The Black Box

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Introduction

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

Herbert Wechsler (1962) 1

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

In the half century since Wechsler wrote, scholars have magnified his concerns about prosecutorial discretion. Many scholars have expressed particular concerns about racial, gender and other nefarious grounds for prosecution, framed as “selective prosecution.”3 Another group of scholars has worried about the increased range of choices available to prosecutors when they file criminal charges because criminal codes have become bloated with new crimes.4 A third group has noted how changes in sentencing law, such as the use of sentencing guidelines and “three strikes” laws, have increased the size and certainty of the consequences that flow from a prosecutor’s charging choices.5

1 Herbert Wechsler, The Challenge of the Model Penal Code, 65 Harv. L. Rev. 1097, 1102 (1962) (emphasis added, quoted in Frank Miller, Prosecution 151 (1970)).

2 Id; see also Kenneth Culp Davis, Administrative Justice at vi (1969) (“Writers about law and government characteristically recognize the role of discretion and explore all around the perimeter of it but seldom try to penetrate it.”).


5 Sentencing laws now offer prosecutors finer controls over sentencing outcomes, effectively granting them the power to reverse-engineer the combination of charges and convictions that will produce the desired sanctions. See Terence D. Miethe, Charging and Plea Bargaining Practices Under Determinate Sentencing: An Investigation of the Hydraulic Displacement of Discretion, 78 J. CRIM. L. & CRIMINOLOGY 155-176 (1987); Marc L. Miller, Domination & Dissatisfaction, 56 Stan. L. Rev. 1211 (2004); Ronald F.
For those who see discretion as the opposite of law, its dominance in the prosecutor’s office has ripple effects throughout criminal justice. The prosecutor’s discretionary power overwhelms any efforts to improve the law elsewhere in the criminal process—in crime definitions, in limits on police power, in trials, or in judicial sentencing decisions.

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

Some scholars, recognizing this conspicuous absence of judicial oversight, have called for legislative review of prosecutorial decisions through hearings and standardized reports. Legislative control of prosecutor choices also might occur through more targeted drafting of substantive criminal codes. But legislators, like the judges, have never answered the calls for external regulation of the prosecutor’s office, and the political dynamics of American criminal justice make it very unlikely they will do so.

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

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7 See infra, Part II.A. For an account of the limited and failed efforts by judges to regulate the criminal charges available to prosecutors, see Ronald J. Allen & Ethan A. Hastert, *From Winship to Apprendi to Booker: Constitutional Command or Constitutional Blunder?* 58 Stan. L. Rev. 195 (2005).


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

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

Additional insights about internal regulation of prosecutors come from Milwaukee, Charlotte, and San Diego, three cities participating in an innovative prosecutor management project of the Vera Institute of Justice. Each of these cities has generated summary data that allow us to reconstruct the reasoning of line prosecutors at key moments in processing a criminal case. The long-delayed arrival of the information age to prosecutors’ offices allows us, at last, to understand more about the internal regulatory forces within those offices.

The first phase in our analysis of the internal regulation of prosecutorial power looked at the outcomes produced when chief prosecutors insist on a principled screening of cases. In this article, we get behind the outcomes to look at the reasons for those decisions. In particular, we focus on the explanations that prosecutors give for declinations, the decisions by prosecutors not to prosecute alleged crimes that police officers present to the office. Declinations epitomize the black box: they remain hidden

\[\text{11 See infra Part II B. For an overview of the “Prosecution and Racial Justice Project” of the Vera Institute in New York, see } http://www.vera.org/project/project1_1.asp?section_id=1&project_id=78.\]

\[\text{12 Ronald F. Wright & Marc L. Miller, The Screening/Bargaining Tradeoff, 54 STAN. L. REV. 29 (2002); see also Marc L. Miller & Ronald F. Wright, Honesty and Opacity in Charge Bargains, 55 STAN. L. REV. 1409 (2003). Practices in New Orleans and elsewhere demonstrated, in our view, that prosecutors could restrict plea bargaining without dramatically increasing the trial rate if they applied what we called “hard” screening practices.}\]

\[\text{13 See Davis, supra note 2, at 188 (“Viewed in broad perspective, the American legal system seems to be shot through with many excessive and uncontrolled discretionary powers but the one that stands out above all others is the power to prosecute or not to prosecute. The affirmative power to prosecute is enormous, but the negative power to withhold prosecution may be even greater, because it is less protected against abuse.”).}\]
from all traditional legal review and test the capacity of our preferred strategy of internal regulation. What image do these declinations create of the day-to-day work of criminal prosecutors—reasoned judgments according to law or random choices according to individual predilection?

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

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

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

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

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

A second source of internal regulation comes from the substantive criminal law itself, a set of doctrines that many assumed, ironically, to be irrelevant during the sorting of cases in the prosecutor’s office. Third, some internal regulations derive from practical problems of proof and evidence, particularly when prosecutors account for the preferences of victims. Fourth, prosecutors account for various regularized office policies, including a hostility to plea bargains. Together these four kinds of reasons offer the predictability and rationality—and perhaps even a measure of democratic responsiveness—of more familiar external legal rules and procedures. Legitimate legal and policy sources seem to matter, even within a black box that remains mostly impervious to external regulation.

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

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

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

This divide between subjective and objectives views of discretion has thus far been absent from the literatures on prosecutorial power. For us, the subjective experience of discretion helps to clarify the types of constraints that external observers

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miss. It explains why “reasoned discretion” should be treated as a meaningful legal category, rather than a legal oxymoron, as Wechsler might have it.

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

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

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

I. The Internal Regulation of Prosecutors

In the post-apocalyptic world of Bartertown in the classically-awful Mad Max films, if you “bust a deal” you must “face the wheel”\(^\text{16}\)—a random roulette wheel method for picking criminal sentences. American prosecutors do not, thankfully, take their cues from the inflexible and arbitrary legal system of Bartertown. Prosecutors sometimes accept the charges that the police recommend to them, while at other times they file different charges or decline to file charges at all. Whatever choices they make, the prosecutors have their reasons.

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

\(^{16}\text{MAD MAX BEYOND THE THUNDERDOME (Warner Bros. Pictures 1985).}\)
Some prosecutors’ offices, however, do require individual prosecutors to declare reasons for declining to file charges in a case. Some offices even expect the prosecutor to record those reasons, either for all crimes or for selected categories of crimes. For many years, the office routines in New Orleans called for prosecutors to declare a reason (and only one reason) for any decision to decline prosecution of a single charge or a group of charges that the police recommended. The screening prosecutors chose their reasons from a standardized office list, and recorded their reasons in computerized format, allowing managers to monitor each prosecutor’s work.

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

Granted, one must take these numbers with a grain of salt. The selected reasons might not reflect the actual reasons that motivated screening attorneys. Nevertheless, we are cautiously optimistic about the power of this data to help reconstruct the thinking of prosecutors during their declination decisions. The data was collected for purposes of internal management rather than a public explanation for prosecutor choices. The volume of cases in the system forced screening attorneys to make their choices quickly. While managers routinely used the data to evaluate the timeliness of an attorney’s work and to make sure that a single prosecutor did not decline charges at an unusually high or low rate, aggregate data about the most common reasons invoked for particular crimes was not routinely available to the screeners. In other words, there were no routine reports suggesting the “right answer” for explaining a declination for a given criminal charge. For these reasons, we believe that the data reasonably reflect the screening attorney’s most prominent reason in a given case for declination.17

The ability to reconstruct declination reasons allows us to address a series of questions. Do the reasons that drive declinations simply reflect the personal values or preferences of individual prosecutors, or do social forces constrain the choices available to the prosecutors? And if the reasons do derive from social forces, are those forces internal or external to the office? Are they legal or extra-legal? Do the budgetary and bureaucratic realities of the office tell most of the story, or do the substantive constraints

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

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

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

A first glance at the reasons prosecutors gave over the years for declining cases produces a familiar list. For all crimes and all years in the database (covering 1988-1999), we found three big categories that account for over 80% of the cases. As Table 1 shows, prosecutors explained that 38% of the charges they declined to prosecute were not necessary because they were “prosecuting on other charges.” Various evidentiary flaws in the charges accounted for 26% of the declinations, while concerns about the victim of the crime explained 18% of the charges declined. This general breakdown of reasons roughly tracks the reasons for declination uncovered in the handful of earlier empirical studies on the topic.

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18 For the entire period we study here, Harry Connick served as the District Attorney for Orleans Parish. Connick retired in 2002, and Eddie Jordan was elected as his successor. During Jordan’s years in office, Hurricane Katrina devastated records, facilities, and everything else about criminal justice in the city. See Christopher Drew, In New Orleans, Rust in the Wheels of Justice, N.Y. TIMES, Nov. 21, 2006. After years of community discontent about crime and management of the District Attorney’s office, Jordan resigned in October 2007. The interim District Attorney, Keva Landrum-Johnson, is running for election as a judge in 2008; five other candidates are running for election as the new District Attorney. See Laura Maggi, Events Raise Stakes in DA Race, NEW ORLEANS TIMES-PICAYUNE, July 12, 2008; Associated Press, New Orleans Murder Rate on the Rise Again, Aug. 18, 2005 (pre-Katrina murder rates rising again after falling from mid-1990s peak, contrary to downward trend in other cities; study by New Orleans Police Foundation found that 42% of serious crime cases from 2002-2004 were declined for prosecution).

19 The reasons we grouped into this category include “testimony insufficient to prove crime,” “insufficient nexus,” “analytical results insufficient,” “unlawful search no warrant,” “no corroborating evidence,” “good defense,” “physical evidence insufficient,” “no probable cause for arrest,” and “other evidence problems.”

20 The reasons included here are “victim refuses to prosecute,” and “victim no show, unlocatable.”

21 The three most important studies here are, in chronological order, VERA INSTITUTE OF JUSTICE, FELONY ARRESTS: THEIR PROSECUTION AND DISPOSITION IN NEW YORK CITY’S COURTS (1977); Frase, supra note 17; and O’Neill, supra note 17. O’Neil found that 17% of federal declinations were based on Police reasons, 48% were based on Evidentiary reasons, 20% were based on the Suspect’s Status, and 5% were based on Resources. Id. at 1459.
Table 1: Most Common Reasons for Declination of Charges, New Orleans 1988-1999

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

But this generic list of reasons falls short of establishing our more ambitious claim that prosecutors by and large decline cases based on legitimate and legal reasons, reflecting the rigors of proof at trial, the *mens rea* doctrines of the substantive criminal law, and the priorities announced in legislation or office policy for selecting among crimes. The patterns that make the case for this stronger claim of prosecutorial legality are not found in the aggregate. Instead, a closer look at particular crimes is necessary to show that one can predict, based on such legitimate concerns, which declination reasons will occur most often with different substantive crimes.

A. Reasons of Procedure: Executive Exclusion

Many scholars have observed that our criminal justice system today is more administrative than adversarial. Because of high rates of guilty pleas, we no longer count on trials in many cases to assess the evidence or to prevent convictions of the innocent. Instead, these quality control functions have moved out of the courtroom and

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22 See, e.g., Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2123 (1998) (“The substantive evaluation of the evidence and assessment of the defendant’s responsibility is not made in court at all, but within the executive branch, in the office of the prosecutor.”); Stuntz, *supra* note 4, at 506 (“Whether prosecutors sort well determines whether the system allocates punishment well, or even decently…. The prime mechanism by which undeserving defendants are cleared, or let off with only nominal punishment, is the prosecutor’s screening process.”).
into the prosecutor’s office: the meaningful screening of cases now may be prosecutorial rather than judicial.

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

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

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

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

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23 See Wright, supra note 5.
25 After removing those charges declined because the office was pursuing other criminal charges, the adjusted totals for the evidentiary categories look like this: testimony insufficient, 16.9%; insufficient nexus, 10.9%; analytical results insufficient, 3.3%; unlawful search no warrant, 3.0%; no corroboration, 2.1%; good defense, 1.8%; physical evidence insufficient, 1.4%; no probable cause for arrest, 1.4%; other evidence problems, 1.2%; these categories total 42% of the adjusted pool of declined charges.
26 These “adjusted” totals of charges declined are reasonably consistent with O’Neill’s findings for the federal system, where the largest category for declination was evidentiary reasons, accounting for 48% of declinations. See O’Neill, supra note 17.
This “executive exclusionary rule” is no trivial after-thought to the constitutional exclusionary rule that judges invoke during pre-trial rulings to exclude evidence. In terms of sheer volume, executive exclusion appears to be more important than judicial exclusion. For instance, the New Orleans data show at least 6,112 declinations by prosecutors based on search and seizure reasons, compared to 723 dismissals of charges after judges granted motions to suppress evidence due to improper searches or seizures.

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

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

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

The break-down between the two leading search-and-seizure categories offer one clue that prosecutors apply the law of search and seizure differently than judicial doctrine

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27 Most studies of judicial exclusions estimate that judges exclude evidence in something between 0.65% and 3% of felony arrests. See Thomas Davies, A Hard Look at What We Know (and Still Need to Learn) About the “Costs” of the Exclusionary Rule: The NIJ Study and Other Studies of “Lost” Arrests, 1983 AM. B. FOUND. RES. J. 611; L. Timothy Perrin et al., If It’s Broken, Fix It: Moving Beyond the Exclusionary Rule, 83 IOWA L. REV. 669 (1998).

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

29 The literature measuring the impact of the exclusionary rule recognized the separate contribution of prosecutors in the early studies, but then dropped the point. In cities other than New Orleans, estimates of the impact of exclusion within the prosecutor’s office fluctuate a lot. See General Accounting Office, Impact of the Exclusionary Rule on Federal Criminal Prosecutions (1979) (Rep. No. GGD-79-45) (analyzing 38 U.S. Attorney offices for two months in 1978, 0.4% of all cases presented were declined because of search and seizure problems); National Institute of Justice, The Effects of the Exclusionary Rule: A Study in California (1982) (analyzing felony arrests rejected for prosecution in California cities, 1976-1982, statewide search and seizure problems accounted for 4.8% of declinations, but 8.5% in San Diego).
would suggest. Prosecutors in New Orleans distinguished sharply between warranted and unwarranted searches. Unwarranted searches produced 2.95% of the charges declined, while “unlawful search with warrant” only produced 0.03% of the declinations, roughly 100 unwarranted cases declined for every warranted case declined. Constitutional doctrine instructs judges to use the same standards for reviewing warranted and unwarranted searches. The gap between prosecutor exclusions of warranted and unwarranted searches reflects in part the far larger total number of warranted searches, but that difference probably does not fill the entire gap. It may be that prosecutors were reluctant to give up on cases when officers invested enough effort to obtain a warrant, or that the errors in warranted searches were more subtle than errors in unwarranted searches. Perhaps prosecutors figured that judges themselves should correct any judicial errors in warrants.

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

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

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30 Other exclusionary rule categories included “no probable cause for arrest” at 1.4%, “other due process problems” at 0.72%, and “inadmissible confession by defendant” at 0.04%. Cf. Craig D. Uchida & Timothy S. Bynum, Search Warrants, Motions to Suppress and “Lost Cases”: The Effects of the Exclusionary Rule in Seven Jurisdictions, 81 J. CRIM. L. & CRIMINOLOGY 1034 (1991) (analyzing all warrants filed during six months in 1984 and 1985 in seven cities; only 1 of 1748 warrants rejected by magistrates; motion to suppress granted and case dismissed in 1.5% of all warrant cases).

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

32 While there are many barriers to learning the total number of searches in a jurisdiction and the proportion of those searches that are based on search warrants, one study estimated that less than one-sixth of searches are warranted. See Ramona Lampley & Cassandra Rich, An Empirical Study of Search and Seizure in a Mid-Sized American City (2003), available at http://law.wfu.edu/x5977.xml (42 of 272 reported searches in three-month period were based on search warrants).

33 See LAFAVE, supra note 29; but see Welsh v. Wisconsin, 466 U.S. 740 (1984) (exigent circumstances present here, “when the underlying offense for which there is probable cause to arrest is relatively minor.”).

34 See Davies, supra note 25 (summarizing studies, showing exclusion in range of 3 to 5 percent in drug and weapons cases); Perrin, supra note 25.

35 Studies in other jurisdictions have found a similar but less pronounced difference. Id.
common in the different crime categories. The evidence in a possession crime is likely to be found in a protected place, and physical evidence is especially important in drug cases, where there is rarely a victim or other lay witness to testify. But part of the difference could also reflect a greater reluctance by prosecutors to credit search and seizure problems in more serious crimes, and perhaps a realistic prediction that courts will hesitate to exclude evidence in the most serious cases, despite what the doctrine says.

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

B. Reasons of Substance: The Criminal Law

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

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

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37 See, e.g., U.S.S.G. § 2F1.1 (majority of sentence in fraud cases attributed to amount of loss).
What explains the practical disappearance of mens rea and the definition of criminal acts? The answer is built into the criminal codes themselves; they contain the seeds of their own irrelevance. When a prosecutor faces difficulty proving one crime, the code is likely to offer some other charging option that authorizes a similar range of sentences. If the alternative charge calls for lower punishment levels, the prosecutor might split the conduct into two distinct counts, opening up the higher options once again. Or the prosecutor might choose a different system altogether, allowing the federal system (or the federal and state systems in tandem) to produce a punishment range when an initial serious state crime seems out of reach.

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

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

So there is plenty of reason to despair over criminal codes. The New Orleans database, however, reveals that the substantive criminal law does exercise some meaningful control over the prosecutor’s choice of charges. The elements of the available offenses allow us to anticipate the reasons prosecutors give for declining to file charges.

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

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38 The prosecutor’s discretion to subdivide conduct into separate counts, and the judge’s discretion to consider the extra counts when selecting a sentence, are enormous issues that have just begun to attract the attention they deserve. See Michael L. Seigel & Christopher Slobogin, Prosecuting Martha: Federal Prosecutorial Power and the Need for a Law of Counts, 109 PENN STATE L. REV. 1107 (2005).
Table 2: Reasons for Declining Homicide Charges, New Orleans 1988-1999

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

As Table 2 shows, the reasons for declining charges shift in predictable ways for homicide offenses. For first degree murder, an exceptionally high proportion of charges were declined because the prosecutor was “prosecuting other charges” (presumably lesser homicide charges).\(^{41}\) Perhaps these discounts were necessary because the initial charges reflected some wishful thinking by investigating officers in these high-stakes crimes. The relatively high total percentage of charges declined for first degree murder (51%) also shows a serious gap between the hopes of the investigating officers and the valuation of the screening attorney.\(^{42}\)

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

At the lower end of the scale—second degree murder and lesser homicides, which include manslaughter, negligent homicide, and vehicular homicide—prosecutors did not give up easily on these cases. They declined relatively low percentages of the recommendations in these categories (17% for second degree murder and 24% for lesser homicides). For the small absolute number of these charges declined, however, the prosecutors chose reasons with some finality, indicating either a lack of sufficient proof even for these lowest levels of mens rea, or a decision that a criminal sanction was not warranted at all. For instance, a large proportion of the declined cases for these two

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\(^{41}\) The lesser charge prosecuted instead of attempted murder was aggravated assault or some other form of assault.

\(^{42}\) The differences between the percentages in the cells in Table 2 are statistically significant. Using the chi-square test of significance, the observed chi-square value is 797.29, while the critical value of chi-square for \(df=24\) and \(p = 0.01\) is 42.98, so the value of \(p\) is below 0.01.
categories (as compared to other homicide crimes) were “not suitable for prosecution.” This reflects a screening prosecutor’s judgment that the civil justice system holds the best response to these least culpable deaths.

The reasons for declining lesser homicide charges also concentrate on a legal problem specific to those cases. The unusually high number of “good defense” reasons (13%) reflects the fact that many manslaughter deaths involve fights, leading to claims of self-defense and provocation.43

Similar observations about the relevance of the criminal code hold true as we move from homicide crimes, where the important variable is mens rea, to theft crimes, where the key variable is the criminal act. For the least serious form of theft crimes under the Louisiana code, possession of stolen property, prosecutors explained 19% of their declinations by declaring that the testimony was “insufficient.”44 For the more serious form of the crime, theft, prosecutors invoked the same reason less than half as often, for 7% of the declined charges.45

This difference in the use of reasons tracks a distinction in the law—the definition of the criminal acts for the two different forms of theft crimes. The criminal act for the more serious version, “taking of anything of value which belongs to another,” allows more straightforward proof than the “possession” required for the lesser crime. A witness’s simple account of actions that the police initially charge as theft is usually adequate to prove the criminal act of “taking.” On the other hand, a witness’s account of the location of stolen goods and the defendant’s actions may not suffice to show possession. A more subtle criminal act element for the lesser possession crime, therefore, leads prosecutors to decline these cases more often based on “insufficient” testimony.

For both homicide and theft declinations, then, these are law-based judgments.46 It is easy to picture prosecutors making their declinations in homicide or theft cases with the code book and case digest in hand. A combination of legal reasoning and predictions about the likely views of juries produces the pattern of reasons. Because they fit roughly with law-based expectations, the reasons that screening prosecutors gave to their

43 The “lesser homicides” in Table 2 are vehicular homicide, negligent homicide, and manslaughter. We combined these columns because the separate crimes produced several expected frequencies lower than 5.
44 Prosecutors declined 68% (35,304 out of 52,010) of the police recommendations to charge under §14:69. Nearly half of those (45%) were declined because the defendant was prosecuted for other charges.
45 Of the 18,376 charges declined under §14:67, 47% were declined because the defendant was prosecuted for other charges. Overall, prosecutors declined 52% of the police recommendations under this code provision.
supervisors—who pay particularly close attention to homicide cases—appear to be based on good faith judgments about the proper meaning of the substantive criminal law.

C. Reasons of Proof: Victims and Prior Relationships

In a study of the criminal courts of New York City 25 years ago, it came to light that the relationships between victims and defendants play a dominant role in criminal justice processing. The Vera Institute study of felony arrests showed very high numbers of cases involving a prior relationship between the defendant and the victim, not only in assaults and homicides, but also in some property crimes. A prior relationship existed in more than half of all felonies involving victims, including 83% of the rape cases, 69% of the felony assaults, 36% of the robberies, and even 39% of the burglaries.\textsuperscript{47} Cases involving these relationships were more likely than other cases to drop out of the criminal system; for instance, felony assaults that involved a prior relationship led to a conviction in 46% of the cases, compared to 71% of the assaults involving no prior relationship.\textsuperscript{48} Interviews with prosecutors and judges confirmed the causal link: the prior relationships between the defendant and the victim provided one of the two most important factors (along with the defendant’s prior record) in their decisions to reduce or dismiss charges.\textsuperscript{49}

The impact of victim relationships is forgotten too often, but the New Orleans data certainly shows it at work. Overall, 30% of declinations are attributed to victims who “refuse to cooperate” or those who are “no shows.”\textsuperscript{50} Recall also, from Table 1, that “witness” problems are far less common than “victim” problems, cutting across all crimes except for homicide cases.\textsuperscript{51}

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

As Table 3 indicates, these victim issues operate visibly in rape and other sexual assault crimes. For aggravated rape, the “victim refuses to cooperate” and “victim no show” reasons accounted for a relatively low 29% of the declinations. For the less serious crime of forcible rape, those two categories explained a larger number of declinations: 44% of the cases.\textsuperscript{52} First degree sexual battery, another intermediate form of sexual

\textsuperscript{47} See Vera Institute, supra note 19, at 19.
\textsuperscript{48} Id. at 28.
\textsuperscript{49} Id. at 19, 135-137.
\textsuperscript{50} Cf. O’Neill, supra note 17, which does not show any category for victim reasons, and attributes only 3% of all declinations to “witness problems,” which may include victims.
\textsuperscript{51} Prosecutors might have applied these terms sloppily at times. Note in Table 2 that “victim” refusal to cooperate was an important reason explaining dismissal of second degree murder charges.
\textsuperscript{52} The differences among the percentages in Table 3 are statistically significant, using the chi-square test for significance. The observed chi-square value is 163.73, while the critical value of chi-square for df=20 and p = 0.01 is 37.57, so the value of p is below 0.01.
violence, also showed one of the stronger impacts from the victim-related reasons, at 34%. For the least serious forms of sexual battery (“other sexual battery”), the influence of these two victim categories dropped back down to 23%.
Table 3: Reasons for Declining Rape and Other Sexual Assault Charges, New Orleans 1988-1999

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

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

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

These victim-related declinations offer one leading example of a broader legal basis for prosecutor decisions: proof problems. Prosecutors who decline cases because of victim troubles do not act on personal whims or a personalized set of priorities. Instead, they are responding to the fundamental legal requirement that the government prove its
case beyond a reasonable doubt.\textsuperscript{53} The fact that prosecutors invoke victim-related reasons more often to explain sexual assault declinations than for other crimes is predictable, at least for anyone with experience in criminal justice.

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

\textbf{D. Reasons of Policy: Resource Limits}

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

But the limits of legal doctrine do not exhaust the influences on declination choices. Prosecutors who make resource trade-offs inevitably must prioritize crimes, and those priorities will not always turn on their chances of obtaining a successful prosecution. Priorities get set for reasons other than money. Even if the prosecutor’s office had an unlimited budget, attorneys would not choose to prosecute every legally sustainable case that the police recommend. Chief prosecutors, who must face the voters every few years, understand that some legally valid applications of the criminal law would be political suicide. Current public opinion constantly rewrites the terms of a criminal code drafted by legislatures over many decades.\textsuperscript{54}

Given these resource and political restraints, chief prosecutors often set office policies designed to keep the declinations of individual attorneys in line with their own priorities. These policies might put a higher priority on some crimes than others, or they might emphasize charges against certain offenders (say, repeat offenders).\textsuperscript{55} Or the charging policies might prioritize a process value, such as limits on charge movement and restrictions on plea bargaining. As our earlier research on the New Orleans office

\textsuperscript{53} In re Winship, 397 U.S. 358 (1970).
\textsuperscript{54} See O’Neil, supra note 17, at 1452 (in federal courts, matters designated as national priorities are less likely to be declined).
\textsuperscript{55} See id. at 1465 (in federal courts, policy reasons for declination more likely to be invoked for regulatory public order offenses; evidentiary reasons more commonly invoked for violent and fraudulent property cases).
explained, policies there linked charging decisions with an effort to inspire public confidence through limits on plea bargaining.  

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

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

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

56 See Wright & Miller, supra note 11.
57 Bureau of Justice Statistics, Local Police Departments, 1999 (May 2001, NCJ 186478) (over 90% of police departments have policies dealing with domestic violence and over three quarters have policies encouraging arrest in at least some domestic violence situations); Robert C. Davis, Barbara E. Smith & Bruce Taylor, Increasing the Proportion of Domestic Violence Arrests That Are Prosecuted: A Natural Experiment in Milwaukee, 2 CRIMINOLOGY & PUB. POL’Y 263 (2003).
58 The City of New Orleans, however, did pass a domestic violence ordinance in 1994. See Katy Reckdahl, Why Doesn’t She Leave? Once Dismissed as “Family Trouble,” Domestic Violence Is Now Recognized as an Epidemic, GAMBIT WEEKLY, June 11, 2002, at 19. Typically, the City Attorney prosecutes ordinance violations, while the District Attorney prosecutes felonies and a few high-priority misdemeanors.
59 First Assistant Camille Buras (now a District Court Judge in Orleans Parish) first described these policies to us during interviews in January 1995.
60 L.A. CODE § 14:35.
Table 4: Declinations of Simple Battery Charges, New Orleans 1988-1999

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Recommended Charges</th>
<th>Percent Declined</th>
<th>Percent of Declinations Based on Vict Refusal To Cooperate</th>
</tr>
</thead>
<tbody>
<tr>
<td>1989</td>
<td>1,377</td>
<td>45</td>
<td>19</td>
</tr>
<tr>
<td>1990</td>
<td>1,203</td>
<td>48</td>
<td>26</td>
</tr>
<tr>
<td>1991</td>
<td>797</td>
<td>71</td>
<td>31</td>
</tr>
<tr>
<td>1992</td>
<td>1,086</td>
<td>48</td>
<td>32</td>
</tr>
<tr>
<td>1993</td>
<td>1,149</td>
<td>43</td>
<td>35</td>
</tr>
<tr>
<td>1994</td>
<td><strong>1,501</strong></td>
<td><strong>37</strong></td>
<td><strong>57</strong></td>
</tr>
<tr>
<td>1995</td>
<td>1,977</td>
<td>45</td>
<td>50</td>
</tr>
<tr>
<td>1996</td>
<td>1,720</td>
<td>45</td>
<td>51</td>
</tr>
<tr>
<td>1997</td>
<td>1,781</td>
<td>41</td>
<td>45</td>
</tr>
<tr>
<td>1998</td>
<td>1,643</td>
<td>47</td>
<td>49</td>
</tr>
<tr>
<td>Total Period</td>
<td>16,123</td>
<td>46</td>
<td>51</td>
</tr>
</tbody>
</table>

For simple battery, one would expect the special efforts of the prosecutor’s office to pay off by bringing down the total number of declinations. The percentage of declinations strayed from the overall average of 46% in only two years: declinations moved up to 71% in 1991, and they dipped to 37% in 1994. Perhaps the 1994 rate reflected the temporary effects of the new District Attorney policy, along with a city-wide emphasis on the issue at that time. In 1994, soon after the U.S. Congress passed the Violence Against Women Act, newly-elected mayor Marc Morial appointed a Domestic Violence Task Force in New Orleans.\(^1\)

Whatever was happening in 1994 in the simple battery cases, however, did not continue into 1995, when the declination rate returned to 45%. With the benefit of hindsight, it seems clear now that the District Attorney’s office policy changed without the full organizational support of the police and the courts. Only in 1999 did the judges organize a special Domestic Violence Monitoring Court, placing more emphasis on the use of protective orders. It also took some time for changed priorities to percolate through the police department.\(^2\)

The data on reasons adds depth to the story of an office policy that struggled to take effect. An office that urges victims to press charges might be expected to rely less often on the “victim refuses to cooperate” reason for a declination. The use of the “uncooperative victim” reason for declination, however, actually increased after the mid 1990s change of policy in Connick’s office. In 1992, 32% of the declinations in simple

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\(^1\) See Reckdahl, *supra* note 55.

battery cases were based on a victim’s refusal to cooperate, but starting in 1994, the numbers remained higher, typically near 50%.\(^{63}\)

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

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

A second common context for assault crimes also reveals office policies and priorities at work. Many assault charges in New Orleans, as in other cities, grow out of altercations between defendants and police officers. Officers who investigate other alleged crimes could add a charge of “resisting an officer” or “battery of a police officer” if the suspect physically resists arrest.\(^{64}\) The more serious version of the offense, battery of a police officer, was refused at a lower rate (27%) than any of the other assault crimes. This suggests that the NODA office placed a high priority on these clear-cut cases of violence against police officers, probably to maintain stronger relationships between the office and the city police department. On the other hand, the more commonly recommended lesser charge, “resisting an officer,” was declined at one of the higher rates for this group of crimes, 49%. The amorphous legal description of the criminal act involved here—resistance—left more room for the prosecutor’s office policies to drive the outcomes.\(^{65}\)

Table 5 shows the reasons that prosecutors gave for dismissing assault cases during the entire period 1989-1999.\(^{66}\)

\(^{63}\) Smaller increases occurred for the “victim no show” reason, which moved from 11% in 1991 (64 of 566) up to 20% in 1998 (152 of 774).

\(^{64}\) See L.A. CODE §§ 14:34.2, 14:108.

\(^{65}\) See MILLER & WRIGHT, supra note 34, at 11-16 (tracking judicial regulation of police efforts to enforce civility in police-citizen interactions).

\(^{66}\) The differences among the percentages in Table 4 are statistically significant, using the chi-square test for significance. The observed chi-square value is 9,909, while the critical value of chi-square for df=20 and p = 0.01 is 37.57, so the value of p is below 0.01.
Table 5: Reasons for Declining Assault Charges, New Orleans 1988-1999

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

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

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

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

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

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

For other cases, the constraints are simultaneously internal and legal. They are internal, in the sense that oversight from other legal bodies does not compel the result. Put another way, in some cases the prosecutor declines to file charges even though the case might ultimately result in a legally valid conviction.67

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

II. Race and Unstated Reasons

In Part I, we considered the lessons one might draw from the stated reasons of screening attorneys when they decline to file charges. Those stated reasons, as we have seen, link in identifiable ways to various legal sources. Skeptics, however, might wonder if stated reasons really tell us anything. The reasons that screening attorneys record for

67 Cf. Malcolm M. Feeley, Two Models of the Criminal Justice System: An Organizational Perspective, 7 LAW & SOC’Y REV. 407 (1973) (system of criminal justice is both a “set of highly formalized” rules and also an organization with no “incentives and sanctions” to enforce the norms).
internal management use might indeed portray hard-working attorneys who consider legitimate legal factors before making wise and reasoned choices. But isn’t that always the case when employees describe their own work for their bosses?

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

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

Race leaves its mark on criminal justice outcomes: any casual stroll around a busy criminal courtroom on a busy weekday should be convincing on this score. Prosecutors are only one potential source of these racial disparities; they could also derive from the community itself, the police, the courts, defense counsel, corrections authorities, parole boards, legislative bodies who fund criminal justice agencies or define crimes, and many others.

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

A. Whence Criminal Justice Bias?

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

Part of the pattern results from the behavior of people in the community. For instance, young African-American males commit homicides at a rate higher than their portion of the population, and that translates into arrests, prosecutions, convictions, and sentences at higher rates than the rest of the population.68

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68 See Callie Rennison, Violent Victimization and Race, 1993-98, at 10 (March 2001, NCJ 176354); U.S. Department of Justice, Bureau of Justice Statistics, Criminal Victimization in the United States, 2005 Statistical Tables, at Table 48 (December 2006, NCJ 215244). This is not true for every crime. For drug offenses in particular, sales and possession cut fairly evenly across racial groups, but the drug crimes that
When the police begin to investigate possible crime, they can tilt the racial imbalance even further out of line. The department’s leadership might allocate their officers in places—designated without much careful thought as “high crime” neighborhoods—where they are most likely to witness the crimes that young minority males commit.69 Meanwhile, crimes in other quarters of the city go unnoticed. Departmental methods of evaluating officers (for instance, rewarding officers for the number of drug arrests they make) could make a difference.70 The department might train officers to investigate clues that lead most often to the arrest of young minority males, such as techniques that direct special scrutiny to young men who drive expensive cars (those whose crime is “driving while black”) because this effort is thought to be an efficient way to catch drug dealers.71 And finally, the bias of individual police officers might play a part. An officer who is more inclined to view a young minority male as “dangerous” will not likely turn down a chance to arrest the suspect when probable cause is present.

Once the police complete their work, prosecutors could contribute to the imbalance themselves—or counteract the effects of police work. As they sort through the files that the police deliver to them, prosecutors must select which cases to decline to prosecute, which to charge at some level below the recommended charges of the police, and which to charge at or above the recommended levels. In disposing of the cases after filing, prosecutors reach plea agreements in some cases by reducing charges, and in other cases by recommending a light sentence. They also choose which cases to dismiss outright. At every point along the way, prosecutors could shift the racial mix of the defendants.72

Judges might contribute in their own ways. Particularly in lower-level felonies and serious misdemeanors, they can influence the decision of defendants whether to waive defense counsel.73 For jury trials, their evidentiary and procedural rulings might produce an acquittal for some defendants and not for others. For bench trials, the judge determines who is convicted of the most serious charge, or lesser charges, or acquitted entirely.

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The judge’s real influence appears at sentencing. Particularly in a discretionary and indeterminate sentencing system, the judge’s general impression of the defendant—not tethered to specific legal or factual findings—can add or subtract years from a sentence.74 These impressions can shape the conditions the judge places on probation, and thus change the odds that a probationer will violate the conditions and return to prison. Finally, probation and corrections officials can also contribute to the impact of the criminal justice system on different races and classes of defendants.

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

The data from New Orleans make such a measurement possible. For all crimes combined, the racial makeup of the defendants entering and exiting the prosecutorial pipeline were virtually identical: 12.2% of the defendants that police referred for prosecution were white and 85.6% of those defendants were black, while 12.1% of the defendants actually charged were white and 85.7% were black.75

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

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74 See Rodney Engen & Sara Steen, The Power to Punish: Discretion and Sentencing Reform in the War on Drugs, 105 AM. J. OF SOCIOLOGY 1357 (2000).
75 Overall, the population in New Orleans in 2000 (before Hurricane Katrina changed the demographic mix along with the rest of the landscape) was 67.3% black and 28.1% white. See http://quickfacts.census.gov/qfd/states/22/2255000.html.
Table 6
Net Prosecutor Impact on Racial Composition of Defendant Pool
For High-Volume Crimes, New Orleans 1988-1999

<table>
<thead>
<tr>
<th>Crime</th>
<th>White %</th>
<th>Black %</th>
<th>Total Charges</th>
<th>White %</th>
<th>Black %</th>
<th>Total Charges</th>
<th>White %</th>
<th>Black %</th>
</tr>
</thead>
<tbody>
<tr>
<td>Illegal Poss. Stolen Things</td>
<td>7.3</td>
<td>90.7</td>
<td>24,056</td>
<td>9.0</td>
<td>89.0</td>
<td>12,398</td>
<td>1.7</td>
<td>-1.6</td>
</tr>
<tr>
<td>Drug Manuf., Distribution</td>
<td>3.7</td>
<td>95.2</td>
<td>24,822</td>
<td>3.6</td>
<td>95.6</td>
<td>11,056</td>
<td>-0.1</td>
<td>0.4</td>
</tr>
<tr>
<td>Drug Possession</td>
<td>7.7</td>
<td>91.6</td>
<td>46,560</td>
<td>10.2</td>
<td>89.0</td>
<td>9,839</td>
<td>2.5</td>
<td>-2.6</td>
</tr>
<tr>
<td>Resisting an Officer</td>
<td>9.2</td>
<td>89.0</td>
<td>18,463</td>
<td>9.0</td>
<td>89.2</td>
<td>9,004</td>
<td>-0.2</td>
<td>0.2</td>
</tr>
<tr>
<td>Aggravated Battery</td>
<td>7.8</td>
<td>90.4</td>
<td>15,339</td>
<td>7.4</td>
<td>91.0</td>
<td>8,288</td>
<td>-0.4</td>
<td>0.6</td>
</tr>
<tr>
<td>Drug Para. Transaction</td>
<td>21.0</td>
<td>78.3</td>
<td>8,825</td>
<td>19.0</td>
<td>80.4</td>
<td>7,762</td>
<td>-2.0</td>
<td>2.1</td>
</tr>
<tr>
<td>Simple Battery</td>
<td>9.4</td>
<td>88.3</td>
<td>16,123</td>
<td>8.3</td>
<td>88.6</td>
<td>7,438</td>
<td>-1.1</td>
<td>0.3</td>
</tr>
<tr>
<td>Theft A</td>
<td>23.1</td>
<td>74.5</td>
<td>11,944</td>
<td>21.9</td>
<td>76.1</td>
<td>6,655</td>
<td>-1.2</td>
<td>1.6</td>
</tr>
<tr>
<td>Theft C</td>
<td>12.1</td>
<td>86.6</td>
<td>11,233</td>
<td>14.2</td>
<td>84.3</td>
<td>5,703</td>
<td>2.1</td>
<td>-2.3</td>
</tr>
<tr>
<td>Theft B</td>
<td>16.4</td>
<td>82.1</td>
<td>11,251</td>
<td>20.5</td>
<td>78.3</td>
<td>5,487</td>
<td>4.2</td>
<td>-3.8</td>
</tr>
<tr>
<td>Simple Burglary</td>
<td>10.6</td>
<td>86.8</td>
<td>14,646</td>
<td>11.7</td>
<td>85.7</td>
<td>5,254</td>
<td>1.2</td>
<td>-1.1</td>
</tr>
<tr>
<td>Trespass</td>
<td>8.6</td>
<td>88.1</td>
<td>8,528</td>
<td>8.3</td>
<td>87.6</td>
<td>5,000</td>
<td>-0.3</td>
<td>-0.5</td>
</tr>
<tr>
<td>Aggravated Assault</td>
<td>10.6</td>
<td>87.7</td>
<td>10,451</td>
<td>8.6</td>
<td>89.7</td>
<td>4,644</td>
<td>-2.0</td>
<td>2.0</td>
</tr>
<tr>
<td>Armed Robbery</td>
<td>3.2</td>
<td>95.2</td>
<td>15,179</td>
<td>3.8</td>
<td>95.4</td>
<td>4,614</td>
<td>0.6</td>
<td>0.2</td>
</tr>
<tr>
<td>Flight from Officer</td>
<td>5.8</td>
<td>92.9</td>
<td>6,166</td>
<td>5.9</td>
<td>93.1</td>
<td>4,151</td>
<td>0.1</td>
<td>0.2</td>
</tr>
<tr>
<td>Damage to Property</td>
<td>19.5</td>
<td>78.5</td>
<td>6,980</td>
<td>16.3</td>
<td>82.0</td>
<td>3,809</td>
<td>-3.3</td>
<td>3.5</td>
</tr>
<tr>
<td>Forgery</td>
<td>25.9</td>
<td>72.6</td>
<td>15,994</td>
<td>27.3</td>
<td>71.8</td>
<td>3,546</td>
<td>1.4</td>
<td>-0.9</td>
</tr>
<tr>
<td>Attempted Murder</td>
<td>5.6</td>
<td>92.6</td>
<td>4,394</td>
<td>5.6</td>
<td>92.9</td>
<td>3,203</td>
<td>-0.0</td>
<td>0.3</td>
</tr>
<tr>
<td>Disturbing Peace</td>
<td>12.0</td>
<td>85.1</td>
<td>4,585</td>
<td>10.9</td>
<td>85.5</td>
<td>2,662</td>
<td>-1.1</td>
<td>0.4</td>
</tr>
<tr>
<td>Conv. Person w/Weapon</td>
<td>3.3</td>
<td>96.1</td>
<td>6,712</td>
<td>4.5</td>
<td>95.1</td>
<td>2,491</td>
<td>1.1</td>
<td>-1.0</td>
</tr>
</tbody>
</table>

Note that prosecutors increased the percentage of white defendants in the pool roughly as often as they increased the percentage of black defendants. In 9 of the 20 high-volume crimes listed here (those with a positive number in the “white %” column for net prosecutor impact), prosecutors reduced the racial imbalance in the pool that they received from the police. Most of the crimes reflecting the larger prosecutor impact (those highlighted with an increase of at least 2%) involve property or drug offenses rather than crimes of personal violence. For the most serious violent offenses on this high-volume list, such as armed robbery or attempted murder, the prosecutors likely felt a stronger obligation to file charges as the police recommended. The seriousness of the alleged offense overwhelmed any considerations about racial imbalances or the defendant’s social background.

Note: These numbers compare in interesting ways to figures from studies of the juvenile justice system. For instance, in North Carolina in 2004, black juveniles were “referred” into the system by citizens and police officers at a higher rate than white juveniles, but prosecutors did not meaningfully change those demographics when they decided which cases to “petition” into the juvenile adjudication system. See Devon J. Green & Megan S. Shafer, Note, The Faces Within: An Examination of the Disparate Treatment of Minority Youth Throughout the North Carolina Juvenile Justice System, 40 WAKE FOREST L. REV. 727 (2005).
The data allow us to quantify, in a rough sense, the contribution of prosecutors to racial imbalance versus the contribution of other criminal justice actors. The data also show that it is crucial to move beyond the aggregate level. While numbers tracking the operation of “criminal justice” writ large may show no racial disparities worthy of comment or concern, the picture looks different once we break down the numbers by crime, or by class of crime, or by subgroups of prosecutors in an office, or by other subcategories. Important questions about consistent and principled prosecutorial choices come to light only after “drilling down” into the numbers. We now turn to the different potential responses of prosecutors to such data-driven insights about declinations.

B. Whither Criminal Justice Bias?

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

1. External Regulation

For many decades, critics of the prosecutor’s contribution to racial injustice have turned to constitutional doctrine, as enforced by the courts, as the leading remedy. The straightforward idea is that “selective prosecution” based on race or gender violates the equal protection clause of the fourteenth amendment.

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

Our second reference point is United States v. Armstrong. When criminal defendants claim that the government’s “selective enforcement” of a law violates the

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equal protection clause, courts ask the defendant to address several issues. First, the defendant must show that others similarly situated were treated differently (for instance, the police did not arrest someone in a different group, despite a viable case against the person). Second, the defendant must show that differences between the groups receiving different treatment are legally significant (for instance, different treatment of racial or gender groups). Finally (and this is the most difficult showing), a defendant must demonstrate that the government agents intentionally discriminated against the group—that is, they chose the target because of the group membership, and not in spite of the group membership. Armstrong created daunting hurdles for such claims: the case involved the preliminary question of whether defendants could even pursue discovery to make these showings. Armstrong lost, and it is difficult to imagine a realistic winning claim, even at the discovery stage.80

The third is a case from Georgia, Stephens v. State.81 The defendant there challenged his life imprisonment based on his second conviction for the sale of a controlled substance. The judge imposed the penalty under a mandatory sentencing provision, and Stephens claimed that Georgia authorities applied the law in a way that discriminated on the basis of race. In Hall County, for example, 14 of the 14 people serving sentences under this statute were black. The law was used to impose a life term on 202 out of 1,107 eligible black defendants between 1990 and 1994, and only 1 out of 167 eligible white defendants. Despite these whopping imbalances, Stephens lost his equal protection claims (both the federal and the state versions).82

This sample of cases illustrates, we think, how timidly the judiciary responds even to the most compelling evidence of systematic bias.83 Perhaps this is a necessary evil, since the implications would be enormous if courts were to intervene in similar situations more often. But the inability of courts to respond to systematic problems is no reason to ignore the problems.

2. Internal Regulation

What are the prospects that an internal regulation of prosecutors’ choices might begin to heal the racial imbalance in criminal justice? We are optimistic that a highly

81 456 S.E.2d 560 (Ga. 1995).
82 Initially, the Georgia Supreme Court struck down the statute, but reversed its position weeks later after a rehearing. Interestingly, the Georgia legislature amended this mandatory sentencing provision in response to the Stephens decision. The revised statute expanded the sentencing options available to the judge after conviction for violation of this statute, and broadened its coverage to include second convictions for sale of methamphetamines. See O.C.G.A. § 16-13-30(d); Trisha Renaud, DA’s, Defenders Joined On Drug Bill: Quiet Coalition Devised Repeal of Mandatory-Life Provision, Fulton County Daily Report, Vol. 107, No. 58, March 22, 1996.
83 See Bennett L. Gershman, The New Prosecutors, 53 U. PITT. L. REV. 393, 435-436 (1992) (“One of the most disturbing developments in criminal justice over the last two decades has been the judiciary’s failure to provide clear standards that would place some rational limits on the prosecutor’s discretion.”).
structured and monitored office environment, with a leadership committed to recording and reviewing the reasons for major choices, could address this problem despite the absence of external controls. At the very least, we argue that the internal strategy in such an office environment will have a more positive effect on racial imbalance than we have seen after many decades of relying too heavily on external regulation through constitutional litigation.

While those who worry about selective prosecution focus on the intentional individual bias of the line prosecutor, internal regulation allows us to broaden the frame of reference and ask about systemic bias. The key virtue of shifting the frame from individual to system is that intent, blame and causation all drop out of the picture. Managers who use disaggregated data about the outcomes and reasons invoked in their offices never have to declare who is to blame for racial disparities. Internal regulation simply asks if the racial disparity is present, whether it is a necessary by-product of other important goals, and whether the prosecutor has the power to change the disparity. Internal regulation can look forward for change strategies rather than looking backward for moral blame and legal responsibility.

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

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

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

85 Constitutional litigation requires a showing that a state actor intentionally caused a racial disparity. See Washington v. Davis, 426 U.S. 229 (1976).
Data management systems make such a diagnosis possible.\footnote{See Lynn D. Lu, \textit{Prosecutorial Discretion and Racial Disparities in Federal Sentencing: Some Views of Former U.S. Attorneys}, 19 \textit{Fed. Sent. Rep.} 192 (2007) (“As an internal office management tool, the U.S. Attorney should collect and analyze quantitative and qualitative data on the race and ethnicity of the defendant and victim at each stage of prosecution”).} An intriguing project of the Vera Institute, known as the Prosecution and Racial Justice Project, works with prosecutors in several major cities to identify subgroups of cases where prosecutors change the racial balance of cases presented to the office. The chief prosecutors now working with the Vera Project include the District Attorneys in Milwaukee, Charlotte, and San Diego.\footnote{See www.vera.org. We must disclose that both of us serve on the Advisory Board to the Prosecution and Racial Justice Project. All board members travel to periodic meetings in New York and in the cities with cooperating prosecutors’ offices; board members receive a modest honorarium.}

One vivid example of the project at work occurred in Milwaukee. Prosecutors and consultants from Vera programmed existing data systems to produce reports that showed declination rates for many different crimes. In the aggregate, these data reports showed no particular cause for alarm. Prosecutors declined the charges that police recommended at the same rates for white and non-white defendants: they declined to prosecute 31 percent of the cases both for white and non-white defendants. When the reports looked separately at felony and misdemeanor charges, the same racial parity held true.\footnote{Misdemeanors were declined for 30% of the cases recommended against defendants of both races. For felonies, prosecutors declined 34% of cases against white defendants and 33% of cases against non-white defendants. \textit{Presentation at Program-wide Meeting of Prosecution and Racial Justice Project}, Oct. 5, 2007, in New York City (hereinafter Vera Presentation).}

When the reports broke down the declinations into smaller crime categories and smaller time periods, however, more worrisome patterns appeared. The 18-month period of data collection for the Milwaukee pilot project coincided with the first few months in office for the newly-elected District Attorney, who reorganized the office along geographical lines to allow prosecutors in different sectors of the city to respond to the priorities and concerns of the people in that area.\footnote{See Tony Anderson, \textit{Ripple Effect: Milwaukee County District Attorney Restructures Department}, \textit{Wisconsin Law Journal}, May 7, 2007; Derrick Nunnally, \textit{DA Reflects on Year of Change}, \textit{Challenge}, \textit{Milwaukee Journal-Sentinel}, Dec. 26, 2007; Derrick Nunnally, \textit{New DA Starts by Remodeling}, \textit{Milwaukee Journal-Sentinel}, Sept. 5, 2007; Interview with John Chisholm, Oct. 5, 2007.} The data reports showed that over the course of the 18-month study period, the percentage of declined cases that involved white defendants rose more quickly than declinations that involved non-white defendants.\footnote{The trend line for white defendants moved from about 29% to over 40%. For non-white defendants, the trend line moved up more modestly, from about 33% to about 37%. See Vera Presentation, supra note 81.} The reason for such a trend over time was not clear to managers in the office, but it became a topic for ongoing discussion and awareness from that point forward.

More concrete results flowed from the data reports broken down by type of crime. The reports showed racial differences in the declinations for certain crimes: for instance, prosecutors declined property charges against non-whites more often than the property
charges against whites. They declined drug charges and public order charges against whites more often.93

Such a finding led to deeper inquiry. Breaking down the offense categories into even smaller sub-units, the data showed which particular crimes reflected the racial differences. Experienced prosecutors then reviewed a sample of the files for that smallest subcategory to determine whether some legitimate prosecutorial objective could explain the racial disparity. In some cases the review of larger files uncovered important facts that the electronic summary files did not capture: for instance, the value of the property stolen or destroyed seemed to explain different declination rates in property cases filed in different sectors of the city, with corresponding differential impact on races.94

On the other hand, closer inquiry for some crime categories led nowhere, revealing no obvious race-neutral justification for the pattern of declinations. When supervisors in Milwaukee received more fine-grained data about the racial differences for declinations in drug cases, they were able to diagnose marijuana possession cases as one major source of the differences. These cases were dismissed against white defendants more often than black defendants.95 Spot checks of the complete case files, along with informal conversations among the prosecutors in the office, revealed the dynamic at work. Less experienced prosecutors, who made the declination decision in the largest number of these cases, considered them to be fairly serious crimes. More experienced prosecutors, who had dealt with a larger range of crimes, considered the marijuana possession cases to be a waste of time, only rarely worthy of prosecution.96

The discovery of chaotic decisions on the declination of marijuana possession cases prompted the District Attorney to take action. He arranged for more explicit training of younger assistants about these cases, placing them in the context of other more important crimes.97 Note that such training could take place without any detailed story to explain why the differences in experience levels among attorneys in the office would produce differential racial results. The point was that charging was haphazard, and the results were not acceptable. Without any dispiriting hunt for racists in the office, prosecutors in Milwaukee identified a racial disparity in charging, inquired closer to learn that no race-neutral objectives were at work, and took concrete steps to change the pattern of charges in the future. The limited reach of constitutional doctrine under the equal protection clause was not relevant to this exercise of internal regulation.

As these examples from Milwaukee show, a well-functioning data management system in a prosecutor’s office allows a manager to run reports for sub-areas of crimes. Based on these reports, managers can note racial patterns in particular crime areas, diagnose the point in the office process where the racial gap appears, and then consult

93 Id.
94 Id.
95 Id.
96 Interview with John Chisholm, Oct. 5, 2007; Bree Nordenson, Partner Profile: Milwaukee DA Focuses on Reducing Racial Disparities, JUST ‘CAUSE (Spring 2008) (newsletter of Vera Institute of Justice).
97 Id.
reasons listed to get a sharper picture of what might be creating the pattern. The objective is not to find some individual line prosecutor who is intentionally or unintentionally biased. Instead, the manager aims to uncover practices built into the system—into the articulated and unspoken priorities and habits of the office—that turn out to have racial impact.

Once the internal inquiries identify a practice with previously unappreciated racial impact, the best response is not automatic. The chief prosecutor might shift office priorities or habits. Yet there will also be times when some legitimate law enforcement value drives the decision, and the chief prosecutor decides to continue the practice even though it contributes to racial imbalance. When the prosecutor holds onto a practice that carries undesirable side effects, the self-awareness that results from an internal inquiry can pay dividends. Flagging the racial impact of a policy encourages more careful usage in the future and promotes ongoing political accountability for the choice.98

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

In a targeted version of this strategy, the chief prosecutor might push back against apparent racial discrimination from other criminal justice actors in settings where there is specific evidence on point. For instance, a prosecutor might know about traffic stop numbers that the local police publish, showing some suspicious patterns.99 In this setting, the chief prosecutor might tell line prosecutors to look especially hard at drug trafficking cases that originate with a traffic stop.

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

98 See Davis, supra note 69 (discussing racial impact statements for prosecutorial work, discussing Vera Project in particular). Political conditions in a community might give some prosecutors greater incentives than others to open their office practices to data-based scrutiny. In particular, newly-elected prosecutors might prove more willing to scrutinize their predecessors’ actions, or the early tentative results of their own reorganizations. This seems to describe the political landscape in Milwaukee.  
allocation of resources. Similarly, a prosecutor might raise questions about the allocation of police resources in a city.

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

### III. Objective and Subjective Discretion

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

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

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

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101 Does a lead prosecutor have any incentive to pursue any of these leadership strategies? In a jurisdiction where the majority of voters are members of racial minority groups, the answer is clearly Yes.

The incentives on prosecutors will depend critically on the role of elections and information. See Ronald Wright & Marc Miller, *Dead Wrong*, 2008 UTAH L. REV. 89, 95-96. Candidates and reporters during election campaigns for district attorneys concentrate too much attention on conviction rates and case backlogs. What if our reporters routinely wrote stories about the racial impact of office structures, and asked for data from office (or the courts) to explore the questions themselves? What if they asked about efforts by the prosecutor to offer feedback and training to the police, or to lobby for legislation?

subjective views of executive discretion. Internal regulation is more likely to have an effect because it accounts for the subjective view of discretion.

The objective account of discretion is familiar, a staple of administrative law and various positivist theories of law. This concept of discretion looks for enforceable legal standards that executive branch actors must follow. The law sets outer boundaries, but any choice falling within those boundaries is something distinct from law—call it discretion—because there is “no law to apply.”

Expectations amount to “legal” rules only when government institutions could ultimately impose them on an unwilling actor. Or as Holmes put it, “If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.”

Under this objective account of discretion, prosecutors encounter very few legal limits in their work. They have plentiful charging options within generous criminal codes in the United States, and pursue personal priorities without any fear that some other institutional actor will enforce a boundary. In such a world, prosecutors can overcharge and create substantial plea-trial differentials to force guilty pleas; all such choices fall within their discretion, immune from effective legal sanctions.

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

Rejecting the image of broad freedom within wide boundaries, executive branch actors feel obliged to justify their choices based on public-regarding reasons. They feel

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104 See Wechsler, supra note 1; Sanford H. Kadish, Legal Norm and Discretion in the Police and Sentencing Processes, 75 HARV. L. REV. 904, 931 (1962) (oversight for discretion of police and prosecutors is necessary because administration of criminal law “is not sui generis, but another administrative agency which requires its own administrative law.”).
105 Oliver Wendell Holmes, The Path of the Law, 10 HARV. L. REV. 457, 459 (1897).
106 See James Vorenberg, Decent Restrain of Prosecutorial Power, 94 HARV. L. REV. 1521, 1545 (1981) (“Self-imposed limits on discretion … are likely to be no stronger than the determination of the men and women who abide by them to limit their own discretion. Human nature being what it is, people rarely give up power voluntarily, and thus the capacity of self-regulation to remove prosecutorial abuse and arbitrariness from the criminal justice system is limited.”).
107 Our account of the subjective or internal experience of discretion draws on various “internal” accounts of obedience to law in jurisprudence. Cf. H.L.A. HART, THE CONCEPT OF LAW 90-91 (2d ed. 1994); TOM R. TYLER, WHY PEOPLE OBEY THE LAW 3-7, 24-26 (1990). We apply these general internal accounts of law in the specialized setting of behavior by government officials rather than the public, and we use the concepts to explain the use of discretion (choices that officials make in zones not strictly governed by positive law) rather than compliance with law.
bound to remain consistent and to offer equal treatment to all members of the public. Actors often assert that they are aware of the risks of bias and work consciously to eliminate it.

Such obligations mark the weakness of discretion as public officials experience it from the inside. This subjective perspective on the exercise of discretion explains much about the prosecutors’ offices in the cities we have studied, and much about judging, policing, and the exercise of discretion throughout the administrative state.109

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

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

Let me start out by saying that in the District of Maine, where I have been United States Attorney for seven years and an Assistant U.S. Attorney for thirteen years, that we do, in fact, meet the standards of the Guidelines and rarely deviate from the strictures of the Guidelines as found in this little brown book. At least in the District of Maine, there are exceptions, but there are relatively few….110

The only problem with this story was the facts. When told that the statistics from his district reported prosecutor-driven departures from the federal guidelines that put that district in the middle of the national pack, Mr. McCloskey’s first response was to speculate that the data must be wrong. When confronted with details from the data, Mr. McCloskey paused. He then explained, at some length, that what appeared to be “deviations from the rules” were in fact nothing of the sort. On a long second thought, he explained that a combination of immigration and gun issues produced a large number of cases consistently and appropriately handled through prosecutorial (substantial assistance) departures, or by judicial departures that the United States Attorneys Office

109 Cf. See Rubin, supra note 15, at 1299-1300 (discussing the dominating impact of self-perceived norms about discretion in the German banking system); David Milon, Objectivity and Democracy, 67 N.Y.U. L. REV. 1, 6, 11-12 (1992) (discussing conventionalist legal theory, claiming that practices and understandings “shared within the legal profession limit the law’s interpretive potential by providing sufficiently clear and stable criteria to facilitate objective analysis of legal problems.”); M.P. Baumgartner, The Myth of Discretion, in THE USES OF DISCRETION 129, 130 (Keith Hawkins, ed., 1992); Richard Lempert, Discretion in a Behavioral Perspective: The Case of a Public Housing Eviction Board, in THE USES OF DISCRETION 185, 186-187 (Keith Hawkins, ed., 1992) (“If law is no guide, other social forces may be, and they may give rise to patterns of behavior that look, and in a sociological sense are, more rule-bound than behavior that is in theory rigorously structured by law.”).

found to be reasonable. Because these judgments were sound, in Mr. McCloskey’s view, they did not seem like “departures” at all.

The second example comes from parole practices in California. At a 2006 conference devoted to the question of “back end sentencing,” the central case study was parole revocation in California, where every offender is automatically placed under parole supervision after release. The critics of parole administration in California assailed the massive discretion of parole authorities to revoke an offender’s parole. Parole supervision—unlike sentencing, release, and parole eligibility criteria—remains largely untouched by the reform movement towards guidelines. The critics suggested that unwise and inconsistent use of the parole revocation powers were partly to blame for the state’s resource and policy crisis.

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

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112 This subjective experience of discretion is not limited to executive branch actors. Another recent discussion at the Stanford Criminal Justice Center focused on the possible role of judicial discretion in a future California sentencing reform. See http://www.law.stanford.edu/program/centers/scjc/#recorded_past_events (May 2006 conference, “A New Proposal for Sentencing Reform in California”). Several California trial and appellate judges were present, along with judges who had been active in sentencing reform in other leading state systems. One early presenter claimed that more discretion existed in the current California sentencing system than might at first appear. A sophisticated superior court judge from Southern California, a person with decades of experience in local and state criminal justice administration, responded that he had very little discretion. He then proceeded to explain that his discretion was sharply limited by mandatory sentences, by legal norms, and by political constraints, since California judge are subject to electoral review. He then acknowledged that there were some questions, such as whether sentences for multiple offenses would be served consecutively or concurrently, that were left to his discretion. On further discussion from other judges, he and others acknowledged varying degrees of involvement in plea negotiations. Other California judges pointed out their very broad discretion with regard to misdemeanants, and in the process of parole administration, parole revocation hearings, and the terms and conditions of sentences to probation.

By the time the discussion had ended, it was clear that California trial judges had very substantial sentencing discretion, even on the face of the formal law. But it was also true that the judges’ self-perception allowed for very little discretion at all. The initial response of the judges in that meeting suggested how deep-seated the belief that individual judgments are informed, rational and consistent, and as a corollary, that the judge hardly exercised discretion at all.
These snapshots may seem like isolated anecdotes, which of course they are. But they are snapshots repeated over and over in our experience, whenever we discuss discretion with those who actually wield it. The difference between the objective (external) and subjective (internal) perspectives on discretion helps explain a commonly-observed gap between discretion’s critics and its executive defenders.

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

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

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

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

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113 For a similar observation about prosecutorial self-image, see David A. Sklansky, Starr, Singleton, and the Prosecutor’s Role, 26 FORHAM URB. L.J. 509, 532 (1999) (“[D]iscretionary decisions can nonetheless be reasoned…. Prosecutors understand it, too. They do not and could not decide whom to charge, for example, in the same way they choose what to order for dinner. They think about it, they argue about it, and sometimes—although not often enough—they write policies about it.”).
Finally, the distinction between subjective and objective discretion should also change the current uses of discretion. For actors operating within the subjective framework, the objective view places on them the burden of publicly articulating those norms, rules and procedures that make them perceive so little discretion. The distinction fairly asks internal actors to be more self-aware and more open about their standards and their decisions. We now examine how openness in prosecution contributes to an effective regime of internal regulation.

IV. Internal Regulation and Transparency

Professor Robert Ellickson went to Shasta County, California in the 1980s to test the Coase Theorem.115 Shasta seemed like a perfect setting to test the theorem, which assumed that in a world of zero transaction costs, different liability rules would produce identical behavior, regardless of the legal starting point. Coase had illustrated his Nobel Prize-winning idea with an extended discussion of the ranchers and farmers.116 In Shasta County, two different liability rules were applied in two different parts of the county. As Ellickson explained, some parts of Shasta Country had “open range” rules that created liability for those farmers who did not fence in their crops, while other parts lived under “closed range” rules that created liability for ranchers who did not successfully fence in their cattle.117

Ellickson learned little about the Coase Theorem. The test he envisioned would have compared the behavior of otherwise similar people in light of the two different legal rules. But the people he studied did not even know the relevant rules, nor did they use the legal process in which those rules might have applied. Some scholars might have left Shasta County at that point, continuing the search elsewhere for another real-world test of the Coase Theorem. But having found a wall barring the original path to his study, Ellickson realized the wall itself was fascinating, and he stayed in Shasta County to describe that wall. Ellickson researched and wrote about how “people frequently resolve their disputes in cooperative fashion without paying any attention to the laws that apply to those disputes.”118 Social norms among farmers and ranchers, not local legal rules and procedures, were central to settling disputes that arose from harm to cattle and to crops.

Ellickson’s book brought new attention to ideas that sociologists had developed across the decades about the relationship between social norms and legal regimes.119

114 See Bruce A. Green & Fred C. Zacharias, Prosecutorial Neutrality, 2004 Wis. L. Rev. 837, 840 (Prosecutors have not “undertaken the task of identifying workable norms for the array of discretionary decisions that their offices make each day.”).
116 Id.
117 See Ellickson, supra note 14.
118 Id. at vii.
119 See, e.g., ROBERT E. PARK & ERNEST W. BURGESS, INTRODUCTION TO THE SCIENCE OF SOCIOLOGY (1924); see also Tracy L. Meares & Dan M. Kahan, Law and (Norms of) Order in The Inner City, 32 LAW
framed the idea in economic terms: social norms can order the behavior of people in some group settings more “efficiently” than formally developed rules of law.120 Ellickson compared legal institutions to other more decentralized methods for creating social order within groups; he also explored the mechanisms for creating such social norms. In the end, however, Ellickson’s work tells us more about alternatives to law than about the law itself.

Some of the social norms literature followed Ellickson in treating legal rules and legal institutions as irrelevant, a force for social order that some groups ignore in favor of other norms that they spontaneously develop for themselves. For instance, Lisa Bernstein has analyzed how social norms and procedures evolve within certain highly insular or traditional industries, such as the cotton trade and the diamond trade.121

Other social norms scholars depict the interaction between legal rules and social norms.122 Some studies show how social norms can determine the practical effects of a proposed law—in some cases impeding the enforcement of law and in other cases strengthening the legal rule.123 Sometimes the causation is reversed: the declaration of a new public value, to be enforced by a new legal rule, can itself shape the norms that operate among private groups.124 Some scholars describe how the existing law serves as a reference point for parties as they create alternative norms.125

Taken together, these accounts dwell on the interaction between legal rules and social norms once the legal rules are established and begin to operate among non-governmental social groups.126 Legal institutions use social norms, but those social norms operate outside the governmental agency, in society at large.


125 For example, Eric Posner depicts legal rules as a reference point for parties as they create reputations. Individuals signal their willingness to comply with inconvenient legal rules to show their more general interest in cooperation. See ERIC A. POSNER, LAW AND SOCIAL NORMS (2000).

What has not yet emerged—and what the study of District Attorneys’ offices can illuminate—is the distinctiveness of social norms within executive branch agencies. This study highlights one role of social norms within agencies, which is the potential of such norms to regularize the discretionary choices of those agencies. Just as public choice theory applied the tools of neo-classical microeconomics to the behavior of actors in legal institutions, we believe that bureaucracies are governed by social norms.

Sociologists certainly have recognized how bureaucratic structures exert distinctive group pressures on individuals, and socio-legal scholars have explored how organizational incentives shape the choices of government officials in many settings. Some have focused on the interaction between the individual line prosecutor and the defense attorneys and other members of a “working group” in the courtroom. The study of District Attorneys’ offices takes this work a step further, offering new insights about the interaction between legal sources and group culture when they meet in a special

norms and law together influence behavior, and (3) sometimes norms and law influence each other.” See McAdams, supra note 121, at 347.

127 One discussion that takes the first few steps down this road appears in Evan J. Criddle, Fiduciary Foundations of Administrative Law, 54 UCLA L. Rev. 117, 161-163 (2006). Criddle notes that a “fiduciary model” of administrative law “considers legal restraints to be just one strand in the intricate web of institutional relations, bureaucratic constraints, and social norms that influence agency behavior.” Criddle discusses several sources of these extralegal constraints, but does not pursue the topic of how they might operate differently within governmental and non-governmental organizations. See also Robert D. Cooter, Three Effects of Social Norms on Law: Expression, Deterrence, and Internalization, 79 Or. L. Rev. 1, 2 (2000) (“State organizations suffer from agency problems that preclude effective motivation of people by formal means alone. Perhaps effective formal institutions depend on flourishing informal institutions.”).

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

129 See James M. Buchanan & Gordon Tullock, The Calculus of Consent: Logical Foundations of Constitutional Democracy (1962). How could it be that 25 years after Ellickson started his work—and generations after sociologists started mapping the group cultures within bureaucracies—legal scholars and politicians in other disciplines have not pursued the distinctiveness of the law-norms interaction in the public bureaucracy setting? Our hypothesis turns on intellectual path dependence. Norms within agencies do not appear to “settle a dispute.” The birth of modern legal social norms scholarship among ranchers and cattlemen—and in opposition to formal legal rules and processes—has perhaps (and ironically) made it hard to see that the insights about the importance of social norms in understanding the power and limits of the law extend to legal institutions as well.


type of organization: one whose personnel and very mission are devoted to the rule of law.

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

A. Norms Within Legal Institutions

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

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

1. Norm Sources

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

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

134 See Posner, supra note 127.
Some of the formal rules have legislative origins. Statutes define crimes and punishments, and grant the prosecutor authority to initiate criminal charges. Statutes grant certain investigative powers or procedural tools to the prosecutor. The legislature appropriates the funds to hire prosecutors, and sometimes directs those funds to particular enforcement priorities. As we saw in Part I, such formal sources of law exert some influence beyond their literal terms. Prosecutors in their declinations seem to account for the limits of the substantive criminal law and procedural limits on searches and seizures even when the law does not strictly compel a dismissal.

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

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

But in the radically decentralized prosecutor services of the United States, it is the elected District Attorney who contributes most powerfully to the norms that prosecutors pursue. Policy priorities in the office, such as a stepped-up interest in

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136 See Criddle, supra note 128, at 162 (“Congress shapes the social norms surrounding agency identity not only through legislation, but also through formal and informal debate over pending legislation, formal congressional oversight of the administrative process, informal dialogue with agency administrators, and committee hearings on regulatory issues.”).


139 Observations about social norms almost certainly apply to courts. Consider on this point the well-developed scholarship on influence of political appointment, judicial elections, and voter initiatives. See Kathryn Abrams, Black Judges and Ascriptive Group Identification, in NORMS AND THE LAW (John N. Drobak, ed. 2006).


141 See Levine, supra note 121.

domestic violence crimes, might not result from any actual change in the criminal law, but they palpably change the norms that define what prosecutors are expected to do.\textsuperscript{143}

The sum of these parts makes the line prosecutor something more than a litigant who operates “in the shadow of the law.” Public prosecutors who decide whether to decline charges, unlike plaintiffs’ attorneys who decide whether to decide civil cases, try to fit within a group identity, a role with non-legal dimensions.\textsuperscript{144} The question is not simply whether filing the case makes sense in light of the odds of success under the current law and the opportunity cost of filing one case rather than another. The line prosecutor must ask whether filing this case would carry out the proper prosecutor’s role, with its legal dimensions, together with the expectations of the local elected prosecutor and the other prosecutors in the office, who decide how to juggle the demands of the judge and the courtroom working group, and every other component of the role.\textsuperscript{145} This is not an individual choice by a line prosecutor about the best way to fit into the “working group” of other attorneys and judges in the local courthouse; it is a collective decision by all the prosecutors in the office about how to remain true to the prosecutor’s job, after accounting for the realities of local conditions.

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

2. Norm Controls

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

The mechanism for transmitting social norms among private groups can be evanescent. Bureaucracies, however, offer clear-cut paths for norms to follow: the hierarchies and rules of the bureaucracy are designed precisely to produce coherent group

\textsuperscript{143} The power of such office policies to produce identifiable results without any changes in the underlying legal authority of the prosecutor was the subject of the first phase of our study of New Orleans. See Wright & Miller, supra note 12.
\textsuperscript{144} See Alex Geisinger, A Group Identity Theory of Social Norms and Its Implications, 78 Tul. L. Rev. 605, 638 (2004) (norm enforcement results from individual’s identification with group).
\textsuperscript{145} See Leonard R. Mellon, Joan E. Jacoby, & Marion A. Brewer, The Prosecutor Constrained by His Environment: A New Look at Discretionary Justice in the United States, 72 J. CRIM. L. & CRIMINOLOGY 52 (1981) (differences in prosecution policy “are often mandated by environmental factors over which the individual prosecutor has no control”).
action. Executive branch agents work within formal boundaries. They are trained and directed to do certain tasks or achieve certain goals (however general or specific). Executive branch agencies of any size at all, in any jurisdiction, have internal organizational and command structures. While private social groups tend to depend on a “norms entrepreneur” to step forward and shift social norms, in government agencies the norms entrepreneurs are already designated. There is no need to await the right economic or sociological conditions for a change agent to appear.

The structure, function and history of each agency will determine the extent to which the agency can consciously create, impose and change internal norms. The scale of a prosecutor’s office matters tremendously here. Think of the difficulty that the U.S. Attorney General has in shifting practices or the self-image of federal prosecutors, scattered in 93 different U.S. Attorney’s offices around the country. The elected prosecutors in local offices—even the largest urban offices—have more control over the office culture because the number of attorneys in the organization remains smaller than in the federal prosecutorial structure.

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

The points we make here about social norms within executive branch agencies are all the more true of agencies, such as prosecutors’ offices, where the critical decision-makers are lawyers. Lawyers add a layer of training and a world view that may make the incorporation of norms even more powerful and direct than for those executive branch agencies with other kinds of training. A key feature of legal training is a commitment

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147 The organizational control of norms distinguishes this account of the prosecutor’s work from the “working group” theory prominent in criminology accounts, which emphasizes the relationship between an individual prosecutor and the defense attorneys, judges, and other courtroom personnel who must work daily to process large numbers of cases. See sources cited in note 133, supra.
150 See Tanina Rostain, Ethics Lost: Limitations of Current Approaches to Lawyer Regulation, 71 S. Cal. L. Rev. 1273, 1320 (1998) (“Regulators care about appearing fair and public-minded, even if their self-interest, more narrowly defined, pulls in a contrary direction. Social norms account for the fact that governmental agencies, despite the dire predictions of public choice theory, often resist capture.”). The point may turn out to be that executive agencies with similar professional training and cultures will both incorporate norms from their fields or training and be susceptible to the norm creation and control in ways specific to the profession or training.
to consistency and the justification of general rules in terms of public values rather than personal convenience. The lawyers who work as prosecutors are inclined by training to embrace a group identity, one that assures the actor of consistent and well-justified organizing principles when making troubling choices.\footnote{151}

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

B. Judging Internal Norms

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

Transparency is hot; it has emerged as an increasingly prevalent concept in legal scholarship over the past fifteen years. A search in the legal scholarship database in Westlaw reveals the growth trend in the use of this term.\footnote{152}

\footnote{151} For a thoughtful essay on the shifting content of this group identity, see Edward Rubin, What’s Wrong With Langdell’s Method, and What to Do About It, 60 VAND. L. REV. 609 (2007).
\footnote{152} A similar but lesser trend appears in popular discourse, as demonstrated by the appearance of the term transparency in the New York Times. No similar pattern appears in federal or state cases over the same period. For a discussion of the adjustments one would ideally make to account for growth in the Westlaw news and scholarship databases over time, see Ronald Wright, The Abruptness of Acton, 36 CRIM. L. BULL. 401 (2000).
For all of the passing references to transparency, however, there have been few substantial efforts to theorize what transparency might mean in different contexts, or what might be driving the increased use of the concept. 153 We hope to illuminate some of the forces that make transparency a growing concept in law reform, and to describe how that concept can help us assess the quality of internal prosecutorial decision-making.

In our view, the idea of transparency is attracting so much attention because technology now offers a new approach to an old problem. The old problem is longstanding frustration with the legitimacy and accountability of the modern administrative state; the new technological environment is expanding access to data about government functions, which citizens and scholars can use to reveal and critique the way that governments work.

The frustration with the modern administrative state comes from failures that Franz Kafka would recognize.\textsuperscript{154} Most decisions by government actors affecting individuals do not result in formal documents explaining those decisions, nor are they subject to any significant review. This is emphatically true in criminal justice systems, where most decisions by police officers and prosecutors regarding citizens go unreviewed and unexplained.\textsuperscript{155}

Frustration with government action also extends to some areas where documents do exist, whether they appear in the daily course of government business (such as the arrest forms that officers fill out daily), or as the endpoint of formal review (such as judicial opinions, statements of reasons attached to agency rule-making, or pardon decisions by a chief executive or pardon board). Scholars and other consumers suspect that those documents do not reveal true or complete reasons behind the decision.\textsuperscript{156}

Since access to existing documents does not satisfy the itch, fuller explanations for government action may also be necessary. The due process revolution prompted the explanation of some important decisions by government officials about individuals.\textsuperscript{157} But a newer understanding is emerging: an explanation for a single case might reveal less than the patterns of government decision-making. Patterns can reveal both intentional and unintentional bias, and the probable grounds for judgment.\textsuperscript{158} Patterns of government behavior may also be useful in spotting “outlier” cases that appear to make sense on their own terms but are harder to explain in a larger information-rich context.\textsuperscript{159}

\textsuperscript{154} See FRANZ KAFAKA, THE TRIAL (Breon Mitchell trans., Schocken Books 1998) (1937); see also People v. Hobbs, 873 P.2d 1246 (Cal. 1994) (Mosk, J., dissenting) (invoking Kafka to criticize rule allowing courts to withhold all information supporting a search warrant as part of an informer’s privilege).
\textsuperscript{155} See Bibas, supra note 12.
\textsuperscript{156} Documents and text are not inherently as transparent as the proponents of “government in the sunshine” laws such as the Freedom of Information Act once hoped. See Fenster, supra note 135; Laura Schenck, Freedom of Information Statutes: The Unfulfilled Legacy, 48 FED. COMM. L.J. 371 (1996) (criticizing the exclusion of the legislative branch from federal and state freedom of information statutes); Bradley Pack, FOIA Frustration: Access to Government Records Under the Bush Administration, 46 ARIZ. L. REV. 815 (2004); Marc Miller & Gregory Aplet, Applying Legal Sunshine to the Hidden Regulation of Biological Control, 35 BIOLOGICAL CONTROL 358 (2005) (noting huge delays in response to Freedom of Information Act requests, limiting the use of FOIA as a tool in active administrative policy-making).
\textsuperscript{158} See Mark A. Hall & Ronald F. Wright, Systematic Content Analysis of Judicial Opinions, 95 CAL. L. REV. 63 (2008) (describing insights to be drawn from studies of large groups of judicial opinions).
\textsuperscript{159} Although the objective of such efforts to explain government action on an individual case level and through patterns of decisions is to promote greater legitimacy in government, the end point of these concerns about the modern administrative state is an even deeper jurisprudential malaise—a deficit in the democratic grounding and accountability of the work of modern governments. See Richard H. Fallon, Jr., Legitimacy and the Constitution, 118 HARV. L. REV. 1787 (2005); Lisa Schultz Bressman, Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State, 78 N.Y.U. L. REV. 461 (2003). That skepticism extends across the branches of government, with somewhat different concerns for each branch. See Judith Resnik & Lane Dilg, Responding to a Democratic Deficit: Limiting the Powers and Term of the Chief Justice of the United States, 154 U. PA. L. REV. 1575 (2006).
The irresistible force pushing towards greater transparency today is the capacity for technology, broadly construed, to lower the cost of collecting and distributing relevant information about government practices. Once it becomes feasible to collect and analyze case-level information about executive decisions, it is only a matter of time before one hears a call for “data-based” or “knowledge-driven” reforms.661

This pressure to build policy based on data occurs in the area of sentencing reform and the movement towards “guidelines” or structured sentencing systems.662 Another illustration appears in the call for “evidence-based reforms” of child protective services systems.663 Or consider the response over the past decade to concerns about criminal law enforcement bias. Most police agencies keep no records about voluntary conversations with citizens, and very limited records about stops. Litigation to challenge alleged “racial profiling” by police has not found much success. Nevertheless, the dominant response to claims of systematic racial bias by police in stops and searches has been to collect data on stops and searches, especially car stops.664 Both legislative and executive mandates rely on this data-driven strategy.665

These are all examples of “internal” transparency—the use of data by people within government to operate systems and to set policy. Modern sentencing reforms in the federal system and in many state systems have relied mainly upon internal transparency efforts.666 All of the modern “structured” or “guideline” reforms are grounded on better knowledge, better rules and better guidance for judges.

Increasingly, however, the data collected within government for administrative purposes greatly interests non-government actors—it offers “external” transparency. Sufficient information of reasonable reliability667 can provide new channels for government oversight by the public.

666 See Miller & Chanenson, supra note 143.
667 The information that is relevant to various policy questions is not self-defining, and what an agency collects and what an outsider wants may not match. Moreover there are huge issues of data collection, data
An informed decision about justice system data and transparency requires attention to a wider range of users and uses of data, both those within the system and those viewing it from the outside. The next generation of sentencing reform should make existing data more externally transparent, and available to a wider range of users and uses.\(^\text{168}\)

The assumption behind the collection and distribution of justice data, including highly detailed data sets, is not that all citizens will instantly flock to the bookstore and buy “Statistics for People Who (Think They) Hate Statistics,”\(^\text{169}\) or “The Cartoon Guide to Statistics.”\(^\text{170}\) Instead, a small number of sophisticated or committed users of good data can make a world of difference. For charging, plea and sentencing decisions, for example, it will often be in the interest of defense lawyers or family members to analyze information to assess whether judges and prosecutors are staying consistent with their own past behavior, with the behavior of their colleagues, and with larger legal and social norms.\(^\text{171}\) There will also be institutional incentives to develop case-level and pattern-level expertise in good justice system data. Newspapers and individual journalists will have market-based reasons and a comparative advantage over other papers and journalists if they have the expertise to evaluate this data.\(^\text{172}\)

1. **Internal and External Transparency**

Dissussions of transparency tend to concentrate on those government actions that trigger disclosure duties. The concept is usually tied to public articulation of the rules and reasoning for government decisions and access to those explanations.\(^\text{173}\) It is equally useful, however, to analyze different uses of transparency. Transparency in rules and reasoning can aim for effects that are internal to an executive branch agency, or external.

quality, and cost. In the acronym made famous among computer programmers, this is the problem of GIGO—garbage in, garbage out.

\(^{168}\) See Miller & Wright, \textit{supra} note 143; Miller, \textit{supra} note 143.


\(^{170}\) See Larry Gonick & Woollcott Smith, \textit{The Cartoon Guide to Statistics} (1994). We also do not assume that a data-rich government is merely a predicate condition for democracy, and schools must then create the correlative knowledge in society.

\(^{171}\) See Bibas, \textit{supra} note 12 (describing roles for subgroups of public in promoting transparency in criminal justice).

\(^{172}\) One dimension of the push towards greater collection and release of data about government behavior is the much lower cost of distributing and accessing information over the internet. See David Markell, “Slack” \textit{In The Administrative State and Its Implications For Governance: The Issue of Accountability}, 84 \textit{OR. L. REV.} 1, 8 (2005). Technology not only lowers the cost of collecting and distributing information, it may lower the cost of analyzing it.

\(^{173}\) Decisions are more transparent when they grow out of more detailed articulation of the reasoning behind decisions and when they allow review and criticism of both individual decisions and patterns of decisions. We do not believe the epitome of transparency is articulated judgments subject to formal challenge and review in courts. The qualities that make different government decisions more or less transparent will depend on the nature of the decision: for example whether it is a one-off or rare or common decision, whether the decision is the product of extended assessment and complex process, or whether the impact of the decision extends over time and space, or affects few or many people or other institutions.
An agency fully committed to internal transparency would identify decision-points and mandate that agents explain and record the basis for judgments at each decision-point. Records could take the form of text or numerical data, but they must accurately capture the nature of the decision. Internal transparency could increase with some combination of training, standard explanations, data storage, and supervisory review.

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

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

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

Internal executive practices can serve these same objectives. Internally, the goal of explanation can be satisfied through more detailed construction of guidelines and standardized choices that explain as much about standard decisions as possible.


175 See Bibas, supra note 12 (calling for routine disclosure of summary prosecutor office statistics on charging and dispositions).

176 See Peter H. Schuck, ed., FOUNDATIONS OF ADMINISTRATIVE LAW (2nd ed. 2003); Criddle, supra note 128.

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

Depending on the nature of the executive branch decision, explanations might be captured in prose or on standard forms or in numerical data.\textsuperscript{179}

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

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

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

Just as administrative law doctrines have left the concept of internal transparency underdeveloped, the concept of external transparency extends further than one might think. It goes far beyond the conception of formal review of agency decision-making or the simple availability of government decision-documents, reflected in the various government-in-the-sunshine acts. External transparency encompasses not only case-level explanations, but release of internal policies, procedures and training materials.\textsuperscript{180} It calls for agencies to release information about outcomes in a format that allows easy comparison and tests for consistency.

The users of external transparency are not limited to litigants in the courts. One important source of oversight can come from reporters who learn how to describe and assess the workings of bureaucracies.\textsuperscript{181} Other external actors include legislative

\textsuperscript{179}There are serious challenges in executing this idea. One must consider whether to measure one or multiple factors at each decision-point; if multiple factors, one must decide how to weight the factors.


\textsuperscript{181}Many scholarly accounts of criminal justice offer a bleak view of the role of media, and this critique surely has some truth to it. See Davis, supra note 69 (transparency and information about prosecutor’s office will be distorted through journalistic habit to promote sensational crime stories). Yet we do find hope in some prominent journalistic efforts to rise above reporting about single cases to describe the workings of
committees, scholars and students, and the many non-governmental organizations that make up “civil society.” To the extent that executive agencies collect data for internal administrative purposes, non-government actors may be able to obtain that data (through FOIA and its state analogs) and to organize it in ways that allow lawyers and policy actors to judge the work of the agency as a whole and its individual decision-makers.

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

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

2. Judging Transparency

The degree of transparency for agency decisions can range from totally opaque—think Kafka and a million of his contemporary cousins—to totally transparent. A totally transparent decision could be reproduced and assessed at every step. Few significant decisions by government, and especially those decisions involving individuals, should be totally opaque. Yet the nature of human judgment compels us to admit that no decision

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182 We have in mind both the domestic and international impact of NGOs.

183 For an example of reliance on TRAC data in the terrorism context, see Robert M. Chesney, Federal Prosecution of Terrorism-Related Offenses: Conviction and Sentencing Data in Light of the “Soft-Sentence” and “Data-Reliability” Critiques, 11 LEWIS & CLARK L. REV. 851 (2007).


185 One exception to this general limitation involves legislative review of pardons in the federal system. See Paul Singer, Showdown Brewing Over Presidential Papers, ROLL CALL, March 15, 2001 (discussing House Government Oversight Committee and Senate Judiciary Committee hearings over President Clinton’s pardon of Mark Rich).

The framework we suggest treats transparency as a matter of degree, and views any move toward greater transparency as a presumptive virtue, while recognizing that some movements towards transparency have costs that are too high to pay.

We propose to use transparency as a metric to evaluate the quality of internal regulation of executive agencies. Consider how transparency might help us evaluate the wisdom of prosecutorial declinations. Because such decisions are not subject to any traditional external legal review, these are the powers that Herbert Wechsler considered antithetical to the idea of law.\(^{187}\) What Wechsler missed was the power of transparency to promote effective ordering through internal regulation.

The United States Attorneys’ offices have built one method to make declinations more externally transparent, thus making them more legitimate. Those offices have issued policies\(^{188}\) to explain the declinations by line prosecutors.\(^{189}\) Herbert Wechsler might say that because criminal defendants cannot enforce the declination policies in court, these policies abandon law in favor of mere assertions of trustworthiness. But by articulating relatively detailed standards federal prosecutors open themselves to criticism from individual litigants, from the judges who try and sentence defendants, and from the Congress, which provides both legal authority and annual funding for departmental operations. They offer a principled basis for a defense attorney to argue that the prosecutor should reconsider the decision to charge a client.

Similar efforts within the prosecutor’s office have helped to inoculate various laws, and the prosecutorial application of those laws, from external attack. For example in Florida, state prosecutors were accused of using a 1988 habitual offender statute in an arbitrary and discriminatory manner.\(^{190}\) Florida legislative committees asked for a study of prosecutorial use of the habitual offender state. A 1992 report concluded that the statute had been used in an unprincipled and racially biased fashion in much of the state.\(^{191}\) In response, several state legislators planned to amend the habitual offender law, restricting its reach to fewer possible defendants. To head off further legislative limits, the Florida Prosecuting Attorneys’ Association (a voluntary professional organization) issued a statement in 1993 that announced specific criteria for prosecutors to use when applying the habitual offender statute. The policy specified a subset of defendants who otherwise fell within the terms of the statute—based on various combinations of prior

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\(^{187}\) See Wechsler, supra note 1.

\(^{188}\) See, e.g., U.S. ATTORNEYS’ MANUAL § 9-2.031 (Dual Prosecution and Successive Prosecution Policy, or “Petite Policy”).

\(^{189}\) See U.S. ATTORNEYS’ MANUAL, § 9-162 (2006) (Federal Prosecution of Business Organizations); U.S. Department of Justice, United States Attorneys’ Written Guidelines for the Declaration of Alleged Violations of Federal Criminal Laws: A Report to the United States Congress (1979), reprinted in Miller & Wright, supra note 35, at 897. It is interesting to note that the promulgation of the declination policies came about from Congressional concern about high federal declination rates. Other policies have been captured in the United States Attorneys Manual—which is also available to the public—for many years.

\(^{190}\) See Fla. STAT. § 775.084(4).

\(^{191}\) See Economic and Demographic Research Division, Joint Legislative Management Committee of the Florida Legislature, An Empirical Examination of the Application of Florida’s Habitual Offender Statute (August 1992) (copy on file with authors).
record and seriousness of offense—as the appropriate targets for use of the sentencing enhancement under this law. The association’s statement called for any prosecutors who planned to depart from the limits of the policy while remaining within the bounds of the statute to “notify this Organization’s President of such filings.”\(^\text{192}\) This is a successful (if partial) example of external transparency at work.

As we have detailed,\(^\text{193}\) the New Orleans District Attorney’s Office followed a path towards internal transparency. The office developed procedures, including training, staffing, promotion, case review, creation of standardized decision categories, data collection, and data review, to make the many decisions by its line prosecutors more transparent. On occasion, especially during election campaigns, the District Attorney used the aggregate statistics on declinations, trial rates and convictions to explain and defend the toughness and fairness of the office as a whole.

The United States Attorneys Offices (and other offices that release their internal policies and guidelines), the New Orleans District Attorneys Office, and the offices in Milwaukee and elsewhere that participate in the Vera Institute Project are more transparent than the norm for prosecutors offices throughout the United States. But none of these prosecutors’ offices offer a transparency ideal. Federal prosecutors have aggressively resisted efforts by defendants to obtain information about their declination practices, including information about the critical but hidden decisions that go into sorting cases between federal and state systems.\(^\text{194}\) The large FOIA exemptions for criminal law enforcement decisions,\(^\text{195}\) together with judicial doctrine that sets a ridiculously high cross-bar for claimants to clear before they can obtain discovery about declination,\(^\text{196}\) have made this legally possible. Social norms have not yet accumulated to change this secretive aspect of the prosecutor’s self-image.\(^\text{197}\)

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\(^{193}\) See Wright & Miller, *supra* note 12; Part I, *supra*.


\(^{195}\) See 5 U.S.C. § 552(b)(7).

\(^{196}\) United States v. Armstrong, 517 U.S. 456 (1996), created such a high bar to discovery about declination, charging and sorting information, even for claims of racial bias, that it may be set higher than all but the most exceptional defendant can cross, like a pole vault cross-bar set for 6 meters. The world record is 6.14 meters. Only 16 vaulters have cleared six meters or higher. See [http://en.wikipedia.org/wiki/Pole_vault#6_metres_club](http://en.wikipedia.org/wiki/Pole_vault#6_metres_club).

\(^{197}\) The New Orleans Office had what may have been one of the most internally transparent systems in the country. But the existence of that system was largely unknown to New Orleans citizens; summaries or portions of the data were not publically released or available for external review.

We use the past tense because there is no indication that Harry Connick’s successor has continued to use the same system. There was considerable evidence even before the flood that the new District Attorney planned to shift the goals of the office to include far more charge bargaining. See Gwen Filosa, *Jordan reduces backlog of cases; DA lets many plead guilty to lesser charges*, NEW ORLEANS TIMES-PICAYUNE, April 23, 2003 (highlighting use of charge bargains in backlog reduction in first 100 days in office); Michael Perlstein, *Open to Appeal; Convicted criminals say DA policy change gives them fair shot*,
It is not clear in the abstract whether strong internal transparency or strong external transparency is more likely to achieve consistent and principled outcomes. But either kind of transparency in a district attorney’s office is likely to produce better outcomes than the norm. Prosecutors on the whole earn low grades for any kind of transparency, internal or external.

An example of a transparency-focused criminal justice reform is the collection of stop and search data in response to the claim that police disproportionately stop African-American motorists—the alleged enforcement of the offense of “driving while black” or “DWB.” Some departments required officers to record standard data about each encounter. Others responded to these issues by requiring officers to video-record their actual exchanges with drivers. The recording of interrogations has also gained enormous momentum over the last generation in police departments. Sex, Lies and Videotape notwithstanding, video provides a record of critical interactions that does not fit easily within traditional notions review by an appellate body to regulate executive action.

These reforms do not seem designed to promote better citizen challenges to government action in individual cases. While recordings might benefit challengers in judicial review of individual cases, record-keeping holds even more power to deter and shape conduct on the front end, and to review patterns of conduct over time. This kind of transparency is fundamentally different from the record-keeping, reason articulation, and

NEW ORLEANS TIMES-PICAYUNE, July 20, 2003 (detailing changes in district attorney office and emphasizing increased use of charge bargains).

199 The drive to collect data about each stop has tended to include not only information about the initial stop but also about the subsequent decision to conduct a search, or to request consent. This additional information was informed by prominent research suggesting that initial stops might be race neutral or at least not significantly disparate, but that subsequent decisions—when the police officer knows the race of the driver or passengers—could be far more disparate.

199 See, e.g., Adam Silverman, Police to Collect Race Data, BURLINGTON FREE PRESS (Vt.), June 11, 2008, at 1B (describing a test by four Vermont police departments of recording the race of each person subject to a traffic stop, an initiative intended to uncover and combat racial profiling); Steven Church, State Police to Police Itself for Profiling, NEWS J. (Wilmington, Del.), Jan. 31, 2002, at 1A (describing a new policy of the Delaware State Police of recording the race of each driver subject to a traffic stop, to uncover and combat racial profiling); Dionne Searcey, State Patrol to Begin Collecting Race Data During Traffic Stops, SEATTLE TIMES, Oct. 5, 1999 (describing a new policy of the Washington State Patrol of recording the race of each driver subject to a traffic stop, to uncover and combat racial profiling).

200 See Miller & Wright, supra note 35, at Chapter 8, part E; Saul M. Kassin et al., Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs, 31 LAW & HUM. BEHAV. 381 (2007) (finding that only 16% of the 631 police investigators surveyed worked in jurisdictions where electronic recording was required, but that 81% believed interrogations should be recorded); Richard A. Leo et al., Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century, 2006 WIS. L. REV. 479 (including a brief survey of the history of recording requirements across the United States); Lisa C. Oliver, Mandatory Recording of Custodial Interrogations Nationwide: Recommending a New Model Code, 39 SUFFOLK U. L. REV. 263 (2005) (including a detailed analysis of recording requirements across the United States).

201 See sex, lies, & videotape (Sony Pictures, 1989). Of course images can be manufactured; cameras can malfunction, or be turned on too late, or turned off.
case-by-case review that were the foundation of the modern due process revolution in criminal procedure.

The potential for prosecutors to increase transparency through internal data collection and analysis is nicely illustrated by the Vera Institute’s Prosecution and Racial Justice (PRJ) project.\(^\text{202}\) The PRJ project is built on the idea of internal data collection and analysis within the offices of chief prosecutors who want to make sure that their public commitment to race (and gender) neutrality is borne out in the practices of their offices.\(^\text{203}\)

The PRJ model stresses internal transparency, but it does have an external component when the chief prosecutor acknowledges disparate decision-making in the office and announces revised rules and procedures. Perhaps down the road prosecutors who gain confidence in the institutional and political viability of detailed internal data collection and analysis will be willing to share portions of that data directly with the public. The PRJ model is fundamentally different from prosecutors who defensively assert race neutrality, or who issue generic internal rules reinforcing a race-neutral goal without specific inquiry into the enforcement of that norm.\(^\text{204}\)

Perhaps a prosecutor will take another bold step and provide explanations and data about declination decisions. Good information about declination decisions might transform the understanding of the concept of declination. It might offer political cover for district attorneys (although reelection rates suggest that district attorneys in the United States do not need much more political cover).\(^\text{205}\) Declination reasons and data might illuminate the tensions between police arrest and prosecutorial charging decisions, and sort out how different applicable legal standards or office values or resources affect declination choices.

\(^\text{202}\) See supra Part II B.

\(^\text{203}\) The virtues of designing or improving data models for prosecutorial decision-making include the self-reflection by line and supervising prosecutors in designing the information system and in explaining decisions in ways that traditional prosecutorial models do not require.

\(^\text{204}\) See, e.g., Natalie Neysa Alund & Carl Mario Nudi, Jury Picked To Hear Walker Murder Trial, BRADENTON HERALD (Fla.), Apr. 8, 2008 (Manatee County Prosecutor says "race plays no role in our decision-making process"); Sandy Davis, Jena Braces for Marchers; Prosecutor says Victim of Beating Lost in "Racism" Charges, ADVOC. (Baton Rouge, La.), Sept. 20, 2007, at A1 (LaSalle Parish DA says the Jena beating case "is not and never has been about race"); Jeremy Redmon, Sex Landed Him in Prison; Will Petition Bail Him Out?, ATLANTA J.-CONST., June 6, 2007, at 1A (Douglas County DA says “race did not play a role” in the aggravated child molestation case against Genarlow Wilson, 17 years old at the time of the alleged crime); Mary Beth Pfeiffer, Black Suspects Lose Assets Most, Poughkeepsie J. (N.Y.), Jan. 25, 2004, at 1A (Duchess County Senior Assistant DA says the DA’s office has “a complete and totally race-neutral policy in regard to all prosecutions”); Farah Stockman, Suffolk DA Contest: Candidates Spar After Point Raised on Minorities, BOSTON GLOBE, Oct. 23, 2002, at B6 (Suffolk County DA says “race plays no role in his prosecutions”); Nicole Weisensee, “Not About Race”; DA: Probe of Shooting Proceeding at “Priority”, PHILA. DAILY NEWS, Jan. 21, 1998, at 06 (Philadelphia DA says “race does not play a role in any decision we make”).

\(^\text{205}\) See Wright & Miller, supra note 92.
Whatever precise form it takes, greater transparency in a prosecutor’s office bodes well for the quality of internal regulation. The obligation to explain, and the aspiration to make consistent and principled decisions, can both thrive in an environment that embraces transparency in many forms. These can become our hopes when the black box of prosecutorial choices becomes more translucent.

Conclusion

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

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