

JUDICIAL POWER TO REGULATE PLEA BARGAINING

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ABSTRACT

Plea bargaining in the United States is in critical respects unregulated, and a key reason is the marginal role to which judges have been relegated. In the wake of Santobello v. New York (1971), lower courts crafted Due Process doctrines through which they supervised the fairness of some aspects of the plea bargaining process. Within a decade, however, U.S. Supreme Court decisions began to shut down any constitutional basis for judicial supervision of plea negotiations or agreements. Those decisions rested primarily on two claims: separation of powers and the practical costs of regulating plea bargaining in busy criminal justice systems. Both rationales proved enormously influential. Legislative rulemaking and state courts both largely followed the Court in excluding judges—and in effect, the law—from any meaningful role.

This Article challenges these longstanding rationales. Historical practice suggests that separation of powers doctrine does not require the prevailing, exceedingly broad conception of “exclusive” executive control over charging and other components of the plea process. This is especially true in the states, many of which had long traditions of private prosecutors and judicial oversight over certain prosecution decisions, as well as different constitutional structures. By contrast, English courts—based on both common law and legislation—retain some power to review such decisions. Moreover, assertions that legal constraints on plea bargaining would fatally impair the “efficiency” of adjudication is belied by evidence of very high guilty plea rates

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both in England, where bargaining is more regulated, and in U.S. courts before the Supreme Court closed off meaningful grounds for judicial review.

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INTRODUCTION

The pervasiveness of plea bargaining and the rarity of trials are familiar features of American criminal justice systems. For years the federal courts have achieved more than 95 percent of all convictions through guilty pleas, and in most state courts, the figures are in the same ballpark.¹ But the “triumph” of plea bargaining (in George Fisher’s description) hardly distinguishes criminal adjudication in the United States from the practices of legal systems elsewhere.² Plea bargaining, or some comparable form of abbreviated, consent-based adjudication process, is widely and routinely relied upon in criminal justice systems worldwide as an alternative to trials. Even though negotiated settlements of criminal prosecutions fit much less comfortably in the civil law tradition than the common law tradition,³ civil law jurisdictions have adopted their own variants of plea bargaining as well.⁴

1. See *infra* note 156 and accompanying text.

2. See generally George Fisher, *Plea Bargaining’s Triumph*, 109 YALE L.J. 857, 859-61 (2000) (arguing that plea bargaining has “won” because it is now the predominant practice in the U.S. and other common law nations).

3. See WORLD PLEA BARGAINING: CONSENSUAL PROCEDURES AND THE AVOIDANCE OF THE FULL CRIMINAL TRIAL, at xxii (Stephen C. Thaman ed., 2010) [hereinafter WORLD PLEA BARGAINING] (noting that while it is clear that many European nations have been traditionally hostile to American-style plea bargaining, most have adopted it).

4. See Bron McKillop, *What Can We Learn from the French Criminal Justice System?*, 76 AUSTRALIAN L.J. 49, 55-56 (2002) (stating that 99.8 percent of French criminal cases are adjudicated in lower courts with expedited processes); Thomas Weigend, *Lay Participation and Consensual Disposition Mechanisms*, 72 REVUE INTERNATIONALE DE DROIT PÉNAL 595, 595-96 (2001) (Fr.) (describing trend toward plea bargaining or similar nontrial adjudication in many countries). See generally JENIA I. TURNER, PLEA BARGAINING ACROSS BORDERS (Hiram E. Chodosh ed., 2009) (describing bargaining practices in Germany, Russia, Bulgaria, China, and Japan); WORLD PLEA BARGAINING, *supra* note 3, at xx (noting that many countries that rely on a strict legality principle have made “radical steps towards confession or plea bargaining”); Arie Freiberg, *Non-Adversarial Approaches to Criminal Justice*, 17 J. JUD. ADMIN. 205 (2007) (Austl.) (discussing the high plea bargaining rate in Australia).

In 1987, the Council of Europe Committee of Ministers’ Recommendation R (87) 18 urged member states to use discretionary prosecution and develop simplified, out-of-court procedures for minor offences as a means to reduce delay in criminal justice systems. COMM. OF MINISTERS, COUNCIL OF EUR., RECOMMENDATION NO. R (87) 18 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES CONCERNING THE SIMPLIFICATION OF CRIMINAL JUSTICE (1987), <https://wcd.coe.int/com.intranet.InstraServlet?command=com.intranet.CmdBlobGet&IntranetImage=608011&SecMode=1&DocId=694270&Usage=2> [https://perma.cc/Q7DK-6VR4]. Interestingly, across national contexts bargaining usually seems to develop from the bottom

Despite lamentations for the “vanishing trial” and criticisms of plea negotiation practices, the basic appeal of negotiated guilty pleas is easy to understand. Negotiated settlements are perfectly adequate and uncontroversial in many cases. Some defendants are quite willing to plead guilty. Oftentimes facts are relatively simple; evidence of guilt is comprehensive and unambiguous without trial; and the criminal charge does not call for normative assessments of “reasonable justification,” “recklessness,” or the like.

Originally, a core function of the common law trial was to *gather* evidence. After the early common law era in which jurors were expected to know many facts or investigate on their own, the trial became a means to *produce* evidence, such as witness testimony that sometimes even the parties had not previously heard.⁵ The evidence-gathering function of trials is much less necessary today, for many reasons. New forms of evidence, such as audio and visual recordings and various kinds of forensic analysis, provide key evidence well before trial. Police have firsthand knowledge of many crimes, such as drug or weapon possession, and they often gather statements from witnesses and suspects. Moreover, many offenses—such as possession crimes—are defined in ways that are easy to prove.

Many criminal cases simply do not require a trial to determine what happened or what liability should follow from it. But it is not always easy to agree on which cases are clear from pretrial investigation sources and which are not.

In addition, even though national wealth—measured by per capita GDP—has never been higher,⁶ there is a strong consensus that governments for the last half century or much longer cannot afford to fund criminal justice systems that adjudicate more than a small fraction of prosecutions through ordinary trials.⁷ Legislators,

up; it starts out in trial courts and later gains statutory or appellate courts’ endorsement.

5. See John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 531-32 (2012).

6. See *GDP Per Capita (Current US\$)*, WORLD BANK, <http://data.worldbank.org/indicator/NY.GDP.PCAP.CD> [<https://perma.cc/52C4-3PVJ>] (last visited Mar. 20, 2016).

7. Cf., e.g., NAT’L CRIMINAL JUSTICE ASS’N, THE IMPACT OF FEDERAL BUDGET CUTS ON STATE AND LOCAL PUBLIC SAFETY: RESULTS FROM A SURVEY OF CRIMINAL JUSTICE PRACTITIONERS (2012), <http://www.ncja.org/sites/default/files/documents/NCJA-VERA-Summar-of-Sequestration-Survery-2012.pdf> [<https://perma.cc/N6HS-S8G2>].

prosecutors, and nearly everyone else share the U.S. Supreme Court's conclusion that "plea bargaining[] is an essential component of the administration of justice," without which "the States and the Federal Government would need to multiply by many times the number of judges and court facilities."⁸ "[W]e accept plea bargaining because many believe that without it ... our system of criminal justice would grind to a halt."⁹ The same view is now common in criminal justice systems outside the United States as well.¹⁰ There are good reasons to be skeptical of this conventional wisdom, many of which I have offered elsewhere.¹¹ Nonetheless, contemporary demands on courts to adjudicate criminal charges exceed courts' capacity to do so through ordinary jury trial process.

These systemic developments cut across national boundaries and probably go a long way toward explaining why U.S. jurisdictions have much company in the routine practice of plea bargaining.

While plea bargaining is pervasive worldwide, U.S.-style bargaining *rules* are not. Under state and federal law, plea bargaining is, in effect, unregulated. To be sure, there is a body of law that governs plea bargaining. For example, prosecutors cannot use illicit pressures to coerce defendants into pleading guilty, and judges must ensure that defendants knowingly waive their trial rights and that any guilty plea has a "factual basis."¹² The law of plea bargaining, however, is much like the law of free markets, which is the source of its underlying logic and rationality. As is true for parties in the

8. *Santobello v. New York*, 404 U.S. 257, 260 (1971); *see also Corbett v. New Jersey*, 439 U.S. 212, 219-20 n.9 (1978) (noting that bargaining is the most important means of achieving "the interest of the State in efficient criminal procedure" (citing *Ludwig v. Massachusetts*, 427 U.S. 618, 627-38, 627 n.4 (1976))). Compare *Bordenkircher v. Hayes*, 434 U.S. 357, 372 (1978) (Powell, J., dissenting) ("The plea-bargaining process ... is essential to the functioning of the criminal-justice system."), with Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 932-37 (1983) (noting and rebutting claims of plea bargaining's practical necessity and evaluating ways to overcome the prevalence of plea bargaining).

9. *Lafler v. Cooper*, 132 S. Ct. 1376, 1397 (2012) (Scalia, J., dissenting).

10. See, e.g., Donna Hackett, Commentary, 46 CANADIAN J. CRIMINOLOGY & CRIM. JUST. 501, 501 (2004) ("Plea bargaining has become absolutely essential to the Crown's management of the high volume of criminal cases.") (author is a justice on the Ontario Court of Justice).

11. See DARRYL K. BROWN, FREE MARKET CRIMINAL JUSTICE: HOW DEMOCRACY AND LAISSEZ FAIRE UNDERMINE THE RULE OF LAW 154-55, 167-71 (2016); Darryl K. Brown, *The Perverse Effects of Efficiency in Criminal Process*, 100 VA. L. REV. 183, 185-87 (2014) (arguing that increased efficiency in the criminal justice system actually leads to increased demand).

12. See, e.g., FED. R. CRIM. P. 11(b)(3); N.Y. CRIM. PROC. LAW § 220.15(4) (McKinney 2015).

private market realm, parties in criminal litigation are free to negotiate and employ any tactics that ordinary criminal law does not prohibit. That means that prosecutors cannot perpetrate frauds or threaten physical harm, and the terms of agreements must be within existing criminal and sentencing laws. But as in the market realm, nearly anything else goes. In particular, prosecutors can act strategically and add charges solely if a defendant insists on trial,¹³ and they can pressure defendants by leveraging circumstances such as limited defense resources,¹⁴ pretrial detention that disrupts work and family obligations, or the threat of prosecution against family members if defendants refuse to plead guilty.¹⁵

In short, American plea bargaining is highly—probably uniquely—“deregulated.” It is less regulated than comparable domains of executive branch enforcement authority, and probably less regulated than the criminal justice systems of other common law jurisdictions. In this Article, I explore reasons why this is so and, in the process, suggest how it could change. The first reason, taken up in Part II, arises from a presumption that prosecutorial decision making is an “exclusively executive” endeavor. This view has evolved into a flawed body of federal and state constitutional law, often grounded in separation of powers jurisprudence, that is inconsistent with the history of criminal justice administration in many states, and has led courts to reject even the most modest and plausible oversight of prosecutorial authority. This jurisprudential conception, which is remarkably consistent across state and federal jurisdictions, has stripped courts of any capacity to regulate even at the extremes of prosecutorial plea bargaining tactics. As a point of comparison, Part III describes some of the key provisions of English criminal law that enable courts to play a modest, but meaningful, role in monitoring prosecutorial charging discretion. Charging decisions are central to the most controversial and problematic forms of plea bargaining, and English law demonstrates one plausible route by which courts can play an appropriate oversight role, consistent with the traditional common law powers of judges and prosecutors.

13. See *infra* note 16.

14. See *infra* note 137.

15. See BROWN, *supra* note 11, at 95-97.

Part IV recalls a body of doctrine in federal constitutional law through which U.S. courts have exercised meaningful oversight of prosecutorial discretion in the plea bargaining context. The U.S. Supreme Court eventually shut down this mode of plea bargaining regulation and elected to build the federal constitutional law of plea bargaining around a market-inspired understanding of the practice modeled closely on the private law of contract. State courts overwhelmingly followed suit and, if only through inaction, legislatures did as well. This market- and contract-based understanding of plea bargaining provides not only a template for the public law governing plea negotiations but also a normative justification for the fairness and desirability of unregulated bargaining, without legal standards or judicial scrutiny, even in the most extreme instances of plea bargaining practice. The Conclusion suggests that this market-inspired normative vision, as well as the assumption that prosecutorial discretion is immune from legal regulation and oversight, will have to change before American plea bargaining can be regulated to the modest, but important, degree that governs much of U.S. civil law enforcement and much of criminal law enforcement outside the United States.

I. LEGAL REGULATION AND JUDICIAL OVERSIGHT OF PROSECUTORIAL DISCRETION

Decisions about which criminal charges defendants will face play a central role in plea bargaining. Prosecutors typically have an array of choices for how to charge a particular suspect on a particular set of facts, and those decisions are affected by the subsequent plea bargaining process. Prosecutors can charge multiple offenses or the most serious ones, and offer to drop some charges or reduce the severity of charges, in exchange for a guilty plea. Alternately, prosecutors can request that defendants plead guilty to the initial charges and warn that they will add more serious charges if defendants refuse to plead guilty. Charging tactics of this sort are routine and well documented in U.S. courts.¹⁶

16. For a study documenting this practice that includes a survey of prosecutors and defense attorneys, see U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 107-09 (2011), <http://www.ussc.gov>.

Because they are left to prosecutors' discretion, charging decisions are the least regulated aspect of the criminal process. In jurisdictions with limited judicial sentencing discretion due to mandatory sentencing law or narrowly tailored guidelines, prosecutors' charging choices have tremendous, sometimes determinate, influence over the punishments that attach after a defendant's guilty plea or trial conviction.¹⁷ Unrestrained charging discretion combined with broad criminal codes and power to define sentencing differentials are the sources of prosecutorial power and leverage in plea bargaining.

This state of affairs might be reformed in several ways. Jurisdictions might return to indeterminate sentencing policies that give judges wide discretion over punishments, which would diminish the

ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_06.pdf [<https://perma.cc/2BNA-V5DK>]. For an excellent survey and detailed documentation of explicit uses of sentence enhancements to compel guilty pleas, see *United States v. Kupa*, 976 F. Supp. 2d 417 (E.D.N.Y. 2013) (citing and summarizing cases and quoting explicit prosecutor assertions and policies).

Many courts note (and complain about) prosecutors' explicit use of sentencing provisions to induce guilty pleas or cooperation. *See, e.g.*, *United States v. Dotson*, 513 F. App'x 221, 223 (3d Cir. 2013) ("Although there was no plea agreement in this case, it was agreed that at the time of sentencing, the government would withdraw one of the convictions from the information to reduce Dotson's sentencing exposure from a mandatory life sentence to a mandatory minimum sentence of twenty years' imprisonment."); *Gilbert v. United States*, 640 F.3d 1293, 1298 (11th Cir. 2011) (observing that "the non-application of [the prior felony information] obviously was part of [the] plea agreement"); *United States v. Shaw*, 426 F. App'x 810, 813 (11th Cir. 2011) (stating that the prosecutor informed the defendant that, "if [he] went forward with the suppression hearing, [the prosecutor] would file the § 851 notice seeking the mandatory-minimum life sentence"); *United States v. Espinal*, 634 F.3d 655, 659 (2d Cir. 2011) (stating that the government advised the defendant that "if he did not plead guilty by September 15, it would file a prior felony information," thus increasing the minimum sentence from ten to twenty years); *United States v. Harris*, 394 F. App'x 676, 679-80 (11th Cir. 2010) (noting that the government agreed to withdraw the notice of prior felonies to remove mandatory life sentence only if the defendant pleaded guilty); *United States v. Forrester*, 616 F.3d 929, 938 (9th Cir. 2010) (describing how the government offered to not file a § 851 notice increasing defendant's mandatory sentence if he accepted a "package" guilty plea offer, which required that he and a co-defendant both accept the offer "by 2:00 pm that same day"); *Coleman v. United States*, 339 F. App'x 643, 644 (7th Cir. 2009) (denying a 28 U.S.C. § 2255 motion for ineffective assistance of counsel for a case in which the attorney had advised the defendant that the government would file a prior felony information unless he pleaded guilty); *United States v. Jenkins*, 537 F.3d 1, 4 (1st Cir. 2008) ("Here, the prosecutor agreed, as part of his plea offer, to refrain from filing a section 851 enhancement information."); *Vadas v. United States*, 527 F.3d 16, 19 (2d Cir. 2007) ("In exchange for the plea, ... *[t]he government also agrees to withdraw the Amended Second Offender Notice Information filed March 15, 2001 pursuant to ... Section 851.*").

17. *See* BROWN, *supra* note 11, at 96-97.

importance of prosecutorial charge selection. They might cull their criminal codes to reduce the number of offenses and punishments that apply to any given criminal act. Or they might somehow affect a sea change in professional prosecutorial culture—perhaps by transforming prosecution offices into nonpolitical civil service bureaucracies—so that tactically selecting and adjusting charges violates professional norms or administrative rules. Another possibility, however, is at least as feasible as any of those (surely more so than the last), and also wholly compatible with any of them. We could increase legal regulation of prosecutorial charging decisions, with judges taking on a modest, but meaningful, capacity to oversee the most extreme and blatantly tactical exercises of prosecutorial power. Regulation could take the form of statutory criteria, administrative regulations, common law, or constitutional law. The reluctance to this path, by courts and legislatures in nearly all U.S. jurisdictions, is widespread, and to a significant degree, it has become embedded in constitutional doctrines regarding separation of powers at both the federal and state levels. Prosecutorial discretion wholly free of judicial oversight, however, is not as long-standing or as uniform a tradition as state and federal courts now tend to assume.

The next two Sections sketch some of the history of executive authority over criminal charging to make the case that, especially in state criminal justice systems, a judicial power that is consistent with constitutional structure and historical practice could play a more meaningful role in regulating plea bargaining.

A. Exclusive Executive Authority and Separation of Powers

It has become a truism that “[g]overnmental investigation and prosecution of crimes is a quintessentially executive function.”¹⁸ The federal executive’s power during the prosecution process is at its apex in the initial decision whether or not to initiate criminal charges. The Supreme Court has repeatedly concluded that the Federal Constitution gives “the Executive Branch … exclusive authority and absolute discretion to decide whether to prosecute a case.”¹⁹ For

18. *Morrison v. Olson*, 487 U.S. 654, 706 (1988) (Scalia, J., dissenting).

19. *Greenlaw v. United States*, 554 U.S. 237, 246 (2008) (citing *United States v. Nixon*,

roughly the last century (but only that long), federal courts have adopted the view that prosecutorial charging discretion is a “special province of the Executive Branch” as an inference from the Constitution’s Take Care Clause, which assigns to the executive the duty to “take Care that the Laws be faithfully executed.”²⁰ On top of this

418 U.S. 683, 693 (1974)); *see, e.g.*, Heckler v. Chaney, 470 U.S. 821, 832 (1985) (“[A]n agency’s refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch.”); United States v. Nixon, 418 U.S. 683, 693 (1974); *see also* State v. Faltynowicz, 660 P.2d 368, 377 (Wyo. 1983) (“The prosecutive decision traditionally has been exercised by the executive department.” (citing *Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1869))).

20. *Heckler*, 470 U.S. at 832 (quoting U.S. CONST. art. II, § 3). The first time the Supreme Court linked federal prosecution discretion to the Take Care Clause was in *Ponzi v. Fessenden*, 258 U.S. 254, 262 (1922). “The Attorney General is the head of the Department of Justice. He is the hand of the President in taking care that the laws of the United States in protection of the interests of the United States in legal proceedings and in the prosecution of offenses, be faithfully executed.” *Id.* (internal citations omitted). A federal district court made the connection a half century earlier. *See United States v. Corrie*, 25 F. Cas. 658, 668 (C.C.D.S.C. 1860) (No. 14,869); *see also* Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments*, 6 SETON HALL CIR. REV. 1, 22-23 (2009) (discussing *Corrie*, *Ponzi*, and the evolution of prosecutorial power under the Take Care Clause). For subsequent Supreme Court references, see *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (“A selective-prosecution claim asks a court to exercise judicial power over a ‘special province’ of the Executive.... They have this latitude because they are designated by statute as the President’s delegates to help him discharge his constitutional responsibility to ‘take Care that the Laws be faithfully executed.’”) (citations omitted); *Morrison*, 487 U.S. at 656-57 (affirming independent prosecutor statute, *inter alia*, because the prosecutor remained in the executive branch, despite President’s lack of control, and judges did not “supervise” the prosecutor); *Heckler*, 470 U.S. at 832 (“[W]e recognize that an agency’s refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to ‘take Care that the Laws be faithfully executed.’”).

Lower courts have also addressed distinctions in judicial and executive powers, defining prosecution as part of the latter. *See United States v. Scott*, 631 F.3d 401, 406 (7th Cir. 2011) (“Under our system of separation of powers, prosecutors retain broad discretion to enforce criminal laws because they are required to help the President ‘take Care that the Laws be faithfully executed.’”); *United States v. Woods*, 576 F.3d 400, 409 (7th Cir. 2009) (“There is nothing that this court either could or should do about the prosecutorial discretion that is exercised at the charging stage.”); *United States v. Moore*, 543 F.3d 891, 900 (7th Cir. 2008); *In re United States*, 503 F.3d 638, 641 (7th Cir. 2007); *United States v. Roberson*, 474 F.3d 432, 434 (7th Cir. 2007); *Nader v. Bork*, 366 F. Supp. 104, 109 (D.D.C. 1973) (“The suggestion that the Judiciary be given responsibility for the appointment and supervision of a ... [p]rosecutor ... is most unfortunate.... The Courts must remain neutral. Their duties are not prosecutorial.”).

textual rationale, courts cite a practical one: they view enforcement decisions as “ill-suited to judicial review.”²¹

In addition to the executive’s exclusive authority to *commence* a prosecution, courts generally have presumed that the separate decision to *terminate* a prosecution also belongs to the executive branch. That too can be inferred from the Take Care Clause, but it draws additional support from common law tradition, which accorded prosecutors exclusive control over the power to *nolle prosequi*, or dismiss, charges that they earlier filed in court.²² Between the decisions to initiate and terminate criminal charges, however, courts have jurisdiction over the case, which enables judges to play some role in supervising how the case proceeds and what the parties do during those proceedings. “[T]he primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions”²³ gives judges a basis for some authority over executive discretion *during* adjudication, even if they have none before that point. The Supreme Court has used that authority, for example, to reject generalized claims of executive privilege that would withhold evidence from a criminal proceeding.²⁴ During the adjudication process, the Court has emphasized its less absolutist account of separation of powers doctrine, which acknowledges the legitimacy of one branch having

21. *Wayte v. United States*, 470 U.S. 598, 607 (1985); *see also United States v. Giannatasio*, 979 F.2d 98, 100 (7th Cir. 1992) (Posner, J.) (“Prosecutorial discretion resides in the executive, not in the judicial, branch, and that discretion, though subject of course to judicial review to protect constitutional rights, is not reviewable for a simple abuse of discretion.”).

22. *See Commonwealth v. Tuck*, 37 Mass. (20 Pick.) 356, 364-66 (1838); 1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 496 (London, MacMillan & Co. 1883); Charles H. Winfield, *Nolle Prosequi*, 5 CRIM. L. MAG. 1, 6-8 (1884). The only traditional limit on *nolle prosequi* power comes at a later stage: once a jury is sworn, jeopardy attaches and a prosecution-initiated dismissal can bar re-prosecution. *Tuck*, 37 Mass. (20 Pick.) at 365. Since the nineteenth century, states have varied their statutory rules on whether a judge must approve dismissal or the prosecutor’s *nolle pros* power is unilateral, but that distinction has little practical effect. Judges cannot command prosecutors to prosecute; refusal to dismiss amounts only to the power to bar the prosecutor’s authority to re-file the same charge later.

For a representative modern statement of prosecutors’ *nolle pros* power, see *State v. Vixamar*, 687 So. 2d 300, 303 (Fla. Dist. Ct. App. 1997) (noting “the prosecutor’s exclusive discretion to decide whether a criminal case should be discontinued and in the absence of a procedural rule authorizing judicial intervention” (citing *State v. Matos*, 589 So.2d 1022 (Fla. Dist. Ct. App. 1991))).

23. *Nixon*, 418 U.S. at 707.

24. *Id.*

some input in a matter assigned primarily to another. “[S]eparate powers were not intended to operate with absolute independence,” but rather with “interdependence” and “reciprocity.”²⁵

An example of the judicial authority in the context of prosecutorial charging discretion that accords with this interdependent conception of separation of powers is the Supreme Court’s decision in *Blackledge v. Perry*.²⁶ Perry was convicted of misdemeanor assault in a state court bench trial.²⁷ State law provided for appeal in the form of a de novo jury trial, which Perry demanded.²⁸ While the second trial was pending, the prosecutor indicted Perry under a felony statute for the same conduct.²⁹ Perry alleged the greater charge was a vindictive response to his appeal that violated due process, and the Supreme Court agreed.³⁰ In order to prevent potential prosecutorial “vindictiveness” and protect a defendant from fear of retaliation—even if that was not the prosecutor’s actual motive—*Blackledge* held that the Due Process Clause barred prosecutors from responding to a defendant’s appeal by indicting him on a more serious charge for the same conduct.³¹

Blackledge thus defined a constitutional limit on prosecutorial charging discretion. More broadly, the Court recognized the judiciary’s competence to supervise criminal charging decisions in some circumstances; not all charging decisions in every context are *exclusively* executive. The executive branch’s “absolute discretion to decide whether to prosecute a case”³² need not be quite so absolute after all. Or rather, properly understood, prosecutorial discretion need not be viewed as incompatible with some constraints, at least at the outer bounds, defined by legal standards and enforced by judicial review. The same point can be drawn from equal protection doctrine, which prohibits prosecutors from basing decisions to charge on intentional

25. *Id.*

26. 417 U.S. 21 (1974).

27. *Id.* at 22.

28. *Id.*

29. *Id.* at 23.

30. *Id.* at 25, 27.

31. *Id.* at 28-29.

32. United States v. Nixon, 418 U.S. 683, 693 (1974) (citing *Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1869)).

racial bias and gives courts the power to investigate and remedy racially biased charges.³³

Blackledge, however, is now only nominally good law and has instead come to represent a doctrinal road not taken. The Supreme Court effectively overturned *Blackledge* in later decisions that have confined the *Blackledge* holding to its facts and imposed insuperable proof burdens for vindictiveness claims in contexts other than the unusual one of demands for de novo jury trials.³⁴ Most importantly in the plea bargaining context, the Court held in *Bordenkircher v. Hayes* that *Blackledge*-style tactical charging decisions intended to influence defendants' choices about exercising other rights—in Hayes's case, the right to trial—are wholly permissible in the context of plea negotiations.³⁵ That discretionary authority gives prosecutors an enormously powerful tool in the plea negotiation process. The same is true of equal protection doctrine for similar reasons. In *United States v. Armstrong*, the Court nominally recognized a standard by which courts guard against discriminatory prosecutions, but then made its requirements insuperably difficult to meet.³⁶ Beyond these two constitutional doctrines, federal courts have not defined other standards that would give courts meaningful authority to review suspect prosecutorial charging decisions.³⁷ State courts have done little better. Likewise, Congress and state legislatures have uniformly chosen not to specify such standards for judicial review by statute.

As a result, prosecutors functionally have exclusive authority not only over the initial decision to charge but also over critical post-charging litigation tactics, especially with regard to changing or dismissing charges. Courts concede the potential for abuse of power. The Supreme Court has acknowledged that “[t]here is no doubt that the breadth of discretion that our country’s legal system vests in

33. *United States v. Armstrong*, 517 U.S. 456, 464-65 (1996).

34. See *United States v. Goodwin*, 457 U.S. 368, 376-81 (1982) (imposing prohibitive “actual vindictiveness” requirement for prosecutorial vindictiveness claims).

35. 434 U.S. 357, 364-65 (1978) (approving prosecutor’s increase in charge severity as a means to encourage plea bargaining).

36. 517 U.S. at 464-65.

37. See *Wayte v. United States*, 470 U.S. 598, 610-11, 613-14 (1985) (nominally acknowledging limits on charging decisions motivated by defendants’ exercising fundamental rights such as free speech, but deferring to prosecutorial discretion).

prosecuting attorneys carries with it the potential for both individual and institutional abuse.”³⁸ But the Court has been firm in its view that this risk—even in light of the “constitutional duty of the Judicial Branch to do justice in criminal prosecutions”³⁹—does not justify courts taking a meaningful role to guard against it, either as a matter of constitutional law or of the judiciary’s inherent supervisory authority. “In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file … generally rests entirely in his discretion.”⁴⁰ Lower courts widely reaffirm this point in broad terms. A statement by the Seventh Circuit is typical: “A judge in our system does not have the authority to tell prosecutors which crimes to prosecute Prosecutorial discretion ... is not reviewable for a simple abuse of discretion.”⁴¹ It may be that the powers accorded to each branch in the federal system were intended to operate with “interdependence” and “reciprocity.”⁴² But with regard to criminal prosecution, the executive branch enjoys something close to “absolute independence.”⁴³

B. History of Criminal Prosecution Authority

The common law tradition clearly accords the “decision whether or not to prosecute” to *prosecutorial* as opposed to judicial control.⁴⁴ But that does not necessarily mean that decisions to prosecute are exclusively in the *executive’s* control—much less that they have been so “always and everywhere.”⁴⁵ Nor does it foreclose a meaningful judicial role in supervising some aspects of prosecution decision

38. *Bordenkircher*, 434 U.S. at 365; see also *Armstrong*, 517 U.S. at 463-65; *Wayte*, 470 U.S. at 607.

39. *United States v. Nixon*, 418 U.S. 683, 707 (1974).

40. *Bordenkircher*, 434 U.S. at 364; see *Purkett v. Elem*, 514 U.S. 765, 767-68 (1995) (noting a comparable level of faith in prosecutorial rectitude, and establishing a presumption against prosecutors’ racial bias in striking potential jurors from the jury).

41. *United States v. Giannattasio*, 979 F.2d 98, 100 (7th Cir. 1992); see also *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965).

42. *Nixon*, 418 U.S. at 707.

43. *Id.*

44. See *Bordenkircher*, 434 U.S. at 364.

45. *Morrison v. Olson*, 487 U.S. 654, 706 (1988) (Scalia, J., dissenting) (noting the power of criminal prosecution “has always and everywhere—if conducted by government at all—been conducted never by the legislature, never by the courts, and always by the executive”).

making, as *Blackledge* once confirmed. The strongest version of the claim that prosecution is always an activity exclusive to executive officials is a comparatively recent one. Even within the federal system, in which the case for that view rests on the firmest ground, some early federal practices undermine it. In state justice systems, as well as in common law systems outside the United States, the claim of longstanding exclusive executive control over prosecution simply does not hold.

C. Prosecutorial Power in the Federal System

The Federal Constitution creates a more unitary structure for the executive branch than do most state constitutions, especially with respect to criminal justice administration.⁴⁶ Several historical practices suggest that the power of criminal prosecution was not always understood as an exclusively executive power to the degree that most courts today tend to assume. For one, private parties were allowed to initiate federal actions closely analogous to criminal prosecutions—*qui tam* actions.⁴⁷ Those claims were understood as quasi-criminal because the plaintiff brought them on behalf of the federal government, the alleged victim of fraud or theft.⁴⁸ Litigating on the government's behalf, the successful *qui tam* relator shared

46. Cf. THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961) (discussing debate about the separation of the judiciary, legislature, and executive at the time of the founding); THE FEDERALIST NO. 51, *supra*, at 321 (James Madison) (“In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own.”); Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 992-94 (2006) (giving an overview of separation of powers debates focused on criminal justice administration). Moreover, the meaning and scope of the unitary executive created by the Federal Constitution remains a topic of scholarly debate. Some of that debate focuses on federal prosecution authority. Compare Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 16-22 (1994) (arguing for executive authority outside the President’s control), and Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 301-04 (1989) (expressing a similar, nonexclusive executive authority view of presidential power), with Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 538-39 (2005) (arguing for a strong unitary conception of executive power, including presidential control over prosecution).

47. See Krent, *supra* note 46, at 296-303.

48. See *id.*

any monetary award with the government.⁴⁹ More significantly, federal crimes were sometimes prosecuted by state officials in state courts—officials clearly not under the control of the federal executive branch.⁵⁰ Moreover, even the first *federal* prosecutors were not clearly or formally under the President's control. The Judiciary Act of 1789 created the office of the Attorney General as well as federal district attorneys,⁵¹ but the latter did not report to the former until 1861.⁵² Beginning in 1820, district attorneys reported to the Treasury Secretary, who in turn was required by statute to report to Congress.⁵³ The Department of Justice was not created until 1870.⁵⁴

From evidence such as this, Larry Lessig and Cass Sunstein concluded that “the decision ‘who should prosecute whom’ was a decision the early Congresses at least thought far more subtle and complex than do the believers in a strongly unitary executive.”⁵⁵ Some scholars disagree about the implications of this history in the broader debate about presidential authority.⁵⁶ But that debate is only weakly related to the debates about the nature of judicial

49. While federal criminal law in its earliest decades evidenced no significant judicial supervision in prosecution powers, the federal executive hardly maintained close or exclusive control over enforcement. Federal crimes were sometimes prosecuted by state rather than federal officials and occasionally by private parties, who could pursue close analogs to criminal prosecutions in private *qui tam* actions. *See id.* at 300; *see also* Lessig & Sunstein, *supra* note 46, at 20. Even today federal courts have power to make interim appointments for federal prosecution vacancies and to appoint special prosecutors to handle criminal contempt charges. *See* 28 U.S.C. § 546(d) (2012); *see also* 153 CONG. REC. 6599-600 (2007) (statement of Sen. Diane Feinstein) (explaining that federal district courts have had authority to make interim appointments to unfilled U.S. Attorney offices since at least 1863). On federal judicial appointment of prosecutors for criminal contempt, see *Young v. United States ex rel. Vuitton et Fils*, 481 U.S. 787, 809-10, 814 (1987).

50. *See Lessig & Sunstein, supra* note 46, at 18-19; Krent, *supra* note 46, at 303-04.

51. The Judiciary Act of 1789, 1 Stat. 73, § 35.

52. *See Lessig & Sunstein, supra* note 46, at 16-17.

53. *See id.*

54. *See id.*; Charles Tiefer, *The Constitutionality of Independent Officers as Checks on Abuses of Executive Power*, 63 B.U. L. REV. 59, 75 (1983) (“The Attorney General did not control or supervise federal district attorneys; his function was merely to advise the President and the Cabinet.”); *see also* Prakash, *supra* note 46, at 555-57 (noting President Washington lacked statutory authority to control federal district attorneys but nonetheless extensively dictated instructions to them, and concluding that Washington’s control over district attorneys and other federal attorneys was “wide ranging and complete”).

55. Lessig & Sunstein, *supra* note 46, at 21; *see also id.* at 17-18 (discussing the history of the Comptroller of the Treasury, who enjoyed some independence from presidential control, as the first centralized federal prosecution authority).

56. *See Prakash, supra* note 46, at 521.

oversight of prosecutorial discretion on constitutional grounds in the manner of *Blackledge* or—should Congress so provide—on statutory grounds. More importantly, the degree of executive control over federal prosecutions is irrelevant to understandings of the scope of executive authority in state criminal justice systems, in which more than 90 percent of criminal cases are adjudicated.⁵⁷

D. Prosecutorial Power in State Systems

State justice systems arise from state constitutions that differ in significant ways from their federal counterpart, especially when it comes to criminal justice administration. In general, many state constitutions draw less rigid distinctions between executive, legislative, and judicial roles than does the Federal Constitution.⁵⁸ As a result, a number of state courts have approved arrangements that likely would be barred in the federal context, such as expansive delegations of rule-making authority to agencies, or the appointment of legislators to executive boards.⁵⁹ Several state courts exercise greater authority than their federal counterparts by providing advisory opinions to other branches, and many have constitutional rule-making authority.⁶⁰ Some state constitutions placed prosecutors

57. In 2006, state courts produced 1,132,290 convictions, compared to 79,725 convictions in federal district courts during the same year—about 7 percent of the state-court volume. See UNIV. AT ALBANY, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS: FELONY CONVICTIONS IN STATE COURTS tbl.5.44.2006, <http://albany.edu/sourcebook/pdf/t5442006.pdf> [<https://perma.cc/652Y-SHEL>] (last visited Mar. 20, 2016); *id.* at tbl.5.42.2006, <http://www.albany.edu/sourcebook/pdf/t5242006.pdf> [<https://perma.cc/KD79-QKYZ>] (last visited Mar. 20, 2016). Federal prisons held about 8 percent of all U.S. prison and jail inmates in 2003: 165,800 federal inmates compared to 1,912,800 inmates in state custody. UNIV. AT ALBANY: SOURCEBOOK CRIMINAL JUSTICE STATISTICS: ADULTS UNDER CORRECTIONAL SUPERVISION tbl.6.2 (2003), <http://www.albany.edu/sourcebook/pdf/t62.pdf> [<https://perma.cc/4QET-C5V9>].

58. ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 235-45 (2009) (providing an overview of differences in state separation of powers law); *see id.* at 237 (noting that forty state constitutions have explicit separation of powers provisions, unlike the Federal Constitution); *cf.* Prentis v. Atl. Coast Line Co., 211 U.S. 210, 225 (1908) (“[W]hen, as here, a state constitution sees fit to unite legislative and judicial powers in a single hand, there is nothing to hinder so far as the Constitution of the United States is concerned.”).

59. WILLIAMS, *supra* note 58, at 241. *See generally* Gary J. Greco, *Standards or Safeguards: A Survey of the Delegation Doctrine in the States*, 8 ADMIN. L.J. AM. U. 567 (1994) (providing a comprehensive analysis of the delegation doctrine in all fifty states).

60. WILLIAMS, *supra* note 58, at 291, 296; *see, e.g.*, *In re Advisory Op. to the Governor*, 732 A.2d 55, 62-64, 73 (R.I. 1999) (describing differences in state and federal separation of powers). One implication of the nonunitary executive structure is that state courts may have

in the *judicial* rather than the executive branch well into the twentieth century; a few states still do, including Florida, Louisiana, Tennessee, and Texas.⁶¹ Most states also depart from the federal model of the unitary executive. In forty-three states, attorneys general are directly elected.⁶² In the remainder they are appointed either by the Governor, the legislature, or—in Tennessee—the state supreme court.⁶³ In most states, chief local prosecutors are also independently elected, and state law frequently gives the attorney general little authority to supervise or remove them.⁶⁴

a different approach to issues of whether judicial supervision powers over prosecutors “are of such a nature that they impede the President’s”—or in the case of states, a Governor’s—“ability to perform his constitutional duty,” than the Supreme Court in *Morrison v. Olson*, 487 U.S. 654, 691 (1988).

61. See FLA. CONST. art. V, §§ 17-18 (creating elected state attorneys—and public defenders—in the “Judiciary” article that also creates courts); LA. CONST. art. V, §§ 18-20, 22, 26 (defining courts, elected judges, and elected district attorneys within the judicial branch); TENN. CONST. art. VI, § 5 (providing for locally elected prosecutors and an Attorney General appointed by the state supreme court within the “Judicial Department”); TEX. CONST. art. V, § 21 (providing for the election of county or district attorneys); State v. Hayes, 75 So. 3d 8, 12 n.1 (La. Ct. App. 2011) (noting that unlike federal law, prosecutorial power under the Louisiana Constitution is in the judicial, not the executive, branch); Meshell v. State, 739 S.W.2d 246, 253 (Tex. Crim. App. 1987) (“By establishing the office of county attorney under Article V, the authors of the Texas Constitution placed those officers within the Judicial department.” That office is “vested with the constitutional duty ‘to represent the State’ in state courts (quoting TEX. CONST. art. V, § 21)). Connecticut amended its constitution in the 1980s to follow the federal model more closely and locate prosecutors in the executive branch. See CONN. CONST. art. IV, *amended by* CONN. CONST. art. XXIII. Until then, prosecutors were appointed by judges. GEORGE COPPOLO, CONN. GEN. ASSEMBLY, OFFICE OF LEGISLATIVE RESEARCH, 2005-R-0139, APPOINTMENT OF CHIEF STATE’S ATTORNEY AND STATE’S ATTORNEYS (2005), <https://www.cga.ct.gov/2005/rpt/2005-R-0139.htm> [<https://perma.cc/T3E6-RHEA>].

62. *Attorney General*, BALLOTPEDIA, http://ballotpedia.org/Attorney_General [<https://perma.cc/J8X6-GEB4>] (last visited Mar. 20, 2016) (noting that forty-three states elect the Attorneys General, and Governors appoint Attorneys General in Alaska, Hawaii, New Jersey, and Wyoming).

63. See ME. CONST. art. IX, § 11 (legislature appoints Attorney General); N.H. CONST. pt. II, art. 46 (Governor and the Executive Council appoint the Attorney General together); TENN. CONST. art. VI, § 5 (state supreme court appoints Attorney General).

64. See generally Michael J. Ellis, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1528 (2012) (describing prosecution systems in various states and the origins of U.S. election of prosecutors). Many states vest the duty to prosecute expressly with local prosecutors rather than the Attorney General. See 7 AM. JUR. 2D *Attorney General* §§ 15, 34 (2016); 7A C.J.S. *Attorney General* § 67 (2016). Some state Attorneys General have formal authority to supervise or take over local prosecutions, but they exercise it only rarely; others lack even formal power save in special circumstances, such as authorization by the Governor. For statutes limiting Attorney General power to intervene in local prosecution, see, for example, COLO. REV. STAT. ANN. § 24-31-101(1)(a) (West 2015); N.Y. EXEC. LAW § 63(2) (McKinney 2015). For

In addition to these contemporary differences, the history of prosecution authority and practice in the states also differed sharply from the federal experience, especially in the nation's first several decades. In the colonial era and roughly the first half century of the republic, public prosecutors in state systems were appointed in various ways—by governors, legislatures, and in some jurisdictions by judges.⁶⁵ Often part-time or short-term officers, they were commonly paid by the case or by the conviction.⁶⁶ Full-time public prosecutors were not widespread, even in larger cities, until the

examples of statutes authorizing general or supervisory power to the Attorney General, see, for example, CAL. GOV'T CODE § 12550 (West 2015); WASH. REV. CODE ANN. § 43.10.090 (West 2015). For decisions describing limits on powers of the Attorney General under state law, see People v. Knippenberg, 757 N.E.2d 667, 672 (Ill. App. Ct. 2001); Johnson v. Pataki, 691 N.E.2d 1002, 1005 (N.Y. 1997) (describing Governor's statutory authority to replace locally elected prosecutors and the state Attorney General's power to take over local prosecutions only after authorization from the Governor); Commonwealth v. Mulholland, 702 A.2d 1027, 1037 (Pa. 1997).

Legislation often authorizes local prosecutors within a state to devise prosecution policies independently, although statewide prosecutor associations can exert some influence toward more uniform practices. *See, e.g.*, FLA. STAT. ANN. § 741.2901 (West 2015) (requiring local prosecutors to devise policies regarding domestic violence prosecutions); WISC. STAT. ANN. § 968.075(3) (West 2015) (same); FLA. STAT. ANN. § 775.08401 (repealed 2011) (requiring that “[t]he state attorney in each judicial circuit” adopt “uniform criteria” for charging under certain sentence-enhancement statutes, and each circuit’s policy to be on file with the state prosecutor association, but prohibiting judicial enforcement of such policies).

65. *See, e.g.*, Ellis, *supra* note 64, at 1537 (noting judicial appointment of prosecutors in Kentucky and New York, and legislative or gubernatorial appointments elsewhere); *see also* GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 247 n.13 (2003) (describing an 1809 Massachusetts statute that transferred power to appoint county attorneys from the Governor to the court); MIKE MCCONVILLE & CHESTER L. MIRSKY, JURY TRIALS AND PLEA BARGAINING: A TRUE HISTORY 35 (2005) (describing early systems of judicial or gubernatorial appointment of prosecutors until the office became an elected one in 1847); *id.* at 28, 35 (noting courts appointed private lawyers as substitute prosecutors when district attorneys failed to appear); *id.* at 35 (indicating that before 1847, the district attorney was “appointed by the Governor’s Council of Appointment and approved by the judges of the Court of General Sessions”); *cf.* JULIUS GOEBEL JR. & T. RAYMOND NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE 367 (1944) (noting that in Colonial New York, judges as well as the Governor ordered prosecutions and *nolle prosequi*); ALLEN STEINBERG, THE TRANSFORMATION OF AMERICAN CRIMINAL JUSTICE: PHILADELPHIA, 1800-1880, at 58, 79-80, 149-58 (1989) (describing judicial management of crime investigation and criminal enforcement, especially on temperance issues; the role of public prosecutors in courts dominated by private prosecutors; and reform that changed the district attorney’s office into an elected one after 1850).

66. NICOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780-1940, at 255-94, 363-65 (2013) (describing the history of prosecutor pay by the case or conviction).

mid-nineteenth century. Most states instituted direct, local election of prosecutors (as well as judges) during a wave of state constitutional reforms in the 1840s-1860s.⁶⁷

Elections failed in many places, however, to reduce political party influence.⁶⁸ Today, forty-five of the fifty states follow that model, a regime of highly decentralized law enforcement and policy making sharply different from the unitary executive model in which federal prosecutors are under presidential control through the Attorney General.⁶⁹ Of the five states that do not elect local prosecutors, three allow the Governor to nominate candidates who must be confirmed by the legislature.⁷⁰ Two of the smallest states, Delaware and Rhode

67. JED HANDELMAN SHUGERMAN, *THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA* 6, 57-102 (2012) (describing this era of state constitutional reform and explaining that reformers hoped that electing state judges would make the judiciary independent from Governors and legislatures). During this era, the state constitutions of Indiana, Maryland, Michigan, New York, North Carolina, Pennsylvania, and Virginia made local prosecutors elected positions. *See, e.g.*, IND. CONST. of 1851, art. I, § 11; MD. CONST. of 1851, art. III (forbidding the creation of state Attorney General office); *id.* art. V; MICH. CONST. of 1850, art. VIII, § 1; *id.* art. X, § 3; N.Y. CONST. of 1846, art. X, § 1; N.C. CONST. of 1868, art. IV, § 29; VA. CONST. of 1850, art. VI, § 19; *see also* MCCONVILLE & MIRSKY, *supra* note 65, at 25-42 (describing New York's early systems for judicial and gubernatorial appointment of prosecutors, until elections of prosecutors began in 1847); STEINBERG, *supra* note 65, at 157-58 (describing Pennsylvania's shift to election of judges in 1851 and Philadelphia's first election of the district attorney in 1850).

68. *See* MCCONVILLE & MIRSKY, *supra* note 65, at 198, 310-14 (describing politicized judges in nineteenth-century New York); RAYMOND MOLEY, *POLITICS AND CRIMINAL PROSECUTION* 74-94 (1929); ROSCOE POUND, *CRIMINAL JUSTICE IN AMERICA* 183 (Transaction Publishers 1998) (1930) (criticizing the "intimate connection of the prosecutor's office with politics"); STEINBERG, *supra* note 65, at 92-96 (describing courts in nineteenth-century Philadelphia); Carolyn B. Ramsey, *The Discretionary Power of "Public" Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1331, 1391 (2002) (describing the public's view on plea-bargaining in New York City).

69. *See generally* Ellis, *supra* note 64 (describing the origins of U.S. election of prosecutors and systems in various states). On local prosecutors' plenary authority and limits on supervision by state attorneys general, *see supra* note 64.

70. Alaska, Connecticut, and New Jersey (and the federal district, Washington, D.C.) do not elect prosecutors. STEVEN W. PERRY, BUREAU OF JUSTICE STATISTICS, DEPT' OF JUSTICE, NCJ 213799, *PROSECUTORS IN STATE COURTS*, 2005, at 2 (2006), <http://www.bjs.gov/content/pub/pdf/psc05.pdf> [<https://perma.cc/ZS6Q-QUKV>]; *see also* Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 589 (2009). On the federal system, see 28 U.S.C. §§ 541-542 (2012) (specifying that chief federal prosecutors are appointed by the President to four-year terms subject to Senate confirmation and—like their assistant prosecutors—serve at the pleasure of the president). For Connecticut, whose prosecutors are appointed through an independent commission, *see About the Criminal Justice Commission*, ST. CONN., <http://www.ct.gov/cjc/cwp/view.asp?a=1361&q=258216> [<https://perma.cc/ZFV6-BFD4>] (last modified Apr. 15, 2011, 12:18 PM) (noting that Article XXIII of the state constitution establishes the

Island, elect an Attorney General who appoints the statewide prosecution staff.⁷¹

More notably for understanding the scope of executive authority, some states followed English practice and relied significantly on *private* prosecutors to initiate and litigate criminal charges. In states such as New York and Pennsylvania, this remained the practice into the latter part of the nineteenth century, well after the advent of elected prosecutors.⁷² Public prosecutors did not gain their full monopoly over criminal charging in some states until a century or more after the nation's founding, although they typically had the authority to take over—and either press or dismiss—a private prosecution. That is still the case for public prosecutors in common law jurisdictions outside of the United States.⁷³ Consequently, courts tended to play a somewhat greater supervisory role over prosecutors.⁷⁴ The early power of appointment in a few places gave them influence, and judges had various means by which to somewhat check private prosecutors. As a threshold matter, criminal complaints could proceed only if a judge found probable cause (except where serious offenses had to go through grand juries). Additionally, private prosecutors who lost might be ordered to pay the defendant's costs or face liability for malicious prosecution.⁷⁵

Moreover, many states adopted statutes in this era that gave judges a new power that prosecutors had exercised exclusively at common law. New statutes in most states required judicial approval of prosecutors' *nolle pros* requests.⁷⁶ These rules, initially adopted

Commission and its power to appoint prosecutors).

71. See DEL. CODE ANN. tit. 29, § 2505 (West 2015); 42 R.I. GEN. LAWS ANN. § 42-9 (West 2015).

72. See MC CONVILLE & MIRSKY, *supra* note 65, at 35 (discussing New York practice in the nineteenth century); STEINBERG, *supra* note 65, at 58, 78 (describing private prosecutors and judicial supervision of prosecution in nineteenth-century Philadelphia).

73. See *infra* Part II.

74. In the 1800s in New York City, judges had power to appoint private attorneys when public prosecutors failed to appear. See MC CONVILLE & MIRSKY, *supra* note 65, at 35.

75. See STEINBERG, *supra* note 65, at 184 (discussing an 1859 law that empowered jurors to order that litigation costs be split between defendant and prosecutor); John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 220-25 (2013) (discussing prosecutor liability for malicious prosecution in the nineteenth century).

76. See Annotation, *Power of Court to Enter Nolle Prosequi or Dismiss Prosecution*, 69 A.L.R. 240-44 (1930) [hereinafter *Power of Court*] ("Under statutes in some states, however, and independently of statute in a few jurisdictions where long practice has established the

in the early nineteenth century, gave judges a different kind of authority over public and private prosecutors—the power to compel enforcement, rather than the power to bar charges as unfounded or to facilitate sanctions for frivolous charges. Whatever legislatures' intention in creating this judicial veto on prosecutorial discretion, courts in every state have effectively rejected it.⁷⁷ Perhaps because public prosecutors gained both exclusive control of criminal charging and democratic legitimacy from their elective status, courts have uniformly interpreted these statutes to require exceeding judicial deference to prosecutors' *nolle pros* requests, rendering judicial authority on this point practically irrelevant.⁷⁸ A smaller number of state legislatures—at least a dozen—have additionally empowered

rule, the prosecuting attorney does not have the power to enter a *nolle prosequi* without the consent of the court. The present annotation is devoted to a discussion of the question of whether or not the court has the power, or the right, to enter a *nolle prosequi*." (internal citations omitted); *see also* ABRAHAM S. GOLDSTEIN, THE PASSIVE JUDICIARY: PROSECUTORIAL DISCRETION AND THE GUILTY PLEA 14 (1981).

77. GOLDSTEIN, *supra* note 76, at 14-15 (discussing the initial purposes of the statutes and criticizing courts for abandoning their statutory authority to prosecutors); POUND, *supra* note 68, at 187.

78. *See Power of Court*, *supra* note 76 (providing a broad overview of state *nolle pros* laws). Enactment of these statutes often predated prosecutorial elections and initially was a tool for judges to control private prosecutors or public ones they had appointed. New York granted courts *nolle pros* authority in 1829, during the state's era of private and judicially appointed prosecutors. MC CONVILLE & MIRSKY, *supra* note 65, at 35 n.112 (citing 1829 Revised Statutes of the State of New York, Title IV, Sec. 68, p.730 & Sec. 54., p.726). The federal rule is FED. R. CRIM. P. 48(a), first enacted in 1944. FED. R. CRIM. P. 48(a) advisory committee's note to 1994 amendment. For examples of courts interpreting their authority over *nolle pros* requests to require deference to prosecutors' preferences, see, for example, Genesee Cty. Prosecutor v. Genesee Circuit Judge, 215 N.W.2d 145 (Mich. 1974). For federal cases, see, for example, United States v. Smith, 55 F.3d 157 (4th Cir. 1995); United States v. Perate, 719 F.2d 706, 710-11 (4th Cir. 1983); Dawsey v. Gov't of V.I., 931 F. Supp. 397, 401-06 (D.V.I. 1996); United States v. Smith, 853 F. Supp. 179 (M.D.N.C. 1994).

A standard explanation for deference is that judges lack means to compel prosecutors to litigate charges at trial. *See, e.g.*, United States v. Greater Blouse, Skirt & Neckwear Contractors Ass'n, 228 F. Supp. 483, 489 (S.D.N.Y. 1964) ("Even were leave of Court to the dismissal of the indictment denied, the Attorney General would still have the right to ... in the exercise of his discretion, decline to move the case for trial. The Court in that circumstance would be without power to issue a mandamus or other order to compel prosecution of the indictment, since such a direction would invade the traditional separation of powers doctrine."). But judges have options short of mandamus. Presumably they could hold prosecutors in contempt for failure to appear, as they could for all other attorneys. And whenever prosecutors retain an interest in charges they seek to dismiss, judges could incentivize them by ruling that failure to litigate charges results (as for civil parties) in forfeiture of the claim or dismissal with prejudice.

judges to dismiss criminal charges on their own, without the prosecutor's request or consent, "in the interest of justice" or on similarly broad grounds.⁷⁹ Here too, however, state appellate courts overwhelmingly seem to have narrowly construed judicial power granted by these statutes, and trial judges seem to rarely use them. On the other hand, a Massachusetts statute that authorizes judges to dismiss charges over a prosecutor's objection seems to get more use. That provision empowers and authorizes judges to dismiss charges without the prosecution's consent if a defendant enters a conditional guilty plea and then completes a supervised probation period with terms set by the court.⁸⁰ At least a few other states grant courts similar authority.⁸¹

From the foregoing, it should be easy to see that not all aspects of prosecution authority have always been insulated from judicial supervision. The decision whether to charge was not exclusively executive; it was also sometimes exercised by private parties.⁸² Moreover, courts had meaningful tools for input on whether a prosecutor's preferred charge should proceed or be dismissed, and

79. See generally Valena Elizabeth Beety, *Judicial Dismissal in the Interest of Justice*, 80 Mo. L. Rev. 629 (2015) (collecting and discussing statutes in at least thirteen states that authorize judges to dismiss criminal charges "in the interests of justice"). Among the statutes Beety considers are: "CAL. PENAL CODE § 1385 (2015); IDAHO CODE ANN. § 19-3504 (2015); MINN. STAT. § 631.21 (2015); MONT. CODE ANN. § 46-13-401 (2015); OKLA. STAT. tit. 22, § 815 (2015); OR. REV. STAT. § 135.755 (2015); ALASKA R. CRIM. P. 43(c); IOWA R. CIV. P. 2.33(1); N.Y. CRIM. PROC. LAW § 210.40 (McKinney 2015); P.R. R. CRIM. P. 247(b); UTAH R. CRIM. P. 25; WASH. R. CRIM. P. 8.3." *Id.* at 656 n.154; see also State v. McDonald, 137 P. 362, 363 (Okla. Crim. App. 1914) (noting the court's statutory authority to dismiss charges over prosecutor's objection).

For the standard position on this point, see, for example, State v. Vixamar, 687 So. 2d 300, 303 (Fla. Dist. Ct. App. 1997) ("[It is] the prosecutor's exclusive discretion to decide whether a criminal case should be discontinued and in the absence of a procedural rule authorizing judicial intervention." (citing State v. Matos, 589 So. 2d 1022, 1023 (Fla. Dist. Ct. App. 1991))).

80. MASS. GEN. LAWS ANN. ch. 278, § 18 (West 2015); see also Commonwealth v. Powell, 901 N.E.2d 686, 689-90 (Mass. 2009) (discussing this statute and the history of this procedure). The practice authorized by the statute seems to have originated as a judicial innovation incorporated into state common law. See Commonwealth v. Brandano, 269 N.E.2d 84, 88 (Mass. 1971) (stating that trial court must hold adversary hearing before dismissing criminal charges over prosecutor's objection).

81. See, e.g., State v. Krotzer, 548 N.W.2d 252, 254-55 (Minn. 1996) (holding that a judge may, over the prosecutor's objection, stay adjudication upon defendant's guilty plea in special circumstances). But see State v. Foss, 556 N.W.2d 540, 541 (Minn. 1996) (finding no "special circumstances" like those in *Krotzer* and reversing trial court's stay of adjudication over prosecutor's objection).

82. See *supra* notes 47-48, 72 and accompanying text.

whether malice played a role in charging decisions.⁸³ From this history and states' distinctive constitutional structures, one would expect to see some state constitutional law, common law, or statutes that sustained a *Blackledge*-like standard through which courts could play a balancing role and guard against outlier instances of prosecutorial vindictiveness or abuse of discretion. For the most part, however, one does not. State criminal justice systems overwhelmingly follow the federal model on separation of powers and treat most aspects of prosecutorial decision making as an executive activity immune from judicial interference.⁸⁴

Some examples make the point. The vast majority of states strengthen executive authority by prohibiting jury instructions without the prosecutor's consent on a species of lesser-included offenses—those that fit the trial evidence but are not “necessarily” included within the elements of the charged offense. To do otherwise, in the words of the California Supreme Court, may violate separation of powers by “usurp[ing] the prosecution’s exclusive charging discretion.”⁸⁵ Likewise, many states cite separation of powers concerns in barring judges from dismissing valid charges before trial.⁸⁶ In Texas, the state’s highest criminal court has taken this view and held that trial judges lack authority to “invad[e] the exclusive province” of prosecutors by dismissing charges with prejudice even though Texas prosecutors are constitutionally within the

83. See *supra* notes 75-76 and accompanying text.

84. See, e.g., *State v. Perleberg*, 736 N.W.2d 703, 706 (Minn. Ct. App. 2007) (rejecting judicial review of prosecutor’s choice to charge conduct as several offenses rather than a single one because “a prosecutor has broad discretion in the exercise of the charging function and ordinarily, under the separation-of-powers doctrine, a court should not interfere with the prosecutor’s exercise of that discretion absent special circumstances” (quoting *Foss*, 556 N.W.2d at 540)); see also *People v. Wabash, St. Louis & Pac. Ry. Co.*, 12 Ill. App. 263, 264-65 (App. Ct. 1882) (stating, in one of the earliest state decisions describing a prosecutor’s wide discretion, that the prosecutor “is charged by law with large discretion in prosecuting offenders against the law. He may commence public prosecutions, in his official capacity by information and he may discontinue them when, in his judgment, the ends of justice are satisfied”). For an overview of U.S. prosecutorial power and the lack of judicial supervision, see Abby L. Dennis, Note, *Reining in the Minister of Justice: Prosecutorial Oversight and the Superseder Power*, 57 DUKE L.J. 131, 134-45 (2007).

85. *People v. Birks*, 960 P.2d 1073, 1075 (Cal. 1998); *id.* at 1088 & n.17 (concluding most states follow the same rule); *id.* at 1089-90 (discussing prosecution authority and separation of powers).

86. See *Commonwealth v. Pellegrini*, 608 N.E.2d 717, 719 (Mass. 1993).

Judicial Department.⁸⁷ For the same reasons of “exclusive prosecutorial discretion,” Texas trial judges have no authority to require that prosecutors subpoena their trial witnesses, even though a subpoena is necessary in order for a defendant to raise—and a trial judge to rule on—a pretrial challenge to whether a witness may testify.⁸⁸

Many state court statements on the parameters of prosecutorial authority are as sweepingly phrased as those of any federal court. Troublingly, the implication is that separation of powers jurisprudence would bar even *legislation* authorizing even modest judicial review of prosecutorial discretion for abuse of discretion or an even more deferential standard. In most cases, because no such statute was at issue, this constitutional limit is only implicit—as in the California rule on lesser-included offenses,⁸⁹ or the Texas decision on witness subpoenas.⁹⁰ Case law directly addressing the constitutionality of statutes that give judges some role regarding prosecution decision making is rare because such legislation is rare. One example, however, comes from Wyoming. The Wyoming Supreme Court invalidated a statute that had granted courts authority to order a prosecutor to pursue a charge when the judge found probable cause for a crime such as, in that case, in-court perjury by a police officer.⁹¹ The court concluded that even the legislature could not alter the state separation of powers implication that “the charging decision is properly within the scope of duty of the executive branch.”⁹²

On the other hand, some states have recognized the judicial capacity for a modest supervisory role over critical aspects of prosecutorial discretion. Statutory authority noted above for judges to

87. *State ex rel. Holmes v. Denson*, 671 S.W.2d 896, 900 (Tex. Crim. App. 1984) (holding that the trial judge “usurped his authority in invading the exclusive province of the [prosecutor]”).

88. *In re State*, 390 S.W.3d 439, 442-44 (Tex. App. 2012) (holding that requiring the district attorney to issue subpoenas for its witnesses invaded exclusive prosecutorial discretion); *see also State ex rel. Holmes v. Salinas*, 784 S.W.2d 421, 427-28 (Tex. Crim. App. 1990) (holding that magistrate cannot issue orders restraining prosecutors from presenting evidence to a grand jury).

89. *See supra* note 85 and accompanying text.

90. *See supra* notes 87-88 and accompanying text.

91. *In re Padgett*, 678 P.2d 870, 871-73 (Wyo. 1984).

92. *Id.* at 873.

dismiss charges filed by prosecutors, or to reject their requests to *nolle pros* charges, are the clearest examples.⁹³ Despite the general pattern of judicial deference to prosecutors, some state courts have departed from federal conceptions of separation of powers. Notwithstanding its rule against judges adding lesser-included-offense instructions at trial, the California Supreme Court has concluded that dismissal of charges is a “judicial function.”⁹⁴ Further, the court cautioned that granting prosecutors a veto over dismissal decisions could violate separation of powers,⁹⁵ and it invalidated statutory provisions that required prosecutorial consent before judges reduced certain offenses to misdemeanors, sentenced offenders to drug treatment in lieu of prison, or struck prior convictions that trigger enhanced punishment.⁹⁶ Perhaps the strongest assertion of judicial authority on state constitutional grounds comes from the New Jersey Supreme Court in the context of sentencing. The New Jersey legislature gave prosecutors the power to invoke mandatory sentence terms—as well as to control access to pretrial diversion programs—as part of their charging discretion.⁹⁷ The state’s high court held that those statutes are constitutional only if prosecutors are guided in those decisions by statewide charging and plea bargaining guidelines, which courts use as a basis to review prosecutorial decisions.⁹⁸

93. See *supra* notes 76, 78 and accompanying text.

94. People v. Superior Court, 917 P.2d 628, 634 (Cal. 1996).

95. *Id.* at 636-37 (concluding that, in California, disposition of pending charges is a judicial function; a statute that gives prosecutors control over judicial dismissal of allegations affecting sentencing would violate separation of powers); *see also* CAL. PENAL CODE § 1385 (West 2015) (“The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed.”).

96. People v. Navarro, 497 P.2d 481, 485, 488-89 (Cal. 1972) (invalidating statute giving prosecutor power to veto a judicial decision to commit a convicted defendant to a drug treatment program in lieu of prison); Esteybar v. Mun. Court, 485 P.2d 1140, 1141 & n.1 (Cal. 1971) (holding that a statutory scheme that granted magistrates the authority to reduce a “wobbler” offense to a misdemeanor but conditioning the exercise of this power on the approval of the prosecutor violated separation of powers); People v. Tenorio, 473 P.2d 993, 997 (Cal. 1970) (holding that a statutory provision giving prosecutors the power to preclude the court from exercising its discretion to strike a prior conviction for purposes of sentencing violated separation of powers doctrine).

97. See, e.g., N.J. STAT. ANN. §§ 2C:35-12, 2C:43-12 (West 2015).

98. See State v. Brimage, 706 A.2d 1096, 1106 (N.J. 1998) (reviewing a prosecutor’s decision to invoke statutory provision for mandatory sentence in context of a plea bargain); State

Statutes that grant judges powers other than dismissing charges or reducing sanctions are less common, especially on decisions that intersect with prosecutorial charging discretion. In a few states, statutes mandate that prosecutors provide reasons for decisions *not* to file charges after a judge has found probable cause at a preliminary examination.⁹⁹ Judges review those reasons and—if they are insufficient—can order the prosecutor to pursue the charges.¹⁰⁰ Note that this applies only to a specific subset of all prosecution decisions to not pursue charges—a distinctive group for which judges have considerable pre-charging access to case facts. Like the authority to disapprove prosecutors' *nolle pros* motions, these statutes effectively give judges the power to order prosecutors to pursue charges that they would prefer to drop—the very core of “the decision whether or not to prosecute” that *Bordenkircher* declared to be “entirely in [the prosecutor's] discretion.”¹⁰¹ Presumably for that reason, courts in the few states with such statutes have interpreted the power narrowly and seem to exercise it sparingly.

v. Baynes, 690 A.2d 594 (N.J. 1997) (reviewing a prosecutor's reasons for charging the defendant instead of diverting him into a drug program); *see also* Commc'n Workers of Am. v. Florio, 617 A.2d 223, 231-32 (N.J. 1992) (describing the New Jersey Governor as an unusually strong model for the state executive, and noting that courts scrutinize “encroachment” on power of one branch by another more closely than abdications of power). *See generally* PETER C. HARVEY ET AL., OFFICE OF THE ATTORNEY GEN., STATE OF N.J., BRIMAGE GUIDELINES 2 (rev. 2004), http://www.state.nj.us/oag/dcjj/agguide/directives/brimage_all.pdf [<https://perma.cc/Z2W5-7BK8>]. New Jersey is one of very few states with a unitary executive similar to the federal model, including appointed prosecutors under the authority of an appointed Attorney General. *See* John J. Farmer, Jr., *The Evolution of New Jersey's Gubernatorial Power*, 25 SETON HALL LEGIS. J. 1, 5 (2001).

99. *See* MICH. COMP. LAWS ANN. § 767.41 (West 2015) (stipulating that in certain cases, prosecutors must file reasons for not charging, and that a court, upon review, can order prosecutor to file charge); NEB. REV. STAT. ANN. § 29-1606 (West 2015) (same); *see also* COLO. REV. STAT. ANN. § 16-5-209 (West 2015) (same); PA. R. CRIM. P. 506 (requiring prosecutors to give court-reviewable reasons for decisions not to prosecute upon a private complaint). Because this statutory scheme applies only to a small subset of cases, this judicial power is narrower than that exercised by English courts as discussed below.

100. *See* People v. Stewart, 217 N.W.2d 894, 898 (Mich. Ct. App. 1974) (holding that “[a] circuit judge *does not enjoy supervisory power over a prosecuting attorney. He may reverse a magistrate's decision only for abuse of discretion*” (quoting *Genesee Prosecutor v. Genesee Circuit Judge*, 215 N.W.2d 145, 147 (Mich. 1974))). *But see* State v. Sanchell, 216 N.W.2d 504, 508 (Neb. 1974) (requiring court approval of agreement between defendant and prosecutor that charges be dismissed).

101. *Bordenkircher v. Hayes*, 434 U.S. 357, 364-65 (1978). *Bordenkircher* makes its claim about prosecutorial discretion “in our system,” implicitly assuming all American jurisdictions, state and federal, to be the same on this point. *See id.*

Finally, at least two states have a different kind of restriction on charging discretion. In New York and California, statutes restrict—nominally if not effectively—prosecutors’ power to reduce or dismiss charges after the initial indictment when they normally would have done so as part of a plea bargain.¹⁰² In both states the statutes have been interpreted in ways that make them easy to avoid, resulting in the statutes having little practical force.¹⁰³ Both states have plenty of plea bargains, and appellate decisions—which do not necessarily tell the whole story—provide little evidence that courts rely on the statutes to limit prosecutors’ charge bargaining. Still, the longstanding existence of the statutes confirms their state constitutionality; these limits on prosecution decisions to reduce or dismiss charges do not unduly interfere with prosecutors’ executive prerogative.

E. Conclusion

In sum, compared to the federal system, many states have distinctive constitutional structures and long histories of prosecution by actors other than executive branch officials. Those differences should lead states away from the error of viewing all critical aspects of prosecutorial discretion as exclusively executive and immune to any judicial input. Some state statutes and doctrines demonstrate—albeit mostly in marginal terms—some possibilities for judicial checks on prosecutorial authority. There are good reasons to question the strong conception of separation of powers doctrine in the federal context, where it prohibits meaningful judicial oversight of prosecutorial discretion about filing, amending, or dismissing charges. That kind of constitutional barrier has an even weaker basis in many states, notwithstanding the overly broad assumptions by state and federal courts alike about our system of criminal

102. CAL. PENAL CODE § 1192.7 (West 2015); N.Y. CRIM. PROC. LAW § 220.10 (McKinney 2015).

103. See, e.g., People v. Brown, 223 Cal. Rptr. 66, 72 n.11 (Ct. App. 1986) (“Section 1192.7 applies only to bargains concerning ‘indictments or informations’ and thus does not limit plea bargaining concerning charges contained in complaints before the municipal or justice court.”); People v. Moquin, 570 N.E.2d 1059, 1061 (N.Y. 1991) (holding that the criminal procedure law provides courts no authority to vacate an illegal plea bargain after it has been imposed).

prosecution.¹⁰⁴ In sum, state executive authority over criminal charging can accommodate specific legislative standards for—or checks on—that authority and a deferential role for the judiciary defined by legislative or even judicially defined standards.

In fact, even in the federal context there should be no dispute that separation of powers doctrine permits *legislatively authorized* judicial review. Congress surely can enact statutory criteria, guidelines, or mandates for executive branch enforcement actions and also provide for judicial review under those rules. This kind of statutorily authorized judicial review already exists for certain civil enforcement decisions made by federal executive branch departments.¹⁰⁵ Charging decisions are not “ill-suited to judicial review” as a federal constitutional matter in all circumstances, and state constitutions are unlikely to present a stronger barrier.¹⁰⁶ At most, that assumption is true only as a practical or prudential matter when no statute or regulation provides a basis for review, although courts are capable of fashioning meaningful standards as a matter of constitutional or common law. Judges are wholly competent to review some aspects of government enforcement decisions under sufficiently specific legal criteria, even if only to guard against extreme exercises of authority. Short of a wholesale revision of expansive criminal codes and determinate sentencing laws, some kind of review along those lines is the only route to meaningful regulation of plea bargaining

104. See *Bordenkircher*, 434 U.S. at 364-65; see also *Lafler v. Cooper*, 132 S. Ct. 1376, 1397 (2012) (Scalia, J., dissenting) (“[M]any believe that without [plea bargaining] ... our system of criminal justice would grind to a halt.”); cf. *State v. Eighth Judicial Dist. Ct.*, No. 66193, 2014 WL 6210281, at *2 (Nev. Nov. 13, 2014) (holding the state trial court abused its discretion in allowing defendant to plead guilty, withdraw his guilty plea, and plead guilty to a lesser offense (quoting *United States v. Batchelder*, 442 U.S. 114, 124 (1979) (“Whether to prosecute and what charge to file or bring before the grand jury are decisions that generally rest in the prosecutor’s discretion.”))).

105. See generally *Heckler v. Chaney*, 470 U.S. 821, 830-34 (1985); *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43, 52 (1983) (requiring federal administrative agency to provide rational reasons for rescinding motor vehicle safety requirements in light of legislation authorizing judicial review); *Dunlop v. Bachowski*, 421 U.S. 560, 563 n.2, 566 (1975) (holding that, under the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 482—which requires that the Secretary of Labor “investigate” a complaint of labor law violations and, “if he finds probable cause to believe that a violation ... has occurred ... he shall ... bring a civil action against the labor organization”—union members may seek judicial review of the secretary’s decision not to initiate civil enforcement action).

106. *Wayte v. United States*, 470 U.S. 598, 607 (1985).

and to leaving executive power to be checked solely by the political process.

II. REGULATION OF PROSECUTORS IN COMMON LAW SYSTEMS

Regulation or judicial supervision of prosecutorial conduct is hardly a novel idea. Some civil law jurisdictions have long had a requirement of mandatory prosecution when evidence is sufficient.¹⁰⁷ Some nations, such as Germany, amended mandatory prosecution to authorize prosecutorial discretion for some crimes, although apparently the mandate remains a significant norm that somewhat constrains exercises of prosecutorial discretion.¹⁰⁸ By contrast, prosecutors throughout common law jurisdictions have always had wide discretion over whether to pursue charges well grounded in evidence.¹⁰⁹ There are few restraints on authority by statutes, constitutional doctrine, or common law.¹¹⁰ But that freedom for

107. Prosecutorial discretion is also the rule in some civil law systems such as Denmark, France, and the Netherlands. Germany, Italy, and Poland are among civil law jurisdictions with mandatory prosecution rules for some classes of offenses. See THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE (Erik Luna & Marianne L. Wade eds., 2012) (providing a summary of prosecutorial practices across nations); James Q. Whitman, *No Right Answer?*, in CRIME, PROCEDURE AND EVIDENCE IN A COMPARATIVE AND INTERNATIONAL CONTEXT 371, 377-87 (John Jackson et al. eds., 2008) (noting the differing civil law and common law understandings of the legality principle and trust in judges and prosecutors); see also JULIA FIONDA, PUBLIC PROSECUTORS AND DISCRETION: A COMPARATIVE STUDY 9 (1995) (discussing the legality principle, which “excludes all discretion from the early stages of the criminal process. Under this principle, prosecution of all offences where sufficient evidence exists of the guilt of the defendant is compulsory”); Isabel Kessler, *A Comparative Analysis of Prosecution in Germany and the United Kingdom: Searching for Truth or Getting a Conviction?*, in WRONGFUL CONVICTION: INTERNATIONAL PERSPECTIVES ON MISCARRIAGES OF JUSTICE 213, 216 (C. Ronald Huff & Martin Killias eds., 2008) (discussing Germany’s “opportunity principle” that grants prosecutors broad discretion for low-level crimes but less discretion for more serious offenses).

108. See FIONDA, *supra* note 107, at 11 (describing historical reasons for Germany’s restrictions on prosecutorial power).

109. See, e.g., Smedleys Ltd. v. Breed [1974] AC 839 at 856 (Eng.) (“It has never been the rule of this country ... that criminal offences must automatically be the subject of prosecution.”).

110. For a classic analysis of American prosecutorial discretion to charge and to decline to charge compared to other officials, see KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 188, 207-08 (1969) (“The affirmative power to prosecute is enormous, but the negative power to withhold prosecution may be even greater, because it is less protected against abuse.... The plain fact is that more than nine-tenths of local prosecutors’ decisions are supervised or reviewed by no one.”).

prosecutorial authority did not arise from a trust in the public prosecutors or executive officials. England relied heavily on private prosecutors to a much greater degree, and for much longer, than did any American state jurisdiction.¹¹¹ The primary explanation for why common law jurisdictions never developed legal parameters for prosecutorial authority to the degree that many civil law jurisdictions did is that common law systems relied primarily on the structure of the adjudication process to oversee government officials: lay juries provided the main safeguard against abusive prosecutions.¹¹² Democratic review rather than judicial review checks prosecutors.

Times have changed. Plea bargaining has marginalized jury trials as the means of adjudication. But what has replaced the jury as an institutional safeguard? In American jurisdictions, very little—despite a deep-seated national skepticism of government power and the monopolization of prosecutorial authority by government officials. Courts have done little to develop bases for judicial review of charging decisions and bargaining tactics. Legislatures have granted prosecutors greater authority through determinate sentencing laws, which give prosecutors power over punishment terms, and through expansive criminal codes that multiply charging options.¹¹³

111. Private prosecution still exists in England. The primary prosecution agency, the Crown Prosecution Service (CPS), was created in only 1985. *See* Prosecution of Offences Act 1985, c. 23, § 1 (Eng.); ANDREW ASHWORTH & MIKE REDMAYNE, THE CRIMINAL PROCESS 222-23 (4th ed. 2010). The Director of Public Prosecutions was created in 1879 but did not handle most prosecutions until the CPS was created. *See* Glanville Williams, *The Power to Prosecute*, 1955 CRIM. L. REV. 596, 601-03 (Eng.). In the intervening century, police came to dominate filing of criminal charges, supplemented by private prosecutions—a system that eventually was viewed as providing insufficient supervision of charging decisions by police. *Id.*

112. *See* Sandra Guerra Thompson, *Judicial Gatekeeping of Police-Generated Witness Testimony*, 102 J. CRIM. L. & CRIMINOLOGY 329, 392 (2012) (“The jury system gives lay people an important participatory role, designed to protect the accused, in the criminal justice system.”); *see also* Frederic N. Smalkin, *Judicial Control of Juries and Just Results in the Common Law System: A Historical Perspective*, 46 IUS GENTIUM 105, 105, 109-112 (2015). Formerly, the grand jury was an additional check on the initiation of serious charges, but it has been abolished in England and many U.S. states. In the jurisdictions where the grand jury remains, rule changes have largely converted it to prosecutors’ handmaidens. On the weaknesses of grand juries, see Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260 (1995). For an argument that juries have little indirect effect on bargaining, see Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004).

113. *See* Harris v. United States, 536 U.S. 545, 571 (2002) (Breyer, J., concurring) (stating that mandatory minimum statutes “transfer sentencing power to prosecutors, who can determine sentences through the charges they decide to bring”); *see also* N.J. STAT. ANN.

On this front, however, the evolution of English and American criminal justice has diverged. And for that reason it is worth considering English practice for roads not taken to the regulation of plea bargaining by state and federal law.

III. JUDICIAL REVIEW OF PROSECUTION DECISIONS IN ENGLAND

The baseline rule regarding English courts' oversight of charging decisions is, much like the American rule, highly deferential: "[J]udicial review of a prosecutorial decision is available but is a highly exceptional remedy."¹¹⁴ Like its American counterparts, the English judiciary recognizes that prosecution decisions typically "turn not on an analysis of the relevant legal principles but on the exercise of an informed judgment of how a case against a particular defendant, if brought, would be likely to fare in the context of a criminal trial

§ 2C:35-7 (West 2015) (prohibiting judges from merging certain offenses for sentencing, and empowering prosecutors to trigger longer sentences through selection of charges); *id.* § 2C:35-12 (stipulating that a mandatory minimum sentence applies unless the prosecutor agrees to a lesser sentence, and that the court may not impose a lesser sentence than parties specified in plea agreement). *But see id.* (granting, in a 2010 amendment, judicial power to waive minimum period of parole ineligibility); *see also* FLA. STAT. ANN. §§ 775.084, 775.0843 (West 2015) (defining habitual offender criteria for more severe, mandatory punishments and giving prosecutors discretion to charge under such provisions). For an early example of a statute increasing prosecutor authority, see *People v. Tenorio*, 473 P.2d 993, 996 (Cal. 1970) (citing state statute that granted unreviewable discretion to the prosecutor). Federal prosecutors are forthright about charging offenses that carry mandatory minimums if they anticipate they will not agree with a judge's use of her sentencing discretion. U.S. SENTENCING COMM'N, *supra* note 16, at 86 n.464 (2011), http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_05.pdf [<https://perma.cc/V3LJ-G46R>] ("[A] prosecutor is far less willing to forego charging a mandatory minimum sentence when prior experience shows that the defendant will ultimately be sentenced to a mere fraction of what the guidelines range is." (alteration in original) (quoting testimony of Patrick J. Fitzgerald, U.S. Attorney, Northern District of Illinois)). *See generally* KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 130-42 (1998) (discussing prosecutorial discretion and noting that prosecutors exercise discretion under the sentencing guidelines when they decide what to charge, enter plea agreement, and suggest downward departures); Ronald F. Wright, *Charging and Plea Bargaining as Forms of Sentencing Discretion*, in THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS 247, 247-69 (Joan Petersilia & Kevin R. Reitz eds., 2012) (discussing the authority that prosecutors have over sentencing in jurisdictions that have sentencing guidelines).

¹¹⁴ *R ex rel. B v. Dir. of Pub. Prosecutions [DPP]* [2009] EWHC (Admin) 106 [52], [2009] 1 Crim. App. 38.

before ... a jury.”¹¹⁵ Nevertheless, defendants in English courts can challenge charging decisions as unlawful, including decisions to charge greater rather than lesser offenses,¹¹⁶ and courts permit victims to challenge prosecutors’ declination decisions, or their decisions to dismiss filed charges.¹¹⁷

In fact:

[R]eview is less rare in the case of a decision not to prosecute than a decision to prosecute (because a decision not to prosecute is final, subject to judicial review, whereas a decision to prosecute leaves the defendant free to challenge the prosecution’s case in the usual way through the criminal court).¹¹⁸

The same standards apply to decisions to *nolle pros* charges, even though English law continues to adhere to the common law rule that prosecutors control the power of *nolle prosequi*.¹¹⁹ Courts justify this form of review on the premise that “a decision not to prosecute, especially in circumstances where it is believed or asserted that the decision is or may be erroneous, can affect public confidence in the integrity and competence of the criminal justice system.”¹²⁰ For this reason, decisions not to charge in incidents that involve deaths in state custody get closer scrutiny to guard against prosecutors’ favoritism toward other law enforcement officials.¹²¹ Again, review is deferential and the actual number of judicial reversals of such decisions appears to be small. But unlike state courts’ authority not to grant *nolle pros* requests or federal court scrutiny of biased charging under the *Armstrong* standard,¹²² this authority is meaningful:

115. R v. DPP *ex parte* Manning [2000] EWHC (QB) 562 [23], [2001] QB 330.

116. See *infra* note 133 and accompanying text.

117. See *Victim’s Right to Review Scheme*, CROWN PROSECUTION SERV. [CPS], http://www.cps.gov.uk/victims_witnesses/victims_right_to_review/ [<https://perma.cc/X4YE-L2S4>] (last updated July 2014).

118. R *ex rel.* B v. DPP [2009] EWHC (Admin) 106 [52].

119. For an example of a court finding wrongful a decision to discontinue prosecution, see *id.* at [63]. On prosecutor’s *nolle pros* authority, see R v. FB [2010] EWCA (Crim) 1857 [13], [2010] 2 Crim. App. 35, and R *ex rel.* Gujra v. CPS [2012] UKSC 52 [10]-[25], [2013] 1 AC 484. See also R v. DPP *ex parte* C [1995] 1 Crim. App. 136.

120. R *ex rel.* Da Silva v. DPP [2006] EWHC (Admin) 3204 [20].

121. See R v. DPP *ex parte* Manning [2000] EWHC (QB) 562 [33]; R v. Metro. Police Comm’r *ex parte* Blackburn [1968] 2 All ER 319; ASHWORTH & REDMAYNE, *supra* note 111, at 221-22.

122. See *supra* note 36 and accompanying text.

English courts periodically disapprove of prosecutors' decisions not to file criminal charges.

Challenges to prosecutorial discretion can be raised on several bases. English judges will intervene in a decision not to prosecute only when a complainant can demonstrate the decision was "(1) because of some unlawful policy, (2) because of a failure to act in accordance with settled policy as set out in the Code [for Crown Prosecutors], or (3) because the decision was perverse, i.e. one at which no reasonable prosecutor could have arrived."¹²³ Similar standards apply to the review of decisions to file charges.¹²⁴ The reasonableness standard is not far removed from the kind of review American courts engage in under constitutional standards or with regard to administrative agency decisions, although here it does not extend to the context of criminal law administration.¹²⁵ The bigger difference

123. *R ex rel. Da Silva v. DPP* [2006] EWHC (Admin) 3204 [24]; *see, e.g.*, *Marshall v. DPP* [2007] UKPC 4 (Jam.) (leading decision on unlawful policy grounds); *R ex rel. Da Silva v. DPP* [2006] EWHC (Admin) 3204 (same); *Sharma v. DPP* [2006] UKPC 57, [2007] 1 WLR 780 (Trin. & Tobago) (same); *R v. DPP ex parte Manning* [2000] EWHC (QB) 562, [2001] QB 330 (same); *R v. DPP ex parte Kebeline* [1999] UKHL 43, [2000] 2 AC 326 (UK) (same); *R v. Metro. Police Comm'r ex parte Blackburn* [1968] 2 All ER 319 (same); *see also, e.g.*, *Guest v. DPP* [2009] EWHC (Admin) 594, [2009] 2 Crim. App. 26 (leading decision on reasonableness/perversity grounds); *R v. Gen. Council of the Bar ex parte Percival* [1990] 3 All ER 137 (same); *see also* ASHWORTH & REDMAYNE, *supra* note 111, at 221-22; Christopher Hilson, *Discretion to Prosecute and Judicial Review*, 1993 CRIM. L. REV. 739, 739 (Eng.) (providing an overview of prosecutorial discretion); *Appeals: Judicial Review of Prosecutorial Decisions*, CPS, http://www.cps.gov.uk/legal/a_to_c/appeals_judicial_review_of_prosecution_decisions/ [<https://perma.cc/W89L-DJY8>] (last updated May 21, 2009).

English courts have acknowledged that the European Convention on Human Rights (ECHR) may impose obligations to prosecute in certain circumstances, or more generally to require a state to maintain a criminal justice system that provides sufficient protection to citizens. So far, English standards of review of noncharging decisions, based in domestic law, have been held sufficient to meet any such obligation. *See R ex parte B v. DPP* [2009] EWHC (Admin) 106 [67]-[70], [2009] 1 Crim. App. 38 (discussing state obligations under Articles 2 and 3 of the Convention). English courts cannot stay a prosecution simply because the underlying statute is held to be in conflict with the ECHR. *But see R v. DPP ex rel. Kebeline* [1999] UKHL 43 [17], [2000] 2 AC 326 (UK) (noting that in exceptional cases, defense arguments that a charged offense is incompatible with—or that evidence gathering violated—the ECHR may be raised as abuse of process on the basis that it is unfair for the prosecution to proceed).

124. *See, e.g.*, *R v. Inland Revenue Comm'r's ex parte Mead* [1993] 1 All ER 772 at 775-77. For the general standard of unreasonableness that justifies a judicial decision to quash a public agency's decision, see *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corp.* [1947] EWCA (Civ) 1, [1948] KB 223 (Eng.); *see also* ASHWORTH & REDMAYNE, *supra* note 111, at 221.

125. *See, e.g.*, *Heckler v. Chaney*, 470 U.S. 821, 828, 837 (1985) (although federal law guarantees that a person "adversely affected or aggrieved" by agency action or failure to act

lies in the legal status of prosecutors' charging policies. The U.S. Attorney's Manual and other federal Justice Department guidelines closely resemble in their form, substance, and formality the English Code for Crown Prosecutors.¹²⁶ The critical distinction is that the latter is truly an administrative code. It exists by statutory mandate, has status equivalent to federal administrative regulations, and therefore serves as the basis for judicial review to ensure that the agency abides by its own guidelines.¹²⁷ Changes to the Code for Crown Prosecutors must go through a formal process that includes public consultation—a notice and comment period in U.S. parlance.¹²⁸ That is not true of U.S. Justice Department policies¹²⁹ or state prosecution guidelines.¹³⁰ Federal policies exist at the discretion of the Attorney General, and courts treat them as unenforceable provisions.¹³¹

is entitled to judicial review, presumption against review of agency nonenforcement actions was not overcome); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 41-43, 52 (1983) (requiring the administrative agency to provide rational reasons for rescinding motor vehicle safety requirements).

126. *Compare, e.g.*, DEPT OF JUSTICE [DOJ], U.S. ATTORNEYS' MANUAL (1997), <http://www.justice.gov/usam/united-states-attorneys-manual> [<https://perma.cc/A9XU-29AW>] [hereinafter U.S. ATTORNEYS' MANUAL], *with* CPS, THE CODE FOR CROWN PROSECUTORS (2013), https://www.cps.gov.uk/publications/docs/code_2013_accessible_english.pdf [<https://perma.cc/3RVA-EY2X>] [hereinafter CPS CODE], *and* CPS Instructions for Prosecuting Advocates, CPS, http://www.cps.gov.uk/legal/p_to_r/prosecuting_advocates_instructions/ [<https://perma.cc/B4VH-XS8D>] (last visited Mar. 20, 2016).

127. Prosecution of Offences Act 1985, c. 23, § 10 (Eng.). For a brief summary of the relevant provision, see *R ex rel. Gujra v. CPS* [2012] UKSC 52 [96]-[101] (Lord Mance) (appeal taken from EWHC Admin) (UK).

128. The English government runs a consultation website where citizens are given the opportunity to voice their opinions about the Crown's prosecution policy. *See Consultations*, CPS, <http://www.cps.gov.uk/consultations/index.html> [<https://perma.cc/R2EF-JGGJ>].

129. *See* U.S. ATTORNEYS' MANUAL, *supra* note 126, § 1-1.600.

130. *See, e.g.*, FLA. STAT. ANN. § 741.2901 (West 2015) (providing legislative guidance on local prosecutors' domestic violence charging policy); WIS. STAT. § 968.075(7) (2015) (providing legislative guidance on local prosecutors' domestic violence charging policy); FLA. STAT. ANN. § 775.08401 (repealed 2011) (defining local prosecutors' authority on sentencing policies). For an example of a rare state exception in New Jersey, see *supra* notes 97-98.

131. *See, e.g.*, *United States v. Thompson*, 579 F.2d 1184, 1189 (10th Cir. 1978) ("We also consider ill-founded the notion that a departmental policy such as the present one is capable of giving rise to an enforceable right in favor of the defendant. The decisions hold that a press release expressing a policy statement and not promulgated as a regulation of the Department of Justice and published in the Federal Register is simply a 'housekeeping provision of the Department.'" (quoting *Sullivan v. United States*, 348 U.S. 170, 184 (1954))).

Additionally, English courts may prohibit prosecutions on various grounds that constitute “abuse of process” by police or prosecutors.¹³² One strand of abuse of process doctrine resembles American law: courts will bar prosecution after prosecutors tell a defendant that a specific charge would not be pursued if the defendant can show reliance on the initial nonprosecution pronouncement.¹³³ But English doctrine seems to be broader than American. A stay can be justified for police misconduct as well, including police promises not to prosecute, even though prosecutors control decisions to charge.¹³⁴ Courts may stay prosecutions for abuse of process even when a fair trial is possible because they are acting within their inherent power to regulate and prevent abuse of the judicial process. A leading decision describes the rationale in rule of law terms:

[T]he judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law The courts, of course, have no power to apply direct discipline to the police or the prosecuting authorities, but they can refuse to allow them to take advantage of abuse of power by regarding their behaviour as an abuse of process and thus preventing a prosecution.¹³⁵

132. See *Abuse of Process*, CPS, http://www.cps.gov.uk/legal/a_to_c/_abuse_of_process/ [<https://perma.cc/JZV7-LNYM>] (last visited Mar. 20, 2016).

133. See *Nembhard v. DPP* [2009] EWHC (Admin) 194 [16]-[17] (describing the court’s authority to stay prosecutions for abuse of process); see also *R ex rel. Smith v. CPS* [2010] EWHC (Admin) 3593 [1], [44] (staying domestic violence prosecution from continuing under abuse of process standard after the CPS agreed to not prosecute); *R v. Bloomfield* [1996] EWCA (Crim) 1801 [8]-[9], [38], [1997] 1 Crim. App. 135 (quashing a drug conviction based on abuse of process standard). See generally ANDREW L-T CHOO, ABUSE OF PROCESS AND JUDICIAL STAYS OF CRIMINAL PROCEEDINGS (2d ed. 2008) (analyzing courts’ ability to stay criminal proceedings that are deemed to be an abuse of court process).

134. See *Abuse of Process*, *supra* note 132; see also Jonathan Rogers, *The Boundaries of Abuse of Process in Criminal Trials*, 61 CURRENT LEGAL PROBS. 289, 292-93 (2008) (describing the expansion in recent decades of English abuse of process doctrine). In extreme cases, U.S. courts also dismiss prosecutions for police misconduct. See, e.g., *United States v. Broward*, 459 F. Supp. 321, 326-28 (W.D.N.Y. 1978) (holding that government agents’ deliberate misrepresentation of facts in affidavit relating to an informant’s identity and related false statements to district judge required dismissal of drug prosecution for governmental misconduct).

135. *R v. Horseferry Rd. Magis. Ct. ex parte Bennett* [1993] UKHL 10 at 13-14, [1994] AC 42 (UK).

The remedy in such cases is to order a stay of prosecution—or, after trial, to reverse a conviction—rather than to dismiss with prejudice,¹³⁶ but this power also appears to be sparingly used.¹³⁷

Overall, then, English courts' supervision of prosecutorial discretion is deferential and concentrates on extremes of unfair or inconsistent enforcement actions, but review is nonetheless real and meaningful. No comparable law or judicial track record exists in U.S. state or federal courts,¹³⁸ in which the standard view is that “[s]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file ... generally

136. See *R v. Adaway* [2004] EWCA (Crim) 2831 [26] (reversing a trial judge's denial of a stay and quashing defendant's conviction).

137. But cf. *Rogers*, *supra* note 134, at 289 (observing that abuse of process case law has multiplied despite reminders it “is only to be exercised in the rarest of cases”). The law is clear that English judges, like their American counterparts, cannot stay or quash a valid indictment on grounds that public resources are limited or that other cases in a crowded docket should take priority. See *R v. FB* [2010] EWCA (Crim) 1857 [34], [2010] 2 Crim. App. 35 (holding that the trial judge had no power to quash a valid indictment on grounds that resources were limited). For a similar American decision, see *People v. Stewart*, 217 N.W.2d 894, 896 (Mich. Ct. App. 1974), and *Czajka v. Koween*, 953 N.Y.S.2d 394, 397 (App. Div. 2012) (citing *In re Soares v. Herrick*, 928 N.Y.S.2d 386, 390 (App. Div. 2011) (holding that the district attorney has wide discretion over public resources to discharge duties)).

138. See, e.g., *McArthur v. State*, 597 So. 2d 406, 408 (Fla. Dist. Ct. App. 1992) (stating that the victim has no authority over decisions to prosecute—that power rests with the state's attorney); *Scanlon v. State Bar of Ga.*, 443 S.E.2d 830 (Ga. 1994) (holding that private citizens have no *judicially cognizable* interests in prosecutions or decisions not to prosecute); *State v. Winne*, 96 A.2d 63, 70 (N.J. 1953) (holding that prosecutors have the exclusive authority to handle the “criminal business of the state”). For a more subtle example of U.S. disfavor of restrictions on prosecutorial authority based on prior notice to defendants, consider judicial interpretation of the following federal statute:

Hearing before report of criminal violation. Before any violation of this chapter is reported by the Secretary to any United States attorney for institution of a criminal proceeding, the person against whom such proceeding is contemplated shall be given appropriate notice and an opportunity to present his views, either orally or in writing, with regard to such contemplated proceeding.

21 U.S.C. § 335 (2012). The Supreme Court has concluded that this obligation is not a prerequisite to prosecution. *United States v. Dotterweich*, 320 U.S. 277, 278-79 (1943).

A few states have rarely used provisions giving courts or private parties some ability to check public prosecutors. Two states require prosecutors to file reasons for a nonprosecution decision with the court in certain serious cases. See MICH. COMP. LAWS § 767.41 (2015) (requiring, in certain cases, that prosecutors file reasons with court for not charging; upon review, courts can order the prosecutor to file charge); NEB. REV. STAT. § 29-1606 (2015) (same). Additionally, Pennsylvania requires prosecutors to give reasons for nonprosecution, which courts may review only after receiving a *private* complaint. PA. R. CRIM. P. 506.

rests entirely in his discretion.”¹³⁹ American judges retain the power to dismiss prosecutions for outrageous government conduct, but only as an extraordinary remedy.¹⁴⁰ They believe more strongly than their English counterparts that “the decision to prosecute is particularly ill-suited to judicial review”¹⁴¹ and stress more insistently the limits of judicial capacity.¹⁴²

Consider two additional barriers to review of decisions not to prosecute. Unlike English courts,¹⁴³ U.S. state and federal courts deny standing to victims, their families, or other aggrieved parties, which strengthens the executive branch’s monopoly of prosecution authority.¹⁴⁴ Even if they entertained such claims, as federal courts do in

139. *Wayte v. United States*, 470 U.S. 598, 607 (1985) (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)); *see also United States v. Giannattasio*, 979 F.2d 98, 100 (7th Cir. 1992) (“Prosecutorial discretion resides in the executive, not in the judicial, branch, and that discretion, though subject of course to judicial review to protect constitutional rights, is not reviewable for a simple abuse of discretion.”). *See generally 27 C.J.S. District and Prosecuting Attorneys § 28 (2016)* (collecting and summarizing cases that affirm wide prosecutorial discretion subject to judicial review generally only under deferential constitutional rules).

140. *See, e.g., United States v. Dyke*, 718 F.3d 1282, 1285 (10th Cir. 2013); *United States v. Smith*, 231 F.3d 800, 807 (11th Cir. 2000); *United States v. Garza-Juarez*, 992 F.2d 896, 904 (9th Cir. 1993) (“The government’s conduct may warrant a dismissal of the indictment if that conduct is so excessive, flagrant, scandalous, intolerable and offensive as to violate due process.”); *United States v. Smith*, 924 F.2d 889, 897 (9th Cir. 1991) (“For a due process dismissal, the Government’s conduct must be so grossly shocking and so outrageous as to violate the universal sense of justice.”); *State v. Perleberg*, 736 N.W.2d 703, 706 (Minn. Ct. App. 2007).

141. *See Wayte*, 470 U.S. at 607; *see also United States v. Armstrong*, 517 U.S. 456, 463-65 (1996); *Giannattasio*, 979 F.2d at 100.

142. *See Pugach v. Klein*, 193 F. Supp. 630, 635 (S.D.N.Y. 1961) (rejecting a petition for a writ of mandamus to compel a prosecutor to charge police officers with illegal wiretapping on the grounds that: “[F]ederal courts are powerless to interfere with [the prosecutor’s] discretionary power. The Court cannot compel him to prosecute a complaint, or even an indictment, whatever his reasons for not acting.”); *People v. Birks*, 960 P.2d 1073, 1089 (Cal. 1998) (“[P]rosecuting authorities … ordinarily have the sole discretion to determine whom to charge The prosecution’s authority … generally is not subject to supervision by the judicial branch.”); *In re Padgett*, 678 P.2d 870, 873 (Wyo. 1984) (“We think it is clear that ... the charging decision is properly within the scope of duty of the executive branch.”); *cf. United States v. Williams*, 504 U.S. 36, 46-47 (1992) (holding that the federal courts’ supervisory powers over grand juries does not include the power to make a rule allowing dismissal of an otherwise valid indictment when the prosecutor has failed to introduce substantial exculpatory evidence to a grand jury).

143. *See supra* note 117 and accompanying text.

144. *See Linda R. S. v. Richard D.*, 410 U.S. 614, 619 (1973) (holding that a crime victim lacks standing in federal court to seek an injunction against a state prosecutor’s unconstitutionally discriminatory enforcement policy for the crime of failure to pay child support, because “a private citizen lacks a judicially cognizable interest in the prosecution or non-

many *civil* enforcement contexts, judges would need access to prosecutors' stated reasons for opting not to charge. U.S. judges are loathe to require explanations from prosecutors,¹⁴⁵ while English courts commonly examine reasons conveyed either to the court or to victims, and they may even require prosecutors to disclose internal documents.¹⁴⁶ The rare and marginal exceptions to the American hands-off approach prove the rule. Two states authorize courts to demand reasons from prosecutors for not charging based on a private complaint.¹⁴⁷ Four states give their courts limited authority—rarely used—to assign special prosecutors when a public prosecutor “neglects” to pursue well-grounded charges.¹⁴⁸ At the same time, such statutes confirm the constitutionality of granting courts

prosecution of another”); *In re Hickson*, 765 A.2d 372, 380 (Pa. Super. Ct. 2000) (noting that a private complainant lacks standing to challenge district attorney’s decision not to prosecute).

145. See *Armstrong*, 517 U.S. at 465.

146. See *R ex rel. Da Silva v. DPP* [2006] EWHC (Admin) 3204 [60] (noting use of redacted investigative report and case notes from CPS, but disavowing evaluation of evidence). English judges do not, however, examine underlying evidence against a suspect. *Id.* Under the ECHR, prosecutors in limited circumstances may have a duty to give reasons for nonprosecution. See *Jordan v. United Kingdom*, App. No. 24746/94 Eur. Ct. H.R. ¶¶ 82-86, 122-23, 142-45 (2001) (holding that under ECHR art. 2, prosecutors should give reasons to the victim’s family explaining the decision not to bring criminal charges after investigating a death caused by a police shooting); see also *R v. DPP ex parte Manning* [2000] EWHC (QB) 562 [33], [2001] QB 330 (Lord Bingham CJ) (“In the absence of compelling grounds for not giving reasons, we would expect the Director to give reasons in such a case [of nonprosecution]: to meet the reasonable expectation of interested parties that either a prosecution would follow or a reasonable explanation for not prosecuting be given.”).

147. See COLO. REV. STAT. ANN. § 16-5-209 (West 2015) (permitting judge to require prosecutor to explain nonprosecution); PA. R. CRIM. P. 506 (requiring prosecutor’s reasons upon private complaint objecting to nonprosecution).

148. See ALA. CODE § 12-17-186 (2015) (presiding judge may appoint an attorney to act as public prosecutor in cases of conflict of interest “or when the district attorney refuses to act”; no appellate decisions document that this power has ever been used); COLO. REV. STAT. ANN. § 16-5-209 (West 2015) (stipulating that upon affidavit alleging “unjustified” refusal to charge, a judge may require public prosecutor to explain reasons; if “arbitrary or capricious,” a judge may order prosecution or appoint a special prosecutor); MINN. STAT. ANN. § 388.12 (West 2015) (same, but whenever public prosecutor “is present,” the statute requires the prosecutor’s consent for any payment to the court-appointed prosecutor); N.D. CENT. CODE ANN. § 11-16-06 (West 2015) (authorizing courts to appoint special prosecutor if “the state’s attorney has refused or neglected to perform any” duties). Additionally, Pennsylvania allows courts to authorize private prosecutors to take over cases from public prosecutors. 16 PA. STAT. AND CONS. STAT. ANN. § 1409 (West 2015). Texas alone retains a unique “Court of Inquiry” procedure, also rarely deployed, that empowers judges to investigate suspected crimes and issue arrest warrants. See TEX. CODE CRIM. PROC. ANN. arts. 52.01-52.08 (West 2015).

capacities of this sort. Legislatures *could* enact judicially enforceable parameters for prosecutorial decision making, but following courts' leads, they have opted to leave executive discretion almost wholly—and perhaps uniquely—unregulated. That policy is evident in other areas of law as well. U.S. prosecutors enjoy absolute immunity from civil liability for their unconstitutional conduct when acting in their prosecutorial function,¹⁴⁹ regardless of the egregiousness of the violation or the severity of the injuries it caused. Save for judges, other government officials enjoy only partial or qualified immunity.¹⁵⁰ The Supreme Court has repeatedly emphasized its confidence in prosecutors' professional integrity and trustworthiness as the reason it grants a strong presumption of lawfulness to their

149. See Jeffries, Jr., *supra* note 75, at 221-30. Compare *Imbler v. Pachtman*, 424 U.S. 409, 432 (1976) (“[I]n initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983.”), with *Mitchell v. Forsyth*, 472 U.S. 511, 521 (1985) (denying absolute immunity to a prosecutor who authorized a warrantless wiretap on grounds he was not acting in his “prosecutorial capacity”).

150. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 809 (1982) (holding that executive officials generally enjoy only qualified immunity).

The prospects of prosecutors facing criminal sanctions, even for flagrant misconduct, are vanishingly small. In 1996, three Chicago prosecutors (and four sheriff's deputies) were indicted for conspiracy, obstruction of justice, and perjury that contributed to wrongful murder convictions. Charges against two of the prosecutors were dismissed before trial; the other was acquitted in 1999, as were the deputies. Although the local government paid a \$3.5 million dollar settlement to the wrongfully convicted men, all prosecutors continued to practice law: one as a chief judge of a state circuit court, one as a federal prosecutor, and one as a defense attorney. See Andrew Bluth, *Prosecutor and 4 Sheriff's Deputies Are Acquitted of Wrongfully Accusing a Man of Murder*, N.Y. TIMES (June 5, 1999), <http://www.nytimes.com/1999/06/05/us/prosecutor-4-sheriff-s-deputies-are-acquitted-wrongfully-accusing-man-murder.html> [<https://perma.cc/57QJ-8BFD>]; Ctr. on Wrongful Convictions, *Police Perjury and Jailhouse Snitch Testimony Put Rolando Cruz on Death Row*, NW. U. SCH. L., <http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/il/rolando-cruz.html> [<https://perma.cc/YP28-QQRD>] (last visited Mar. 20, 2016). For comparison, the German Penal Code defines felony-level punishments for prosecutors who file baseless charges, or who fail to pursue well-grounded ones. STRAFGESETZBUCH [STGB] [PENAL CODE], § 339, *translation at* http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html [<https://perma.cc/W62M-TKHJ>] (making perversion of justice by a judge or another public official punishable by imprisonment from one to five years); *id.* §§ 258, 258a (subjecting anyone who obstructs the punishment of another by an unlawful act to punishment of up to five years in prison or a fine); *see also* Markus D. Dubber, *Criminal Law Between Public and Private Law*, in THE BOUNDARIES OF THE CRIMINAL LAW 191, 204-05 (R.A. Duff et al. eds., 2010) (discussing the German Criminal Code and the punishment available for instances of official misconduct in criminal cases); Kessler, *supra* note 107, at 216 (stating that in Germany, police officers are not authorized to drop cases).

actions.¹⁵¹ Why U.S. judges and legislators trust prosecutors more and regulate them less is a question for another day, but surely part of the explanation is that U.S. jurisdictions rely on the political process rather than the law to check prosecutorial abuse; the U.S. is alone in electing its prosecutors.¹⁵²

To be clear, this body of English law governing charging discretion is not expressly directed at prosecutors' tactical use of charging options in the plea bargaining process. Charge bargaining is expressly permitted by the Code for Crown Prosecutors, within vaguely worded limits that courts apparently have no opportunity to enforce.¹⁵³ The point here is not that English law successfully restricts coercive or otherwise undesirable prosecutorial tactics in plea bargaining, nor that England significantly restricts plea bargaining.

151. The presumption of regularity, which the Court sometimes notes is assured by legal education, bars oversight and internal supervision within prosecutors' offices. *See Connick v. Thompson*, 563 U.S. 51 (2011); *Hartman v. Moore*, 547 U.S. 250, 263-65 (2006); *United States v. Ruiz*, 536 U.S. 622, 629 (2002); *United States v. Armstrong*, 517 U.S. 456, 464 (1996); *Town of Newton v. Rumery*, 480 U.S. 386, 395-97 (1987); *Wayte v. United States*, 470 U.S. 598, 607-08 (1985). On the sufficiency of informal regulation, see *Malley v. Briggs*, 475 U.S. 335, 342-43, 343 n.5 (1986); *Imbler*, 424 U.S. at 428-30. *See generally Jennifer E. Laurin, *Prosecutorial Exceptionalism, Remedial Skepticism, and the Legacy of Connick v. Thompson*, in 27 CIVIL RIGHTS LITIGATION AND ATTORNEY FEES ANNUAL HANDBOOK 29, 51-58 (Steven Saltzman ed., 2011)* (discussing *Connick* and the unchecked power of prosecutors).

152. *See In re Hickson*, 765 A.2d 372, 380 (Pa. Super. Ct. 2000) ("The prosecutor is elected to run her office using her broad discretion fairly and honestly. If she fails to do so, the remedy lies in the power of the electorate to vote her out of office."); *In re Padgett*, 678 P.2d 870, 873-74 (Wyo. 1984) (disapproving judicial supervision of prosecutor decisions and noting "that district and county attorneys hold elective offices; if their constituents are unsatisfied, they are free to express their feelings at the voting polls"); *see also Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 386 (2004) ("The decision to prosecute a criminal case, for example, is made by a publicly accountable prosecutor subject to budgetary considerations."). For a development of this argument, see *BROWN*, *supra* note 11, at 25-28. *See also Pugach v. Klein*, 193 F. Supp. 630, 635 (S.D.N.Y. 1961) ("The remedy for any dereliction of his duty lies, not with the courts, but, with the executive branch of our government and ultimately with the people."); *Milliken v. Stone*, 7 F.2d 397, 399 (S.D.N.Y. 1925), *aff'd*, 16 F.2d 981 (2d Cir. 1927) (holding that "courts are without power to compel" prosecutors "to enforce the penal laws The remedy ... is with the executive and ultimately with the people"); *United States v. Woody*, 2 F.2d 262, 262-63 (D. Mont. 1924); *Czajka v. Kowek*, 953 N.Y.S.2d 394, 397 (App. Div. 2012) (stating that the "district attorney is a constitutional officer, chosen by the electors of his or her county to prosecute all crimes and offenses," with wide discretion over public resources to discharge duties as he judges most effective (quoting *In re Soares v. Herrick*, 928 N.Y.S.2d 386, 390 (App. Div. 2011))).

153. CPS CODE, *supra* note 126, § 9.2 (prosecutors may not enter charge bargains merely for convenience nor agree to charge reductions that would prevent the court from imposing a sentence that "matches the seriousness of the offense").

English law embraces plea bargaining. Judicial sentencing guidelines authorize discounts for guilty pleas up to one-third less than a post-trial sentence.¹⁵⁴ And England has plenty of plea bargaining. In the Crown Courts of England and Wales, which handle what U.S. law would label serious felonies, 73.5 percent of charged defendants pled guilty in 2009-2010, and 91 percent of convictions occurred through guilty pleas.¹⁵⁵ In the federal courts the same year, 87.7 percent of charged defendants pled guilty and 96.7 percent of convictions came through guilty pleas.¹⁵⁶ Thus, whatever limits English

154. Criminal Justice Act 2003, c. 44, Explanatory Notes ¶¶ 447, 489 (UK); SENTENCING GUIDELINES COUNCIL, REDUCTION IN SENTENCE FOR A GUILTY PLEA §§ 2.1, 2.2, 4.2 (2007), https://www.sentencingcouncil.org.uk/wp-content/uploads/Reduction_in_Sentence_for_a_Guilty_Plea_-Revised_2007.pdf [https://perma.cc/CDP9-LCKR]; Attorney Gens. Reference Nos. 14 & 15 (Tanya French & Alan Webster) [2006] EWCA (Crim) 1335 [52], [2007] 1 All ER 718 (noting that the “[g]uidelines do no more than provide guidance [to judges]. There may well be circumstances which justify awarding less than a discount of one third where a plea of guilty has been made at the first opportunity”).

155. CPS, ANNUAL REPORT AND ACCOUNTS 2011-12, at 85 tbl.7 (2012), http://www.cps.gov.uk/publications/docs/cps_annual_report_and_accounts_2012.pdf. [https://perma.cc/GL6G-AKCL] (data for years 2009 through 2012). Of the 26.5 percent of charged defendants who did not plead guilty, 12.9 percent went to trial (where 7.2 percent were convicted), and the remainder earned dismissal or judge acquittal. *Id.*

156. For 2009 federal data, see MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS, DOJ, NCJ 233464, FEDERAL JUSTICE STATISTICS 2009—STATISTICAL TABLES 18 tbl.4.2 (rev. 2012), <http://bjs.gov/content/pub/pdf/fjs09st.pdf> [https://perma.cc/59K9-NK7B]. In U.S. federal courts in the years 2007-2011, guilty plea rates increased from 95.8 to 96.9 percent of all convictions; the percentage of convictions following trial declined from 4.2 to 3.1 percent. U.S. SENTENCING COMM’N, 2011 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.C, <http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks/2011/sourcebook-2011> [https://perma.cc/V8K2-AA86]. Guilty plea rates within each of the twelve federal circuits showed little variation, ranging from 93.6 to 98.3 percent in 2011. *Id.* at tbl.10, <https://perma.cc/4DD2-PQRK>.

Data is less thorough for state courts, but figures appear to be similar. See, e.g., VA. CRIMINAL SENTENCING COMM’N, 2014 ANNUAL REPORT 33 (2014), <http://www.vcsc.virginia.gov/2014AnnualReport.pdf> [https://perma.cc/FXF3-GSKL] (90 percent of felony sentences in circuit courts followed guilty pleas, 9 percent bench trials, 1.2 percent jury trials). In 2001, data from twenty-two states found 3 percent of state criminal cases were resolved by either bench or jury trial, the remainder by guilty pleas, dismissals or other disposition. See NAT’L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 2001: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 63 (Brian J. Ostrom et al. eds., 2001), <https://www.ncjrs.gov/pdffiles1/Digitization/195881NCJRS.pdf> [https://perma.cc/KUP4-E564]. Hawaii had the highest trial rate at 12.8 percent; Vermont’s rate of 0.9 percent was lowest. *Id.*; see also HON. GREGORY E. MIZE ET AL., NAT’L CTR. FOR STATE COURTS, THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT 63 (2007), <http://www.ncsc-jury-studies.org/~media/Microsites/Files/CJS/SOS/SOSCompendiumFinal.ashx> [https://perma.cc/J52U-ZNNW] (reporting similar, more recent data, although in different terms, for example, trials per 100,000 population).

law places on prosecutorial discretion are compatible with high rates of guilty pleas. The point here is simply that English law, built on traditions of common law and adversarial process shared across U.S. jurisdictions, demonstrates the feasibility of regulating some aspects of prosecutorial discretion, including a modest role for judicial oversight akin to U.S. judicial review in the context of administrative agencies. Some regulation of that sort is essential to meaningful regulation of plea bargaining, especially given contemporary conditions of expansive criminal codes—which multiply charging options—and mandatory sentencing rules, which turn charging decisions into sentencing decisions.¹⁵⁷ In fact, as the next Part recounts, in the early years of modern plea bargain regulation, U.S. courts developed broadly comparable constitutional doctrines to ensure fairness in negotiated guilty pleas. But the U.S. Supreme Court eventually chose a different path for federal law, which states have largely followed.

IV. THE PRESUMPTION OF FAIRNESS IN UNREGULATED BARGAINING

Limits on guilty plea sentence discounts and on prosecutorial charging discretion are important ways—probably critical ways—by which plea bargaining can be regulated. But they are not the only ways to regulate bargaining. After the U.S. Supreme Court finally acknowledged plea bargaining in 1971 and initiated constitutional regulation of its practice,¹⁵⁸ federal courts began to develop a body

157. English law and practice differs in important respects on this point. English prosecutors do not make sentence recommendations or otherwise argue for specific sentences on the premise that sentencing is a judicial function. See *R v. Atkinson* [1978] 1 WLR 425 at 428 (“In our law the prosecution is not heard upon sentence. This is a matter for the court, after considering whatever has to be said on behalf of an accused man.”); Sir John May, *The Responsibility of the Prosecutor to the Court, in THE ROLE OF THE PROSECUTOR* 90, 94 (J.E. Hall Williams ed., 1988) (author was a Lord Justice of Appeal). Since the 1980s, English prosecutors have assisted courts by drawing attention to governing sentencing law and relevant facts but still avoid American-style sentencing recommendations. ANDREW ASHWORTH, *SENTENCING AND CRIMINAL JUSTICE* 377-78 (5th ed. 2010). Moreover, English law has significantly fewer mandatory sentencing rules, which makes charging decisions less determinative of punishments. *But see* Power of Criminal Courts (Sentencing) Act 2000, c.6, §§ 110-111 (UK) (establishing mandatory sentencing for the third offense of domestic burglary or Class A drug trafficking); Firearms Act 1968, c.27, § 51(1) (UK) (establishing sentencing guidelines for firearms offenses).

158. *Santobello v. New York*, 404 U.S. 257, 260-63 (1971).

of law that focused on the fairness of the bargaining process and of plea bargain terms.¹⁵⁹ The Court in *Santobello v. New York* concluded that plea bargaining was “essential” to criminal justice administration but also that the Constitution put limits on how it is practiced.¹⁶⁰ The principles that justify plea bargaining, the Court wrote, “presuppose fairness in securing agreement between an accused and a prosecutor.”¹⁶¹ Plea agreements “must be attended by safeguards to insure the defendant what is reasonably due in the circumstances.”¹⁶² The Court warned that federal courts “will vacate a plea of guilty shown to have been unfairly obtained.”¹⁶³ The Constitution, *Santobello* strongly implied, requires judges to supervise plea bargaining.¹⁶⁴

Many lower courts took that *Santobello* language seriously and in the 1970s began to develop more specific fairness standards for plea negotiations grounded in Due Process doctrine. For a time, courts used those doctrines to exercise modest but meaningful judicial supervision over plea bargaining. With the jury now absent from adjudication, courts aimed “both to protect the plea bargaining defendant from overreaching by the prosecutor and to insure the integrity of the plea bargaining process.”¹⁶⁵ Judges kept a close eye on whether prosecutors had met the “most meticulous standards of both promise and performance … in plea bargaining.”¹⁶⁶

In order to facilitate meaningful judicial scrutiny, prosecutors had to create records that enabled judicial review of some aspects of their discretionary actions. In *United States v. Bowler*, the plea agreement included the promise that prosecutors would make their sentencing recommendation only after considering certain mitigating factors, such as a defendant’s cooperation and his health.¹⁶⁷ That

159. See *infra* notes 165-66.

160. *Santobello*, 404 U.S. at 260-63.

161. *Id.* at 261.

162. *Id.* at 262.

163. *Id.* at 264 (Douglas, J., concurring) (quoting *Kercheval v. United States*, 274 U.S. 220, 224 (1927)).

164. See *id.* at 262.

165. *United States v. Bowler*, 585 F.2d 851, 854 (7th Cir. 1978).

166. *Id.* (quoting *Correale v. United States*, 479 F.2d 944, 947 (1st Cir. 1973)); see also *Palermo v. Warden, Green Haven State Prison*, 545 F.2d 286, 296 (2d Cir. 1976) (“[F]undamental fairness and public confidence in government officials require that prosecutors be held to ‘meticulous standards of both promise and performance.’”).

167. *Bowler*, 585 F.2d at 854-55.

discretionary assessment “is an evaluative function normally performed internally within the office of the prosecutor,” but the Seventh Circuit insisted on some disclosure about how prosecutors exercised their discretion: “[T]he Government’s evaluation of the specified mitigating factors must be set forth in the record at the time of sentencing.”¹⁶⁸ Numerous courts also called out prosecutors for half-heartedly fulfilling promises, particularly sentence recommendations, and required that they offer supporting arguments to trial courts for the recommendations to which they had agreed.¹⁶⁹ Another application of post-*Santobello* Due Process doctrine targeted the heart of prosecutorial charge manipulation in the bargaining process.

Before *Bordenkircher v. Hayes*, the Sixth Circuit Court of Appeals required that prosecutors provide reasons to justify additional charges they filed against a defendant after he had rejected their plea bargain offer.¹⁷⁰ These requirements were not so different from requirements in English law under which prosecutors disclose to courts reasons for their discretionary decisions.¹⁷¹ In many cases, making rationales for prosecutors’ actions transparent was the only way for courts “to ascertain whether or not the Government had in fact performed the promised evaluation.”¹⁷² The alternative was separation of powers without the ability of one branch to check and balance the actions of another. More specifically, the alternative was to leave the judiciary incapable of determining the lawfulness of executive action in the adjudication process: “[I]t is not the privilege of the Government to make the determination as to whether or not it has honored its promise.”¹⁷³

168. *Id.*

169. See *Geisser v. United States*, 513 F.2d 862, 870-71 (5th Cir. 1975) (ordering prosecutors to make strong recommendations to the Parole Board as well as to the Department of State against a defendant’s extradition to fulfill promises made in a plea bargain); *United States v. Brown*, 500 F.2d 375, 377 (4th Cir. 1974) (holding that where the prosecutor promised to recommend a particular sentence, the mere half-hearted recitation of the recommended sentence without reasons for supporting it breached the plea agreement); *Correale v. United States*, 479 F.2d 944, 947 (1st Cir. 1973) (“[M]ost meticulous standards of both promise and performance must be met by prosecutors engaging in plea bargaining.”).

170. *Hayes v. Cowan*, 547 F.2d 42, 44-45 (6th Cir. 1976).

171. See, e.g., *R ex rel. Da Silva v. DPP* [2006] EWHC (Admin) 3204 [27] (discussing the rationale underlying the Crown Prosecution Service’s decision not to prosecute).

172. *Bowler*, 585 F.2d at 854-55.

173. *Id.* at 855.

Private contract law became an increasingly common reference point for the public law of plea negotiations, but after *Santobello*, lower courts concluded that *Santobello*'s constitutional mandate that guilty pleas be "fairly obtained" required judges to scrutinize negotiated agreements between the government and defendants by more rigorous standards than the law of contract did for private parties in ordinary market transactions. For example, the Fourth Circuit held that while ordinarily private contract *offers* are not enforceable, the Due Process Clause mandated that prosecutors' plea bargain offers *were* enforceable.¹⁷⁴ In other words, prosecutors could not withdraw offers before a defendant had a chance to accept. On this point as well, federal constitutional law was, for a time, on a path not far removed from English law, which enforces some prosecution promises to victims to charge—or to defendants not to charge—in particular cases.¹⁷⁵

This body of Due Process doctrine suggests that the differences in the capacity of English and American judiciaries to oversee prosecutors do not arise from fundamental differences in constitutional or institutional structure. The problem is not that federal and state constitutions impose incontrovertible limits on judicial authority and insulate prosecutors more than English law does in the English justice system. This approach to Due Process law did not last because constitutional text and tradition dictated no specific answers in this realm; it left courts plausible options for what the law should be. The U.S. Supreme Court rejected it in favor of a different vision for federal constitutional law, one that draws heavily on contract law to limit judicial capacity and protect executive authority. It adopted a conception of how "our system" operates that differed both from the approach of many lower federal courts after *Santobello* and from English analogs, even though alternatives in which the judiciary played a greater regulatory role in plea

174. *Cooper v. United States*, 594 F.2d 12, 15-19 (4th Cir. 1979). In *Cooper*, the prosecutor offered to dismiss three of four charges in exchange for defendant's guilty plea and cooperation in other cases. *Id.* at 15. The defense counsel quickly met with his client and called to accept the offer four hours after it was extended, but during that time, a supervising prosecutor had vetoed the offer and so the office refused to abide by it. *Id.* The court held that the offer was enforceable. *Id.* at 19. Private contract law generally would not enforce an offer before acceptance, absent defendant's detrimental reliance on the agreement. *Id.* at 15-17.

175. See, e.g., CHOO, *supra* note 133, at 64-68.

bargaining were fully “available” in the sense that they were plausible routes for constitutional law development.¹⁷⁶

The Supreme Court built the contemporary constitutional law of plea bargaining upon a set of premises that excluded judges from a meaningful role in plea bargaining process or in assuring substantively fair outcomes from that process. This constitutional vision in turn has largely set the parameters for all state and federal law on plea bargaining. From its assumption that plea bargaining “is an essential component of the administration of justice,”¹⁷⁷ the Court took the view that rules related to guilty pleas must maximize the efficiency of the bargaining process. To serve that aim, the Court looked to the private law of contract, and to the free-market premises that party autonomy and minimal state regulation maximize efficiency. In the Court’s view, “plea bargains are essentially contracts,”¹⁷⁸ much like “any other bargained-for exchange.”¹⁷⁹ In contrast to their English counterparts, the Justices cite private contract law treatises in plea bargaining decisions and draw on private contract principles for remedies to plea bargain breaches.¹⁸⁰ The market-based rationality is at times almost comically explicit:

176. See *supra* notes 165-75 and accompanying text (arguing that inferior federal courts interpreted the Constitution to require some judicial oversight of plea bargaining).

177. *Santobello v. New York*, 404 U.S. 257, 260 (1971); see also *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (“[P]lea bargains have become … central to the administration of the criminal justice system.”); *Bordenkircher v. Hayes*, 434 U.S. 357, 372 (1978) (Powell, J., dissenting) (“The plea-bargaining process … is essential to the functioning of the criminal-justice system.”); *Corbitt v. New Jersey*, 439 U.S. 212, 222 & n.12 (1978) (noting that the process of plea bargaining is mutually beneficial to the defendant and the state). *But see Alschuler, supra* note 8, at 952, 955 (noting and rebutting claims of plea bargaining’s practical necessity).

178. *Puckett v. United States*, 556 U.S. 129, 137 (2009).

179. *Mabry v. Johnson*, 467 U.S. 504, 508 (1984).

180. *United States v. Hyde*, 520 U.S. 670, 677-78 (1997) (“[I]f the court rejects the Government’s promised performance, then the agreement is terminated and the defendant has the right to back out of his promised performance (the guilty plea), just as a binding contractual duty may be extinguished by the nonoccurrence of a condition subsequent.”). Courts similarly base remedies for breaches of plea agreements on those developed in private contract law. See *Frye*, 132 S. Ct. at 1411; *Lafler v. Cooper*, 132 S. Ct. 1376, 1388-89 (2012). For an example of a court addressing disputes about whether either party breached a plea agreement, see *United States v. Ataya*, 864 F.2d 1324, 1338 (7th Cir. 1988). See generally Nancy J. King, *Judicial Oversight of Negotiated Sentences in a World of Bargained Punishment*, 58 STAN. L. REV. 293 (2005) (advancing several methods of improving judicial oversight of the plea bargaining process).

[I]f the prosecutor is interested in “buying” the reliability assurance that accompanies a waiver agreement, then precluding waiver can only stifle the market for plea bargains. A defendant can “maximize” what he has to “sell” only if he is permitted to offer what the prosecutor is most interested in buying.¹⁸¹

These conceptual guideposts of markets and contract supported the turn to unregulated prosecutorial discretion and cut against judicial oversight of party behavior or substantive agreements. The Court rejected lower courts’ post-*Santobello* doctrines of plea bargain fairness by reconceiving fairness in constitutional law to match the notion of fairness that prevails in the private market realm. In the private sphere, fairness means autonomy from state regulation to compete against or negotiate with others and enter into contracts, with few legal standards about fair bargaining practices, conditions, and contract terms.

Conceptualizing plea bargaining as just another voluntary interaction between private parties undercuts reasons to regulate prosecutorial behavior. Any “difficult choices” that prosecutors manufacture for defendants are taken as an “inevitable attribute of any legitimate system which tolerates and encourages the negotiation of pleas.”¹⁸² Judges should be concerned with little more than whether a defendant had competent legal assistance and had not “misunderstood the choices that were placed before him”; constitutional law has almost nothing to say about whether choices the state creates for defendants are fair or coercive.¹⁸³ Fairness requires no specific attention because plea bargains, like private contracts, arise

181. United States v. Mezzanatto, 513 U.S. 196, 208 (1995).

182. Corbitt v. New Jersey, 439 U.S. 212, 219 n.9 (1978) (quoting Chaffin v. Stynchcombe, 412 U.S. 17, 31 (1973)).

183. *Id.* at 225 (emphasis added); *see also* Boykin v. Alabama, 395 U.S. 238, 242 (1969) (emphasizing the voluntariness of the guilty plea). However, in some states, agreements between prosecutors and defendants are enforceable only after a court has approved the agreement in a formal judgment. *See, e.g.*, FLA. R. CRIM. P. 3.172(g) (agreement not binding on either party until approved by court). Limited exceptions apply primarily if the defendant performed his part of an agreement to his potential detriment, often by voluntarily submitting to forensic testing. For representative decisions taking this view and citing other courts adopting this approach, see State v. Vixamar, 687 So. 2d 300, 301-02 (Fla. Dist. Ct. App. 1997), and Commonwealth v. Scuilli, 621 A.2d 620, 622-26 (Pa. Super. Ct. 1993).

from “a process mutually beneficial to both the defendant and the State.”¹⁸⁴

With this transformation, *Santobello*’s fairness requirement lost any real force. Rather than viewing prosecutors as state officials on whom public law imposes distinctive obligations, constitutional law now largely treats prosecutors and defendants in the plea negotiation context like any two private actors competing and negotiating in a free market. By the time of its 1984 decision in *Mabry v. Johnson*, the Court had effectively done away with *Blackledge*-style scrutiny of bad prosecutorial motives and rejected any fair bargaining standard for prosecutors higher than that for other parties.¹⁸⁵ Constitutional limits and judicial oversight for prosecutors would only impair the efficiency of adjudication. Likewise, *Bordenkircher v. Hayes*, which rejected judicial supervision of charging tactics to ratchet up pressure to plead guilty,¹⁸⁶ serves the ambition of making plea bargains quicker and more likely.¹⁸⁷ The same is true of *United States v. Batchelder*, which held that federal prosecutors have complete discretion in each case to choose between two identical statutes that carry separate punishments.¹⁸⁸ On this point, like others, state courts have overwhelmingly adopted the same rule under state law.¹⁸⁹

184. *Corbett*, 439 U.S. at 222.

185. 467 U.S. 504, 509 (1984).

186. See *supra* note 35 and accompanying text.

187. 434 U.S. 357, 364 (1978) (“[B]y tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor’s interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty.”).

188. 442 U.S. 114, 123-25 (1979).

189. See *Hart v. State*, 702 P.2d 651, 662 (Alaska Ct. App. 1985) (adopting *Batchelder*, and noting that the “majority” of states have done the same); *Commonwealth v. Parker White Metal Co.*, 515 A.2d 1358, 1368-69 (Pa. 1986) (upholding statute permitting prosecutors to choose between summary and misdemeanor offense for same wrongdoing on *Batchelder* grounds); *State v. Rooney*, 19 A.3d 92, 102 (Vt. 2011) (adopting *Batchelder* position as state law and observing that “most states have embraced the reasoning in *Batchelder*”); *Johnson v. State*, 61 P.3d 1234, 1248 (Wyo. 2003) (following *Batchelder* along with “[m]any of our sister jurisdictions”). A small number of states depart from the *Batchelder* approach, mostly in pre-*Batchelder* decisions. See *People v. Marcy*, 628 P.2d 69, 74 (Colo. 1981) (“In sharp contrast to *Batchelder*, we have held consistently that equal protection of the laws requires that statutory classifications of crimes be based on differences that are real in fact and reasonably related to the general purposes of criminal legislation.”); *Spillers v. State*, 436 P.2d 18, 23 (Nev. 1968) (“A state may not prescribe different penalties for the same offense without violating the equal protection concept.”), overruled in part by *Bean v. State*, 465 P.2d 133 (Nev. 1970); *State*

The Court's most recent decisions on plea bargaining fit this arc as well, despite modestly increasing one aspect of constitutional regulation. *Missouri v. Frye*,¹⁹⁰ *Lafler v. Cooper*,¹⁹¹ and *Padilla v. Kentucky*¹⁹² all strengthened the constitutional right to effective assistance of counsel in the context of plea negotiations. Those decisions are committed to ensuring a defendant's informed engagement in the bargaining process. In particular, a defendant must be told of a prosecutor's plea bargain offer, receive competent advice on his prospects at trial, and be informed of certain kinds of nonpunitive collateral consequences, such as deportation, that follow from conviction.¹⁹³ Those decisions aim to ensure a defendant's capacity to negotiate about—or at least choose among—the options that prosecutors define. But none restrict coercive *Bordenkircher*-like plea bargaining tactics nor otherwise regulate plea agreement terms or negotiating practices.

CONCLUSION

The history of American criminal justice includes multiple practices by which executive power over criminal prosecution was constrained and supervised rather than left effectively unfettered. “Privatizing” prosecutorial authority—allowing that power to be shared with private actors—was one such check. Others arose from the various powers judges exercised: occasionally in a few states by appointing prosecutors or compelling them to explain charging decisions, but more often by their authority to control the pursuit or dismissal of charges that prosecutors initiated. Two broad sets of ideas led American criminal practice away from a balanced legal structure for criminal prosecution and in particular for plea

v. Chavez, 419 P.2d 456, 458 (N.M. 1966) (when two statutes “condemn the same act” but carry different penalties, “they are irreconcilable” and prosecution must proceed under the more recently enacted because the legislature’s “last expression would control.” Otherwise, law enforcement officials could “subject one person to the possibility of a greater punishment than another who has committed an identical act,” which would violate equal protection guarantees); State v. Pirkey, 281 P.2d 698, 702-03 (Or. 1955) (holding statute unconstitutional that allowed same conduct to be charged as either a felony or a misdemeanor); State v. Shondel, 453 P.2d 146, 148 (Utah 1969).

190. 132 S. Ct. 1399 (2012).

191. 132 S. Ct. 1376 (2012).

192. 559 U.S. 356 (2010).

193. *Frye*, 132 S. Ct. at 1408; *Lafler*, 132 S. Ct. at 1389-90; *Padilla*, 559 U.S. at 374.

bargaining: the idea that all key aspects of prosecution are exclusively the province of executive officials, and the belief that interaction between prosecutors and defendants works, and should work, much like the interaction of private parties in ordinary market settings. Neither of these ideas—perhaps more obviously the second—are compelled by federal constitutional law. But the Supreme Court elected to build constitutional doctrines on these premises, and a remarkable degree of state courts, as well as legislatures, adopted the same view. The result has been that the U.S. practice of plea bargaining is remarkably unregulated, even compared to other common law jurisdictions such as England. Both of these ideas, and the normative visions that support them, will have to change before it is possible to regulate plea bargaining sufficiently to bring its practice within a plausible conception of the rule of law.