343 Another cost measure could be that prosecutors could be assigned a budget allocation and they would have to make decisions about how much prison time to recommend for individuals they charge, and they could run out of space in county jails and state prisons if they overspent their allotment.

2. Judicial Enforcement of Individual Rights

The judiciary has abandoned its role of enforcing individual constitutional rights for criminal defendants. There are several roles that a judge could play in criminal cases that would help provide a subconstitutional check. Overall, judges could oversee criminal discovery similar to the way magistrates oversee civil discovery with timelines, deadlines, and decisions that hold each side accountable. Without accountability by a third party, it is no wonder that prosecutors often fail to turn over *Brady* material, or interpret *Brady* obligations in their favor. With a judge ruling on all of these individual decisions, this would provide the needed check to ensure that prosecutors actually hand over exculpatory information. Judges could oversee this turning over of *Brady* information and even set a time for it to be turned over. Judges could set time for discovery and also require checks for effective assistance of counsel. Judges could ensure that the defendant has had adequate time with counsel and understands his rights at every stage of the process.

One subconstitutional check is opening the door to § 1983 actions³⁴⁴ against executive officers in the criminal context. Certainly, § 1983 prohibits civil suits,³⁴⁵ but possibly allowing an exception when a person has been unfairly prosecuted or investigated or mistreated by an executive officer in relation to a criminal case, may be justified. This may provide a subconstitutional check on police and prosecutors by offering a larger incentive to treat defendants fairly. This would help protect criminal defendants in the same way civil litigants are with rights to sue government officials for misconduct.

Certainly judges have not stood back and been completely uninvolved in the criminal dysfunction, particularly when it comes to perceived legislative missteps. Judges have famously testified before Congress to reduce drug sentences in federal cases.³⁴⁶ Judges have written opinions complaining

344 42 U.S.C. § 1983 (2012) (enabling individuals to file a civil action for deprivations of constitutional and federal statutory rights by persons acting under the color of law).

345 *Id.*

346 See Sasha Abramsky, *Jed Rakoff and the Lonely Fight for Wall Street Justice: The Federal Judge Is Waging a One-Man War on Bank-Friendly SEC Settlements*, NATION (June 18, 2014), <https://www.thenation.com/article/jed-rakoff-and-lonely-fight-wall-street-justice/>. In addition to “demanding that large financial institutions be held fully accountable,” Judge Rakoff has held the federal death penalty unconstitutional and has pushed for the public release of documents. *Id.*; see Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), <http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/> (sharply criticizing the U.S. Sentencing Guidelines); Seth Schiesel & Simon Romero, *WorldCom Strikes a Deal with S.E.C.*, N.Y. TIMES (Nov. 27, 2002), <http://www.nytimes.com/2002/11/27/business/worldcom-strikes-a-deal-with-sec.html> (describing Judge Rakoff’s role in instituting corporate governance reform at WorldCom); Matt Taibbi, *Finally, a Judge Stands Up to Wall Street*, ROLLING STONE (Nov. 10, 2011), <http://www.rollingstone.com/politics/news/finally-a-judge-stands-up-to-wall-street-20111110#ixzz1iHrUuQzQ> (“Federal judge Jed Rakoff, a former prosecutor with the U.S. Attorney’s office . . . in New York, is fast becoming a sort of legal hero of our time.”); Ian Thoms, *Rakoff Slams US Sentencing Guidelines for Being Too Harsh*, LAW360 (May 14, 2012), <http://www.law360.com>

about mandatory minimums as well, in an effort to take a stand against executive power.³⁴⁷ However, these are not subconstitutional checks. They do not grant power to judges to actually stop legislative or executive acts that are unjust. In order for the judiciary to provide a meaningful check, it must actively take on its constitutional duty to check the executive by better enforcing constitutional rights, providing active review of plea negotiations and criminal discovery, and possibly interpreting § 1983 to apply to criminal government officers.

C. *Legislative Checks*

The legislature has often served as an assistant to the executive branch in criminal cases, rather than as a check. Legislatures have passed harsh legislation, failed to review executive decisions, and neglected to study the impact of their legislation on criminal justice as enforced by the executive. Subconstitutional checks should be put in place for regular legislative impact reviews and cost checks on the executive branch by both federal and state legislatures.

1. Legislative Impact Review

On the legislative front, a consideration of prosecutorial charging decisions and their impact on incarceration and prison budgets by a legislative committee would serve as a subconstitutional check. There could be a requirement that with every federal or state law passed, prosecutors have to report on the impact of that law—and the probable data, including arrests and convictions occurring as a result of that law. The public should be made aware of when the law is used, how it is used, and why it is used. The legislature could consider the fiscal impact of a proposed legislation before enacting any new criminal legislation. Additionally, Congress has the power to request documents and information from the executive regarding its enforcement power and should use this power. And to provide a further check, Congress could place a sunset provision on all of the criminal legislation passed so that if criminal legislation on the state or federal level is passed in response to a certain criminal event, Congress can reevaluate that law in five or ten years and determine if the legislation is appropriate or has served its purpose. Reactionary criminal laws based on a certain high-profile event should also involve a criminal code review to ensure that existing legislation cannot adequately punish individuals for the particular harm caused. This

www.law360.com/articles/340366/rakoff-slams-us-sentencing-guidelines-for-being-too-harsh (“In speaking during the New York City Bar Association’s first white collar summit, U.S. District Judge Jed Rakoff said federal sentencing guidelines foolishly suggest judges can use simple arithmetic to answer the complex question of what is an appropriate punishment for a crime.”).

³⁴⁷ See Baradaran, *supra* note 93, at 304 nn.438–39 (giving examples of complaints judges have raised regarding mandatory minimum sentencing laws).

would help reduce the proliferation of overlapping criminal laws that provide the executive with more options each year in charging defendants.

Congress may request the executive to disclose documents, provide reports, or hold open meetings through Article I.³⁴⁸ For instance, Congress could require an annual report from the executive branch regarding investigations and prosecutions. This could indicate the investigation and prosecution priorities, declinations, and convictions. There is some precedent for this as the legislature has the power to require information from the executive and can release this information to the public. The Department of Justice releases statistical reports each year with much of the data Congress would be interested in auditing, including enforcement priorities, convictions, declinations, and other information.³⁴⁹ However, without an audit and in-hearing review by the legislature, there is little accountability. For instance, in the 2013 annual report, the DOJ reported its enforcement priorities were terrorism and violent crime.³⁵⁰ However, of the 61,529 cases the DOJ prosecuted, only 0.3% were terrorism- or national security-related and 19.7% were violent crime cases.³⁵¹ The majority of cases brought by the executive branch were immigration (38.6%) and drug cases (21.8%), which were not on the list of priorities.³⁵² Congress could bring DOJ officials into hearings and question them about the stated priorities and actual actions taken and demand answers as to why there was such a heavy focus on drug crimes, when violent crimes were a stronger stated priority. This is the kind of questioning that Congress could do to help keep the executive accountable to its goals. It could also help Congress understand the effect of its legislation on the enforcement of the law. Annual statistical reports in states and the federal government to measure the enforcement of key priorities to hold prosecutors accountable would serve as an important subconstitutional check.

2. Legislative Cost Checks

A potential subconstitutional check is forcing the branch of government imposing laws to be directly responsible for the fiscal impact of that law. This is not currently a check on the federal or state level. Missouri and Minnesota have recently passed a fiscal impact law to measure the impact of laws on

348 See Douglas Kriner, *Can Enhanced Oversight Repair "The Broken Branch"?*, 89 B.U. L. REV. 765, 770–72 (2009) (noting that congressional oversight is an implied power from Article I).

349 See DOJ EXEC. OFFICE STATISTICS 2013, *supra* note 255.

350 *Id.* at 7 (“The number one priority of the United States Attorneys is to prevent terrorism and promote the nation’s security. During Fiscal Year 2013, the United States Attorneys also continued their longstanding commitment to fighting violent crime and addressing other special emphasis areas, including civil rights violations, financial fraud, crimes against vulnerable victims, hate crimes, and human trafficking.”).

351 *Id.* at 7, 11.

352 *Id.* at 11.

race, but this would not capture this data.³⁵³ This may also help prevent legislatures, judges, and the executive from working together. If each branch felt the direct effects of its actions in the criminal context, each would have the incentive to prevent undue costs. For instance, if the federal or state legislature wants to pass a law allowing harsher punishment that will likely increase incarceration rates, it should have to earmark specific funding for that law.

On the state level, forcing state prosecutors to absorb the costs within their county of the individuals they choose to convict and incarcerate can reduce costs and create a check. Currently, in many states, state prosecutors convict individuals and are elected at a county level, while state prisons are funded at a state level.³⁵⁴ Therefore, the individuals in charge of bringing cases are not facing the consequences of their decisions and the taxpayer electorate is also not able to consider this in its decision. Another possibility, creatively suggested by David Ball, would be to distribute money among counties based on crime rates and allowing local decisionmakers to spend it as they see fit.³⁵⁵ They can choose to fund crime prevention, drug treatment, or prison beds, and they have the option to use it in an optimal way and may be held accountable by the public in doing so.

These are just a few potential subconstitutional checks that could be employed to prevent criminal justice dysfunction. While I begin the discussion and provide a blueprint for potential prescriptions, the major contribution of this Article is the external constitutional critique of criminal justice and the insight that subconstitutional checks within each branch are necessary to fix the collusion among the branches. Another contribution is explaining why fixing symptoms of criminal justice dysfunction will not provide a lasting solution to the broad criminal justice problems we face. Other researchers can help fill the remaining gaps on how, specifically, subconstitutional checks should function in criminal justice.

CONCLUSION

There is no question that the American criminal justice system suffers from dysfunction. There are abuses by police and prosecutors with little accountability, overcriminalization and mass incarceration in state and federal prisons, and wrongful and pressured convictions by plea agreements without any judicial oversight. Most suggested solutions to address this dysfunction involve reforming one branch of government. For instance, the leg-

353 See Mario L. Barnes et al., *A Post-Race Equal Protection?*, 98 GEO. L.J. 967, 1004 (2010) (“Until our reality—in the form of statistical data detailing improving life circumstances across race—matches our aspirations, then racial categories and the effects they have created should be the subject of meaningful review within our courts.”).

354 See generally Heather K. Gerken, *Federalism All the Way Down*, 124 HARV. L. REV. 4 (2010) (discussing the need for transparency and checks on institutions that go beyond the city and state level).

355 See W. David Ball, *Defunding State Prisons*, 50 CRIM. L. BULL. 1060, 1062–63, 1073–75 (2014).

islature should stop mandatory minimum sentences or draconian three-strikes and drug legislation.³⁵⁶ Or judges should better enforce *Miranda* rights or the right to confrontation.³⁵⁷ Or we should rein in prosecutor and police abuses.³⁵⁸ While these would be important improvements, these reforms demonstrate a profound underestimation of the problem. Only by first understanding the deeper constitutional dynamics of the criminal justice system, and how modern changes have deeply offset the constitutional balance between the three branches, can we then embark on a path of lasting change in criminal justice.

The current criminal justice system is failing because it lacks functional constitutional checks. Constitutional checks have failed to function due to aligned incentives among the three branches that work in concert against criminals. While judges should enforce constitutional rights and interpret statutes, they have largely abdicated this function due to extreme deference to prosecutors and police and their approval of a system dominated by plea agreements, which allows only a minimal role for judges.³⁵⁹ Similarly, legislatures have worked hand-in-hand with prosecutors to strengthen executive power by passing a large number of criminal statutes and providing harsh sentences without imposing any limits or supervision on how these laws are enforced.³⁶⁰ As a result, the executive branch has operated largely since the 1980s and 1990s in the criminal realm with few real constitutional checks from the other branches. Indeed, separation of powers is failing, as two branches have ceded their power to the third.

Rather than trying to address the individual failing branches, this Article contends that instituting subconstitutional checks—stopgaps adopted by the three branches of government to effectuate the rights in the Constitution when the system is stalled in dysfunction—could create meaningful change. The failure of structural checks and separation of powers has only harmed all of our individual constitutional rights. In other fields, like administrative law, subconstitutional checks have stepped in to honor the original constitutional

356 See Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1276 (2005); Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 104, 127 (2003).

357 See Susan R. Klein, *Miranda Deconstitutionalized: When the Self-Incrimination Clause and the Civil Rights Act Collide*, 143 U. PA. L. REV. 417, 420 (1994) (discussing how one of the consequences of eliminating *Miranda* rights “would seriously infringe upon personal liberties”); Richard M. Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV. 1885, 1913 (2014) (“[T]he Confrontation and Self-Incrimination Clauses expressly address evidentiary issues at trial and have always been viewed as judicially enforceable through in-trial exclusion.”).

358 Stuntz, *supra* note 50, at 5.

359 See Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1150 (2001); see also Alschuler, *supra* note 49, at 6, 10, 38; Fisher, *supra* note 49, at 864.

360 Stuntz, *supra* note 36, at 2003; Comment, *supra* note 53, at 209.

balance of powers.³⁶¹ In order to accomplish this in criminal law, we must create checks within each branch and stop the current collusion of the three branches against criminal defendants.

The creation of subconstitutional checks requires these potential changes: *First*, the judicial branch should provide meaningful constitutional review of plea agreements to make sure the rights of defendants are respected and statutes are interpreted properly, since so few cases go to trial. *Second*, the legislative branch should institute legislative impact reviews and cost checks to measure the impacts of criminal legislation, and institute sunset provisions for criminal legislation. *Third*, the executive branch should institute direct review of line prosecutors and police from the highest levels of the executive branch and create transparency of broad—not case-specific—criminal justice data to the public. By adding subconstitutional checks within each branch we can provide the additional review and guidance necessary to allow real constitutional balance and, as an important byproduct, criminal justice reform. All three branches must be involved to justify the punishment of ordinary citizens. The path described here is certainly less efficient, with more burdens required to charge and punish citizens, but this slower path is a wiser one prescribed by the Constitution.

The proposal for subconstitutional checks in criminal justice—like this Article—is a first step. If subconstitutional checks were adopted properly, there would be lasting systemic change in criminal justice. Meaningful change is difficult, however, and, as demonstrated here, requires coordination and effort from all three branches of government. We are far from this right now. But, at the very least, this Article will help academics, policymakers, judges, and prosecutors understand why typical criminal justice reforms involving one branch will never fix the dysfunction of the criminal justice system. It will also help judges and legislators understand the implications of abdicating their power to the executive branch in each individual case or with each criminal statute passed. And in so doing, it will start an ongoing conversation about how to reimagine the original constitutional protections for criminal defendants using subconstitutional checks.

361 See Michaels, *supra* note 1, at 522; Note, *Comparative Domestic Constitutionalism: Rethinking Criminal Procedure Using the Administrative Constitution*, 119 HARV. L. REV. 2530, 2530–33 (2006).