PROSECUTORIAL CONSTITUTIONALISM

ERIC S. FISH*

ABSTRACT

As adversary lawyers, prosecutors seek to convict defendants. But as government officials who take an oath of office, prosecutors must interpret and apply the Constitution in good faith. These two roles are at odds. The first pushes prosecutors to argue for narrow readings of defendants' constitutional rights, while the second pushes prosecutors to enforce the Constitution evenhandedly. The crucial question is: when should prosecutors be adversary advocates, and when should they be quasi-judicial implementers of constitutional protections? This Article argues that prosecutors should adopt the latter role in situations where the adversary system fails to fully protect constitutional rights. This happens when judges are unable to effectively control prosecutors' actions (for example, with regard to the duty to reveal exculpatory evidence), and also when judges underenforce constitutional rights out of concern for the separation of powers or the limitations of judicial doctrine (for example, with regard to charging decisions and plea bargains). In such situations, prosecutors should preserve defendants' constitutional rights even if judicial doctrine does not require it, and even if doing so lowers the chance of obtaining a conviction.

But individual prosecutors should not be expected to decide by themselves when to switch between these two roles. Rather, prosecutors' offices should, and in some cases already do, establish constitutional protections through internal policies that govern prosecutorial decisionmaking. Such policies can be found in places like the American Bar Association's Rules of Professional Conduct, the United States

* Ph.D. Candidate in law, Yale Law School.

Attorneys' Manual, and the State of Washington's Recommended Prosecution Standards. Indeed, although these documents are not presently understood as tools of constitutional enforcement, they protect defendants' constitutional rights above the baseline set by judges in a wide variety of areas: charging decisions, plea bargaining, grand jury proceedings, the disclosure of exculpatory evidence, exonerations, and more. Consequently, these systems of regulation for prosecutors function as important (and understudied) sites of constitutional norm articulation.

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INTRODUCTION

On April 5, 1959, the Department of Justice ("DOJ") announced that it would restrain itself from prosecuting defendants who had already faced

state prosecution for the same crime. It established a new policy requiring that any such duplicative prosecution must be justified by "compelling" reasons, and must be approved by an Assistant Attorney General, with review by the Attorney General.[1] This policy, known as the "Petite policy," was formulated in response to two Supreme Court decisions—*Bartkus v. Illinois* and *Abbate v. United States*—that permitted such duplicative prosecutions.[2] The Petite policy preserved the spirit of the Double Jeopardy Clause by limiting the effects of *Bartkus* and *Abbate*.[3] It did so not by creating judicially enforceable rights, but instead by using internal DOJ rules to restrict dual prosecutions. And the DOJ has taken the Petite policy quite seriously. In a number of cases, beginning with *Petite v. United States* (for which the policy is named), it has gone so far as to ask courts to set aside convictions that were obtained in violation of the policy.[4] This presents a bit of a puzzle. Why would prosecutors embrace broader protections against double jeopardy than the judiciary requires?

Prosecutors in the American system play a double role. On the one hand, they are partisan advocates embedded in an adversary system of criminal justice. They are assigned the task of arguing for conviction, and so take positions that narrow defendants' constitutional rights. On the other hand, prosecutors have special professional obligations to ensure that the system of criminal adjudication is just and procedurally fair.[5] These obligations go beyond those owed by private lawyers because they stem from prosecutors' unique role as state actors charged with enforcing the

1. Press Release, U.S. Dep't of Justice, Memorandum to the United States Attorneys (Apr. 5, 1959), *reprinted in* NORMAN ABRAMS, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 763–64 (1986) [hereinafter Press Release, U.S. Dep't of Justice]. The policy remains in effect today, though in somewhat modified form, and it is now enshrined in the United States Attorneys' Manual. UNITED STATES ATTORNEYS' MANUAL § 9–2.031 (2015).

2. Abbate v. United States, 359 U.S. 187 (1959); Bartkus v. Illinois, 359 U.S. 121 (1959).

3. *See* Rinaldi v. United States, 434 U.S. 22, 28–29 (1977) ("Although not constitutionally mandated, this Executive policy serves to protect interests which, but for the 'dual sovereignty' principle inherent in our federal system, would be embraced by the Double Jeopardy Clause.").

4. *See* Thompson v. United States, 444 U.S. 248, 249–50 (1980) (citing Hammons v. United States, 439 U.S. 810 (1978)); Frakes v. United States, 435 U.S. 911 (1978); Rinaldi v. United States, 434 U.S. 22 (1977); Croucher v. United States, 429 U.S. 1034 (1977); Watts v. United States, 422 U.S. 1032 (1975); Ackerson v. United States, 419 U.S. 1099 (1975); Nayles v. United States, 419 U.S. 892 (1974); Thompson v. United States, 400 U.S. 17 (1970); Marakar v. United States, 370 U.S. 723 (1962); Petite v. United States, 361 U.S. 529 (1960).

5. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 2016) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.").

law.[6] Further, and connected to this duty to seek justice, prosecutors have an obligation as government officers to interpret and apply the Constitution in good faith. This requires them to preserve defendants' constitutional rights, even when those rights act as shields against conviction. The conflict between these two roles—adversary advocate and neutral implementer of constitutional protections—complicates the professional ethics of prosecution. For any particular decision that a prosecutor faces—whether to reveal evidence to the defense, say, or whether to use aggressive plea bargaining tactics—the norms of partisan advocacy call for the prosecutor to go right up to the line of what judges will allow. But the duty to preserve constitutional rights requires them to stop short of that line. This creates a vexing problem. Prosecutors must mediate these conflicting imperatives by deciding exactly how much to restrain themselves in the name of the Constitution. And they must do so in the face of powerful professional incentives to obtain convictions.

The Petite policy and other policies like it represent an elegant way of approaching this problem. Rather than relying on individual prosecutors to decide the limits of strategic advocacy, the head of the prosecution department draws the line by imposing an internal set of regulations. The DOJ could have taken full advantage of the power *Bartkus* and *Abbate* granted it, and given prosecutors free reign to pursue duplicative prosecutions. But the DOJ instead decided to limit such prosecutions to exceptional cases, and created a sticky default rule by requiring prosecutors to seek an Assistant Attorney General's permission before initiating them. This does not effectively undo *Bartkus* and *Abbate*, since such prosecutions can still sometimes be brought. But it does give broader scope to the constitutional right to be free from double jeopardy. The DOJ is drawing its own constitutional limits—prosecutors may take advantage of the ability to try a defendant twice for the same offense, but only to a certain extent. And it is doing so through internal regulations. The DOJ is, in short, voluntarily expanding the reach of the Double Jeopardy Clause by employing bureaucratic inertia to preserve defendants' rights. Or, to put it more precisely, the DOJ is implementing the constitutional norm contained in the Double Jeopardy Clause, and it is doing so above the minimum level established by court-defined constitutional rights doctrine.

6. *See* Berger v. United States, 295 U.S. 78, 88 (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.").

This Article seeks to reimagine prosecutors' role in our constitutional system by foregrounding regulations like the Petite policy. In doing so, it initiates a conversation between three different scholarly literatures. These are: (1) the constitutional theory literature on executive branch implementation of constitutional rights; (2) the legal ethics literature analyzing prosecutors' dual role as adversary advocates and ministers of justice; and (3) the institutionalist criminal justice literature concerning how prosecutors' offices should be structured and regulated so as to protect rights and other important system values. These three literatures are engaged herein, with the goal of developing two original arguments. First is a prescriptive claim that prosecutors should frequently act as independent guardians of constitutional rights. Second is a descriptive claim that many different prosecutorial policies and regulations are presently serving that role.

This Article first argues that prosecutors should protect defendants' constitutional rights to a greater extent than required by judges. They should do so because of three overlapping reasons: their professional duty to "seek justice," their obligation to uphold the Constitution, and the de facto reality that they are the most powerful actors in the criminal justice system. This is not to say that prosecutors can or should replace judges as the main guardians of criminal defendants' rights, or that judges should be any less vigilant in protecting those rights. However there are many areas where judges are poorly placed to protect defendants' constitutional rights, for a variety of reasons. Some rights cannot be enforced by judges except through costly sanctions (such as overturning a conviction). Some rights apply only to decisions that prosecutors unilaterally control. And some rights are not amenable to clear doctrinal distinctions, but require a messy balancing of interests. To the extent that judges underdefine or underenforce constitutional rights for such reasons, prosecutorial constitutionalism should fill in the gap.

Fortunately, there is already a robust set of institutions through which prosecutors can do precisely this. Hence this Article's descriptive argument: prosecutors' offices, at least some of them, already do preserve constitutional rights above the level required by judges in a number of different ways. They do so through regulations that include internal office guidelines (such as the Petite policy), professional ethical requirements imposed by state bars (such as the American Bar Association's Model Rule 3.8), and structural rules that allocate power within prosecution agencies (such as the DOJ's death penalty protocol). Such regulations are not currently understood as tools for expanding constitutional protections. But

in many instances, that is how they function. This Article provides the first synthetic scholarly treatment of these self-binding prosecutorial rules, examining the role that they play in constitutional enforcement.[7]

Part I lays the theoretical groundwork for prosecutorial constitutionalism. First, it explores the conflict between partisan advocacy and "seeking justice" that defines prosecutors' professional ethics. Then, it connects the professional duty to seek justice with the related duty to interpret and implement the Constitution, which prosecutors are obligated to do through their oaths of office, but which also conflicts with their adversary role. These dueling imperatives create a puzzle: when should prosecutors be partisan advocates, and when should they be quasi-judicial guardians of constitutional rights? Part I argues that prosecutors should adopt the latter role when the adversary process fails to fully protect defendants' rights. This happens in three kinds of situations: (1) where courts are unable to fully enforce constitutional rights because judicial remedies are retroactive and inadequate to constrain prosecutors; (2) where courts underdefine constitutional rights out of deference to prosecutorial discretion; and (3) where courts underdefine constitutional rights because of their desire for easily administrable bright-line rules. The first of these situations involves prosecutors enforcing constitutional rights that are formally recognized by judicial doctrine. The second and third involve prosecutors implementing what Lawrence Sager has called "underenforced constitutional norms"—constitutional protections that should have legal force, but that have not been incorporated into judicial doctrine for institutional reasons.[8] Prosecutors ought to act as constitutional guardians in all three of these situations, and not as partisan advocates, because they must supplement inadequate judicial enforcement. Thus, Part I argues, prosecutors have a professional ethical obligation to protect both judge-defined constitutional rights and underenforced constitutional norms. But prosecutors might also, conceivably, choose to enforce constitutional rights above the minimum level set by judges even where the adversary system does not fail, and prosecutors simply believe that the Constitution grants defendants greater protection than judges recognize.

7. *See* David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condones Unlawful Disclosures of Information*, 527 HARV. L. REV. 512, 539 n.142 (2013) ("[A] number of other DOJ policies have constrained prosecutors beyond what the Constitution has been read to require . . . . This suite of self–binding rules awaits a synthetic scholarly treatment.").

8. *See* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213 (1978).

Part II considers the regulations that prosecutors' offices use to preserve constitutional rights and the institutional frameworks in which those regulations operate. The three main frameworks that it explores are the United States Attorneys' Manual, which provides decisionmaking guidance for federal prosecutors; state prosecution guidelines, such as those adopted in Washington and New Jersey; and the Model Rules of Professional Ethics, which are promulgated by the American Bar Association ("ABA") and adopted by state bar associations. These documents are frequently used to protect defendants' constitutional rights beyond the level required by judges. They do so in a variety of ways, including through conduct rules that forbid prosecutors from taking certain actions, and through structural rules that establish decisionmaking procedures and allocate power within a prosecutor's office. Consequently, these documents function as important (and understudied) sites of constitutional norm articulation.[9] Part II also argues that the effectiveness of prosecutorial constitutionalism depends in part on the size and culture of a particular prosecution agency. Larger, more bureaucratic, and more professionalized outfits (like the federal DOJ) have more capacity to incorporate constitutional protections into their decisionmaking. And if prosecutorial constitutionalism is going to succeed, it is crucial that prosecutors' offices promote a culture of neutrality and justice-seeking, not a culture of pure adversary competition.

Part III examines a multitude of specific prosecution policies that expand constitutional protections at both the state and the federal level. It looks at policies governing charging decisions, plea bargaining, grand jury proceedings, the revelation of exculpatory evidence, First and Sixth Amendment rights, federalism, and post-conviction rights. These policies often take the form of conduct rules dictating that prosecutors must take or not take certain actions. But prosecutors' offices also protect constitutional rights through a variety of structural rules, such as rules that centralize decisionmaking authority, change prosecutors' incentives, require training in relevant constitutional rights, demand that certain decisions be pre-approved by bosses, and provide for monitoring of line prosecutors.

Throughout this Article, three distinctive features of prosecutorial constitutionalism will become recurrent themes. These are worth foregrounding. First, prosecutors are more nimble than judges in their capacity to incorporate constitutional rights into their decisions. While

9. *See* Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 55 (2002) ("Legal scholars rarely discuss the internal administration of justice agencies.").

judges commonly prefer to operate through prospective rules that draw clear lines between lawful and unlawful conduct, prosecutors can balance constitutional principles against other system goals in a more nuanced and experimental fashion driven by case-specific factors. Second, prosecutorial constitutionalism is often political, even if it need not be self-consciously political. Federal and state prosecutors are either elected themselves or appointed by elected officials, and consequently, the ways that they implement constitutional norms often have a clear political valence connected to factors like party ideology and the need to respond to scandals. Third, prosecutorial constitutionalism is frequently the product of dialogues or power struggles between the different branches of government. A number of internal prosecutorial rules that protect defendants' rights have been enacted because of judicial prompting or the threat of legislative action.

I. PROSECUTORS' CONSTITUTIONAL DUTIES

Prosecutors are adversary lawyers in our system, but they are not merely adversary lawyers. They also serve a quasi-judicial role. They must seek "justice" rather than merely convictions, and they must uphold the Constitution even where doing so conflicts with the goal of obtaining convictions. This first Part considers the duality of the prosecutorial role in the American system, and the implications of this duality for prosecutors' obligation to preserve defendants' constitutional rights. It argues that prosecutors should adopt a non-adversary role in situations where they are effectively in control of the criminal justice process, as well as in situations where judges underenforce or underdefine defendants' constitutional rights, so that these rights are not compromised by adversary zeal.

A. THE ADVERSARY SYSTEM AND THE DUTY TO "SEEK JUSTICE"

The professional ethics of the American prosecutor reflect two starkly different ideals. One ideal views the prosecutor as a partisan lawyer who must try to convict criminal defendants. The other ideal views the prosecutor as an unbiased minister of justice who must ensure fairness to criminal defendants. Our hybrid approach to prosecutorial ethics can be better understood by first separately examining these two ideals.

The ideal of the prosecutor as adversary lawyer finds its purest form in the Anglo-American tradition of private prosecution. In the old English system, criminal prosecution was a private law matter—victims brought

criminal cases against those who had harmed them.[10] Similarly, in the United States before 1800, the main approach to criminal prosecution was for victims to pursue charges against the accused.[11] While public prosecution has become the dominant model today, our criminal justice system is still largely premised on this ideal of adversary litigation.[12] The prosecutor and the defense attorney present opposing arguments to a neutral adjudicator who decides the truth of the matter while policing the adversary process. The animating vision of this system is that of a fair fight between two sides, with each lawyer committed to the success of their respective side regardless of that lawyer's personal views. This vision is reflected in the modern rules of professional ethics for lawyers—they must stay loyal to their clients and zealously advocate their clients' interests.[13] The ethics codes do not exempt prosecutors from this emphasis on adversarialism. While a modern public prosecutor does not have a "client" in the conventional sense, but is instead said to represent the state, they are still expected to act (at least in part) as a partisan advocate for conviction.[14] The conventional justification for this adversary model is an "invisible hand" argument:[15] By pitting two sets of attorneys against one another, and having one advocate conviction while the other advocates acquittal, we can achieve more accurate, more just, or otherwise better results than if each lawyer behaved impartially.[16] Prosecutors are therefore, on this view,

10. *See* ALLEN STEINBERG, THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800–1880, at 5 (1989); John H. Langbein, *The Origins of Public Prosecution at Common Law*, 17 AM. J. LEGAL HIST. 313, 317–18 (1973).

11. *See* Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U.C. DAVIS L. REV. 411, 421–24 (2009); Allen Steinberg, *From Private Prosecution to Plea Bargaining: Criminal Prosecution, the District Attorney, and American Legal History*, 30 CRIME & DELINQUENCY 568, 571 (1984).

12. Indeed, historically the distinction between public and private prosecutors has been somewhat slippery. In the nineteenth century, after public prosecution became widespread, prosecutors were still paid for each case that they brought or for each conviction that they obtained. This fee structure effectively caused public prosecutors to act as private lawyers for accusers, or as partisan advocates for conviction. *See* NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1840, at 255–62 (2013).

13. *See* MODEL RULES OF PROF'L CONDUCT pmbl., r. 1.1–1.10 (AM. BAR ASS'N 2016) ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."); DANIEL MARKOVITS, A MODERN LEGAL ETHICS 27–34 (2008).

14. CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2(b) (3d ed. AM. BAR ASS'N 1993); MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 2016); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 52 (1991) ("The codes are concerned specifically with structuring adversarial practice. They do not exempt prosecutors from the requirements of zealous advocacy.").

15. *See* Adrian Vermeule, *The Invisible Hand in Legal and Political Theory*, 96 VA. L. REV. 1417, 1443–44 (2010).

16. A number of legal ethics scholars articulate (and critique) this argument for the adversary

justified in acting strategically to seek convictions because by doing so they make the system run properly.[17]

The ideal of prosecutors as ministers of justice finds its purest form in the continental European inquisitorial system. In Germany, for example, the prosecutor functions as a "second judge" who is duty-bound to present facts and legal arguments in an unbiased fashion.[18] German prosecutors thus do not adopt adversary litigation positions concerning issues like the defendant's procedural rights, the scope of a criminal statute, whether certain evidence should be admitted, and so forth. Instead, they investigate and present all of the evidence both for and against the defendant's guilt so as to ensure the criminal proceeding comes to a legally correct result, and even sometimes file appeals on behalf of defendants.[19] The American system also adopts the view of prosecutors as neutral ministers of justice, though to a much more limited degree than Germany. The Supreme Court stated in *Berger v. United States* that a prosecutor's "interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done."[20] And the ABA's rules of professional ethics establish that "[a] prosecutor has the responsibility of a minister of justice and not simply that

system while describing it as the dominant view. *See, e.g.*, ARTHUR ISAK APPLBAUM, ETHICS FOR ADVERSARIES 175–203 (1999); GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 1.2:301, at 36 (2d ed. Supp. 1996); DAVID LUBAN, LAWYERS AND JUSTICE 67–92 (1988); MARKOVITS, *supra* note 13, at 103–08; WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS 7 (1998). *See also* MODEL RULES OF PROF'L CONDUCT prmbl. para. 8 (AM. BAR ASS'N 2016) ("[W]hen an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done.").

17. There are other scholarly arguments for an adversary legal system, such as the idea that a partisan lawyer acts as a "friend" to their client, see Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1065 (1976); that lawyer partisanship preserves the authority of law over personal values, see W. BRADLEY WENDEL, LAWYERS AND FIDELITY TO LAW 49–50 (2010); Normal Spaulding, *The Rule of Law in Action: A Defense of Adversary System Values*, 93 CORNELL L. REV. 1377, 1410 (2008); and that only partisan lawyers are able to give full voice to their clients' desires, see MARKOVITS, *supra* note 13, at 27-34. These arguments apply with less force to the unique case of a public prosecutor, who lacks a "client" in the normal sense. *See, e.g.*, Daniel Markovits, *Adversary Advocacy and the Authority of Adjudication*, 75 FORDHAM L. REV. 1367, 1371 (2006).

18. *See* Shawn Marie Boyne, *Uncertainty and the Search for Truth at Trial: Defining Prosecutorial "Objectivity" in German Sexual Assault Cases*, 67 WASH. & LEE L. REV. 1287, 1288–91 (2010); John H. Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204, 206–12 (1979); Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413, 1468–75 (2010).

19. *See* STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BUNDESGESETZBLATT, Tiel I [BGBl. 1], § 296 (Ger.) ("The public prosecution office may also make use of [appellate remedies] for the benefit of the accused."); Boyne, *supra* note 18, at 1289–90.

20. Berger v. United States, 295 U.S. 78, 88 (1935).

of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice."[21] The animating moral logic of this "minister of justice" model is very different from that of the adversarial model. Rather than treating the criminal process as a contest between prosecutors and defense attorneys, it views the prosecutor as more akin to a judge. Much like a judge, the prosecutor has a tremendous amount of power over the defendant. Thus, much like a judge, the prosecutor should exercise their power fairly and seek to achieve just results.[22]

The American role ethics of prosecution embrace both of these ideals at once. Prosecutors must behave as a hybrid of the adversarial prosecutor and the neutral minister of justice. The ABA endorses this mixed role, stating that "[t]he prosecutor is an administrator of justice, a zealous advocate, and an officer of the court."[23] But this is like having a basketball game where the same person is both a coach and a referee. The two roles are at odds.[24] They prescribe different approaches to the major decisions that a prosecutor must make when pursuing a case. Should a prosecutor try to get certain exonerating evidence excluded from a trial? Should they point out where a defendant has unwisely waived an objection? Should they advance an aggressive interpretation of a criminal statute? Should they require as part of a plea bargain that the defendant forgo the right to appeal? The answers to these questions depend on which role the prosecutor is playing.

The key issue, then, is when the prosecutor should play one role and when the other. The ABA's ethics rules provide some guidance in this regard. For example, the ABA instructs that prosecutors should not use

21. MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 2016).

22. *See, e.g.*, Robert H. Jackson, *The Federal Prosecutor*, 31 AM. INST. CRIM. L. & CRIMINOLOGY 3, 3 (1940) ("The prosecutor has more control over life, liberty, and reputation than any other person in America."). *See also* GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 94 (F.B. Rothman ed., 5th ed. 1993) (1854); Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 625–33 (1999); Zacharias, *supra* note 14, at 56–60.

23. CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2(b) (3d ed. AM. BAR ASS'N 1993).

24. Some academic and judicial commentary try to resolve this tension by arguing that the prosecutor is a lawyer for the state, and the state in turn is committed to justice. *See, e.g.*, *Berger*, 295 U.S. at 88; Green, *supra* note 22, at 633–37. This argument requires one to develop a theory of the state's normative commitments. Does the state want its prosecutors to be adversary advocates who maximally enforce the criminal statutes, or ministers of justice who also pursue values like due process and mercy? Each role serves a different conception of justice, and one would need to say more about the abstract goals of the state-as-client before concluding which role it wants its prosecutors to play. One might construct a client-based argument for the "minister of justice" role by relying on the fact that many criminal procedure rights are embedded in the federal Constitution, which is our country's governing charter and its most official statement of canonical values, on which prosecutors take an oath.

cross-examination to undermine the credibility of witnesses they believe to be truthful, and should promptly disclose any evidence suggesting that a convicted defendant did not commit the offense of conviction.[25] Rules like these stipulate when a prosecutor should shift from one role to another. But this role fluidity is complicated by the fact that prosecutors' professional incentives push them to advocate for conviction and punishment. Locally elected district attorneys have political incentives to secure convictions.[26] And line prosecutors face various kinds of bureaucratic and professional pressure to convict defendants.[27] These factors disincentivize prosecutors from making concessions that lower the chance of getting a conviction, and so they may undermine prosecutors' role as ministers of justice.

B. PROSECUTORS AS CONSTITUTIONAL INTERPRETERS

As government officials who take an oath to uphold the Constitution,[28] and who undertake to represent a state whose deepest value commitments are embodied in the Constitution, prosecutors are obligated

25. *See* CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-3.9(b) (3d ed. AM. BAR ASS'N 1993); MODEL RULES OF PROF'L CONDUCT r. 3.8(g) (AM. BAR ASS'N 2016). Scholars of legal ethics have proposed various other concrete approaches to prosecutorial role switching. *See, e.g.*, Roberta K. Flowers, *A Code of Their Own: Updating the Ethics Codes to Include the Non-Adversarial Roles of Federal Prosecutors*, 37 B.C. L. REV. 923, 962–74 (1996); Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 333–36 (2001); Zacharias, *supra* note 14, at 49.

26. *See* MARK BAKER, D.A.: PROSECUTORS IN THEIR OWN WORDS 79 (1999); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 153–56 (2004); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 533–39 (2001); Ronald V. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. OF CRIM. L. 581, 601 (2009) (showing the relative frequency of various performance-related claims in prosecutor elections); Wright & Miller, *supra* note 9, at 35 n.13 (quoting news reports in which prosecutors cite their conviction rates in seeking reelection).

27. *See* DAVID A. HARRIS, FAILED EVIDENCE: WHY LAW ENFORCEMENT RESISTS SCIENCE 103–04 (2012); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2470–71 (2004); Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii, xxvi (2015); Medwed, *supra* note 26, at 134–37. And beyond career incentives, the simple desire to "win" a case can also push prosecutors to behave more like adversary advocates. *See* BAKER, *supra* note 26, at 78, 167; Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197, 206–07 (1988).

28. This Article's focus is mostly limited to the federal Constitution, and it is important to note that state prosecutors may also have obligations to implement the rights contained in their various state constitutions. However, different states' constitutional systems may call for different prosecutorial approaches to enforcing such constitutional rights. *Cf.* Neal E. Devins & Saikrishna Bangalore Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend*, 124 YALE L.J. 2100, 2119–22 (2015) (arguing that whether a state attorney general has a duty to defend a constitutionally challenged law or a duty to challenge a constitutionally suspect law varies based on the laws of each individual state).

to interpret the Constitution in good faith and abide by its requirements.[29] There is a large body of scholarly work on how non-judicial government actors should approach this task of constitutional interpretation, and on what relationship their interpretations should have to judge-made constitutional law.[30] This literature focuses in particular on executive branch constitutionalism, looking at institutions like the Presidency, the Office of Legal Council, and administrative agencies, and considering how they should make constitutional decisions in domains where courts have little say.[31] However this literature so far ignores the role of prosecutors in constitutional interpretation.

As discussed above, the American prosecutor plays two distinct and conflicting roles in the criminal justice process.[32] One role is to advocate conviction as a partisan lawyer, while the other is to pursue "justice" as a quasi-judicial figure. This same duality of role extends to prosecutors' obligation to uphold the Constitution. The duty to seek "justice" in the context of prosecution overlaps substantially with the duty to apply the Constitution in good faith. Many of the major decisions that a prosecutor must make have some constitutional dimension, whether it be through the

29. *See* U.S. CONST. art. VI, cl. 3; 4 U.S.C. § 101 (2016) (oath for state officers); 5 U.S.C. § 3331 (oath for federal officers). *See also* John O. McGinnis & Charles W. Mulaney, *Judging Facts Like Law*, 25 CONST. COMMENT. 69, 110 (2008) ("Formally, no express clause of the Constitution singles out one branch or the other for exclusive responsibility of constitutional assessment. Indeed, members of all branches take an oath to uphold the Constitution."); Richard M. Re, *Promising the Constitution*, 110 NW. U. L. REV. 299, 301–08 (2016) (discussing how the oath of office establishes an official duty to adhere to the Constitution).

30. *See generally* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 62–63 (2005); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 33–53 (1999); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997); Frank H. Easterbrook, *Presidential Review*, 40 CASE WEST. RES. L. REV. 905 (1989); Richard H. Fallon, Jr., *Executive Power and the Political Constitution*, 2007 UTAH L. REV. 1 (2007); Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799 (2010); Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153 (1997); Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979 (1987); Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479 (2010); Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189 (2006); Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303 (2000); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003); Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021 (2006).

31. *See generally, e.g.*, Easterbrook, *supra* note 30; Lee, *supra* note 30; Morrison, *supra* note 30; Moss, *supra* note 30; Paulsen, *supra* note 30.

32. *See supra* Section I.A.

Sixth Amendment, the Due Process Clause, or another constitutional provision. The duties to "seek justice" and to enforce the Constitution are not identical—one could preserve constitutional rights in a way that does not involve "justice" norms, or pursue "justice" in a way that does not implicate rights found in the Constitution.[33] But these duties overlap substantially, and they both conflict with the prosecutor's adversary role. As an adversary, the prosecutor must follow the judiciary's constitutional instructions to the letter, but do nothing more. If the doctrine contains an implausible loophole that makes prosecution easier, then the prosecutor should exploit it, not seek to correct it. Certainly a private lawyer would not (and should not) voluntarily undermine their own case in the name of their opponent's constitutional rights. However, as an independent constitutional enforcer, the prosecutor must implement his or her own good-faith view of what the Constitution requires. This does not mean they can ignore judicially established rules of constitutional law.[34] But they can effectively expand defendants' constitutional rights by refusing to take certain actions that judges would permit.

A few examples will help illustrate how prosecutors can preserve constitutional rights above the floor set by judges. In *Brady v. Maryland*, the Supreme Court held that a prosecutor violates the Due Process Clause if they fail to disclose certain material exculpatory evidence to the defense prior to trial.[35] However, the Court has not extended *Brady* to the plea bargaining context, meaning that prosecutors in some jurisdictions can keep material exculpatory evidence from the defense before finalizing a plea bargain.[36] But if prosecutors believed that doing so conflicted with due

33. For example, American constitutional law lacks a general principle that the number of crimes should be limited, even though this principle clearly implicates norms of justice. *See* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 74–83 (2011). There is also no provision protecting victims' rights in the Constitution, although there have been many proposals in Congress for a "Victims' Rights Amendment." *See* Michael E. Solimine & Kathryn Elvey, *Federalism, Federal Courts, and Victims' Rights*, 64 CATH. U. L. REV. 909, 910 (2015).

34. In the literature on "departmentalism," there is much discussion of whether the executive branch must always follow judicial interpretations of the Constitution that it believes to be incorrect. *See, e.g.*, Fallon, *supra* note 30; Paulsen, *supra* note 30. But there is no plausible argument that prosecutors should be able to disregard judicial rulings on the scope of defendants' constitutional rights. If they did so freely, our system of criminal justice would fall apart. *Cf.* Alexander & Schauer, *supra* note 30 (defending judicial supremacy in constitutional interpretation on the grounds that it is necessary for system stability).

35. Brady v. Maryland, 373 U.S. 83, 87–88 (1963).

36. *See* United States v. Ruiz, 536 U.S. 622, 633 (2002) (holding that a *Brady* challenge cannot be brought for failure to disclose impeachment evidence prior to a plea bargain agreement); Stephanos Bibas, Brady v. Maryland*: From Adversarial Gamesmanship Toward the Search for Innocence?*, *in* CRIMINAL PROCEDURE STORIES 150 (Carol S. Steiker ed., 2006). *See also* Michael Nasser Petegorsky,

process, then they could choose on their own to reveal such exculpatory evidence prior to making plea agreements. The Petite policy is another example.[37] In *Bartkus v. Illinois* and *Abbate v. United States*, the Supreme Court held that bringing duplicative state and federal prosecutions for the same crime does not violate the Double Jeopardy Clause.[38] Through the Petite policy the DOJ limited federal prosecutors' ability to bring such duplicative prosecutions, and so expanded the reach of the Double Jeopardy Clause. Further examples abound. Prosecutors might decline to use evidence that they believe was obtained in violation of defendants' constitutional rights, even if a judge would have admitted that evidence. Prosecutors might also decline to seek the death penalty if they believe it is unconstitutional, even though the Supreme Court permits its use.[39] In short, prosecutors can voluntarily decide, based on their own reading of the Constitution, that a defendant's rights should be protected beyond the minimum level required by the judiciary.

This raises an important question: how does constitutional implementation by prosecutors differ from constitutional implementation by judges? When prosecutors operationalize constitutional protections, they do so in the context of a complex set of administrative processes designed to manage the criminal justice system. Indeed, given that the overwhelming majority of convictions are secured through plea bargains, American criminal justice could be described as a regulatory system of private settlements administered by prosecutors.[40] Thus, prosecutors who protect

Note, *Plea Bargaining in the Dark: The Duty to Disclose Exculpatory* Brady *Evidence During Plea Bargaining*, 81 FORDHAM L. REV. 3599, 3625–31 (2013) (describing a post-*Ruiz* circuit split on the question of whether *Brady* challenges can be brought after guilty pleas).

37. Press Release, U.S. Dep't of Justice, *supra* note 1. *See supra* notes 1–4 and accompanying text (discussing the Petite policy).

38. Abbate v. United States, 359 U.S. 187, 194–96 (1959); Bartkus v. Illinois, 359 U.S. 121, 136–39 (1959).

39. *Cf.* John A. Horowitz, Note, *Prosecutorial Discretion and the Death Penalty: Creating A Committee to Decide Whether to Seek the Death Penalty*, 65 FORDHAM L. REV. 2571, 2581–82 (1997) (discussing how in 1995 the Bronx District Attorney, Robert Johnson, announced his general intention not to seek the death penalty on the grounds that it is unfairly applied and risks putting innocent people to death).

40. *See generally* STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE (2012); MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1979); Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968); Rachel E. Barkow, *Criminal Law as Regulation*, 8 N.Y.U. J.L. & LIBERTY 316 (2014) [hereinafter Barkow, *Criminal Law*]; Susan R. Klein, *Enhancing the Judicial Role in Criminal Plea and Sentence Bargaining*, 84 TEX. L. REV. 2023, 2027 (2006); Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117 (1998). *See also* Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 276–306 (2013) (describing how the DOJ has come to dominate other elements of the federal law enforcement

constitutional rights can be understood as engaging in a form of "administrative constitutionalism."[41] In recent work, Sophia Lee has described how the Federal Communications Commission in the 1960s and 1970s enforced constitutional antidiscrimination principles through its regulation of broadcasters.[42] Similarly, prosecuting agencies like the DOJ and state district attorneys' offices can enforce due process rights and other constitutional principles through their regulation of criminal cases. This looks quite different from judicial protection of constitutional rights. While judges must issue binding orders from outside the regulatory system, prosecutors and other bureaucrats can tinker from within. As a consequence, prosecutorial constitutionalism can be subtler, more experimental, and less disruptive than judicial constitutionalism, giving prosecutors more leeway to balance constitutional norms against other system values.[43] As Gillian Metzger has observed, "agencies approach constitutional questions and normative issues from a background of expertise in the statutory schemes they implement and the areas they regulate," and as a result, "they are likely to be better at integrating constitutional concerns with the least disruption to these schemes and regulatory priorities."[44]

American judges often prefer, for institutional reasons, to operationalize constitutional rights through bright-line rules.[45] This is especially true in the criminal justice context, where vague rules raise constitutional notice concerns.[46] Prosecutors, by contrast, can more easily engage in messy and case-specific balancing. Take for example the Petite

bureaucracy including clemency, corrections, and forensics).

41. *See* WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 33–34 (2010).

42. *See* Lee, *supra* note 30.

43. *Cf.* Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 1016 (2009) ("Conventional external regulation has failed to guide prosecutors. It cannot work well because outsiders lack the information, capacity, and day-to-day oversight to structure patterns of decisions.").

44. Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1922–23 (2013). *See also* ESKRIDGE & FEREJOHN, *supra* note 41, at 33; Bertrall L. Ross II, *Embracing Administrative Constitutionalism*, 95 B.U. L. REV. 519, 553–66 (2015).

45. *See generally* Andrew B. Coan, *Judicial Capacity and the Substance of Constitutional Law*, 122 YALE L.J. 422 (2012). American courts have generally rejected the proportionality-based approach to constitutional review that prevails in much of the rest of the world. *See* Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3096 (2015); Alec Stone Sweet & Jud Mathews, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 EMORY L.J. 797, 798–99 (2011).

46. *See, e.g.*, Johnson v. United States, 135 S. Ct. 2551, 2562–63 (2015) (holding the residual clause of the Armed Career Criminal Act void for vagueness).

policy, which established that a duplicative federal prosecution could only be brought for "compelling" reasons.[47] It is difficult to imagine the Supreme Court drawing such an unclear line when operationalizing the Double Jeopardy Clause. But the DOJ, because it directly supervises the charging process in an ongoing fashion (rather than issuing a single prospective proclamation of law), can more easily balance constitutional principles against other system goals. Similarly, judges can only implement constitutional protections by interpreting the Constitution to establish binding legal rules. But prosecutors can create internal policies that expand constitutional protections without needing to interpret the Constitution as making those policies mandatory.[48] For example, while the Petite policy clearly implements the norm contained in the Double Jeopardy Clause, the DOJ has never taken the position that the Petite policy is constitutionally required. Thus, in contrast to judge-made constitutional law, the DOJ could change the Petite policy without having to state that it is legally incorrect. This leeway allows prosecutors to implement and revise constitutional protections with more dexterity than judges, who are restricted by *stare decisis.*

C. WHEN PROSECUTORS SHOULD PRESERVE CONSTITUTIONAL RIGHTS

And so we come to the crucial question: when should prosecutors shed their adversary role and adopt a quasi-judicial posture towards defendants' constitutional rights? The basic answer is that prosecutors should act like judges in situations where judges themselves fail to fully protect defendants' constitutional rights. This happens in a number of different circumstances. First, and perhaps least controversially, prosecutors should independently follow judicial doctrine concerning constitutional rights where judges underenforce that doctrine. Judicial rights enforcement is often incomplete because judges' principal post-conviction remedy—vacating the defendant's conviction—is rarely imposed, and judges have few other effective remedies at their disposal. Prosecutors should not take advantage of these limitations—they should voluntarily abide by judge-defined constitutional law even when it goes unenforced. Second, prosecutors should go beyond judicial doctrine, and independently interpret and protect defendants' constitutional rights during those stages of the criminal justice process where prosecutors have unilateral authority. These

47. Press Release, U.S. Dep't of Justice, *supra* note 1, at 763-64. *See also supra* notes 2–4 and accompanying text.

48. *See* Sager, *supra* note 8, at 1213. *Cf.* Richard A. Bierschbach & Stephanos Bibas, *Constitutionally Tailoring Punishment*, 112 MICH. L. REV. 397, 402 (2013) ("[O]ur suggestions are constitutionally inspired, not constitutionally required.").

include charging decisions, plea bargaining, grand jury proceedings, and more. The argument for adversary advocacy breaks down during these stages because the prosecutor is effectively the judge—they control the legal decisionmaking process with little judicial oversight. Third, there are also situations where judges have not entirely abandoned the field of constitutional enforcement, but where they nonetheless underdefine defendants' rights due to the limitations of judicial doctrine. In such cases, prosecutors should supplement judicial doctrine by giving broader scope to the constitutional rights that judges underdefine. Fourth, prosecutors can also protect constitutional rights above the baseline established by judges simply because they disagree with the judicial doctrine. In cases like this the conditions of adversary advocacy are fully satisfied, so there is no structural need for the prosecutor to act as a surrogate judge. The justification for prosecutorial constitutionalism must be found elsewhere in such cases, for example in the benefits of redundant enforcement, or in the prosecutor's mandate as an elected official.

1. Judicially Underenforced Rights

Prosecutors should act as neutral enforcers of constitutional rights in situations where judicial enforcement is ineffective. These situations do not call for prosecutors to actually expand constitutional rights from the judicially defined baseline, merely to follow the existing judicial doctrine. A major problem with judicial rights enforcement is that judges can usually only correct rights violations retrospectively through costly remedies like vacating the defendant's conviction.[49] But judges are often unwilling to take such extreme steps.[50] And even in situations where a judge does immediately notice a prosecutor's misconduct, the remedial options are limited. Consequently, a number of important constitutional rights go underenforced by judges. In these situations, prosecutors should temper their adversary role and should supplement judges' enforcement efforts by incorporating constitutional rights into their own decisionmaking processes.

49. *See* Kozinski, *supra* note 27, at xxiii–iv.

50. *See* Sonja B. Starr, *Sentence Reduction as a Remedy for Prosecutorial Misconduct*, 97 GEO. L.J. 1509, 1516–17 (2009) (noting that judges are generally unwilling to declare mistrials, and arguing that they should instead impose sentence reductions to remedy prosecutorial misconduct); Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2510–11 (1996) (showing that the Supreme Court has, in recent decades, curtailed remedies for violations of criminal procedure rights while leaving the scope of those rights intact); Zacharias, *supra* note 14, at 48 n.13.

There are many different ways that prosecutors can violate defendants' rights during the criminal justice process without effective judicial enforcement. Here are but a few examples. Prosecutors can fail to disclose constitutional violations in the gathering of evidence, such as unduly suggestive witness identification procedures.[51] They can make public statements that undermine the right to a fair trial by prejudicing potential jurors.[52] They can decline to reveal significant exculpatory or mitigating evidence to the defendant, despite the requirements of *Brady v. Maryland*.[53] They can suborn perjury by knowingly allowing a witness to testify untruthfully at trial and failing to correct the record.[54] During jury selection they can use their peremptory challenges unconstitutionally, for example by striking jurors on the basis of their race.[55] And during the actual trial they can make improper statements to the jury, for instance referring to the fact that the defendant did not take the stand in their own defense.[56] In each of these examples, the judge is constrained in their ability to remedy the constitutional violation. For those violations that happen outside the judge's view, judicial remedies can only be imposed retrospectively. And even for violations that happen in the actual courtroom, the judge's remedial power is limited to issuing curative jury instructions or, if the misconduct is egregious enough, declaring a mistrial.[57]

51. *See, e.g.*, People v. Bermudez, 906 N.Y.S.2d 774, 774 (Sup. Ct. 2009); Bennett L. Gershman, *Misuse of Scientific Evidence by Prosecutors*, 28 OKLA. CITY U. L. REV. 17, 30 (2003).

52. *See, e.g.*, Thaai Walker, *Major Drug Dealer Gets 28-Year Term / Flowers Gives Warning to Youngsters in Oakland to Avoid His Rocky Path*, S.F. CHRONICLE (Feb. 17, 1999), http://www.sfgate.com/crime/article/Major-Drug-Dealer-Gets-28-Year-Term-Flowers-2946678.php ("[Judge] Quackenbush also dismissed racketeering charges against Flowers after finding that then-U.S. attorney Michael Yamaguchi made inappropriate comments to a Chronicle reporter during the 1996 trial. The controversy cost Yamaguchi his nomination for a federal judgeship.").

53. *See* United States v. Olsen, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, J., dissenting from denial of rehearing en banc) ("There is an epidemic of Brady violations abroad in the land."); Bibas, *supra* note 36, at 130 (showing that most *Brady* material is ambiguous, and thus easily overlooked by prosecutors); Editorial Board, *Beyond the Brady Rule*, N.Y. TIMES (May 18, 2013), http://www.nytimes.com/2013/05/19/opinion/sunday/beyond-the-brady-rule.html?_r=0 ("[T]here is good reason to believe that [*Brady*] violations are widespread.").

54. *See, e.g.*, Baca v. Adams, No. ED CV 08-683-MMM (PJW), 2013 WL 3071248, at *15 (C.D. Cal. June 18, 2013) *rev'd*, 777 F.3d 1034, 1035 (9th Cir. 2015).

55. *See* EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 14–27 (2010); Gilad Edelman, *Why Is It So Easy for Prosecutors to Strike Black Jurors?*, NEW YORKER (June 5, 2015), http://www.newyorker.com/news/news-desk/why-is-it-so-easy-for-prosecutors-to-strike-black-jurors.

56. *See, e.g.*, Doyle v. Ohio, 426 U.S. 610, 626–27 (1976); Griffin v. California, 380 U.S. 609, 615 (1965); People v. Mendoza, 37 Cal. App. 3d 717, 726 (Ct. App. 1974).

57. There is much evidence that curative instructions are ineffective, both for judges and for juries. *See, e.g.*, Andrew J. Wistrich, Chris Guthrie, & Jeffrey J. Rachlinski, *Can Judges Ignore*

Further, several doctrinal barriers impede judges' ability to fix prosecutorial violations of defendants' constitutional rights. One such barrier is the "harmless error" rule.[58] Rule 52(a) of the Federal Rules of Criminal Procedure provides that any error that does not substantially affect the likelihood of conviction "must be disregarded."[59] Under this rule, a judge must ignore a prosecutor's misconduct if they believe that it had at most a minor impact on the proceeding. The same harmless error rule applies after the defendant has been convicted, though with the added requirement that the error's harmlessness must be proven "beyond a reasonable doubt."[60] Thus, a judge will not remedy a constitutional violation if they are sufficiently confident that a conviction would still have been obtained absent the error.[61] In practice this means that reversals for constitutional violations are uncommon, because judges often hold such violations harmless in light of all the other evidence of the defendant's guilt.[62] Defendants can also bring post-conviction habeas corpus petitions challenging the constitutionality of their convictions. But habeas proceedings are quite deferential to the trial court—they place the burden of proof on the petitioner, and apply standard harmless error analysis (rather than the heightened "beyond a reasonable doubt" test).[63] And they are especially deferential when a federal habeas petition is brought against a state conviction under the Antiterrorism and Effective Death Penalty

Inadmissible Information?: The Difficulty of Deliberately Disregarding, 153 U. PA. L. REV. 1253–58 (2005).

58. *See* Chapman v. California, 386 U.S. 18, 22 (1967) (noting that the "harmless error" rule operates in all fifty states and the federal system).

59. FED. R. CRIM. P. 52(a) (2016); Kotteakos v. United States, 328 U.S. 750, 776 (1946).

60. *Chapman*, 386 U.S. at 22–23. *See also* 28 U.S.C. § 2111 (2016).

61. There are, however, some "structural" constitutional errors that lead to automatic reversal without harmless error analysis, such as deprivation of the right to counsel. *See* Arizona v. Fulminante, 499 U.S. 279, 309–10 (1991); *Chapman*, 386 U.S. at 23–24.

62. *See* ABA SECTION OF LITIGATION ANN. CONF., CROSSING THE LINE: RESPONDING TO PROSECUTORIAL MISCONDUCT 1 (2008) (describing a California study that showed that of 443 cases involving findings of prosecutorial misconduct, all but 53 were affirmed due to harmless error); Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 631 (1972); Harry T. Edwards, *To Err is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1180–83 (1995); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 304, 350 (2006) ("[C]ognitive biases can contribute in powerful ways to a conclusion that the defendant was indeed guilty, and that the error was therefore harmless.").

63. *See* 3 CHARLES ALAN WRIGHT & SARAH N. WELLING, FEDERAL PRACTICE & PROCEDURE: CRIMINAL § 635 (4th ed. 2011) (burden of proof is on the petitioner in habeas proceedings); Brecht v. Abrahamson, 507 U.S. 619, 631 (1993) (harmless error analysis applies in habeas proceedings); Williams v. United States, 481 F.2d 339, 346 (2d Cir. 1973) (applying a "presumption of regularity" to a conviction challenged through habeas).

Act.[64] Further, civil tort suits against prosecutors are not a source of relief because absolute immunity shields them from liability for decisions they make in their prosecutorial capacity.[65] Judges are thus rather constrained in their ability to police prosecutors' violations of defendants' rights, because judicial remedies for such violations are often either ineffective or difficult to impose.

The protections of the adversary system also break down in situations where the defendant has inadequate counsel.[66] If the defense lawyer does not competently argue for the defendant's constitutional rights, then the judge will be hindered in their ability to protect those rights. And judges have only limited power to correct defense lawyers' failings after the fact. In cases where a defense lawyer fails to object to a prosecutor's unconstitutional actions at trial, the standard of review on appeal becomes more deferential—the judge must find that the violation was a "plain error," meaning that it both affected the outcome of the proceeding and was improper under clearly established law.[67] The defendant can also bring a post-conviction "ineffective assistance of counsel" claim through a habeas corpus petition, but such a claim faces major hurdles.[68] The defendant must show both that the lawyer's performance was deficient and that this deficiency affected the likelihood of conviction.[69] Judges hearing such claims must presume that the defense lawyer was competent,[70] and hindsight bias often causes judges to believe in retrospect that conviction was inevitable regardless of what the defense lawyer did.[71] And defendants

64. 28 U.S.C. § 2254(d) (2016). *See* Kozinski, *supra* note 27, at xli.

65. Imbler v. Pachtman, 424 U.S. 409, 427 (1976). Prosecutors can, however, be sued if they commit misconduct in their investigative capacity, where only qualified immunity applies. *See* Buckley v. Fitzsimmons, 509 U.S. 259, 275 (1993); Genzler v. Longanbach, 410 F.3d 630, 638 (9th Cir. 2005). Criminal defendants can also sometimes recover attorney fees through the "Hyde Amendment" if they are exonerated in a federal prosecution. *See, e.g.*, United States v. Campbell, 134 F. Supp. 2d 1104, 1107 (C.D. Cal. 2001), *aff'd*, 291 F.3d 1169 (9th Cir. 2002).

66. *See* Zacharias, *supra* note 14, at 66–74. Consequently, defense lawyers also play a crucial role in constitutional enforcement. *See* John Wesley Hall, *We Are Enforcers of the Constitution*, CHAMPION, Aug. 2008, at 5.

67. *See* FED. R. CRIM. P. 52(b); United States v. Olano, 507 U.S. 725, 733–34 (1993).

68. *See generally* Eve Brensike Primus, *Procedural Obstacles to Reviewing Ineffective Assistance of Trial Counsel Claims in State and Federal Postconviction Proceedings*, 24 CRIM. JUST. 6 (2009) (discussing barriers to post-conviction review of indigent defense, and concluding that the current system of review fails to check ineffective trial attorney performance).

69. Strickland v. Washington, 466 U.S. 668, 687 (1984).

70. *See id.* at 690 ("[C]ounsel is strongly presumed to have . . . made all significant decisions in the exercise of reasonable professional judgment.").

71. Stephanos Bibas, *The Psychology of Hindsight Bias and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH L. REV. 1, 5–6 (2004); Findley & Scott, *supra* note 62, at 350–51.

have no constitutional right to counsel in post-conviction challenges,[72] meaning those that cannot afford lawyers must proceed *pro se* or abandon their claims. Thus, it is quite difficult for defendants to litigate violations of their constitutional rights as "ineffective assistance" claims. Because poor defense lawyering is so difficult to fix in hindsight, it presents yet another situation in which the prosecutor should temper their adversary zeal and adopt a quasi-judicial orientation. And, unfortunately, the underfunding of public defender services makes inadequate defense advocacy far too common in the American criminal justice system.[73]

Finally, judges also have difficulty monitoring the actions of police officers during investigations. If an officer violates the Constitution while gathering evidence, a judge only finds out about it later when the case is tried. At that point the judge can suppress the evidence if, for example, it is an object obtained in a warrantless search,[74] a confession procured without *Miranda* warnings,[75] or a witness identification conducted with procedures that violate the Due Process Clause.[76] But each of these doctrines contains major exceptions, which reflect judges' general unwillingness to let the criminal go free because the constable has blundered.[77] Post hoc judicial enforcement is thus far from complete. Further, the relevant Fourth and Fifth Amendment rights safeguard fundamental privacy interests that go beyond just the exclusion of evidence.[78] Judicial suppression does not fully protect those interests because it does not prevent the unconstitutional police conduct—it merely excludes the fruits of that conduct from being used at trial. Besides suppression motions, defendants can also bring tort lawsuits against police officers under 42 U.S.C. § 1983 for violating their

72. Murray v. Giarratano, 492 U.S. 1, 7–13 (1989); Pennsylvania v. Finley, 481 U.S. 551 (1987).

73. *See* Carol S. Steiker, Gideon *at Fifty: A Problem of Political Will*, 122 YALE L.J. 2694, 2695–97 (2013).

74. *See* Perry v. New Hampshire, 132 S. Ct. 716, 723–25 (2012).

75 *See* Miranda v. Arizona, 384 U.S. 436, 478–79 (1966).

76 *See* United States v. Ross, 456 U.S. 798, 798 (1982).

77. People v. Defore, 150 N.E. 585, 587 (N.Y. 1926). *See also Perry*, 132 S. Ct. at 720 (allowing judges to admit witness identification evidence tainted by police influence if the "indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances"); Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 111, 113 (2003); Russell M. Gold, *Beyond the Judicial Fourth Amendment: The Prosecutor's Role*, 47 U.C. DAVIS L. REV. 1591, 1606–14 (2014); Klein, *supra* note 40, at 2030–32 (describing the many judicial exceptions to *Miranda* and the warrant requirement); Eve Brensike Primus, *The Future of Confession Law: Toward Rules for the Voluntariness Test*, 114 MICH. L. REV. 1, 22–23 (2015) ("In the last twenty years, the Supreme Court has effectively eliminated most of the protection that *Miranda* and *Massiah* once provided."); Avani Mehta Sood, *Cognitive Cleansing: Experimental Psychology and the Exclusionary Rule*, 103 GEO. L.J. 1543, 1549–53 (2015).

78. *See* Griswold v. Connecticut, 381 U.S. 479, 484–85 (1965).

constitutional rights.[79] But such suits face significant barriers to success, including the officers' qualified immunity,[80] the requirement of *Heck v. Humphrey* that any conviction be reversed before a lawsuit is brought,[81] and the general bias of juries in favor of police officers.[82] The judicial system is, in short, severely limited in its ability to prevent police officers from engaging in unconstitutional conduct. And these limits are compounded by the fact that the outcomes of cases generally have little effect on police officers' careers, so the exclusionary rule and other judicial remedies are unlikely to deter police officer misconduct.[83] It is therefore crucial that prosecutors step in to provide guidance to police officers conducting investigations. Unlike judges, prosecutors can work directly with police during investigations and monitor their practices so as to prevent them from violating the Constitution.[84] In doing so, prosecutors again must put their advocacy role aside and act as neutral guardians of the Constitution.

2. Rights Controlled by Prosecutors

Prosecutors should protect defendants' constitutional rights in those stages of the criminal justice process that prosecutors unilaterally control. They should go beyond judicial doctrine during these stages because judges do not meaningfully enforce defendants' rights. Indeed, prosecutors effectively act as surrogate judges during these stages, and accordingly they should adopt judge-like role ethics. This means deciding questions of constitutional rights with a commitment to fairness and neutrality. The standard justification for an adversary system is that by having two sets of partisan lawyers argue before a neutral adjudicator, we can achieve justice for both parties.[85] But when one of these partisan advocates is also the key decisionmaker, the argument for adversarialism breaks down. One cannot be both a participant in a contest and the judge of that contest, at least not if

79. *See* AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 31–45 (1997) (arguing that tort suits should replace the exclusionary rule).

80. Harlow v. Fitzgerald, 457 U.S. 800, 806–08 (1982).

81. Heck v. Humphrey, 512 U.S. 477, 486–88 (1994).

82. *See* Calabresi, *supra* note 77, at 114–15.

83. *See id.* at 116–17; Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 368–92.

84. *See* CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-3.2 (3d ed. AM. BAR ASS'N 1993); John Buchanan, *Police-Prosecutor Teams: Innovations in Several Jurisdictions*, NAT'L INST. OF JUSTICE REPORTS, May–June 1989, at 1–4.

85. *See* MODEL RULES OF PROF'L CONDUCT prmbl. para. 8 (AM. BAR ASS'N 2016) ("[W]hen an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done."); HAZARD & HODES, *supra* note 16, at 36; Markovits, *supra* note 17, at 1368–69; Vermeule, *supra* note 15, at 1443–44.

the contest is going to be fair. Furthermore, as government officers, prosecutors are obligated to act as neutral interpreters of the Constitution in situations where they control the relevant constitutional decision. An analogy can be drawn to the President's power of constitutional review. The President has an independent obligation to interpret the Constitution in good faith, and this obligation is at its peak when the President makes decisions that are unreviewable by other government institutions.[86] Just as the President should approach such decisions with an attitude of interpretive neutrality, prosecutors should also neutrally enforce constitutional rights when their own decisions are not reviewable. If constitutional principles like due process and equal protection are to play a role in such decisions, then prosecutors themselves must take those principles into account.

Prosecutors exercise near-plenary power at a number of different stages in the criminal adjudication process. Here are a few illustrative examples. First, at the beginning of a criminal case the prosecutor has full discretion to decide whether or not to charge the defendant, as well as what crimes to charge the defendant with. A judge cannot require that the prosecutor charge or not charge a particular crime, nor can a judge supervise prosecutorial charging decisions across cases to ensure that different defendants are treated similarly.[87] The prosecutor therefore has a basically unreviewable power to decide how much or how little punishment the defendant may face. Second, the prosecutor also maintains functional control over the grand jury. In the American system there is no judge present at a grand jury hearing, nor is there a defense attorney, and the grand jury's records are generally sealed.[88] The prosecutor thus unilaterally controls the grand jury proceedings, determines the presentation of evidence, and faces only minimal judicial oversight.[89] Consequently, the

86. *See* Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199, 203 (1994); The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. O.L.C 55, 55–56 (1980); Dawn E. Johnsen, *What's a President To Do? Interpreting the Constitution in the Wake of Bush Administration Abuses*, 88 B.U. L. REV. 395, 410–19 (2008); Jeffrey A. Love & Arpit K. Garg, *Presidential Inaction and the Separation of Powers*, 112 MICH. L. REV. 1195, 1222–23 (2014); Saikrishna Bangalore Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613, 1679–80 (2008).

87. *See* United States v. Armstrong, 517 U.S. 456, 464 (1996); Heckler v. Chaney, 470 U.S. 821, 832 (1985); United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965); Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments*, 6 SETON HALL CIRCUIT REV. 1, 9–11 (2009).

88. *See* FED. R. CRIM. P. 6(d)–(e); Douglas Oil Co. of Cal. v. Petrol Stops Nw., 441 U.S. 211, 217–24 (1979).

89. *See* United States v. Williams, 504 U.S. 36, 48–50 (1992); W. Thomas Dillard, Stephen R.

grand jury's decision whether or not to indict a defendant is heavily influenced by the prosecutor's presentation.[90] Third, the prosecutor often controls whether a defendant can receive sentencing credit for cooperating with the government. For example, in the federal system defendants can only receive a departure for "substantial assistance" under Section 5K1 of the Federal Sentencing Guidelines if the prosecutor files a motion asking for one.[91] Section 5K1 is used in over 12 percent of federal criminal cases, and defendants who get a 5K1 departure receive a median of thirty-five months' decrease in their sentences below the Guidelines minimum.[92] Prosecutors therefore exercise significant control over sentencing decisions when they decide whether to file 5K1 motions.

In settings like these, where prosecutors control the key decisions, judges have very few tools at their disposal to protect defendants' constitutional rights. For charging decisions and government-controlled sentencing departures, the only significant constraint on prosecutorial discretion is that the prosecutor cannot base their decision on an unconstitutional factor. For example, the prosecutor cannot add charges because of the defendant's race,[93] or in retaliation for the defendant exercising a constitutionally protected right (such as the right to a jury trial).[94] But it is extremely difficult for a defendant to succeed with such a claim—absent a frank admission by the prosecutor that they acted with unconstitutional purpose, the defendant has no effective way of generating evidence.[95] And a tort lawsuit for malicious or unlawful prosecution under

Johnson & Timothy Lynch, *A Grand Façade: How the Grand Jury Was Captured by Government*, 476 CATO POL'Y ANALYSIS 3 (2003); Thaddeus Hoffmeister, *The Grand Jury Legal Advisor: Resurrecting the Grand Jury's Shield*, 98 J. CRIM. L. & CRIMINOLOGY 1171, 1180–85 (2008).

90. *See* William J. Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & CRIMINOLOGY 174, 174 (1973) ("The grand jury is the total captive of the prosecutor who, if he is candid, will concede that he can indict anybody, at any time, for almost anything, before any grand jury."); Ben Casselman, *It's Incredibly Rare for a Grand Jury to Do What Ferguson's Just Did*, FIVETHIRTYEIGHT (Nov. 24, 2014), http://fivethirtyeight.com/dtalab/ferguson-michael-brown-indictment-darren-wilson ("According to the Bureau of Justice Statistics, U.S. attorneys prosecuted 162,000 federal cases in 2010, the most recent year for which we have data. Grand juries declined to return an indictment in 11 of them.").

91. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (U.S. SENTENCING COMM'N 2015); Wade v. United States, 504 U.S. 181, 185 (1992). *See also* Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. REV. 105, 108 (1994).

92. *See* U.S. SENTENCING COMM'N, 2014 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.30 (2014), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-source books/2014/Table30.pdf.

93. *See, e.g.*, United States v. Armstrong, 517 U.S. 456, 464–65 (1996); *Wade*, 504 U.S. at 185–87 (1992); McCleskey v. Kemp, 481 U.S. 279, 309 n. 30 (1987); Wayte v. United States, 470 U.S. 598, 608–09 (1985).

94. Blackledge v. Perry, 417 U.S. 21, 28–29 (1974).

95. *See* Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67

42 U.S.C. § 1983 is a non-starter because prosecutors' decisions are protected by absolute immunity.[96] Further, during grand jury proceedings, judges are only empowered to enforce a small number of clearly established rules against misconduct, such as the rules providing for grand jury secrecy and requiring that no one other than grand jurors be present during deliberations.[97] Due to the independence of the grand jury, judges' supervisory role extends no further than this.[98] And judges cannot generally reverse convictions due to constitutional errors in grand jury proceedings, because any such errors are necessarily harmless. If there was proof beyond a reasonable doubt to convict, there logically must also have been probable cause to indict.[99] In sum, beyond deciding the types of narrow constitutional claims just discussed, judges play no real role in policing defendants' rights in those phases of the criminal justice process that are controlled by prosecutors.

Prosecutors also exercise unilateral authority during the plea bargaining process. Given that the overwhelming majority of criminal convictions—over 90 percent—are obtained through plea bargains, this arguably makes prosecutors the most powerful figures in the criminal justice system.[100] Indeed, American criminal justice could be described as an administrative system of negotiated settlements punctuated by the occasional trial.[101] Within this system, the prosecutor largely controls the terms of plea bargain agreements. They determine what crimes to charge, decide the content of cooperation agreements, and often dictate the calculation of sentence lengths.[102] And several structural features of the

FORDHAM L. REV. 13, 48–49 (1999); Donald G. Gifford, *Equal Protection and the Prosecutor's Charging Decision: Enforcing an Ideal*, 49 GEO. WASH. L. REV. 659, 691–98 (1981).

96. Imbler v. Pachtman, 424 U.S. 409, 427 (1976). *See also* Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L. REV. 2089, 2094 (2010).

97. *See, e.g.*, 18 U.S.C. §§ 1622, 1623, 2515 (2016); FED. R. CRIM. P. 6(d)-(e).

98. United States v. Williams, 504 U.S. 36, 46 n.6 (1992).

99. *See* United States v. Mechanik, 475 U.S. 66, 67 (1986). There is, however, a notable exception to this rule for cases alleging racial discrimination in the selection of the grand jury. *See* Vasquez v. Hillery, 474 U.S. 254, 260–64 (1986).

100. *See* Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty ("In 2013, while 8 percent of all federal criminal charges were dismissed . . . more than 97 percent of the remainder were resolved through plea bargains, and fewer than 3 percent went to trial . . . . While corresponding statistics for the fifty states combined are not available, it is a rare state where plea bargains do not similarly account for the resolution of at least 95 percent of the felony cases that are not dismissed.").

101. *See* BIBAS, *supra* note 40, at xvi; FEELEY, *supra* note 40, at 273–74; GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 175–205 (2003); Barkow, *Criminal Law*, *supra* note 40, at 327; Lynch, *supra* note 40, at 2120–21.

102. *See* Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from*

American criminal justice system tilt the scales in favor of prosecutors during plea negotiations.[103] The proliferation of criminal laws gives prosecutors the ability to charge many crimes for the same conduct, letting them put a laundry list of violations in an indictment so as to gain leverage against the defendant.[104] Defendants also generally face much higher penalties if they go to trial than if they plead guilty, which helps prosecutors pressure defendants into accepting plea deals.[105]

Judges, by contrast, play only a minor role in the plea bargaining process. Once a plea bargain has been agreed to, the judge's role is usually limited to confirming in open court that the defendant entered into the agreement voluntarily and with adequate knowledge of the consequences, and also to determining that there are sufficient facts to support the guilty plea.[106] After the judge accepts the plea bargain, the defendant can only bring a limited set of claims attacking it: that the agreement was not voluntarily or knowingly entered into, that the government breached the agreement, or that the defendant's counsel was ineffective.[107] Plea bargain agreements also commonly contain clauses waiving the defendant's right to appeal, which limits the judicial role even further.[108] Beyond hearing this narrow set of claims, judges do not generally monitor prosecutors' plea bargaining tactics or participate in plea bargaining themselves (although a

Administrative Law, 61 STAN. L. REV. 869, 876–84 (2009).

103. *See generally* Bibas, *supra* note 27 (exploring a number of structural and psychological factors that distort the plea bargaining process).

104. *See* DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF CRIMINAL LAW 22–23 (2008); Stuntz, *supra* note 26, at 534–38, 546–52; William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2567–68 (2004).

105. *See* John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 12–19 (1978) (analogizing the American plea bargaining system to the medieval practice of confession through torture); Richard A. Oppel, Jr., *Sentencing Shift Gives New Leverage to Prosecutors*, N.Y. TIMES, Sept. 25, 2011, at A1 ("After decades of new laws to toughen sentencing for criminals, prosecutors have gained greater leverage to extract guilty pleas from defendants and reduce the number of cases that go to trial, often by using the threat of more serious charges with mandatory sentences or other harsher penalties.").

106. *See* FED. R. CRIM. P. 11; Jon Brick, *Guilty Pleas*, 73 GEO. L.J. 523, 533–34 (1984); Daniel S. McConkie, *Judges as Framers of Plea Bargaining*, 26 STAN. L. & POL'Y REV. 61, 70–71 (2015). *Cf.* Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1059–60 (1976) (calling for an expanded judicial role in the plea bargaining process).

107. *See* Padilla v. Kentucky, 559 U.S. 356, 364–66, 373–74 (2010); United States v. Broce, 488 U.S. 563, 569–71 (1989); Santobello v. New York, 404 U.S. 257, 262 (1971); Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CAL. L. REV. 1117, 1142–43 (2011).

108. *See* Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 212 (2005) ("In nearly two-thirds of the cases settled by plea agreement in our sample, the defendant waived his right to review.").

few states do permit some judicial involvement in plea bargaining).[109] Thus, the plea bargaining system is basically a shadow criminal justice system run by prosecutors, one that happens to decide the great majority of criminal cases. If constitutional rights are to be enforced in this system, prosecutors themselves have to do the enforcing.

3. Judicially Underdefined Rights

Prosecutors should also expand defendants' constitutional rights in cases where the judicial doctrine underdefines them. As Lawrence Sager has observed, judges often fail to give constitutional provisions their full scope due to the institutional limitations of judicial decisionmaking.[110] This does not mean that judges have abandoned the field entirely—they do give the relevant rights some meaning. But judges often artificially limit their definitions of constitutional rights out of concern that the doctrinal standards they adopt must be administrable. This creates a bias in favor of clear doctrinal lines, and such lines frequently fail to capture the entirety of the relevant constitutional norm. This is distinct from the problem of underinclusive remedies discussed in Section I.C.1—the issue here is not one of judges recognizing a constitutional right and then failing to enforce it (for instance, out of unwillingness to overturn a conviction), but is instead one of judges articulating a decision rule for a right that fails to encompass the full scope of the relevant constitutional norm.[111] Prosecutors, by contrast, are more nimble than judges at balancing constitutional protections against other system values, and so are more capable of expanding them to their fullest degree.

Judges' desire for clear doctrinal lines, and their consequent underdefinition of certain constitutional rights, does not diminish the force of those rights.[112] It simply falls to other government actors, such as prosecutors, to pick up the slack. The Equal Protection Clause is a

109. In the federal system, judges are prohibited from participating in plea bargaining discussions. FED. R. CRIM. P. 11(c)(1). Further, the ABA's "Standards for Criminal Justice" instruct judges not to participate in plea bargaining negotiations. STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY § 14-3.3(c) (AM. BAR ASS'N 1999). However, state systems have a variety of approaches—most of them forbid or discourage judicial involvement in plea bargaining, but some permit it. *See* Rishi Raj Batra, *Judicial Participation in Plea Bargaining: A Dispute Resolution Perspective*, 76 OHIO ST. L.J. 565, 572–79 (2015).

110. Sager, *supra* note 8, at 1212–13. *See also* Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1275, 1298–1303 (2006).

111. For a useful discussion of this distinction, see Kermit Roosevelt III, *Aspiration and Underenforcement*, 119 HARV. L. REV. FORUM 193, 193–94 (2006).

112. Sager, *supra* note 8, at 1220–28.

paradigm example of this. In *Washington v. Davis*, the Supreme Court expressed serious concern that if it held that the Equal Protection Clause bans government policies that are formally race-neutral but have discriminatory effects, then the judiciary would be forced to hear difficult-to-administer challenges to a wide variety of different laws.[113] The Court solved this problem by limiting judicial enforcement of the Equal Protection Clause to only cases of overt discrimination, and leaving disparate impact claims for "legislative prescription."[114] This rule does not encompass the full scope of the Equal Protection Clause, and other actors (like legislators and prosecutors) can independently implement the equal protection norm through policies that seek to counteract unintentional race discrimination. Coercive plea bargains present a similar example. The Supreme Court held in *Bordenkircher v. Hayes* that a prosecutor can file additional charges against a defendant if that defendant refuses to plead guilty.[115] Prosecutors are thereby given the Court's blessing to coerce defendants into accepting plea bargains. One can see why this hands-off approach would appeal to judges—it is difficult for a judge to draw a line between charging decisions that impermissibly coerce plea bargain agreements and charging decisions that simply provide acceptable discounts for pleading guilty. But prosecutors can draw this line more readily, since for them plea bargain decisions are a matter of internal office policy. Prosecutors can expand defendants' rights in areas like equal protection and plea bargaining because they do not share judges' need for bright-line rules. They are capable of balancing constitutional protections against other system values in a more messy, complicated, and granular way.

This is an important feature of administrative constitutionalism, and by extension of prosecutorial constitutionalism. Expert agency officials like prosecutors are more nimble in implementing constitutional protections, because they can incorporate them into micro-level decisionmaking processes rather than needing to impose them from the outside. A court trying to assert its authority over an agency is like a child trying to design

113. Washington v. Davis, 426 U.S. 229, 248 (1976). *See also* Ross, *supra* note 44, at 554–55. *Cf.* Sager, *supra* note 8, at 1218 (providing judicial treatment of challenges to taxation measures as an example of underenforcement of the Equal Protection Clause due to institutional concerns).

114. *See Davis*, 426 U.S. at 248. *Cf.* Sager, *supra* note 8, at 1239–40 (discussing justifications for judicial deference to the legislature as a means of overcoming underenforcement of constitutional norms due to institutional concerns). Indeed, Congress has enacted several statutes that prohibit both intentional and "disparate impact" racial discrimination, including Title VII of the Civil Rights Act and Section 2 of the Voting Rights Act. *See* 42 U.S.C. § 2000e-2 (2016); 52 U.S.C. § 10301 (2016).

115. Bordenkircher v. Hayes, 434 U.S. 357, 364–65 (1978).

an ant farm—you can shake all you want, but only the ants can decide where to build the tunnels. Agencies also have more flexibility because they can expand constitutional protections without creating binding legal entitlements.[116] These differences allow for a division of enforcement labor between judges and prosecutors. Judges can enforce constitutional rights up to a certain baseline through bright-line legal rules, and prosecutors can use internal policies to implement them above that baseline while balancing them against other system values. The Petite policy is a good example of this approach. In *Bartkus* and *Abbate*, the Supreme Court underdefined the right against double jeopardy. In doing so the Court was motivated, in part, by the concerns that it is difficult to determine which federal and state laws are duplicative of each other, and that a more expansive double jeopardy right would hinder law enforcement.[117] However, through the Petite policy, the DOJ more expansively protected defendants' constitutional interest in not being doubly prosecuted by restricting such prosecutions to cases with "compelling" reasons.[118] When he announced the policy, Attorney General William P. Rogers noted that its purpose was to "observe not only the rulings of the court but the spirit of the rulings as well"—that is, to prevent prosecutors from taking undue advantage of the Court's limited implementation of the Double Jeopardy Clause.[119] Judges could not easily administer the vague standard announced in the Petite policy. But prosecutors can do so more readily, both because criminal defendants cannot sue to enforce internal guidelines like the Petite policy, and because prosecutors can develop internal standards to cash out phrases like "compelling reasons." This division of labor between judges and prosecutors is an attractive enforcement structure. The courts enforce much of the Double Jeopardy Clause through a clear legal rule, while prosecutors implement the Clause's penumbra by incorporating it into internal administrative processes and balancing it against other considerations. And, in cases like *Bartkus* and *Abbate*, courts could even explicitly invite (or perhaps even order) prosecutors to implement the relevant constitutional protections above the floor set by judicial doctrine.

116. Such legal entitlements can have unexpected second-order effects. *Cf.* Marin K. Levy, *Judging the Flood of Litigation*, 80 U. CHI. L. REV. 1007, 1007 (2013) (discussing how the Supreme Court analyzes "floodgates" arguments).

117. Abbate v. United States, 359 U.S. 187, 195 (1959); Bartkus v. Illinois, 359 U.S. 121, 138–39 (1959).

118. *See* Press Release, U.S. Dep't of Justice, *supra* note 1. *See also supra* notes 2–4 and accompanying text.

119. Alvin Shuster, *Rogers Tells Federal Attorneys to Limit Double Jeopardy Trials*, N.Y. TIMES, Apr. 6, 1959, at 19.

4. Interpretive Disagreements

A prosecutor might also expand constitutional protections beyond the level required by the judiciary simply because they disagree with judicial doctrine. If a prosecutor believes that judges have defined a constitutional right too narrowly, the prosecutor can unilaterally choose not to take advantage of judges' permission to infringe that right. This is a very different kind of prosecutorial constitutionalism from the kind advocated in the prior three subsections. Here, the prosecutor is not correcting a failure of the adversary system: the prosecutor does not unilaterally control the relevant right, nor does the judicial doctrine underdefine or underenforce the right due to institutional limitations. Rather, the constitutional question has been fully and fairly litigated in the courts, and the prosecutor simply disagrees with the legal outcome. Crucially, such disagreement can only go in one direction: towards more expansive enforcement of constitutional provisions. Prosecutors cannot, for example, unilaterally decide to ignore the requirements of *Brady* and *Miranda*, even if they believe those cases were wrongly decided. But they can go beyond those cases if they think the Constitution requires more. Thus, prosecutors could engage in a kind of soft departmentalism, implementing their own constitutional interpretations without threatening judicial supremacy. For example, prosecutors could construe the Eighth Amendment as imposing greater limits on the use of the death penalty than those found in current judicial doctrine, and could consequently seek the death penalty only when they believe it to be constitutionally permissible.[120] Prosecutors could also interpret the Due Process Clause as requiring them to reveal inculpatory evidence, and thus go beyond the disclosure requirements of *Brady*, which only applies to material exculpatory and mitigating evidence. And prosecutors could take such positions notwithstanding contrary judicial precedent.[121] The argument for prosecutorial constitutionalism is weaker in situations of mere disagreement than it is where the adversary system fails. After all, it seems

120. *See, e.g.*, Michael Clemente, Note, *A Reassessment of Common Law Protections for "Idiots"*, 124 YALE L.J. 2746, 2791–2801 (2015) (arguing that current Eighth Amendment doctrine permits the execution of people with intellectual disabilities who would have been protected from execution at the time of the framing).

121. Analogously, the DOJ has taken the position that the Supreme Court's decision in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), prohibiting mandatory life without parole for juvenile homicide offenders, applies retroactively. *See* Government's Response to Petitioner's Application for Authorization to File a Second or Successive Motion Under 28 U.S.C. § 2255 at 18–19, Johnson v. United States, 720 F.3d 720 (8th Cir. 2013) (No. 12-3744). The DOJ has maintained this position notwithstanding the fact that the only circuits to have considered the question have gone the other way. *See In re* Morgan, 713 F.3d 1365, 1367–68 (11th Cir. 2013); Craig v. Cain, No. 12-30035, 2013 U.S. App. LEXIS 431, at *3–6 (5th Cir. Jan. 4, 2013).

odd that a prosecutor should act like a judge while making an argument before a judge. But there are nonetheless a few potential justifications for prosecutors in such cases to expand constitutional rights beyond the judicial minimum.

One potential justification is that having multiple, redundant constitutional enforcers serves many useful functions in our legal system. In the federalism context, Robert Cover has observed that overlapping assertions of jurisdiction between states and the federal government create a number of benefits.[122] These include a greater possibility for error correction through relitigation, checks against systematic bias or corruption by particular decisionmakers, more possibility for creative legal innovation, and dialogue between redundant decisionmakers that leads to more robust norm articulation.[123] When prosecutors act on their independent judgments about the scope of defendants' constitutional rights, they create a similar situation of polycentric rights enforcement that carries many of the same benefits. Redundancy through prosecutorial enforcement can correct situations where judges erroneously fail to enforce a constitutional right. It can also lead to more creative innovations in constitutional interpretation, and spark interbranch dialogue that will help to develop constitutional norms.[124]

Another potential justification is that prosecutors' constitutional interpretations could be understood as instances of "popular constitutionalism." In the American system, prosecutors are commonly either elected officials or appointees of elected officials. Prosecutorial constitutionalism can thus perhaps be seen as the electorate expressing its constitutional views through its choice of representatives, which a number of scholars have endorsed as a desirable model of constitutional lawmaking.[125] For example a prosecutor might, during an election, take the position that the plea bargaining system violates the constitutional right to a jury trial.[126] Or a prosecutor might argue that the death penalty process in a

122. Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 676 (1981).

123. *Id.* at 654–58, 661–63, 665, 674–80.

124. *See, e.g.*, *infra* Section III.E (discussing a number of examples of prosecutors' constitutional interpretations sparking interbranch dialogue concerning First Amendment and Sixth Amendment rights).

125. *See, e.g.*, KRAMER, *supra* note 30, at 8; TUSHNET, *supra* note 30, at 16–17, 47, 181–87, 193–84; Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335, 1336–37, 1382–87 (2001).

126. For example, Robert T. Johnson, then the District Attorney of the Bronx, abolished plea bargains in felony cases in 1992. *See* Ian Fisher, *Bronx District Attorney Moves to Ban Plea Bargains in*

particular state is unconstitutional, and thus assert that they will refuse to seek the death penalty.[127] If the prosecutor is elected on such a platform, then they arguably have a popular mandate to implement that view of the Constitution. David Pozen has made a similar observation about judicial elections—if they turn on issues of constitutional law, then they are the clearest avenues for the electorate to actualize its constitutional views.[128] Analogously, if prosecutorial elections became about constitutional issues, they would be paradigm cases of popular constitutionalism. They would, however, only be what Pozen labels "modest" popular constitutionalism, since they would pose no threat to judicial supremacy.[129] Much like the President's decision to veto a law on constitutional grounds, the interpretive decisions discussed here are squarely within prosecutors' policy discretion.[130] If a prosecutor refuses to plea bargain or seek the death penalty due to their own constitutional theory, doing so does not infringe on the powers of the judiciary. Further, the argument for popular constitutionalism by prosecutors is perhaps somewhat stronger than for other elected officials, because enforcing a constitutional right above the judicial minimum usually (though not always) involves helping defendants.[131] Generally prosecutors run for office on a platform of being tough on criminals, and helping defendants could become a political liability.[132] So when an elected prosecutor enforces a constitutional right above the judicial minimum, for example by refusing to impose the death penalty, that decision is more likely than most to be tested in a subsequent election. However, this argument for prosecutorial elections as vehicles of popular constitutional interpretation does depend on prosecutors actually

Felony Cases, N.Y. TIMES (Nov. 25, 1992), http://www.nytimes.com/1992/11/25/nyregion/bronx-district-attorney-moves-to-ban-plea-bargains-in-felony-cases.html.

127. *Cf.* Mark Berman, *Pennsylvania's Governor Suspends the Death Penalty*, WASH. POST (Feb. 13, 2015), http://www.washingtonpost.com/news/post-nation/wp/2015/02/13/pennsylvania-suspends-the-death-penalty/?utm_term=.6868a8c9b7b6 (reporting a moratorium on the "flawed" death penalty system until the state had studied the issue).

128. David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2064–86 (2010) (considering judicial elections as a mechanism of popular constitutionalism). *Cf.* Joseph Blocher, *Popular Constitutionalism and the State Attorneys General*, 122 HARV. L. REV. 108, 114–15 (2011) (explaining the electorate's influence on constitutional interpretation through state attorney generals).

129. Pozen, *supra* note 128, at 2060–61.

130. *See* Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1263–73 (2011).

131. One major exception is when prosecutors seek to enforce the Equal Protection Clause by increasing all defendants' charges and punishments to an equal, high level. *See, e.g.*, *infra* Section III.F (discussing Attorney General Ashcroft's death penalty policies). Another is when prosecutors abolish plea bargaining by refusing to give defendants lower sentences in exchange for guilty pleas. *See infra* Section III.B.

132. *See supra* note 26 and accompanying text.

campaigning on their constitutional views, and the public understanding and endorsing these views. And given the general low salience of state district attorney elections, such a model seems aspirational.[133]

II. INSTITUTIONS OF PROSECUTORIAL CONSTITUTIONALISM

Up to this point, this Article has discussed prosecutorial constitutionalism as if it involved individual prosecutors deciding, in the midst of litigation, to switch out of advocate mode and into quasi-judge mode. But this is a lot to ask of a prosecutor. Prosecutors have powerful incentives to achieve convictions in specific cases, so relying on them to decide on the fly whether or not to protect defendants' rights is problematic.[134] And even putting the incentives problem aside, it is difficult to make complicated system-level decisions about one's proper role in the middle of arguing a case. An analogy can be drawn to the relationship between personal physicians and public health officials: a physician's goal is to treat the individual patient, while a public health official's goal is to ensure that the entire population is healthy. So where a physician might overprescribe antibiotics, a public health official should step in to set rules limiting their use.[135] Similarly, individual prosecutors' choices should be constrained through system-level rules that compel prosecutors to incorporate constitutional rights into their decisionmaking.[136] Such rules can be established at a number of different levels: individual offices, larger prosecution bureaucracies, or state bar associations. They can also be implemented in a variety of ways: training prosecutors, imposing internal discipline, centralizing decisionmaking authority, creating positions tasked with protecting constitutional rights, and imposing bar sanctions.

133. *See* Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism*?, 118 HARV. L. REV. 1594, 1621–23 (2005) (reviewing LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004)) (expressing skepticism that the electorate ever understands itself as engaging in constitutional interpretation when it selects representatives). *Cf.* Pozen, *supra* note 128, at 2094-3005 (discussing the low quality of judicial election dialogue, and the consequent difficulty with translating them into vehicles of popular constitutionalism without a substantially more engaged public); David Schleicher & Elina Treyger, The Case Against the DA (unpublished article) (on file with author) (showing through empirical data that almost no traditional metrics of prosecutorial success, such as conviction rates, are correlated with district attorneys' reelection); Wright, *supra* note 26, at 591–606 (discussing the low salience and poor quality of prosecutorial campaigns).

134. *See* Barkow, *supra* note 102, at 896; Kozinski, *supra* note 27, at xxvi; Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 803 (2003).

135. I owe this analogy to Kevin Lamb.

136. *Cf.* Barkow, *supra* note 102, at 871–74 (arguing that "enforcement" and "adjudicatory" functions should be separated within prosecutors' offices).

Consequently, both prosecutors' internal office guidelines and the bar's rules of professional ethics function as important tools for preserving defendants' constitutional rights.

A. THE INTERNAL RULES OF PROSECUTORS' OFFICES

Prosecutors' offices are hierarchical in structure—there is a head prosecutor at the top who establishes office policies, and individual line prosecutors must implement those policies in particular cases. Head prosecutors frequently use internal memoranda and other guidance to provide instruction on how to handle certain issues that arise in the course of criminal litigation. Such issues might include how to decide the terms of a plea bargain agreement, what crimes to charge in certain cases, and when to offer a defendant a break for assisting with an investigation. These internal systems of rules can be used as frameworks for preserving defendants' constitutional rights. For example, the head of an office can impose rules requiring that defendants will not be coerced into accepting plea bargains, or that duplicative prosecutions will not be brought.[137] Such rules reflect an internal division of roles within the prosecutor's office: the head of the office performs a quasi-judicial function by imposing rules that preserve defendants' rights, while the line prosecutors perform the standard prosecution function by seeking to convict defendants within the limits of those rules.[138] By separating out the judicial and prosecutorial functions in this way, the office can balance the conflicting roles of adversary advocate and constitutional guardian. Line prosecutors can be partisan advocates only up to the point that their actions infringe on one of the office's internal rules, and then they have to step back and preserve the defendant's rights. Such internal systems of rules are not necessarily just the reflection of a single boss's decisions. They can take on a life of their own as they pass between different prosecutorial administrations, and can thereby become engrained in the culture of an office.

The DOJ's "United States Attorneys' Manual" is a good example of

137. *See* Bibas, *supra* note 43, at 1016 (arguing that the heads of prosecutors' offices should design internal regulations, structures, and incentives that will counteract line prosecutors' perverse incentives). *See generally* Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1 (1971) (calling for comprehensive policy statements governing prosecutorial decisionmaking).

138. For useful discussion of the concept of internal separation of powers within government agencies, see Barkow, *supra* note 102, at 895–906; Neal Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2338–39 (2006); Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1038–41 (2011).

such an internal system of prosecutorial rules.[139] The Manual was originally written in 1953, and in its present form it contains rules and policy guidance for federal prosecutors concerning a wide range of job functions. The Manual is "intended to be comprehensive," and is promulgated and periodically revised by a rotating committee of U.S. Attorneys working under the Attorney General.[140] The portion of the Manual dealing with criminal law issues contains a number of rules mandating that federal prosecutors protect defendants' rights. Here are but a few examples: Section 9-5.001 provides that prosecutors must reveal certain exculpatory and impeachment evidence beyond the level mandated by judges,[141] Section 9-11.233 requires that prosecutors present a grand jury with any evidence negating the guilt of the defendant, even though the courts impose no such rule,[142] Section 9-2.031 contains the Petite policy,[143] and Section 9-5.150 restricts prosecutors' ability to seek to close trials to the public and the press.[144] These rules are enforced through internal disciplinary mechanisms at the DOJ, and anecdotal evidence suggests that they are taken seriously by both bosses and line prosecutors.[145] But crucially, the Manual does *not* grant judicially enforceable rights to criminal defendants. The Manual stipulates that it "is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal."[146] Thus the Manual functions as an internal regulatory framework for prosecutors, not as a defensive shield against prosecutorial abuses. However, this does not mean that the Manual is solely an internal concern—judges and defense counsel can point out the Manual's requirements in their discussions with federal prosecutors as a way of ensuring that prosecutors follow their own rules.[147]

139. UNITED STATES ATTORNEYS' MANUAL § 9-2.031 (2015).

140. *Id.* § 1-1.200.

141. *Id.* § 9-5.001 ("Disclosure of exculpatory and impeachment information beyond that which is constitutionally and legally required.").

142. *Id.* § 9-11.233.

143. *Id.* § 9-2.031 ("Dual and Successive Prosecution Policy ('Petite Policy')").

144. *Id.* § 9-5.150.

145. *See, e.g.*, *id.* § 9-11.233 ("While a failure to follow the Department's policy should not result in dismissal of an indictment, appellate courts may refer violations of the policy to the Office of Professional Responsibility for review."); Susan R. Klein, *Monitoring the Plea Process*, 51 DUQ. L. REV. 559, 588 (2013) ("My experience working as a federal criminal prosecutor is that Assistants do read and attempt to follow internal guidelines to the extent they can.").

146. UNITED STATES ATTORNEYS' MANUAL § 1-1.100 (2015).

147. *Cf.* Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 425–26 (2009) (pointing out that internal separation-of-

Individual prosecutors' offices also establish internal policies that can be used to preserve defendants' rights. For example, in 1990 the Eastern District of New York established a policy of voluntarily disclosing evidence of government informants' testimony in prior cases.[148] These disclosures were not formally required by law—in the words of one commentator, they demonstrated a "firm commitment to complying with the spirit, not merely the letter, of *Brady* and its progeny."[149] Similarly, in 1992 the District Attorney for the Bronx established an internal policy that prohibited the use of plea bargain agreements in felony cases.[150] And a 1996 survey showed that seven of Wisconsin's district attorneys' offices used internal guidelines to determine how cases should be charged.[151] Such internal policies need not be established through formal memoranda or employee manuals. They can also operate informally through office norms.[152] A certain task might come to be done a particular way, and that way of doing it might then become the office's standard practice through the instruction and training of new prosecutors. For example, in a 1993 interview, a prosecutor at the U.S. Attorney's Office for the Southern District of Florida revealed that they had an unwritten policy of declining to prosecute cases involving only a small volume of drugs.[153] Similar informal policies can also be established concerning plea bargaining, the revelation of evidence, and other matters that implicate defendants' constitutional rights.

Internal prosecutorial regulations such as these do not necessarily have to originate with the jurisdiction's top prosecutor. They can also be pushed by other government bodies. For example, a court adjudicating constitutional claims against a prosecutor's office might order that office to establish policies protecting defendants' rights. This can happen through institutional injunctions, akin to those that have been issued against prisons and police departments.[154] It can also happen through more subtle nudges.

powers schemes can be reinforced through the checks provided by external separation-of-powers schemes).

148. Kozinski, *supra* note 27, at xxviii.

149. *Id.*

150. *See* Fisher, *supra* note 126.

151. Kim Banks Mayer, Comment, *Applying Open Records Policy to Wisconsin District Attorneys: Can Charging Guidelines Promote Public Awareness?*, 1996 WIS. L. REV. 295, 306.

152. *See* Wright & Miller, *supra* note 9, at 56–57.

153. *See* William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 OHIO ST. L.J. 1325, 1343 n. 88 (1993).

154. *See, e.g.*, Brown v. Plata, 563 U.S. 493, 545 (2011) (upholding an order that the state of California establish policies to reduce prison overcrowding); Ligon v. City of New York, 925 F. Supp. 2d 478, 544–45 (S.D.N.Y. 2013) (ordering the NYPD to establish procedures for training and

In *State v. Lagares*, for example, the Supreme Court of New Jersey requested that the state Attorney General develop internal guidelines for the use of a certain sentence enhancement provision.[155] The Court noted that the adoption of such guidelines would "promote uniformity and provide a means for prosecutors to avoid arbitrary or abusive exercises of discretionary power."[156] The state Attorney General complied, promulgating such guidelines.[157] Similarly, in 1992 the Florida legislature began debating amendments to a habitual offender law after a legislative study showed that prosecutors had applied the law in an arbitrary and racially biased fashion.[158] In order to prevent such legislative changes, a private association of Florida prosecutors announced specific criteria for application of the habitual offender law, and called on prosecutors who planned to depart from those criteria to notify the association's president.[159] Further, sometimes other government bodies even draft prosecutors' internal policies for them. In 1984 the Washington state legislature enacted a series of "Recommended Prosecution Standards," drafted by the state sentencing commission, that provide guidance for prosecutors' charging and plea bargaining decisions.[160] These "Standards" were modeled after internal guidelines that had been developed by the elected prosecutor of King County, the state's largest county.[161] And while they are nonbinding, the Standards have generally been followed (with regional variations).[162] To the extent that the Standards are effective, they help to regulate

supervision of officers to prevent unconstitutional searches). *Cf.* Christopher Goffard, *Orange County D.A. is Removed from Scott Dekraai Murder Trial*, L.A. TIMES (Mar. 12, 2015), https://latimes.com/local/orangecounty/la-me-jailhouse-snithc-20150313-story.html (reporting that a judge disqualified an entire prosecutor's office based on its chronic failure to turn over mitigating evidence). *See generally* John Rappaport, *Second-Order Regulation of Law Enforcement*, 103 CALIF. L. REV. 205 (2015) (describing a model of constitutional enforcement in which courts instruct law enforcement entities to implement constitutional values in their own regulations).

155. State v. Lagares, 601 A.2d 698, 704 (N.J. 1992). *Accord* State v. Vasquez, 609 A.2d 29, 32–33 (N.J. 1992).

156. *Lagares*, 601 A.2d at 704. *See also* FLA. STAT. ANN. § 775.08401 (West 2000) (repealed July 1, 2011) (requiring that prosecutors create guidelines for the use of habitual offender statutes).

157. *See* Ronald F. Wright, *Sentencing Commissions As Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010, 1031–33 (2005) [hereinafter Wright, *Sentencing Commissions*]; Ronald F. Wright, *Prosecutorial Guidelines and the Terrain in New Jersey*, 109 PENN ST. L. REV. 1087, 1094 (2005).

158. *See* Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 192–93 (2008).

159. See *id.*

160. WASH. REV. CODE ANN. § 13.40.077 (West 2016).

161. *See* Wright, *Sentencing Commissions*, *supra* note 157, at 1023–24.

162. *See* David Boerner & Roxanne Lieb, *Sentencing Reform in the Other Washington*, 28 CRIME & JUST. 71, 120 (2001).

prosecutors' discretion and ensure the protection of certain rights.[163] Prosecutorial constitutionalism can thus be established not only through the top-down directives of head prosecutors, but also through dialogue with other government institutions.

B. ABA MODEL RULE 3.8 AND STATE ETHICAL RULES

Prosecutors are subject to professional regulation by the organized bar, and this regulation is also used as a mechanism of constitutional enforcement. The most significant bar rule governing prosecutors' conduct is Rule 3.8 of the American Bar Association's Model Rules of Professional Conduct, which has been adopted in whole or in part (and often with modifications) by every state bar association except California's.[164] Rule 3.8 actually reads more like a code of criminal procedure than a list of ethical norms. It imposes a series of requirements on prosecutors, most of which implicate defendants' constitutional criminal procedure rights in some way. For example, Rule 3.8(a) forbids prosecutors from bringing charges without probable cause, Rule 3.8(b) instructs prosecutors to ensure that defendants have the opportunity to obtain counsel, and Rule 3.8(d) requires prosecutors to make evidentiary disclosures beyond those mandated by *Brady*.[165] Additionally, the ABA has promulgated a guidance document entitled "Standards for Criminal Justice," and included in it a section on the "Prosecution Function," which provides a long list of instructions to prosecutors.[166] While the Standards lack the formal state bar enforcement structure of Rule 3.8, they too instruct prosecutors to preserve constitutional rights above the level required by judicial doctrine. For example, Standard 3-1.4(b) advises prosecutors to actively prevent other law enforcement personnel from making public statements likely to prejudice a criminal proceeding, Standard 3-3.6(b) tells prosecutors to

163. *See* Kate Smith, *Principles, Pragmatism, and Politics: The Evolution of Washington State's Sentencing Guidelines*, 76 LAW & CONTEMP. PROBS. 105, 124–25 (2013).

164. MODEL RULES OF PROF'L CONDUCT r. 3.8 (AM. BAR ASS'N 2016). *See also* David Keenan et al., *The Myth of Prosecutorial Accountability After* Connick v. Thompson*: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203, 229 (2011) (showing that Rule 3.8(a) and (d) have been adopted by 49 states, 3.8(b) and (f) by 43 states, 3.8(c) by 40 states, 3.8(e) by 32 states, and 3.8(g) and (h) by 5 states).

165. MODEL RULES OF PROF'L CONDUCT r. 3.8(a), (b), (d) (AM. BAR ASS'N 2016). *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-454 (2009) (discussing the prosecutor's duty to disclose evidence and information favorable to the defense, and noting that "[t]he ABA adopted [Rule 3.8(d)] against the background of the Supreme Court's 1963 decision in *Brady v. Maryland*, but most understood that the rule did not simply codify existing constitutional law but imposed a more demanding disclosure obligation").

166. CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2(b) (3d ed. AM. BAR ASS'N 1993).

disclose mitigating and exculpatory evidence to a grand jury, and Standard 3-4.1(c) instructs prosecutors not to make false representations of fact or law during plea negotiations.[167] Both Rule 3.8 and the ABA Standards function as extrajudicial tools of constitutional enforcement. They each contain multiple specific regulations that instruct prosecutors to give certain constitutional rights broader application than judicial doctrine requires. Therefore, much like the U.S. Attorneys' Manual, both of these documents are tools of prosecutorial constitutionalism.

At one level it seems a bit odd to have state bar associations engage in constitutional enforcement through their regulation of prosecutors. State bars are merely professional associations that regulate the practice of law—they are not generally tasked with implementing the Constitution.[168] But the professional role ethics of prosecutors have significant bearing on the enforcement of defendants' constitutional rights. To the extent that prosecutors step out of their adversary role and follow their duty to "seek justice," defendants' rights will be better preserved. Thus state bar associations engage in indirect constitutional enforcement when they define the prosecutor's professional role.[169] When a state bar's ethics committee adopts a rule protecting defendants' rights, say by requiring that prosecutors make certain evidentiary disclosures, the committee is both delineating the ethical practice of law and deciding the scope of the extrajudicial Constitution. In a sense, then, Rule 3.8 is an example of constitutional enforcement by the legal profession itself. While the U.S. Attorneys' Manual and individual prosecutors' office guidelines involve prosecutors voluntarily enforcing constitutional rights against themselves, Rule 3.8 involves the larger legal profession enforcing such rights against the subset of lawyers that work as prosecutors.

And there is an interesting twist for federal prosecutors. Under a federal statute called the McDade Amendment, Assistant U.S. Attorneys are subject to the bar rules of the state where they practice.[170] Thus a federal prosecutor in Connecticut must follow both the U.S. Attorneys'

167. *Id.*

168. *See generally* Quintin Johnstone, *Bar Associations: Policies and Performances*, 15 YALE L. & POL'Y REV. 193, 199–205 (1996) (describing the structure of state bar associations).

169. *Cf.* Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389, 1396–1402 (1992) (arguing that the state's laws and the legal profession's ethics rules compete with each other to regulate the domains that both cover).

170. 28 U.S.C. § 530B(a) (2016). *See also* Bradley T. Tennis, Note, *Uniform Ethical Regulation of Federal Prosecutors*, 120 YALE L.J. 144, 152 (2010).

Manual and the ethics rules of the Connecticut state bar.[171] Since those ethics rules have a constitutional dimension, this creates a reverse federalism dynamic. State bar associations are effectively requiring federal prosecutors to protect defendants' constitutional rights. For example, the Kentucky Bar Association has stated in a formal ethics opinion that it violates the Kentucky Rules of Professional Conduct for a prosecutor to include a waiver of ineffective assistance of counsel claims in a plea bargain agreement.[172] Consequently, the McDade Amendment prohibits federal prosecutors in Kentucky from asking defendants to waive future ineffective assistance of counsel claims, notwithstanding any contrary instructions by the DOJ (indeed, the DOJ brought an unsuccessful challenge to this ethics opinion in the Kentucky Supreme Court).[173] In effect, the state bar is using its control over the professional norms of federal prosecutors to make them enforce constitutional rights above the level required by either the judiciary or the DOJ.[174]

State bar associations implement the rules of professional ethics in a number of different ways. Many state bars offer advisory opinions that clarify the scope of the ethics rules by formally answering attorneys' questions about whether certain conduct is prohibited. Some of these ethics opinions give more precise content to the rules instructing prosecutors to protect defendants' rights.[175] And when attorneys, including prosecutors, violate the ethics rules they can be brought before disciplinary bodies with the power to sanction them through remedies like suspension, disbarment, or reprimand.[176] These disciplinary bodies are sometimes run through private bar associations, but increasingly (and with the ABA's encouragement) states are adopting government-run disciplinary bodies controlled by the judiciary to hear professional ethics complaints.[177] These disciplinary bodies do not commonly sanction prosecutors, however. A number of different studies looking at the bar discipline process have

171. Indeed, the requirements of the U.S. Attorneys' Manual sometimes conflict with those of state bar associations. *See* Tennis, *supra* note 170, at 149–53. *See also* Green, *supra* note 22, at 631.

172. Kentucky Bar Association, Ethics Op. KBA E–435 (Nov. 17, 2012).

173. United States v. Ky. Bar Ass'n, 439 S.W.3d 136, 140 (Ky. 2014).

174. *Cf.* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1512–20 (1987) (arguing that states should enact statutes creating "converse-1983" causes of action to sue federal officials for violating the Constitution).

175. *See, e.g.*, Kentucky Bar Association, Ethics Op. KBA E–435 (Nov. 17, 2012); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-454 (2009); Tennessee Board of Prof'l Responsibility, Formal Ethics Op. 87-F-112 (Sept. 28, 1987) (giving more precise content to the prohibition on communication with a defendant without knowledge of defense counsel).

176. *See* Johnstone, *supra* note 168, at 212–13.

177. *See id.*; MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT r. 1 (AM. BAR ASS'N 2002).

shown that they very rarely hold prosecutors accountable for violating professional ethics rules.[178] And these disciplinary bodies tend to focus on the most egregious violations; hence there is little evidence that bar sanctions are ever imposed on prosecutors for failing to implement their duty to "seek justice," or for failing to preserve defendants' constitutional rights beyond the judicially required minimum.[179] This unwillingness to pursue disciplinary sanctions against prosecutors is probably motivated by a number of factors, including institutional competence concerns and worries about interfering with the criminal justice process.[180] But the scarcity of formal enforcement proceedings does not render the rules of professional ethics meaningless for prosecutors. The rules are also implemented through internal office supervision, including training, performance evaluation, and review of alleged misconduct.[181] Thus, much like internal guidance documents such as the U.S. Attorneys' Manual, the rules of prosecutorial constitutionalism are primarily enforced through prosecutors' self-regulation.

C. FEDERAL PROSECUTORS, STATE PROSECUTORS, AND OFFICE CULTURE

It is one thing to establish rules that require prosecutors to expand the scope of defendants' constitutional rights. But it is quite another to make such rules effective. Prosecutors' offices must take the rules seriously enough that they abide by them in actual cases, even though doing so will often lower the chance of obtaining a conviction. In recent work, Rachel Barkow and Stephanos Bibas have shown that institutional design choices are important to ensuring that prosecutors wield their power responsibly.[182]

178. *See* CENTER FOR PUBLIC INTEGRITY, HARMFUL ERROR: INVESTIGATING AMERICA'S LOCAL PROSECUTORS, at i, 2 (2003); KATHLEEN M. RIDOLFI & MAURICE POSSLEY, N. CAL. INNOCENCE PROJECT, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997-2009, at 3 (2010); Keenan et al., *supra* note 164, at 220; Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 730–31 (1987); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 751, 753 (2001); Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHI. TRIB. (Jan. 11, 1999), http://www.chicagotribune.com/new/watchdog/chi-020103trial1-story.html; Neil Gordon, *Misconduct and Punishment: State Disciplinary Authorities Investigate Prosecutors Accused of Misconduct*, CTR. FOR PUB. INTEGRITY (June 26, 2003), http://www.publicintegrity.org/2003/06/26/5532/misconduct-and-punishment.

179. *See* Zacharias, *supra* note 14, at 105; ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-454 (2009) ("[D]isciplinary authorities rarely proceed against prosecutors in cases that raise interpretive questions under Rule 3.8(d).").

180. *See* Fred C. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. REV. 1, 43–57 (2009).

181. *See* Zacharias, *supra* note 178, at 762.

182. *See* Barkow, *supra* note 102, at 887–93; Bibas, *supra* note 43, at 1016. *Cf.* Katyal, *supra* note

In particular, prosecutorial self-regulation is more successful when a prosecution agency separates out the adjudicative function of enforcing defendants' rights from the line prosecutor function of obtaining convictions.[183] This internal division of powers is easier to implement in a large, professionalized bureaucracy (such as the DOJ) than in a small, locally elected body (such as a state district attorney's office). Large bureaucracies simply have more people and resources to devote to specialized rights-enforcing roles.[184] Furthermore, and at a more basic level, it is crucial that prosecutors' offices develop a culture that values abiding by the rules and discourages cutting corners to win a case. Prosecutorial constitutionalism simply cannot work if prosecutors are not committed to playing by their own rules.

The federal DOJ is a massive, sprawling bureaucracy with offices in all fifty states. As a consequence of the DOJ's size, resources, and hierarchical structure, it is able to devote a significant number of personnel to internally enforcing rule frameworks like the U.S. Attorneys' Manual and ABA Model Rule 3.8. Every U.S. Attorney's office has both a "Professional Responsibility Officer" and an "Ethics Advisor" who are respectively tasked with advising DOJ employees about their professional obligations and the government's internal rules.[185] Further, there are two separate bodies within Main Justice that investigate and sometimes sanction prosecutors' rule violations. The Office of the Inspector General ("OIG") investigates general misconduct within the DOJ, while the Office of Professional Responsibility ("OPR") handles misconduct related to an attorney's investigative and litigation activities.[186] There is little public information available about the investigations conducted by the OIG and the OPR, which makes it difficult to gauge the extent of their enforcement efforts.[187] According to one report, in the year 2013 the OPR conducted ninety-three inquiries into alleged violations of DOJ rules, and opened

138, at 2322–24; Magill & Vermeule, *supra* note 138, at 1057–58.

183. *See* Barkow, *supra* note 102, at 895–906.

184. *See generally* Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 CARDOZO L. REV. 53 (2014) (discussing a number of specialized offices in the federal administrative state, including the DOJ, that are tasked with preserving rights).

185. *See* Scott N. Schools, *An Overview of the General Counsel's Office of the Executive Office for United States Attorneys*, UNITED STATES ATTORNEY'S BULLETIN, May 2007, at 4.

186. *See* UNITED STATES ATTORNEYS' MANUAL § 1-4.100 (2015).

187. *See* Ellen S. Podgor, *Department of Justice Guidelines: Balancing Discretionary Justice*, 13 CORNELL J. L. & PUB. POL'Y 167, 175–76, 185–89 (2004). Federal prosecutors are only very rarely sanctioned by state bars' ethics boards. *See* Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 ST. THOMAS L. REV. 69, 94 (1995).

thirty-three formal investigations.[188] Beyond these ex post enforcement mechanisms, several different provisions of the U.S. Attorneys' Manual also require that prosecutors obtain explicit permission from someone higher up in the DOJ hierarchy before taking a certain action (for example, the Petite policy requires such approval).[189] These provisions regulate the restricted actions ex ante through bureaucratic inertia—they create sticky default rules in favor of not taking the relevant actions. Other provisions of the U.S. Attorneys' Manual establish that certain decisions can only be made by specific actors within the DOJ. For example, the Attorney General herself must decide whether to seek the death penalty in any capital eligible case.[190] And the DOJ also conducts extensive training programs for its prosecutors concerning various rules, such as their obligation to disclose evidence to defendants.[191] The size, resources, and hierarchical nature of the DOJ are what enable it to have all of these different enforcement mechanisms for its internal regulations. These features of the DOJ thus make it especially conducive to prosecutorial constitutionalism.

By contrast, state prosecution systems are not nearly so centralized. In forty-five states, the top prosecutor for any particular jurisdiction is a locally elected district or county attorney.[192] The only exceptions are Rhode Island, Delaware, and Alaska, which have unified prosecution bureaucracies run by the attorney general, and Connecticut and New Jersey, which have appointed local prosecutors.[193] As a function of this decentralization, state prosecution systems do not have nearly the same resources as the DOJ to devote to internal monitoring of rule enforcement. State prosecutors' offices are also often relatively small, and consequently it is rare to find internal separation-of-powers schemes or complex guidance manuals like the U.S. Attorneys' Manual.[194] And while a private advocacy group called the National District Attorneys Association

188. U.S. DEP'T OF JUSTICE: OFFICE OF PROF'L RESPONSIBILITY, FISCAL YEAR 2013 ANNUAL REPORT (2013), http://www.justice.gov/sites/default/files/opr/legacy/2014/07/08/annualreport2013.pdf. Some have argued that the OPR underenforces the ethical rules. *See, e.g.*, Michael S. Ross, *Thinking Outside the Box: How the Enforcement of Ethical Rules Can Minimize the Dangers of Prosecutorial Leniency and Immunity Deals*, 23 CARDOZO L. REV. 875, 890 & n. 66 (2002).

189. *See* UNITED STATES ATTORNEYS' MANUAL § 9-2.03l (2015). *See also id.* § 9-2.400 (illustrating all the prior approvals required by the U.S. Attorneys' Manual).

190. *See id.* § 9-10.040.

191. *See* Barkow, *supra* note 96, at 2113.

192. *See* CAROL J. DEFRANCES, U.S. DEP'T OF JUSTICE, PROSECUTORS IN STATE COURTS, 2001, at 11 (2002).

193. *See id.*

194. There do not appear to be any state prosecution offices that have internal guideline systems approaching the size and complexity of the U.S. Attorneys' Manual.

("NDAA") promulgates a set of "National Prosecution Standards" setting out certain guidelines for state prosecutors (some with constitutional implications), these are entirely nonbinding.[195] In most states, there is no equivalent of Main Justice that can centralize decisionmaking or monitor compliance with internal policy guidelines. Instead, policy decisions are generally made by the very people who are in charge of bringing the cases, and are supervised by a lead prosecutor who is directly elected by the district or county. As a consequence, there is little separation between adjudicative and prosecutorial functions. And, as management theorists have shown, it is quite tricky to have the same actor make a decision and then try to make a neutral adjudicative evaluation of that decision.[196] There is thus reason to believe that the structure of state prosecutors' offices makes it more difficult for prosecutorial constitutionalism to flourish there. Nonetheless, there are a number of state district attorneys' offices that serve as models of prosecutorial constitutionalism.[197]

Beyond these institutional design questions, the success of prosecutorial constitutionalism also depends on the culture of a prosecutor's office. Cultures vary substantially from office to office, and so they are not conducive to abstract generalizations of the kind one often sees in the pages of a law journal.[198] Some prosecutors' offices take quite seriously the duty to "seek justice" and the obligation to enforce defendants' constitutional rights. For example, the U.S. Attorney's Office for the Southern District of New York is often cited as an exemplar of the quasi-judicial, justice-seeking model of prosecution.[199] In some other offices, these obligations are taken less seriously. There are frequent news reports of abuses at prosecutors' offices that have developed a culture of winning at all costs.[200] In such offices, it is unlikely that prosecutors will

195. *See* NAT'L DIST. ATTORNEYS ASS'N, NATIONAL PROSECUTION STANDARDS 10 (3d. ed. 2009) ("These standards are intended to be an aspirational guide to professional conduct in the performance of the prosecutorial function.").

196. *See* Barkow, *supra* note 102, at 896; Jerry Ross, *Avoiding Captain Ahabs: Lessons from the Office of the Independent Counsel*, 35 ADMIN. & SOC'Y 334, 337–38 (2003).

197. The DA offices in Milwaukee and San Diego, for example, seem especially committed to the norms and structures of prosecutorial constitutionalism. *See infra* Part III.

198. *See* Ronald F. Wright et al., *The Many Faces of Prosecution*, 1 STAN. J. CRIM. L. & POL'Y 27, 28–34 (2014) (calling for academics to adopt a "ground-up" research methodology looking at the actual practices of particular prosecutors' offices).

199. *See, e.g.*, Green, *supra* note 22, at 607–10.

200. *See, e.g.*, BAKER, *supra* note 26, at 78, 167; Radley Balko, *In Louisiana Prosecutor Offices, a Toxic Culture of Death and Invincibility*, WASH. POST (Apr. 6, 2015), https://www.washingtonpost.com/news/the-watch/wp/2015/04/06/in-louisiana-prosecutor-offices-a-toxic-culture-of-death-and-invincibility/?utm_term=.2de80792a0e8 ("Thompson was up against a prosecutorial climate that critics had long claimed valued convictions over all else, one that saw a death sentence as the profession's

willingly take actions that meaningfully enhance defendants' constitutional rights above the minimum level established by judges. Office culture is intimately connected to structural factors such as how centralized a prosecution agency is, how large it is, and whether it adopts and enforces internal rules protecting defendants' rights.[201] But culture is not fully reducible to such structural factors—it is also a product of the individuals who lead the prosecutor's office.[202] Even the most generous rules protecting defendants' rights will be rendered meaningless if line prosecutors do not take them seriously because their bosses have fostered an office culture that emphasizes adversarialism and diminishes prosecutors' adjudicative role.[203]

III. PROSECUTORIAL CONSTITUTIONALISM IN PRACTICE

Prosecutorial constitutionalism is not a utopian theory. In fact, it is already widely practiced. If anything, theory has not caught up with reality. Prosecutors currently protect constitutional rights above the judicial minimum in a wide variety of different contexts. This final Part describes several specific examples. It looks at rules that concern charging decisions, plea bargaining, the use of grand juries, the revelation of evidence, rights stemming from the First and Sixth Amendments, federalism principles, and post-conviction rights. The rules it explores come from sources like the U.S. Attorneys' Manual, Model Rule 3.8, and state district attorneys' internal office policies. Unfortunately a disproportionate number of the examples discussed here come from the federal system, both because the DOJ is unusually transparent about its internal rules, and because (as discussed in Part II) the unique structure and culture of the DOJ make it more conducive to prosecutorial constitutionalism. But there are some good examples from the states as well. The rules discussed in this Part present a

brass ring. The New York Times reported in 2003 that prosecutors in Louisiana often threw parties after winning death sentences.").

201. *See, e.g.*, Miller & Wright, *supra* note 158, at 179–80; Steve Weinburg, *Changing an Office's Culture*, CTR. FOR PUB. INTEGRITY (June 26, 2003), http://www.publicintegrity.org/2003/06/26/5520/changing-offices-culture (discussing how a series of San Diego County Attorneys changed the office's culture from the 1970s to the 1990s through reforms like establishing an internal office manual, publishing a journal, and encouraging prosecutors to stay at the office long term).

202. *See* Bibas, *supra* note 43, at 997–1000; Patrick J. Fitzgerald, *Thoughts on the Ethical Culture of a Prosecutor's Office*, 84 WASH. L. REV. 11, 15–29 (2009) (emphasizing factors like hiring people with good values, acculturating them, supervising them well, and establishing ethical norms); Miller & Wright, *supra* note 158, at 177–78.

203. *See* Barkow, *supra* note 96, at 2093; Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 422 (2006).

wide variety of different strategies for implementing constitutional protections through prosecution decisions. Such strategies include the imposition of conduct rules, the allocation of decisionmaking power within prosecution agencies, and the creation of offices tasked with rights protection. This Part is mainly descriptive—it goes through the existing rules and institutions of prosecutorial constitutionalism. But it is not meant as an endorsement of the status quo. These are by no means the only, or the best, rules that prosecutors could adopt. Indeed, at several points the failings of some of these rules will be made apparent.

Of course, many of prosecutors' internal regulations are motivated by goals other than the desire to implement constitutional protections. For example, when a prosecution office establishes an "open file" policy, letting the defendant's lawyer see all of the evidence law enforcement has gathered, this can be explained in a number of different ways. The office might be committed to implementing an expansive vision of the Due Process Clause, but it might also be trying to buy credibility with judges, facilitate plea bargaining, lower the chance of an appellate reversal or successful habeas petition, or prevent the passage of a burdensome discovery law. Such policies commonly have multiple motivations that cannot easily be disentangled.[204] The important thing in such cases is not the office's specific mix of motivations, but whether the relevant rule exists because of a constitutional norm or mandate.[205] In the examples discussed herein, the Constitution has at least some explanatory force. In some of them prosecutors explicitly announce that the policy is motivated by constitutional principles, while in others the policy is self-evidently built on judge-made constitutional doctrine or designed to implement specific constitutional protections.

A. CHARGING DECISIONS

In the American system, the decision of whether or not to charge a certain crime is left to the prosecutor's near-total discretion. Prosecutors are free to bring charges or to decline to bring charges according to their own preferences, and the judicial restraints on such charging decisions are

204. *Cf.* Metzger, *supra* note 44, at 1929–31 ("Distinguishing administrative constitutionalism from ordinary administrative policymaking can be difficult.").

205. An analogy can be drawn to the enactment of the Fair Housing Act. Congress was not going to enact this law before Martin Luther King, Jr. was assassinated, and the fallout from his assassination is what ultimately pushed Congress to pass it. But while individual members of Congress had extrinsic motivations to vote for the law (such as a desire to stop riots), their motivations do not make it any less of a mechanism for implementing constitutional equality principles. *See* John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 U. MIAMI L. REV. 1067, 1068, 1070 n.15 (1998).

minimal.[206] As a result, charging policy is one area where prosecutors must define and implement defendants' constitutional rights if those rights are to have any meaning.[207] There are currently a number of prosecutorial policies that do in fact preserve constitutional rights in connection with charging decisions. These include policies that ensure there is sufficient evidence to bring a charge, policies that protect defendants from duplicative prosecutions, and policies that aim to prevent discrimination in charging decisions.

First, a number of internal policies restrict prosecutors from bringing charges unless there is adequate evidence that the defendant committed the relevant crime. These policies enforce a due process norm—if prosecutors charged people for crimes with little or no evidence, they would be arbitrarily imposing substantial burdens on those people by forcing them to go through the criminal justice process without good reason.[208] These policies also help to prevent prosecutors from "overcharging" defendants and using the added charges as plea bargaining leverage to secure harsher punishments.[209] Rule 3.8(a) of the Model Rules of Professional Conduct states that prosecutors must "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause."[210] The U.S. Attorneys' Manual contains more restrictive language. Section 9-27.200 states that lack of probable cause is an "absolute bar" to federal prosecution, while Section 9-27.220 requires that the prosecutor believe that the defendant's conduct was a federal offense, and also that the defendant will "probably" be convicted by an unbiased trier of fact.[211] The U.S. Attorneys' Manual also restricts overcharging—Section 9-27.320 instructs prosecutors to "bring as few charges as are necessary to ensure that justice is done," and in particular notes that "[t]he bringing of

206. *See supra* Section I.C.2; Newman v. United States, 382 F.2d 479, 480 (D.C. Cir. 1967) (Burger, J.) ("Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings.").

207. Indeed, in some jurisdictions (such as New Orleans) potential defendants can remain in jail for months with no charges while prosecutors determine whether or not to indict. This makes prosecutorial charging policy especially important, since prosecutors can effectively control how long someone will be deprived of their liberty. *See* Albert Samaha, *"DA Time": How New Orleans Locks People Up for Weeks Without Charges*, BUZZFEED NEWS (Aug. 5, 2015, 12:12 PM), https://www.buzzfeed.com/albertsamaha/da-time-how-new-orleans-locks-people-up-for-weeks-without-ch.

208. *See* Jackson, *supra* note 22, at 3.

209. *See* Bennett L. Gershman, *Prosecutorial Decisionmaking and Discretion in the Charging Function*, 62 HASTINGS L.J. 1259, 1279–81 (2011).

210. MODEL RULES OF PROF'L CONDUCT r. 3.8 (AM. BAR ASS'N 2016).

211. UNITED STATES ATTORNEYS' MANUAL § 9-27.200, 9-27.220 (2015).

unnecessary charges not only complicates and prolongs trials, it constitutes an excessive—and potentially unfair—exercise of power."[212] And the DOJ further instructs prosecutors not to file charges that are solely intended to induce a plea deal.[213] The ABA's non-binding "Criminal Justice Standards" provide even more extensive restrictions on bringing charges without sufficient evidence. Not only do they require probable cause, they also provide that before bringing charges the prosecutor should reasonably believe "that admissible evidence will be sufficient to support conviction beyond a reasonable doubt," and furthermore that "a prosecutor's office should not file or maintain charges if it believes the defendant is innocent, no matter what the state of the evidence."[214] Each of these rules preserves the norm of constitutional due process in charging, because each helps to ensure that people are only subjected to criminal prosecution if there is a threshold level of evidence.

Second, as discussed above, the DOJ imposes internal constraints that limit duplicative prosecutions.[215] In *Bartkus v. Illinois* and *Abbate v. United States*, the Supreme Court established that consecutive state and federal prosecutions do not violate the Double Jeopardy Clause.[216] This "dual sovereignty" doctrine underdefines the constitutional norm contained in the Double Jeopardy Clause.[217] Approximately half of the states have corrected this underdefinition by prohibiting duplicative prosecutions, either through legislation or through interpretation of the state constitution.[218] At the federal level, however, the only restriction on the dual sovereignty doctrine comes from prosecutors themselves. Through the Petite policy, the DOJ restricts such dual prosecutions to a limited set of cases, and the DOJ has even moved to vacate convictions that were obtained in violation of the Petite policy.[219] In its current form, the Petite policy imposes a procedural

212. *Id.* § 9-27.320.

213. *See* Memorandum from Eric Holder, Att'y Gen., to Dept. of Justice Attorneys (Sept. 24, 2014), https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/holder-memo-charging-sentencing.pdf (noting the "long-standing Department policy" that '[c]harges should not be filed simply to exert leverage to induce a plea'").

214. CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-4.3 (3d ed. AM. BAR ASS'N 1993).

215. *See supra* notes 1–4 and accompanying text.

216. Abbate v. United States, 359 U.S. 187, 195–95 (1959); Bartkus v. Illinois, 359 U.S. 121, 139 (1959).

217. *See supra* Section I.C.3.

218. *See* Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 AM. J. CRIM. L. 1, 5 (1992).

219. *See* Thompson v. United States, 444 U.S. 248, 249–50 (1980) (collecting cases); Frakes v. United States, 435 U.S. 911, 911 (1978); Hammons v. United States, 439 U.S. 810, 810 (1978); Croucher v. United States, 429 U.S. 1034, 1034 (1977); Rinaldi v. United States, 434 U.S. 22, 23

requirement and three substantive requirements. A duplicative prosecution must be approved by an Assistant Attorney General, and it must (1) involve a substantial federal interest that is (2) left "demonstrably unvindicated" by the state prosecution, and also must satisfy (3) the general requirements for bringing federal charges.[220] This is not the only form that the Petite policy could take. The DOJ could also, for example, ban duplicative prosecutions outright, or could limit them to only a certain type of case.[221] Akhil Amar and Jonathan Marcus have argued that the dual sovereignty doctrine should be scrapped, except in prosecutions that implicate Congress's power to enforce the Fourteenth Amendment, where duplicative federal prosecutions should be allowed.[222] And indeed, during the Carter administration, Attorney General Griffin Bell modified the Petite policy to approximate just that approach. Bell instituted a new procedure whereby duplicative prosecutions would be more commonly approved if they had civil rights implications.[223] This illustrates an important feature of prosecutorial constitutionalism: it is nimble, and can be adapted to the different priorities of different prosecutorial administrations.[224] The Carter administration took the position that the norm against double jeopardy was weaker in cases implicating civil rights, and future administrations might adopt any number of other interpretive approaches.

Third, prosecutors' charging decisions also implicate the Equal Protection Clause. If some categories of people systematically face more or harsher charges than others, then they are not receiving "equal protection of the laws." However, per *Washington v. Davis*, the Supreme Court only interprets the Equal Protection Clause to prohibit intentional discrimination—it does not reach policies that have discriminatory

(1977); Ackerson v. United States, 419 U.S. 1099, 1099 (1975); Watts v. United States, 422 U.S. 1032, 1032 (1975); Hayles v. United States, 419 U.S. 892, 892 (1974); Thompson v. United States, 400 U.S. 17, 17 (1970); Marakar v. United States, 370 U.S. 723, 723 (1962); Petite v. United States, 361 U.S. 529, 530–31 (1960).

220. UNITED STATES ATTORNEYS' MANUAL § 9-2.031 (2015).

221. *See, e.g.*, Adam J. Adler, Note, *Dual Sovereignty, Due Process, and Duplicative Punishment: A New Solution to an Old Problem*, 124 YALE L.J. 448, 451 (2014) (proposing that "when the interests of one sovereign state are fully or partially vindicated by another state, the sovereign should be able to impart only as much additional punishment as is necessary to fully vindicate its interests").

222. *See* Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 2 (1995).

223. *See* Podgor, *supra* note 187, at 181. *See also* United States v. Hayes, 589 F.2d 811, 818 (5th Cir. 1979) ("[T]his policy was modified by Attorney General Bell after an initial determination had been made not to prosecute defendants herein. The new formulation requires that determinations of prosecution for alleged violations of civil rights must be made on an individual basis.").

224. *See supra* Sections I.B, I.C.3.

effects.[225] Some prosecutors' offices have stepped into this breach and imposed internal policies that help to ensure equal treatment for defendants.[226] They have done so through a wide variety of mechanisms. At the federal level, the DOJ instructs that prosecutors charge the "most serious" readily provable offense, meaning the offense that will likely carry the harshest punishment.[227] This ensures a rough equality of (harsh) treatment among defendants. The DOJ's charging policy has been modified in interesting ways across presidential administrations. Attorney General Janet Reno added a provision requiring an "individualized assessment" of the charges, John Ashcroft removed that provision, and Eric Holder introduced different language calling for individualized assessments.[228] This again illustrates the flexibility of prosecutorial constitutionalism—different administrations can tailor their policies to emphasize different constitutional norms, such as equality of treatment or individualization of punishment.[229] Some states have similarly used charging guidelines to create a rough equality between defendants. For example, in the 1990s the Attorney General of New Jersey created guidelines for certain drug charges, and these guidelines generated equality by treating everyone harshly (much like the DOJ's charging policy).[230] And Harry Connick, the long-time District Attorney for New Orleans, developed an internal office manual with charging principles designed to ensure uniformity.[231]

Such formal guidelines are not the only way to implement constitutional equality norms at the charging phase. Another method is to centralize decisionmaking power in a small group of actors. The DOJ does precisely this with its death penalty procedures. According to the DOJ's guidelines, all prosecutions in which the death penalty could be sought must be reviewed by a body called the "Capital Review Committee," selected from a rotating group of Assistant U.S. Attorneys spread

225. Washington v. Davis, 426 U.S. 229, 239–48 (1976).

226. For a good (if dated) discussion of judicial underenforcement of equal protection norms in charging decisions, see Donald G. Gifford, *Equal Protection and the Prosecutor's Charging Decision: Enforcing an Ideal*, 49 GEO. WASH. L. REV. 659, 682–85 (1981).

227. UNITED STATES ATTORNEYS' MANUAL § 9-27.300 (2015).

228. *See* GWLADYS GILLIÉRON, PUBLIC PROSECUTORS IN THE UNITED STATES AND EUROPE 101–02 (2013).

229. *Cf.* Gregg v. Georgia, 428 U.S. 153, 189 & n. 38 (1976) (holding that the death penalty requires individualized assessment).

230. *See* Wright, *Sentencing Commissions*, *supra* note 157, at 1032.

231. *See* Wright & Miller, *supra* note 9, at 63–64. Though it should also be noted that Connick's office had a poor record on the protection of constitutional discovery rights. *See* Connick v. Thompson, 563 U.S. 51, 95–100 (2011) (Ginsrburg, J., dissenting); Ellen Yaroshefsky, *New Orleans Prosecutorial Disclosure in Practice After* Connick v. Thompson, 25 GEO. J. LEGAL ETHICS 913, 921–27 (2012).

throughout the country.[232] The Capital Review Committee considers materials submitted to it from both the prosecutor and the defendant's attorney, and the Committee is also specifically instructed to consider "any allegation of individual or systemic racial bias in the Federal administration of the death penalty."[233] The Committee then makes a recommendation to the Attorney General, who renders the final decision on whether or not to seek the death penalty.[234] This stands in stark contrast to state death penalty policies, which are largely left to the discretion of local prosecutors, with the result that death penalty rates vary widely within some states, and that death sentences are mostly concentrated in a small number of jurisdictions throughout the country.[235] The DOJ uses similar centralization procedures in other areas—for example, indictments under the Racketeer Influenced and Corrupt Organizations Act must be centrally approved, as must indictments for contempt of Congress.[236] Beyond the DOJ bureaucracy, some individual prosecutors' offices also organize their decisionmaking procedures so that a small number of experienced attorneys are the ones who determine what charges to file.[237] This helps create internal consistency by ensuring that charges do not vary based on the identity of the prosecuting attorney. And some prosecutors' offices, such as the New Orleans District Attorney's Office, the San Diego District Attorney's Office, and others, keep data on each charging decision and the reason that decision was made.[238] Such data can be used to analyze charging practices and determine whether there is systematic bias against certain groups. Indeed, the Vera Institute of Justice has worked with a number of different prosecutors' offices, such as the Manhattan, Milwaukee, and San Diego District Attorney's Offices, in an effort to use such data to identify and correct sources of racial discrimination.[239] Such internal management

232. UNITED STATES ATTORNEYS' MANUAL § 9-10.130 (2015).

233. *Id.*

234. *Id.*

235. *See* Meg Beardsley et al., *Disquieting Discretion: Race, Geography, & The Colorado Death Penalty in the First Decade of the Twenty-First Century*, 92 DENVER U. L. REV. 431, 443–46 (2015); Robert J. Smith, *The Geography of the Death Penalty and its Ramifications*, 92 B.U. L. REV. 227, 230–35 (2012); Robert J. Smith, *America's Deadliest Prosecutors: The Last Stubborn, Bloodthirsty Devotees of the Death Penalty*, SLATE (May 14, 2015, 3:54 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/05/america_s_deadliest_prosecutors_death_penalty_sentences_in_louisiana_florida.html.

236. UNITED STATES ATTORNEYS' MANUAL §§ 9-110-210, 9-69.200 (2015).

237. *See* Laurie L. Levenson, *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors*, 26 FORDHAM URB. L.J. 553, 559 (1998).

238. *See* Miller & Wright, *supra* note 158, at 192–93.

239. *See, e.g.*, BESIKI LUKA KUTATLADZE & NANCY R. ANDILORO, VERA INST. OF JUSTICE,

decisions provide more subtle and effective tools for combatting discrimination than could judicial doctrine.

B. PLEA BARGAINING

Plea bargaining is another area where prosecutors' discretion is largely unsupervised by judges. Since over 90 percent of convictions in the United States are obtained through plea bargains, this lack of supervision arguably makes prosecutors the most powerful actors in the criminal justice system.[240] The great majority of cases are resolved through a shadow system of private settlement in which prosecutors' offices decide what terms to offer defendants. The plea bargaining process is thus another area where prosecutors themselves must preserve defendants' constitutional protections. And it is probably the most important such area, given how much power prosecutors exercise. Prosecutors can implement constitutional protections at plea bargaining through a variety of different policies, only three of which are explored here. They can ban plea bargains altogether (or severely limit them), they can choose to reveal exculpatory evidence during plea negotiations, and they can prohibit the use of appeal waivers and other waivers of defendants' rights.

First, the head prosecutor of an office might decide that plea bargaining offends our constitutional system because it coerces defendants into giving up sacred procedural rights.[241] Such a prosecutor might then determine that they should restrict the circumstances in which their subordinates can offer plea deals, or even ban plea bargaining altogether. And indeed, prosecutor-imposed bans on plea bargaining have occurred several times in the United States.[242] In 1992 the elected District Attorney

PROSECUTION AND RACIAL JUSTICE PROGRAM, PROSECUTION AND RACIAL JUSTICE IN NEW YORK COUNTY: TECHNICAL REPORT 4, 217–23 (Jan. 31, 2014), https://www.ncjrs.gov/pdffiles1/nij/grants/247227.pdf; Miller & Wright, *supra* note 158, at 163–65 (describing a project in which consultants from the Vera Institute helped a district attorney's office in Milwaukee, Wisconsin identify and try to change certain charging practices that had a racially disparate impact).

240. *See generally supra* notes 100–105 and accompanying text.

241. *Cf.* Langbein, *supra* note 105, at 9 (arguing the potential unconstitutionality of plea bargaining); Robert Schehr, *The Emperor's New Clothes: Intellectual Dishonesty and the Unconstitutionality of Plea Bargaining*, 2 TEX. A&M L. REV. 385, 392–95 (2015) (arguing that plea bargaining is structured as a power imbalance, mitigating the defendant's free will).

242. In most of these examples, increased pressure on the courts and/or the prosecutors from bringing cases to trial has led prosecutors to walk the policy back or circumvent it. *See, e.g.*, Teresa White Carns & John A. Kruse, *A Re-evaluation of Alaska's Plea Bargaining Ban*, 8 ALASKA L. REV. 27, 27–30 (1991); Robert A. Weninger, *The Abolition of Plea Bargaining: A Case Study of El Paso County, Texas*, 35 UCLA L. REV. 265, 269 (1987); Ian Fisher, *Reconsider Ban on Plea Bargains, Bronx Lawyers Ask*, N.Y. TIMES (Dec. 4, 1992), http://www.nytimes.com/1992/12/04/nyregion/reconsider-ban-on-plea-bargains-bronx-lawyers-ask.html.

for the Bronx prohibited plea bargains in all felony cases.[243] In the 1970s the District Attorney for El Paso, Texas banned plea bargaining for six years, in part to create uniformity between different defendants' sentences.[244] And attorneys general of Alaska have banned plea bargains twice, once from 1975 until 1985, and again in 2013.[245] One feature of plea bargain bans that may make them attractive to elected prosecutors is the fact that, unlike most exercises of prosecutorial constitutionalism, they can be seen as harming criminal defendants. DAs can claim to be throwing the book at defendants, rather than giving them "sweetheart deals."[246] The DOJ's policy on plea bargaining, much like its policy on charging decisions, has shifted in interesting ways over the years, going from highly restrictive in Republican administrations to looser in Democratic ones.[247] In 1989, Attorney General Richard Thornburgh established a policy that required defendants to plead to the most serious readily provable offense, and that allowed only a narrow set of exceptions.[248] In 1993, Janet Reno revised this policy to allow for "an individualized assessment" looking at the facts of the case, the purpose of the criminal law, and the impact on federal resources.[249] In 2003, John Ashcroft removed the "individualized assessment" exception, and established a policy even more restrictive than Thornburgh's by removing an exception for cases where the indictment exaggerates the offense.[250] And in 2010, Eric Holder issued a memo that largely restored the Reno policy allowing individualized assessments.[251]

243. *See* Fisher, *supra* note 126.

244. *See* Weninger, *supra* note 242, at 269; Roland Acevedo, Note, *Is a Ban on Plea Bargaining an Ethical Abuse of Discretion? A Bronx County, New York Case Study*, 64 FORDHAM L. REV. 987, 988 (1995).

245. *See* Carns & Kruse, *supra* note 242, at 27; Michelle Theriault Boots, *State Puts an End to Sentencing Deals in Serious Crimes*, ALASKA DISPATCH NEWS (July 23, 2013), http://www.adn.com/alaska-news/article/state-puts-end-sentencing-deals-serious-crimes/2013/07/24/.

246. *See, e.g.*, Weninger, *supra* note 242, at 270 n. 16 ("[El Paso DA] Simmons, who has held the office of district attorney for 14 years, easily won re-election last year after his opponent campaigned to reinstate plea bargaining. Simmons' often quoted remark, 'We don't make sweetheart deals with criminals,' makes him popular among voters who generally believe that plea bargains allow criminals to get off easy in exchange for pleading guilty to lesser charges.").

247. *See* Alan Vinegrad, *Justice Department's New Charging, Plea Bargaining and Sentencing Policy*, 243 N.Y. L.J. 110 (2010).

248. Memorandum from Richard Thornburg, Att'y Gen., to Federal Prosecutors (Mar. 13, 1989), *reprinted in* 1 FED. SENT'G REP. 421, 421–22 (1989).

249. Memorandum from Janet Reno, Att'y Gen., to Holders of U.S. Attorneys' Manual, Title 9 (Oct. 2, 1993), *reprinted in* 6 FED. SENT'G REP. 352, 352 (1994).

250. Memorandum from John Ashcroft, Att'y Gen., to All Federal Prosecutors (Sept. 22, 2003), https://www.justice.gov/archive/opa/pr/2003/September/03_ag_516.htm.

251. Memorandum from Eric H. Holder, Jr., Att'y Gen., to All Federal Prosecutors (May 19, 2010), https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/holder-memo-charging-

This yo-yoing of plea bargaining policy between different administrations once more underscores the inevitably politicized nature of prosecutorial constitutionalism. Different parties emphasize different constitutional norms, such as equal treatment or individualization, that accord with their own political values.

Beyond banning or restricting plea bargaining, prosecutors can also preserve defendants' constitutional rights by ensuring that the plea bargain market functions well.[252] One way to do this is to give defendants better information about the government's evidence, so that they can make an informed decision about the risks of going to trial. Lower courts have interpreted *Brady v. Maryland* to require disclosure of material exculpatory and mitigating evidence "in time for its effective use at trial."[253] But most courts have not extended *Brady* to cases where the defendant pleads guilty before trial.[254] Since more than 90 percent of convictions are obtained through pleas, this means that *Brady* provides little protection in the vast majority of cases. Prosecutors can fill this void by adopting policies that ensure the disclosure of exculpatory and mitigating evidence before a guilty plea is entered. A number of different policies appear to serve this function. Rule 3.8(d) of the Model Rules of Professional Conduct provides that prosecutors must make "timely" disclosure of exculpatory and mitigating evidence, and in 2009 the ABA issued a formal ethics opinion establishing that Rule 3.8(d) requires disclosure before a plea bargain is finalized.[255] Thus, in jurisdictions that have adopted Rule 3.8(d), prosecutors are ethically obligated to disclose exculpatory and mitigating evidence quickly during the plea bargaining process.[256] The ABA's "Standards for Criminal Justice" go even further, calling for disclosure "at the earliest feasible opportunity," and instructing that a prosecutor "should not intentionally avoid pursuit of evidence because he or she believes it will damage the prosecution's case."[257] And some individual prosecutors'

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252. *See* Bibas, *supra* note 107, at 1145–46; Klein, *supra* note 145, at 587–91.

253. *See, e.g.*, *In re* United States v. Coppa, 267 F.3d 132, 135, 142 (2d Cir. 2001).

254. *See* Miriam H. Baer, *Timing Brady*, 115 COLUM. L. REV. 1, 13–14 (2015); Bibas, *supra* note 36; Petegorsky, *supra* note 36, at 3625-31.

255. MODEL RULES OF PROF'L CONDUCT r. 3.8(d) (AM. BAR ASS'N 2016); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-454 at 6 (2009) ("[T]imely disclosure requires the prosecutor to disclose evidence and information covered by Rule 3.8(d) prior to a guilty plea proceeding."). *See also* Baer, *supra* note 254, at 11 (noting that Rule 3.8 goes further than judicial doctrine by requiring earlier disclosure of *Brady* evidence).

256. However, failure to do so will probably not result in professional sanctions. *See* Baer, *supra* note 254, at 11–12, 27–28 (noting that disciplinary proceedings are unlikely for violations of Rule 3.8(d)).

257. CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-3.11 (3d ed. AM. BAR

offices, such as the Milwaukee District Attorney's Office, have adopted policies of voluntarily providing evidence to defendants earlier than required (sometimes even including inculpatory evidence, which is not covered by *Brady*).[258] Such policies help to ensure that defendants will be aware of the quality of the prosecution's evidence. They thereby give defendants a fair opportunity to decide whether to go to trial, and help ensure the accuracy and voluntariness of guilty pleas.[259] (It should be noted, however, that notwithstanding these ethical regulations it is still common practice to have defendants waive their right to *Brady* evidence in plea bargain agreements.)[260]

Prosecutors' offices can also preserve defendants' rights by limiting the use of waivers in plea bargain agreements. Prosecutors often require as a condition of plea bargains that defendants waive their right to appeal, to challenge the sentence, or to raise post-conviction ineffective assistance of counsel claims.[261] Through such waivers, defendants effectively sign away procedural rights.[262] And, especially with respect to ineffective assistance of counsel, defendants do so at a time when they may not know whether they have a valid claim. The Supreme Court and lower courts have generally allowed the use of such waivers, subject only to the restriction that the plea agreement must be a valid contract.[263] But a number of internal prosecutorial regulations restrict this practice. Twelve states' bar

ASS'N 1993).

258. *See* DANIEL S. MEDWED, PROSECUTION COMPLEX: AMERICA'S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT 47 (2012) (noting that Milwaukee District Attorney John Chisholm implemented open file discovery around 2010); Editorial, *Justice and Open Files*, N.Y. TIMES (Feb. 26, 2012), http://www.nytimes.com/2012/02/27/opinion/justice-and-open-files.html. *See also* United States v. Algie, 667 F.2d 569, 571–72 (6th Cir. 1982) (noting "the intention of the United States Attorney for the Eastern District of Kentucky to continue the policy in many cases of 'advanced disclosure of Jencks Act materials to defendants'"); Memorandum from Thomas G. Walker, U.S. Att'y, Eastern District of North Carolina, to All Criminal AUSAs/SAUSA (Sept. 6, 2013), https://www.justice.gov/usao-ednc/file/764861/download (requiring Jencks Act disclosures twenty-one days after the indictment, well before the statutory deadline).

259. *See* Corinna Barrett Lain, *Accuracy Where It Matters:* Brady v. Maryland *in the Plea Bargaining Context*, 80 WASH. U. L. Q. 1, 34, 36 (2002); Ellen Yaroshefsky, *Ethics and Plea Bargaining: What's Discovery Got to Do With It?*, 23 CRIM. JUST. 28, 31–32 (2008).

260. *See* Klein, *supra* note 145, at 579–80.

261. *See* Susan R. Klein et al., *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. 73, 76–77 (2015); Alexandra W. Reimelt, Note, *An Unjust Bargain: Plea Bargains and Waiver of the Right to Appeal*, 51 B.C. L. REV. 871, 872–73 (2010).

262. Though it is important to note that post-conviction challenges are rarely successful. *See*, *e.g.*, Nancy J. King, *Enforcing Effective Assistance After* Martinez, 122 YALE L. J. 2428, 2446–48 (2013).

263. *See* Brady v. United States, 397 U.S. 742, 748–53 (1970); Riemelt, *supra* note 261, at 875–84.

associations, including those in Florida, Pennsylvania, Utah, and Virginia, have issued formal ethics opinions establishing that it is unethical to ask a defendant to waive ineffective assistance of counsel claims in a plea bargain agreement.[264] Also, as noted previously, the Kentucky Bar Association issued such an opinion in 2014, and Kentucky's U.S. Attorneys then unsuccessfully challenged the opinion in the Kentucky Supreme Court (since federal prosecutors are subject to state ethics rules).[265] Up until 2014, one-third of the ninety-four U.S. Attorneys' offices made use of plea bargain waivers to ensure that defendants could not bring post-conviction ineffective assistance claims.[266] However, in September of 2014, Attorney General Eric Holder established a new policy that prohibits DOJ prosecutors from using such waivers. In announcing the policy, Holder stated that it "reaffirms the commitment by the department's prosecutors to protecting the right to counsel and enhancing due process," and that it "will help to bring our system of justice closer in line with our most fundamental values and highest ideals."[267] This new policy not only forbids ineffective assistance waivers going forward, it also instructs prosecutors in many cases not to enforce waivers that have already been signed.[268] Holder's policy is thus an example of a prosecution agency voluntarily forgoing strategic advantages in order to enhance defendants' constitutional protections.

C. GRAND JURIES

Judges exercise very limited oversight over grand jury proceedings. As a consequence, prosecutors largely control what evidence is presented to the grand jury, as well as the manner in which it is presented.[269] The federal courts have declined to require the exclusion of unconstitutionally obtained evidence from grand jury proceedings,[270] nor do the courts require that grand juries be shown exculpatory evidence,[271] or that witnesses be

264. *See* Joe Palazzolo, *Government Rethinks Waivers with Guilty Pleas*, WALL ST. J. (Sept. 26, 2014, 12:19 PM), http://www.wsj.com/articles/u-s-government-seeks-to-curb-appelas-over-bad-legal-avice-1411745218.

265. *See supra* notes 172–73 and accompanying text.

266. Palazzolo, *supra* note 264.

267. Press Release, Dep't of Justice, Attorney General Holder Announces New Policy to Enhance Justice Department's Commitment to Support Defendant's Rights to Counsel (Oct. 14, 2011), https://www.justice.gov/opa/pr/attorney-general-holder-announces-new-policy-enhance-justice-departments-commitment-suppoet.

268. *Id.*

269. *See supra* notes 88–90 and accompanying text.

270. *See* United States v. Calandra, 414 U.S. 338, 353–55 (1974).

271. *See* United States v. Williams, 504 U.S. 36, 44–55 (1992).

given *Miranda* warnings before their testimony.[272] In the absence of such judicial restrictions, the DOJ has crafted internal regulations that seek to ensure procedural fairness in grand jury proceedings.[273] For example, Section 9-11.233 of the U.S. Attorneys' Manual provides that prosecutors must present to the grand jury any "substantial evidence that directly negates the guilt of a subject of the investigation," and that if a prosecutor fails to do so, "appellate courts may refer violations of the policy to the Office of Professional Responsibility for review."[274] Some appellate courts have specifically noted that they will refer such cases for discipline.[275] Further, Section 9-11.231 of the Manual provides that a prosecutor should not present to a grand jury any evidence that the prosecutor knows was "obtained as a direct result of [a] constitutional violation" against the defendant.[276] And Section 9-11.151 of the Manual requires prosecutors to give grand jury witnesses the equivalent of *Miranda* warnings—advising them that they can refuse to give self-incriminating testimony, can seek the advice of counsel, and so forth—if the relevant witness is a target of investigation.[277] These sections of the U.S. Attorneys' Manual provide defendants with constitutional protections that the Supreme Court has specifically declined to recognize.[278] However, they do so through internal office protocols rather than through externally enforceable rules.

D. DISCLOSING EVIDENCE

Prosecutors are obligated under *Brady v. Maryland* to disclose any exculpatory or mitigating evidence that is material to the defense.[279] The Supreme Court has defined "material" in the *Brady* context to mean evidence for which there is "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[280] Prosecutors have established various internal rules that

272. *See* United States v. Washington, 431 U.S. 181, 186–90 (1977).

273. The ABA's Standards of Criminal Justice contain a number of rules for grand jury proceedings that largely mirror those in the U.S. Attorneys' Manual. *Compare* CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION §§ 3-3.5, 3-3.6 (3d ed. AM. BAR ASS'N 1993), *with* UNITED STATES ATTORNEYS' MANUAL tit. 9 (2015).

274. UNITED STATES ATTORNEYS' MANUAL § 9-11.233 (2015).

275. *See, e.g.*, United States v. Gillespie, 974 F.2d 796, 802 (7th Cir. 1992).

276. UNITED STATES ATTORNEYS' MANUAL § 9-11.231 (2015).

277. *Id.* § 9-11.151.

278. *See* United States v. Williams, 504 U.S. 36, 45–55 (1992); United States v. Washington, 431 U.S. 181, 186–90 (1977); United States v. Calandra, 414 U.S. 338, 353–54 (1974); Podgor, *supra* note 187, at 173.

279. Brady v. Maryland, 373 U.S. 83, 87 (1963).

280. United States v. Bagley, 473 U.S. 667, 682 (1985).

provide broader disclosure than this minimum set by *Brady*. The U.S. Attorneys' Manual states that prosecutors must "take a broad view of materiality and err on the side of disclosing exculpatory and impeaching evidence."[281] The Manual also instructs prosecutors to disclose any such evidence that falls under certain broad categories, even if the evidence is not "material," admissible, or judicially required to be disclosed.[282] ABA Model Rule 3.8(d) provides that prosecutors must reveal *all* evidence "that tends to negate the guilt of the accused or mitigates the offense."[283] And the ABA has clarified through a 2009 formal opinion that Rule 3.8(d) goes further than *Brady*, because it "does not implicitly include the materiality limitation recognized in the constitutional case law."[284] Further, some prosecutors' offices, such as those of the Milwaukee District Attorney and the Tarrant County, Texas District Attorney, voluntarily reveal all (or nearly all) of their evidence to defendants, including inculpatory evidence, through "open file" policies.[285] Each of these different policies expands the reach of the Due Process Clause by granting defendants access to more evidence than judicial doctrine requires.

Another issue is ensuring that prosecutors actually disclose exculpatory evidence. *Brady* has substantial enforcement problems—judges can only enforce it after the fact, and they are often reluctant to vacate convictions on the basis of suppressed evidence.[286] And *Brady* violations do happen—one prominent jurist recently declared that "[t]here is an epidemic of *Brady* violations abroad in the land."[287] Since *Brady* violations are already illegal, they most likely cannot be adequately policed through internal prosecution regulations that merely prohibit them. Instead,

281. UNITED STATES ATTORNEYS' MANUAL § 9-5.001 (2015). *See also* Eric H. Holder, Jr., *In the Digital Age, Ensuring That the Department Does Justice*, 41 GEO. L.J. ANN. REV. CRIM. PROC. iii, iv–v (2012) (pointing out various ways that the U.S. Attorneys' Manual goes beyond *Brady*).

282. UNITED STATES ATTORNEYS' MANUAL § 9-5.001 (2015). These categories include "information that is inconsistent with any element of any crime charged against the defendant or that establishes a recognized affirmative defense" and "information that either casts a substantial doubt upon the accuracy of any evidence . . . the prosecutor intends to rely on to prove an element of any crime charged, or might have a significant bearing on the admissibility of prosecution evidence." *Id.*

283. MODEL RULES OF PROF'L CONDUCT r. 3.8(d) (AM. BAR ASS'N 2016).

284. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-454 (2009).

285. *See* MEDWED, *supra* note 258, at 47; Kozinski, *supra* note 27, at xxviii; Yaroshefsky, *supra* note 259, at 30–33.

286. *See* Starr, *supra* note 50, at 1516–17; Zacharias, *supra* note 14, at 48 n. 13.

287. United States v. Olsen, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, J., dissenting from denial of rehearing en banc). *See also* Barkow, *supra* note 96, at 2090 n. 1 (summarizing various studies showing the frequency of prosecutorial misconduct, including violations of *Brady*); Editorial Board, *Justice Gone Wrong in New Orleans*, N.Y. TIMES, Oct. 20, 2015, at A24 (describing a number of *Brady* violations stemming from the conduct of the New Orleans District Attorney's office); Editorial Board, *supra* note 53, at SR10.

prosecutors' offices must figure out structural ways to discourage line prosecutors from suppressing evidence. In response to recent high-profile *Brady* violations (including one involving the prosecution of Senator Ted Stevens), and resulting political pressure to fix the problem (including congressional inquiries and threats of legislation), the DOJ has implemented some internal reforms.[288] The DOJ added the aforementioned expansive discovery rules for exculpatory and impeachment evidence, including the rules requiring disclosure of some non-*Brady* material. The DOJ also, in response to this political pressure, established "*Brady* coordinators" in every U.S. Attorney's Office, announced a new annual two-hour training program for federal prosecutors on disclosure obligations, and created a new position in the DOJ that will oversee discovery reforms.[289] Academics and commentators have advocated a variety of other structural changes, including mandatory early disclosure of basic information to defendants, internal discovery audits for prosecutors' offices, and the use of financial incentives to encourage *Brady* compliance.[290] These types of internal reforms are designed to enforce the Constitution by aligning prosecutors' incentives with the protection of defendants' rights, and by centralizing decisionmaking so as to control wayward prosecutors.

The problem of ensuring *Brady* compliance also extends to the law enforcement officers who generate evidence. Under the Supreme Court's decision in *Kyles v. Whitley*, prosecutors are obligated to learn of any information known to the police that is subject to disclosure under *Brady* and its progeny.[291] Thus, it is no excuse that a prosecutor was unaware of police evidence that undermines their case—prosecutors must affirmatively seek out such evidence, which is not always easy.[292] A number of different

288. *See* Klein, *supra* note 145, at 589–90. Indeed, one recent (and wonderfully cynical) article argues that major pro-defendant reforms only seem to happen when prosecutors go after legislators like the DOJ went after Stevens. *See* Craig S. Lerner, *Legislators as the 'American Criminal Class': Why Congress (Sometimes) Protects the Rights of Defendants*, 2004 U. ILL. L. REV. 599, 601–04.

289. *See* UNITED STATES ATTORNEYS' MANUAL § 9-5.001(E) (2015); Barkow, *supra* note 96, at 2113; Klein, *supra* note 145, at 589–90.

290. *See* Baer, *supra* note 254, at 61–66; Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 907–10 (1995); Christina Parajon, Comment, *Discovery Audits: Model Rule 3.8(d) and the Prosecutor's Duty to Disclose*, 119 YALE L.J. 1339, 1348–50 (2010).

291. Kyles v. Whitley, 514 U.S. 419, 437 (1995).

292. *See* Jonathan Abel, *Brady's Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743, 745–47 (2015) (observing that prosecutors often have difficulty accessing police personnel files which may contain important and sensitive information about police officers' past misconduct).

internal regulations establish requirements that prosecutors must gather exculpatory information from the police. The U.S. Attorneys' Manual provides that "[i]t is the obligation of federal prosecutors, in preparing for trial, to seek all exculpatory and impeachment information from all the members of the prosecution team," which includes "federal, state, and local law enforcement officers."[293] The Manual also establishes a series of procedures through which law enforcement agencies within the DOJ—including the FBI, the DEA, and the Bureau of Alcohol, Tobacco, and Firearms—must disclose potential impeachment information to prosecutors.[294] These procedures are designed to ensure that federal prosecutors are made aware of any evidence that undermines a law enforcement witness's testimony, so that such evidence may be disclosed to the defense.[295]

And beyond merely learning about problems with the evidence, prosecutors can also actively monitor and participate in police investigations to ensure that constitutional requirements are met.[296] The State of Washington's Recommended Prosecution Standards, for example, provide that a prosecuting attorney should be fully advised of the investigatory techniques used by law enforcement, and should ensure that a thorough and constitutionally valid investigation is conducted.[297] The ABA's Criminal Justice Standards instruct prosecutors to help train police in their legal duties, and to "provide legal advice to the police concerning police functions and duties in criminal matters."[298] And the NDAA's "National Prosecution Standards" recommend that prosecutors give police legal advice "to promote lawful investigatory methods that will withstand later judicial inquiry."[299] Prosecutors also have an important gatekeeping function for evidence generated by the police. If a prosecutor determines that evidence was generated in a dubious fashion or in a way that violated the defendant's rights, the prosecutor can refuse to make use of that

293. UNITED STATES ATTORNEYS' MANUAL § 9-5.001(B)(2) (2015).

294. *Id.* § 9-5.100.

295. Law enforcement agencies also sometimes establish their own internal protocols for ensuring that prosecutors learn of exculpatory evidence. *See, e.g.*, Klein, *supra* note 145, at 590–91 (describing the broad *Brady* disclosure policy of the Waxahachie Police Department in Texas, and the Department's use of officer training and discipline to ensure compliance).

296. *See generally* Richman, *supra* note 134, at 813–31 (exploring the dynamics of interaction between prosecutors and law enforcement agents).

297. WASH. REV. CODE ANN. § 13.40.077 (West 2016).

298. CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-2.7 (3d ed. AM. BAR ASS'N 1993).

299. NATIONAL PROSECUTION STANDARDS § 2-5.6 (3d. ed. NAT'L DIST. ATTORNEYS ASS'N 2009).

evidence (and indeed, such prosecutorial exclusion is more common than judicial exclusion).[300] In short, prosecutors' constitutional enforcement role does not end with litigation decisions—they can also help ensure that investigating officers do not commit constitutional violations.

E. FIRST AND SIXTH AMENDMENT RIGHTS

The First and Sixth Amendments to the Constitution guarantee several different rights, including freedom of speech, freedom of the press, the right to a public trial, and the right to assistance of counsel.[301] Prosecution agencies have adopted a number of internal rules to preserve these rights above the level required by judicial doctrine. These include restrictions on subpoenas, rules requiring that proceedings remain open to the public, and limitations on prosecutors' ability to communicate with defendants without counsel.

The DOJ has placed strict limits on its own ability to subpoena journalists and defense attorneys. With respect to journalists, the DOJ has enacted formal federal regulations at 28 C.F.R. § 50.10, which are adopted by reference in the U.S. Attorneys' Manual.[302] These regulations restrict subpoenas of journalists to only those cases where the sought-after information is essential to a prosecution, and where attempts to obtain the information through alternative means have failed. They also require that the Attorney General expressly authorize any subpoena of a journalist. The text of these regulations justifies them in First Amendment terms, stating that their purpose is "to protect freedom of the press, newsgathering activities, and confidential news media sources."[303] Yet interestingly, while the DOJ has maintained adherence to these internal guidelines (which amount to a qualified reporters' privilege), it has also argued strenuously against any constitutional, common law, or statutory recognition of a reporters' privilege by the courts or by Congress.[304] This perhaps suggests the DOJ's preference that it should be the one to balance First Amendment

300. *See, e.g.*, UNITED STATES ATTORNEYS' MANUAL § 9-11.231 (2015); Gold, *supra* note 77, at 1606–14 (arguing that prosecutors should exclude evidence they deem unconstitutional, even if judges will admit it); Miller & Wright, *supra* note 158, at 138 ("This 'executive exclusionary rule' is no trivial afterthought to the constitutional exclusionary rule that judges invoke during pretrial rulings to exclude evidence. In terms of sheer volume, executive exclusion appears to be more important than judicial exclusion.").

301. U.S. CONST. amend. I, VI.

302. 28 C.F.R. § 50.10 (2015); UNITED STATES ATTORNEYS' MANUAL § 9-13.400 (2015).

303. 28 C.F.R. § 50.10(c).

304. *See* Pozen, *supra* note 7, at 538–39.

rights against other interests. If another government body took on that role, such as Congress or the judiciary, there is a risk that it would conduct the balancing through blunt prospective rules, rather than through case-by-case decisions that permit more precise weighing of the various factors.[305] Of course, the self-interest of the DOJ in preventing external regulation should not be understated here. As with the internal *Brady* rules brought about by threatened legislation after the Ted Stevens case, the DOJ's policy on subpoenaing journalists is at least partly motivated by a desire to prevent legislation or court decisions that would diminish its power.[306] Prosecutorial protection of rights can thus be prompted by prosecutors' fear that other institutions will step in to protect those rights.

A similar set of internal restrictions exists for subpoenas of defense attorneys concerning information related to their clients. The U.S. Attorneys' Manual requires that all requests for such subpoenas must be centrally approved by the Assistant Attorney General for the Criminal Division, and that such requests will only be approved if the information is not privileged, all reasonable attempts have been made to find the information from other sources, and the benefits of the subpoena outweigh the harm.[307] The Manual also notes that the DOJ maintains "close control over such subpoenas" because of their "potential effects upon an attorney-client relationship."[308] ABA Model Rule 3.8(e) contains a similar restriction, instructing prosecutors not to subpoena a lawyer for information about a client unless the information is not privileged, is essential to the prosecution, and cannot be feasibly obtained any other way.[309] These regulations preserve the Sixth Amendment right to counsel by limiting the circumstances in which a lawyer can be made to testify against their client.

The DOJ also prevents its prosecutors from requesting the closure of a courtroom too readily (or too readily consenting to a defense request for closure). Keeping a court open to the public implicates both the First Amendment right of access to criminal proceedings and the Sixth Amendment right to a public trial, and the DOJ's restrictions on courtroom closure preserve these rights beyond the level required by judges.[310] The

305. *See* 28 C.F.R. § 50.10(a) ("[T]he approach in every instance must be to strike the proper balance among several vital interests: Protecting national security, ensuring public safety, promoting effective law enforcement and the fair administration of justice, and safeguarding the essential role of the free press in fostering government accountability and an open society.").

306. *See supra* note 288 and accompanying text; Pozen, *supra* note 7, at 538–39.

307. UNITED STATES ATTORNEYS' MANUAL § 9-13.410 (2015).

308. *Id.*

309. MODEL RULES OF PROF'L CONDUCT r. 3.8(e) (AM. BAR ASS'N 2016).

310. *See* Globe Newspaper Co. v. Superior Court for Norfolk, 457 U.S. 596, 603–10 (1982).

DOJ has published a rule in the Code of Federal Regulations limiting prosecutors' ability to file motions to close trials and other proceedings to the public (or to consent to such motions), and included the same limits in the U.S. Attorneys' Manual.[311] The DOJ's policy creates a "strong presumption against closing proceedings," and it only allows closures in the "very few cases" where "[n]o reasonable alternative exists for protecting the interests at stake," and where "[t]he degree of closure is minimized to the greatest extent possible."[312] It also requires that any closed proceeding be reviewed every sixty days by government attorneys, and if the reasons for closure no longer apply, that the record of the proceedings be made public.[313] These regulations help preserve the First and Sixth Amendment interest in public proceedings, but they do so through a sticky default rule against closure requests rather than an absolute prohibition on them.

One of the more interesting case studies in the politics of prosecutorial constitutionalism concerns whether prosecutors can interact with potential defendants without a defense attorney present. If a suspect lacks an attorney altogether, then various regulations—including Model Rule 3.8, Model Rule 4.3, and the NDAA's "National Prosecution Standards"—instruct the prosecutor not to take advantage of the situation.[314] This means not seeking concessions, helping the defendant find a lawyer, and disclosing the potential for criminal liability.[315] But dealing with represented defendants is a different matter. ABA Model Rule 4.2 (which has been adopted in most states) imposes a "no-contact" rule for all lawyers, including prosecutors.[316] This means that a prosecutor generally cannot contact a represented person at all without the consent of their lawyer. The DOJ has historically resisted this rule. In 1989, Attorney General Richard Thornburgh issued an internal memorandum establishing that state ethical rules do not apply to federal prosecutors, and consequently that the "no-contact" rule does not either.[317] In 1995, Attorney General Janet Reno codified this memorandum through a formal rule establishing

311. 28 C.F.R. § 50.9; UNITED STATES ATTORNEYS' MANUAL § 9-5.150 (2015).

312. 28 C.F.R. § 50.9.

313. *Id.*

314. MODEL RULES OF PROF'L CONDUCT r. 3.8(b)–(c), 4.3 (AM. BAR ASS'N 2016); NATIONAL PROSECUTION STANDARDS § 2-5.6 (3d. ed. NAT'L DIST. ATTORNEYS ASS'N 2009).

315. *Id.*

316. MODEL RULES OF PROF'L CONDUCT r. 4.2 (AM. BAR ASS'N 2016).

317. Memorandum from Richard Thornburg, Att'y Gen., to All Justice Department Litigators (June 8, 1989), *reprinted in In re Doe*, 801 F. Supp. 478, 489–93 (D.N.M. 1992) (discussing "Communications with Persons Represented by Counsel").

that DOJ prosecutors could contact represented persons notwithstanding Model Rule 4.2.[318] The federal judiciary, however, resisted the DOJ's attempts to exempt itself from state ethical rules.[319] The Eighth Circuit rejected the Reno memorandum altogether, while the Ninth Circuit held that contact with represented persons could only be authorized through explicit statute or common law, not executive decree.[320] Eventually, Congress itself resolved the issue. Congressman Joseph McDade (who had himself been the target of an unsuccessful federal bribery prosecution) sponsored a law, known as the "McDade Amendment," explicitly establishing that federal prosecutors are subject to state ethical rules.[321] This law took effect in 1999, and has created a situation where federal prosecutors must adhere to state bars' ethics requirements, including those that expand the scope of the Sixth Amendment and other constitutional rights. This fascinating episode underscores that prosecutorial constitutionalism is sometimes the product of interbranch politics. The DOJ's no-contact rule was ultimately established through a decade-long back-and-forth between various attorneys general, the federal courts, Congress, and state bar associations.

F. FEDERALISM

In the criminal law context, judges do very little to enforce federalism norms. The Supremacy Clause prevents states from exempting their residents from federal criminal laws, and through the Commerce Clause the federal judiciary has permitted federal criminal law to expand into virtually any domain.[322] This leaves a great deal of room for the DOJ to determine through its own policies when federal law should be enforced, and when states and localities should instead have control. Federalism in the criminal law context involves two distinct issues—(1) situations where state and federal crimes overlap, and (2) situations where states seek to define certain

318. Communications with Represented Persons; Final Rule, 59 Fed. Reg. 39,910, 39,910 (1994) (codified at 28 C.F.R. § 77.2(a) (1999)).

319. *See* Note, *Federal Prosecutors, State Ethics Regulations, and the McDade Amendment*, 113 HARV. L. REV. 2080, 2085–86 (2000).

320. United States *ex rel.* O'Keefe v. McDonnell Douglas Corp., 132 F.3d 1252, 1257 (8th Cir. 1998); United States v. Lopez, 4 F.3d 1455, 1461–65 (9th Cir. 1993).

321. 28 U.S.C. § 530B (2000).

322. *See, e.g.*, Gonzales v. Raich, 545 U.S. 1, 15–33 (2005) (permitting Congress to regulate purely intrastate production and use of marijuana); Brandon L. Bigelow, *The Commerce Clause and Criminal Law*, 41 B.C. L. REV. 913, 913–15 (2000); Ernest A. Young, *Popular Constitutionalism and the Underenforcement Problem: The Case of the National Healthcare Law*, 75 LAW & CONTEMP. PROBS. 157, 159 (2012) ("Federalism is, in other words, underenforced in current law.").

conduct as noncriminal.[323]

First, federalism concerns arise where there are overlapping state and federal criminal laws, and the states have a commitment to their own procedures or punishments. Take, for example, the death penalty—many states prohibit the death penalty, while the federal system permits it. So when the DOJ seeks the death penalty in a non-death state, that effectively overrides the state's ability to determine its own moral framework of crime and punishment.[324] The U.S. Attorneys' Manual takes a small step towards alleviating this problem. It provides that, in cases where a state has concurrent jurisdiction, "a Federal indictment for an offense subject to the death penalty generally should be obtained only when the Federal interest in the prosecution is more substantial than the interests of the State or local authorities."[325] This provides a soft form of deference to the states—it does not prevent capital prosecutions altogether in non-death penalty states, but it restricts them to only uniquely "federal" cases, and takes into account the relevant state's interest in prosecution. Data from 1999 suggest that during the 1990s the DOJ did in fact skew its capital prosecutions towards states that allow the death penalty, and away from states that prohibit it.[326] However, Attorney General Ashcroft pushed for greater uniformity in the mid-2000s, believing that federal death penalty prosecutions should be spread evenly across the country rather than concentrated in death penalty states.[327] He did so by changing a number of internal DOJ policies concerning death penalty prosecutions—he ended a rule limiting federal prosecutors' ability to seek a death sentence in states that lacked the death

323 *See* Susan R. Klein, *Independent-Norm Federalism in Criminal Law*, 90 CAL. L. REV. 1541, 1547–52 (2002) (distinguishing between "decentralization" federalism and "independent norm" federalism).

324. *See* United States v. Acosta Martinez, 106 F. Supp. 2d 311 (D.P.R. 2000) (holding the federal death penalty "locally inapplicable" to Puerto Rico), *rev'd sub nom*. United States v. Acosta-Martinez, 252 F.3d 13 (1st Cir. 2001); Michele Martinez Campbell, *Federalism and Capital Punishment: New England Stories*, 36 VT. L. REV. 81 (2011). *Cf.* United States v. Fell (Fell IV), 571 F.3d 264, 284 (2d Cir. 2009) (en banc) (Calabresi, J., dissenting) (raising federalism concerns with the application of the federal death penalty in non-death penalty states).

325. UNITED STATES ATTORNEYS' MANUAL § 9-10.110 (2015).

326. *See* Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 FORDHAM URB. L.J. 347, 454 (1999) ("Thus there does appear to be geographic disuniformity in administration of the federal death penalty, which to some extent reflects the regional maldistribution of State death penalty executions.").

327. *See* Richard B. Schmitt, *Ashcroft Is Undeterred in Push for Capital Cases*, L.A. TIMES (Sept. 29, 2004), http://www.articles.latimes.com/2004/sep/29/nation-na-death29 ("A small number of federal districts, including pockets of Texas and Virginia, were accounting for the bulk of death cases. Experts decried the geographical disparities. For Ashcroft, an ardent supporter of capital punishment, the solution was to seek the death penalty more often and more widely.").

penalty, and imposed a new rule requiring that Main Justice approve any plea bargain that eliminated the possibility of a death sentence.[328] Ashcroft thus expanded the number of death penalty prosecutions that the DOJ brought in anti-death penalty states. Here we have an interesting case where prosecutors must choose between conflicting constitutional norms—federalism and equality. If the DOJ varies its policy by state, then it preserves states' autonomy at the cost of nationwide uniformity. But if it pursues capital punishment uniformly throughout the nation, it will be executing criminals in states that oppose the death penalty.

Second, a different kind of federalism problem arises when federal law criminalizes activities that a state wishes to permit (or even promote). Then there is a direct conflict between state and federal policy. The DOJ can defer to states in such contexts by voluntarily forgoing prosecution, or by limiting its prosecutions to only a certain category of cases. The most prominent recent example of this kind of prosecutorial constitutionalism is the DOJ's policy on marijuana. Several states have recently legalized marijuana, including Alaska, Oregon, Colorado, California, and Washington. Yet the sale and possession of marijuana remain federal crimes. This creates a clear conflict between state and federal laws. In 2013, the DOJ issued a memorandum to all U.S. Attorneys directing them not to prosecute marijuana crimes in states that have legalized the drug, so long as those states implement (and marijuana sellers comply with) "strong and effective regulatory enforcement systems that will address the threat those state laws could pose."[329] This policy is an exercise of prosecutorial discretion—the federal government is deferring to the states, voluntarily declining to enforce federal criminal laws so long as the states effectively regulate their marijuana markets. But this policy may not last. During the 2016 presidential election, several candidates for the Republican nomination have specifically pledged that they will fully enforce federal drug laws in states that have legalized marijuana.[330] Thus, prosecutors'

328. *See id.* ("[Ashcroft] eliminated a Clinton administration rule that empowered local federal prosecutors to enter plea bargain agreements that eliminated the possibility of a death sentence. All such deals are now subject to approval from Washington. Ashcroft also abolished a rule that barred federal prosecutors from seeking a death sentence for the sole reason that the state where the crime was committed did not have the death penalty. The rule was intended to ensure that there was a legitimate federal interest in a case, and to prevent prosecutors from bypassing state laws that did not authorize capital punishment.").

329. Memorandum from James M. Cole, Deputy Att'y Gen., to All United States Attorneys 3 (Aug. 29, 2013), https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf (providing "Guidance Regarding Marijuana Enforcement").

330. *See* Tessa Berenson, *The Political Upside of Chris Christie's Threats Against Colorado Pot Users*, TIME (July 29, 2015), http://www.time.com/3976853/marijuana-chris-christie-colorado; Alex

constitutional enforcement decisions are, once more, tied up in democratic politics.

G. POST-CONVICTION RIGHTS

In the American criminal justice system, prosecutors have a lot of control over whether innocent defendants are ultimately exonerated.[331] Thus, prosecutors play an important role in protecting defendants' post-conviction rights. A variety of different internal policies and regulations help prosecutors to serve this role. First, a growing number of prosecutors' offices have established "conviction integrity units" that seek to identify wrongfully convicted prisoners. Such units exist in twelve states, as well as Washington D.C, and more are being added.[332] To take just one example, the newly elected District Attorney of Dallas County, Texas created a conviction integrity unit in 2007 in response to a number of high profile wrongful convictions.[333] Since its establishment, that unit has been responsible for a total of 33 exonerations, out of a total of 61 for all conviction integrity units nationwide.[334] Second, some rules instruct prosecutors to help innocent defendants. ABA Model Rules 3.8(g) and (h), for instance, require prosecutors to promptly disclose any evidence making it likely that a convicted defendant is innocent, and to work to remedy any conviction they believe is incorrect.[335] For some reason, however, these two rules have only been adopted in a handful of states.[336] Third, prosecutors can impose internal rules that temper the zeal to preserve convictions. One example of this is the DOJ's restrictions on waivers of

Leary, *Rubio Says He'd Use Federal Law to Crack Down on Marijuana*, TAMPA BAY TIMES (Aug. 11, 2015), http://www.tampabay.com/blogs/the-buzz-florida-politics/rubio-says-hed-use-federal-law-to-crack-down-on-marijuana/2240735.

331. *See* Douglas H. Ginsburg & Hyland Hunt, *The Prosecutor and Post-Conviction Claims of Innocence: DNA and Beyond?*, 7 OHIO ST. J. CRIM. L. 771, 778 (2010) ("Often the prosecutor is, as a practical matter, the sole arbiter of whether a defendant has access to potentially exculpatory material, including DNA, and the prosecutor's support or opposition may make or break the defendant's chance at exoneration through whatever procedure remains available, such as executive clemency."); Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 502 (2009); Fred C. Zacharias, *The Role of Prosecutors in Serving Justice After Convictions*, 58 VAND. L. REV. 171, 173 (2005).

332. *See* Kozinski, *supra* note 27, at xxxi; Daniel S. Medwed, *The Prosecutor As Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35, 61 (2009).

333. *See* Barkow, *supra* note 96, at 2116.

334. *See* CENTER FOR PROSECUTOR INTEGRITY, CONVICTION INTEGRITY UNITS: VANGUARD OF CRIMINAL JUSTICE REFORM 9 (Dec. 2014).

335. MODEL RULES OF PROF'L CONDUCT r. 3.8(g)–(h) (AM. BAR ASS'N 2016).

336. *See* Keenan et al., *supra* note 164, at 229.

access to DNA evidence. Until recently, a number of U.S. Attorneys' offices regularly sought to have plea bargaining defendants waive their right to DNA evidence that might exonerate them.[337] In 2010, Attorney General Eric Holder announced a new policy imposing significant restrictions on prosecutors' ability to seek such waivers.[338] Policies such as these, which seek to help defendants undo wrongful convictions, are an especially tricky area for prosecutors. There is an inevitable dissonance between the desire to preserve a conviction and the ability to neutrally examine whether the convicted may be innocent.[339] But prosecutors are also the best-placed actors to protect the constitutional rights of wrongly convicted defendants.

CONCLUSION

American legal culture treats judges as the guardians of the Constitution. This is largely due to the distinctive power of judicial role ethics. Judges are quintessentially neutral parties, whose task is to interpret and enforce the law without bias or favor. There is perhaps no other actor in American government with a role that is so clearly and powerfully defined. The role ethics of the judiciary are the rock on which we build our constitutional republic. This Article has argued that judicial role ethics should extend also to prosecutors. It has thus tried to provoke a reimagining of the role prosecutors play in our criminal justice system. In the many situations where judges are unable to fully implement constitutional protections, prosecutors should step in and perform the task themselves. The theoretical resources for this role can be found in commonplace maxims about prosecutors: they have a duty to "seek justice," not just obtain convictions, and they are obligated to uphold the Constitution through their oaths of office. And this argument is not merely theoretical—as this Article has shown, American prosecutors actually already do implement constitutional protections above the judicial minimum in a wide variety of contexts. Prosecutors' role as constitutional guardians should be formalized, expanded, and embraced as a fundamental aspect of American legal culture.

337. *See* Klein, *supra* note 145, at 581 ("28.8% of all robbery plea agreements contained either a waiver of the right to request DNA testing, explicitly allowed the government to destroy DNA samples, or both."); Jerry Markon, *Justice Dept. to reverse Bush-era policy on DNA tests*, WASH. POST (Nov. 18, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/11/17/AR201011706244.html ("As of last year, at least 19 U.S. attorneys' offices used the waivers for some or all plea agreements.").

338. Markon, *supra* note 337.

339. *See* Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1612–13 (2006).

One additional thought in closing: the logic of this Article is by no means restricted to prosecutors. It extends to many other contexts where government lawyers, or perhaps even bureaucrats who have not taken the bar exam, make decisions that implicate constitutional rights and norms. It is true that in American legal culture, prosecutors have a more well-defined role ethics than do most other government actors. But that is not inevitably so. One could imagine a constitution-infused role morality for American bureaucrats, akin to that of Her Majesty's Civil Service in England.[340] Certainly other parts of the federal bureaucracy—the National Security Agency, for example, or the Internal Revenue Service—regularly make decisions that define the scope of the Constitution, with little or no judicial oversight. Perhaps we should develop canons of professional ethics for these jobs as well. This might help American bureaucrats to define their role more broadly, as not just achieving certain policy outcomes, but as doing so with sensitivity to the constitutional rights of those affected.

340. *See* JAMES MORRISON, ESSENTIAL PUBLIC AFFAIRS FOR JOURNALISTS 103–04 (4th ed. 2015); Vanessa MacDonnell, *The civil servant's role in the implementation of constitutional rights*, 13 INT'L J. CONST. L. 383, 395–403 (2015).