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New York University School of Law



**October 22nd, 2026, from 4-7 pm
Lester Pollock Room, FH, 9th Floor**

Colloquium in Legal, Political, and Social Philosophy

**Conducted by
Sophia Moreau and Liam Murphy**

**Speaker: Daniel Fryer, The University of Michigan
Paper: The Reform Shell Game**



Colloquium Website: <http://www.law.nyu.edu/node/22315>

Dear NYU Colloquium in Legal, Political and Social Philosophy Participants: Thank you for engaging with this draft. I am hoping that the paper will spark an interesting and productive conversation. And I am very much looking forward to our discussion and your feedback. Any comments are welcomed at the colloquium or at a later time (fryerd@umich.edu). Please do not circulate without permission.

-Daniel Fryer

The Reform Shell Game

“I think the joke is that the prosecutor is a cop in a suit and the judge is a prosecutor in a robe.”¹

Introduction

Criminal justice reformers often identify a particular institution as the place where especially consequential power resides. Here’s a pitch for police: “Police officers, as gatekeepers of the criminal justice system, hold almost exclusive authority—by way of citations, arrests, and even physical force—to enforce and regulate the law.”² Here’s one for judges: “Judges are at the center of the criminal justice system and should be leaders in acting to reduce, and eventually eliminate, mass incarceration in our country....It is the judge who will determine whether or not the defendant will lose his or her liberty and, if so, for how long.”³ Here’s another one for legislatures: “Mass incarceration exists because our lawmakers created it.”⁴ And, of course, we can’t leave prosecutors out: “[A]ny efforts at meaningful systemic criminal justice reform must start with the prosecutor. As the most powerful

¹ Paul Wright, *Interview with Conrad Black, Former Federal Prisoner and Millionaire Media Magnate*, PRISON LEGAL NEWS (Sept. 15, 2012), <https://www.prisonlegalnews.org/news/2012/sep/15/interview-with-conrad-black-former-federal-prisoner-and-millionaire-media-magnate/>.

² S. Rebecca Neusteter, Ram Subramanian, Jennifer Trone, Mawia Khogali & Cindy Reed, Vera Inst. of Just., *Gatekeepers: The Role of Police in Ending Mass Incarceration* (2019), <https://vera-institute.files.svdcn.com/production/downloads/publications/gatekeepers-police-and-mass-incarceration.pdf?dm=1568649069>.

³ Judge Robert Sweet & James Thompson, *The Role of Judges, in* DECARCERATING AMERICA: FROM MASS PUNISHMENT TO PUBLIC HEALTH, 83 (Ernest Drucker ed., The New Press 2018).

⁴ Lauren-Brooke Eisen, *Fact Sheet: A Blueprint for Reducing Mass Incarceration in America*, BRENNAN CTR. FOR JUST. (Dec. 9, 2016), <https://www.brennancenter.org/our-work/research-reports/fact-sheet-blueprint-reducing-mass-incarceration-america>.

actors in our criminal legal system, prosecutors have been and remain one of the principal drivers of mass incarceration.”⁵

That last one is especially important because the prosecutor-centered account has dominated criminal justice scholarship in recent years.⁶ Scholars, activists, judges—and even presidents—have hailed prosecutors as the key to criminal justice reform.⁷ As a result, many reformers have come to view the prosecutor’s office as a particularly effective site for transforming the criminal justice system—going so far as to claim that “[f]or all intents and purposes, prosecutors *are* the criminal justice system.”⁸

But prosecutors haven’t always occupied that position. A few years earlier, the reformer’s gaze was fixed on the legislature: if lawmakers wrote the laws that produced excessive punishment, then changing those laws was the obvious route to changing the system.⁹ Before that, judges occupied a comparable position as the reformer’s favorite target. Sentencing reformers sought to constrain judicial discretion—and judges themselves were cast as officials getting in the way of everyone receiving fair and equitable treatment in the criminal legal system.¹⁰ The institution at the center of reform therefore shifts over time—from judges, to legislatures, to prosecutors, and, sometimes, back again to one of those institutions,¹¹ with the police occasionally making an appearance on some accounts. Our collective memories of these shifts are remarkably short. Each generation of reformers

⁵ Brandon Hasbrouck, *The Just Prosecutor*, 99 WASH. U. L. REV. 627 (2021).

⁶ Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 174 (2019) [Bellin, *Power of Prosecutors*] (discussing the longstanding and increasingly frenetic claims about prosecutorial preeminence).

⁷ Daniel Fryer, *Race, Reform, & Progressive Prosecution*, 110 J. Crim. L. & Criminology 769 (2020) [Fryer, *Progressive Prosecution*] (collecting comments from various figures about the merits of a prosecutor-led reform movement).

⁸ Erik Luna & Marianne Wade, *Introduction to Prosecutorial Power: A Transnational Symposium*, 67 WASH. & LEE L. REV. 1285, 1285 (2010).

⁹ DOUGLAS HUSAK, *OVERCRIMINALIZATION* 3 (2007) (“[the most pressing problem with the criminal law today is that we have too much of it.]” [Husak, *Overcriminalization*]; Todd Haugh, *Overcriminalization's New Harm Paradigm*, 68 VAND. L. REV. 1191, 1194 (2015) (“[O]vercriminalization can be described as the proliferation of criminal statutes and overlapping regulations that impose harsh penalties for unremarkable conduct (i.e., conduct that should be governed by civil statute or no statute at all). Those most closely studying the phenomenon regard it as a vexing problem of the criminal justice system; some say it is the most pressing problem in criminal law today.”)

¹⁰ JONATHAN SIMON, *POOR DISCIPLINE: PAROLE AND THE SOCIAL CONTROL OF THE UNDERCLASS, 1890-1990* 230-239 (1993) (discussing sentencing reform efforts in the 1970s aimed at reducing the harmful impact of judges); Nancy Gertner, *Sentencing Reform: When Everyone Behaves Badly*, 57 ME. L. REV. 569, 573 (“By 1984 sentencing reform seemed inevitable... To the right were those who believed that sentencing reform was important to rein in liberal judges. To the left were those who believed that reform was needed to rein in the draconian sentencers, and especially racially-biased judges.”).

¹¹ See, e.g., RACHEL E. BARKOW, *JUSTICE ABANDONED: HOW THE SUPREME COURT IGNORED THE CONSTITUTION AND ENABLED MASS INCARCERATION* 243 (2025) (“The Constitution anticipated the danger of a government committed to mass incarceration, and it stands at the ready to stop it across the nation. We just need a Supreme Court willing to enforce it and not one content to leave justice abandoned.”).

come to regard their favorite institution as essential, treating its dominant capacity to reshape the system as a newly discovered phenomenon. Yesterday's star becomes today's supporting cast,¹² while the newly identified institution steps into the spotlight as if it has been running the system all along.

At a minimum, this seems to be a recurring scholarly mistake. And, hopefully, the challenge that I issue in this paper is enough to put us on guard of the repeated tendency to locate criminal justice power in whichever institution happens to be under significant scrutiny by commentators in the moment. But I want to suggest something even more troubling than a scholarly misstep: the structure of the criminal justice system itself can make power appear to reside in one institution while conditions that make this form of power possible lie elsewhere. What I mean is: power in the criminal justice system is neither fixed nor neatly allocated. It's *contingent*, because an institution's ability to exercise power often depends on what other institutions permit, require, or do. And it's also *overlapping*, because the powers we typically associate with one institution are often possessed, sometimes in different forms, by others. The power that we see one institution exercising may depend on powers not exercised elsewhere; and when one institution stops exercising that power, the problem that reformers aim to correct may be flaunted by another institution. This matters for reformers because they are not merely trying to study institutional power—they are often trying to eliminate the flaws in the system.¹³ But if power is contingent and overlapping, changing one institution does not necessarily

¹² See, e.g., Jacob Schuman, *Prosecutors in Robes*, 77 STAN. L. REV. 629, 635 (2025) (“This Article’s structural analysis of community supervision also suggests *a new way to reform the system*. The conventional wisdom among legal scholars is that the criminal justice system is flawed because it *gives too much power to prosecutors and too little to judges*... In this Article, however, I argue that judge-initiated revocations *give too much power to judges and too little to prosecutors*.”).

¹³ In this sense, I believe the philosopher writing about power in the context of criminal justice reform ought not lose place of its role in potentially guiding how one would perceive the implications for a reform project. This approach is, admittedly, not in step with the way that some philosophers have perceived the role of political philosophy. For instance, in his thought-provoking discussion about the aims of political philosophy, Jeremy Waldron concludes his essay with the following:

I guess most of us—authors, readers, fellow-symposiasts—are from time to time asked the following question by those not cursed with philosophical pretensions: ‘What’s the point of your work? What difference is it going to make? How is it going to help the fight against poverty, racism, and sexism?’ My bottom line is that we are not really doing political philosophy, and thus paradoxically that we are probably not really being of much use, unless we are largely at a loss as to how to answer that question.

Jeremy Waldron, *What Plato Would Allow*, in NOMOS XXXVII: THEORY AND PRACTICE 138-78 (Ian Shapiro & Judith Wagner Decew eds., 1995). My aim, however, has been to ensure that I am not left at a loss when those questions arise. Indeed, consideration of the fact that the aim of the reformist project is to fight present forms of injustice is sometimes my starting place—even when I’m critiquing the assumptions behind those projects. See, e.g., Fryer, *Race, Reform, and Progressive Prosecution*, supra note __, at 772 (“We are unlikely to make substantial progress in our reform efforts unless we examine the principles underlying the movement the aims it expects to achieve.”); Daniel Fryer, *Idealizing Abolition*, 17 CRIM. L. & PHIL. 553, 555 (2023) (“What abolitionists are doing is not merely a philosophical exploration of the issues. Instead, their activist position aims at providing proposals that would be beneficial to our present society.”); Daniel Fryer, *Reforming Abolition*, 124 Mich. L. Rev. 187, 218-19 (2025) (“Ultimately, how receptive abolitionists should be to various conceptions of abolition depends on which understanding serves the project of abolition best.”); Daniel Fryer,

eliminate the capacity that institution was exercising or the problems it was creating. The consequence may instead be that any particular reform has a weaker effect than anticipated or, perhaps, simply shifts where the underlying problem appears.

The result can look a lot like a shell game. A reformer identifies where power appears to reside, takes control of that institution or its capacity to commit the harm, and then discovers the power to achieve the necessary reform lies elsewhere. We think of the police as gatekeepers who initiate the criminal process. But after reforming the police we discover that prosecutors can play that role too, and so can judges—even if they don’t typically do so.¹⁴ Prosecutors shape punishment through charging, plea bargaining, and sentencing recommendations. But police and private parties may also possess charging powers, judges have to accept the plea put forth, and those sentencing recommendations are sometimes merely that: *recommendations* that the court may or may not follow.¹⁵ And legislatures may write the law. But through discretionary choices, police, prosecutors, and judges determine what that law is on the ground.¹⁶ The upshot of this is that when it comes to the decisions that determine whether someone could avoid being investigated, charged, detained, or sentenced, there is rarely one decisionmaker that controls the decision. Power can shift. And it can be hiding within the domain of an institution that we did not realize possessed it. The concern here is that reformers may mistake the location of a power as its sole source. Taking away one institution’s ability or desire to produce an objectionable outcome may simply relocate the problem elsewhere. The “reform pea” does not always stay still.

That’s bad enough news for reformers—but it also underplays the problem. The powers that reformers must confront after their efforts may be powers that do not appear while everyone is moving in the same punitive direction. Suppose everyone agrees that we should be pursuing a “tough-on-crime” agenda. Why quarrel about who gets to decide? Officials can just defer to one another. Legislatures supply the statutes. Police investigate and arrest. Prosecutors charge. Judges sentence. Everyone congratulates the others for doing their jobs. It’s only when reformers gain traction and push against the punitive norm that these other institutions have reason to exercise their dormant powers. The effect is that liberty becomes the exception—rather than the norm—in our system. The

What's the Point of Reparation?, 61 TULSA L. REV. 335 (2026) (noting that answering the title question “will help us gain clarity on other complicated issues, such as what reparation ought to look like and whether demands for reparation are morally valid”).

¹⁴ See *infra* ____.

¹⁵ See *infra* ____.

¹⁶ See *infra* ____.

reformist wager is that getting an institution to behave differently can eliminate the ills of the criminal justice system. But uncovering the power of one institution may simply make another institution more consequential.

My argument proceeds in three parts. Part I begins with prosecutors, because the rise of prosecutor-centered accounts provides an especially clear illustration of the issue I want to identify. This part traces how prosecutors became the center of criminal justice power and considers what the progressive prosecution movement reveals about that account. Because the system was constructed to make it appear as if prosecutors had the unilateral power to end mass incarceration, reformers took the bait, which resulted in the realization that there were dormant powers elsewhere in the criminal justice system that were easy to overlook. The point of the section is not to show that prosecutors aren't powerful, but that their power is contingent on the actions of other institutions.

In Part II, I direct my attention to other officials. Here we start to see how the reform shell game operates. Although the prior discussion of prosecutors may suggest a unique feature to prosecutors, I explain why that would be the wrong lesson to draw. I show how other criminal legal institutions possess contingent and overlapping powers that can misdirect the aims of reform.

In Part III, I reveal a deeper implication of the problem that can be easy to miss: when we have contingent and overlapping powers in the criminal legal system, liberty is no longer the norm—it's the exception. This part demonstrates that the contingent and overlapping powers in the criminal law raises both separation of powers and checks and balance concerns.

The conclusion asks a fundamental question that is encouraged by my analysis: is the shell game winnable for reformers? If power can shift among institutions, and liberty does not fill the space left by its retreat, what would it take for us to do more than simply move the problems of the criminal legal system around?

I. In Search of Power

The recent progressive prosecution movement is a useful place to begin because it provides a current demonstration of the shell game at work. For years, reformers were told that prosecutors ruled the criminal legal system and, as a result, sought to end mass incarceration by getting prosecutors on

their side. But when prosecutors stopped advancing the punitive practices we commonly associate with them, other officials did not follow their lead. Rather, reformers were exposed to the extent to which prosecutorial power was contingent on other actors deferring to prosecutors' actions and not exercising their own powers. The point of this section is to advance a critical step in the argument: changing an institution in which power is most visible can reveal, rather than eliminate, the ways in which the system can produce harmful outcomes.

A. Finding Power in the Prosecutor

Scholars have spent the last few decades pointing their finger at prosecutors. They have blamed prosecutors for most of the ills of the American criminal justice system,¹⁷ argued that “good people” shouldn’t pursue careers as prosecutors,¹⁸ and portrayed prosecutors as the key explanatory figures for mass incarceration. Some commentators go further. It’s not just that prosecutors are *an* important part of the justice process. One account casts the prosecutor as “*the* pivotal figure in the justice process.”¹⁹ Another suggests “the prosecutor *is* the criminal justice system.”²⁰ Rachel Barkow has referred to prosecutors as the “leviathan.”²¹ Ben Capers agrees, observing that “[n]o word seems more apt.”²² The reason, scholars tell us, is that “the institution of the prosecutor has more power than any other in the criminal justice system.”²³ Or: “[t]he American prosecutor rules the criminal justice system, exercising almost limitless discretion and virtually absolute power.”²⁴ Or, if you want to know what that “greater stature and strength than the Natural”²⁵ that Hobbes was referring to

¹⁷ David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. Crim. L. & Criminology 473, 474 (2016) [Sklansky, *Prosecutorial Power*] (“Much of what is wrong with American criminal justice—it’s racial inequity, its excessive severity, its propensity for error—is increasingly blamed on prosecutors.”).

¹⁸ Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355 (2001).

¹⁹ Jack M. Kress, *Progress and Prosecution*, 423 ANNALS AM. ACAD. POL. & SOC. SCI. 99, 100 (1976).

²⁰ Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413, 1415 (2010).

²¹ Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 898 (2009) [Barkow, *Institutional Design*]. See also, Josh Gupta-Kagan, *Rethinking Family-Court Prosecutors: Elected and Agency Prosecutors and Prosecutorial Discretion in Juvenile Delinquency and Child Protection Cases*, 85 U. CHI. L. REV. 743, 757 (2018) (“Prosecutors are the ‘Leviathan’ in our criminal justice system.”).

²² Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561, 1571 (2020).

²³ Jason Krag, *Prosecutorial Analytics*, 94 WASH. U. L. REV. 771, 771 (2017).

²⁴ Sklansky, *Prosecutorial Power*, supra note __, at 480–81.

²⁵ THOMAS HOBBS, *LEVIATHAN* 127–28 (RICHARD TUCK ED., CAMBRIDGE UNIV. PRESS 1996) (1651).

looks like today: “[Prosecutors] really hold all the effective power, reporting to no one save God, or their own ambition.”²⁶

I could go on.²⁷ But you get the picture. There is a persistent theme that prosecutors control the legal system.²⁸ And, at some point, one is left wondering whether there’s anyone left in the system not waiting for prosecutors to tell them what to do.

It’d be easy to chalk this up to unnecessary hyperbole and move on. But this view has had practical consequences. Language matters. And the myth of the all-powerful prosecutor has, for instance, led those who are interested in correcting the problems of our criminal justice system to focus their attentions on prosecutorial power in recent years. At first, the goal was to regulate them. Reformists viewed prosecutorial power as an impediment that needed to be constrained. Because prosecutors wield “unfettered power,”²⁹ reformists sought more transparency as a way of making them more accountable to the public,³⁰ tried to regulate prosecutors’ ability to coerce pleas,³¹ attempted to equalize the funding between prosecutors and public defenders,³² among other efforts.³³ The general thought here was that we could solve the problems of the criminal justice system if we constrained prosecutorial power. And the proposals to do so became so prevalent that one scholar commented: “It has now become common, at least among progressive criminal justice scholars, to argue that *the criminal justice system could be fixed—or at least greatly improved—if we simply regulated prosecutors more.*”³⁴

²⁶ Adam Gopnik, *How We Misunderstand Mass Incarceration*, NEW YORKER (Apr. 10, 2017), <https://www.newyorker.com/magazine/2017/04/10/how-we-misunderstand-mass-incarceration>

²⁷ See, e.g., Fryer, *Progressive Prosecution*, supra note __ (discussing exaggerated statements about prosecutorial power).

²⁸ See Bellin, *Power of Prosecutors*, supra note __, at 171 (noting “an unchallenged modern consensus holds that prosecutors rule the criminal justice system.”)

²⁹ Dwight L. Greene, *Abusive Prosecutors: Gender, Race & Class Discretion and the Prosecution of Drug-Addicted Mothers*, 39 BUFF. L. REV. 737, 738 (1991).

³⁰ Marc L. Miller & Ronald Wright, *Reporting for Duty: The Universal Prosecutorial Accountability Puzzle and an Experimental Transparency Alternative*, in THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE 392, 392 (Erik Luna & Marianne L. Wade eds., 2012) (“The need for accountable criminal prosecutors runs deep. Prosecutors enforce the most serious moral commitments of a society and control the most serious punishments that a government can impose, short of waging war. In democratic governments committed to the rule of law, the prosecutor must exercise this power responsibly and be able to demonstrate the fact to the public.”).

³¹ Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CAL. L. REV. 1117, 1151–60 (2011).

³² Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219 (2004); Eve Brensike Primus, *Defense Counsel and Public Defense*, in REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESSES 121 (Erik Luna ed. 2017).

³³ See Capers, *Against Prosecutors*, supra note __, at 1561–62 (describing efforts to regulate prosecutorial power).

³⁴ Id.

More recently, however, reformists stopped trying to regulate prosecutors and decided to try to use prosecutorial power for good. Instead of viewing prosecutorial power as an obstacle they had to overcome, reformists have attempted to leverage prosecutorial power to advance progressive change.³⁵ Thus, they have made great efforts to assist so-called “progressive prosecutors” win elections across the country. Again, the thought here is straightforward: “[I]raditional prosecutors have exercised discretion in ways that have created and exacerbated injustices in the criminal legal system. Progressive prosecutors pledged to use that same well-established discretion to correct these injustices, and they had every reason to believe they had the power to do so.”³⁶ If prosecutors really possess the unchecked power attributed to them, then the progressive prosecutor movement offers an efficient way to reform criminal justice: elect prosecutors that promise to reduce charges, review old sentences, alter plea bargaining practices, and seek lower sentences. “[J]ust as the power and discretion of prosecutors have contributed to mass incarceration and racial disparities in the criminal justice system,” Angela J. Davis writes, “that same power and discretion may be used to institute reforms to correct these injustices.”³⁷ Since the prosecutor *is* the criminal justice system, the reasoning goes, once we elect people who are committed to solving the problems of the criminal legal system, “the system’s injustices should melt away.”³⁸ This internal picture of reform seems so appealing that even President Obama declared: “If you are really concerned about how the criminal justice system treats African-Americans, the best way to protest is to vote.... Do what they just did in Philadelphia and Boston, and elect state’s attorneys and district attorneys who are looking at issues in a new light.” Instead of treating prosecutorial power as inherently threatening, the progressive prosecution movement offered a more optimistic picture: a benevolent Leviathan—an institution with the power to unilaterally change the system, now in the hands of reformers.

Spoiler alert: the system’s injustices didn’t melt away when progressive prosecutors started taking office. Rather, that shift led to other decisionmakers exercising their dormant power to block the reforms advanced by progressive prosecutors. I have more to say about this below, and I’ve said some of it already.³⁹ But before returning to the consequence of the claim about prosecutorial

³⁵ Fryer, *Progressive Prosecution*, *supra* note __, at 776.

³⁶ Angela J. Davis, *Undermining Discretion: The Selective Attacks on Progressive Prosecutors*, 47 CARDOZO L. REV. 579, 603 (2026) [Davis, *Undermining Discretion*].

³⁷ Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 5 (2019).

³⁸ Bellin, *Power of Prosecutors*, *supra* note __, at 174-75.

³⁹ Fryer, *Progressive Prosecution*, *supra* note __, at __.

preeminence, I want to ask where it came from. The answer lies in a history that is, in retrospect, a bit more complicated—and perhaps more surprising—than the familiar story about prosecutorial power suggests.

B. Stuntz's lawmaker

Okay, parts of the history are not that surprising. William Stuntz is often listed as the original authority for the proposition that prosecutors are all powerful. For instance, Jeff Bellin has been highly critical of what he calls the “the prosecutor-king narrative pioneered by Stuntz.”⁴⁰ On Bellin’s telling, “the iconic Bill Stuntz probably deserves the most credit” for the academic commentary about prosecutorial preeminence.⁴¹ This is because Stuntz famously documented the way that “[p]ower accumulated in the hands of a single shadowy actor, the prosecutor.”⁴² In one of the most cited law review articles in the modern era,⁴³ Stuntz argued that “prosecutors [] are the criminal justice system’s real lawmaker.”⁴⁴ And from there, Bellin claims, “the rest of academia fell into line.”⁴⁵ Over time, the view of prosecutors as the “kings of the courtroom” became the dominant picture and “[n]o one bats an eye at scholarly pronouncements like, ‘prosecutors are the criminal justice system,’ ‘[p]rosecutors [r]ule the [c]riminal [j]ustice [s]ystem,’ or ‘[p]rosecutors are the ‘Leviathan’ in our criminal justice system.”⁴⁶ Thus, Bellin tells us: “Today, Stuntz’s view stands triumphant. Commentators assail the ‘prosecutor king’ who presides over the criminal justice system, wielding ‘virtually unchecked powers’ to generate mass incarceration and foster injustice.”⁴⁷

But this is where the story becomes a bit more complicated. No doubt there is some justification for placing the blame on Stuntz for the excessive claims about prosecutorial power that dominate the literature. He does, after all, describe how the criminal justice system concentrates power in prosecutors and he notes that as a practical matter prosecutors’ choices effectively determined who

⁴⁰ Jeffrey Bellin, *Defending Progressive Prosecution: A Review of Charged* by Emily Bazelon, 39 YALE L. & POL’Y REV. 218, 224 (2020) [Bellin, *Defending Progressive Prosecution*].

⁴¹ Bellin, *Power of Prosecutors*, supra note __, at 175.

⁴² Bellin, *Defending Progressive Prosecution*, supra note __, at 219.

⁴³ Bellin, *Power of Prosecutors*, supra note __, at 173 (citing William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001) [Stuntz, *Pathological Politics*]).

⁴⁴ Id.

⁴⁵ Bellin, *Power of Prosecutors*, supra note __, at 173.

⁴⁶ Id.

⁴⁷ Bellin, *Defending Progressive Prosecution*, supra note __, at 220.

would receive criminal penalties.⁴⁸ But from there, the story takes on some of the qualities of an old school game of telephone. Stuntz warns that prosecutors become the real lawmakers *when legislatures write expansive criminal codes*.⁴⁹ The next speaker repeats the warning about prosecutors but ignores the part about legislative action contributing to the power. The next turns prosecutor’s lawmaking power into “more power than any other in the criminal justice system.”⁵⁰ And before long prosecutors are no longer the “real lawmakers” but the “real *rulers* of the American criminal justice system”⁵¹ with “limitless discretion and virtually absolute power.”⁵² By the time we get to the other side of the room, people are saying that “[n]o serious observer disputes that prosecutors drive sentencing and hold most of the power in the United States criminal justice system.”⁵³ And the take-home message becomes that “[m]ass incarceration is made or broken by a bunch of assistant D.A.s and their supervisors and the decisions they make between 10.00 a.m. and noon.”⁵⁴

The irony is clear: what began as a message about prosecutors being empowered by another institution becomes a message about prosecutors being able to change the system without them.⁵⁵ Contrary to what is sometimes assumed, Stuntz stopped short of claiming that prosecutorial power was unilateral.⁵⁶ His claim was that institutional arrangements created incentives for prosecutors and legislatures to work together and diminish the importance of courts.⁵⁷ Indeed, he recognized that criminal law “is the product of a political *system*, a set of institutional arrangements by which power over the law and its application is dispersed among a set of actors with varying degrees of political accountability.”⁵⁸ For Stuntz, it was legislatures’ willingness to write broad criminal codes, that allowed

⁴⁸ Stuntz, *Pathological Politics*, supra note __, at 599 (“Prosecutors are by and large reasonable and decent people, but even reasonable and decent people should not be given the power both to define the law and to adjudicate violations. Power is too concentrated.”).

⁴⁹ Id. at 528 (noting that “legislative power liberates prosecutors, widening their range of charging opportunities”).

⁵⁰ Jason Kreag, *Prosecutorial Analytics*, 94 WASH. U. L. REV. 771, 771 (2017).

⁵¹ Jed S. Rakoff, *Why Prosecutors Rule the Criminal Justice System—and What Can Be Done About It*, 111 Nw. U. L. Rev. 1429, 1436 (2017).

⁵² David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. Crim. L. & Criminology 473, 480–81 (2016).

⁵³ Adam M. Gershowitz, *Consolidating Local Criminal Justice: Should the Prosecutors Control the Jails?*, 51 WAKE FOREST L. REV. 677, 677–78 (2016).

⁵⁴ EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION 99 (2019) (quoting Danielle Sered).

⁵⁵ Id. at xxvii (“The power of the D.A. makes him or her the actor—the only actor—who can start to fix what’s broken without changing a single law.”).

⁵⁶ See Daniel C. Richman, *Overcriminalization for Lack of Better Options: A Celebration of Bill Stuntz*, IN THE POLITICAL HEART OF CRIMINAL PROCEDURE: ESSAYS ON THEMES OF WILLIAM J. STUNTZ 65 (Michael J. Klarman, David A. Skeel, Jr. & Carol Steiker eds., 2012). (“Bill has never suggested that these actors make their moves within a closed universe.”).

⁵⁷ Stuntz, *Pathological Politics*, supra note __, at __ (“Legislators gain when they write criminal statutes in ways that benefit prosecutors. Prosecutors gain from statutes that enable them more easily to induce guilty pleas. Appellate courts lack the doctrinal tools to combat those tendencies.”)

⁵⁸ Id.

prosecutors to elicit guilty pleas. And since most criminal cases are resolved through plea bargaining—and not trials—courts lack the opportunity to exercise their adjudicative function. The pathological politics is not merely a story of prosecutors becoming too powerful—it’s a story about how one institution’s behavior can create the conditions for another institution to exercise power. The important insight is that power exercised by one institution may only be fully intelligible by reference to the decisions—or, perhaps, failures—of another. So, understanding prosecutorial power may be a useful place to begin. But there is a larger problem with how we talk about the criminal justice system lurking in the background.

The takeaway point here is that Stuntz explained how prosecutors have become powerful; but later scholarship has treated prosecutorial power as the starting point. Yes, prosecutors appear to have a lot of power. But that is largely because other actors allow them to. So, Bellin is right to critique the Stuntzian view of the prosecutor king who unilaterally controls the outcomes of the criminal justice system.⁵⁹ But I imagine Stuntz would have also critiqued *that* Stuntzian view. Stuntz’s paper has become a founding document for a view that he doesn’t seem to have quite endorsed himself.

C. Shifting Power

Anyway, my primary goal here is not to vindicate Stuntz. I find his work useful not for identifying the most powerful actor in the criminal justice system, but for showing why formal institutional roles don’t always capture how the system actually works. We do not traditionally think of prosecutors as lawmakers. But when legislatures decide to enact broad and severe criminal codes that cannot be universally enforced, they place *de facto* lawmaking abilities in prosecutors’ hands. Stuntz illuminates what has long been recognized in the sociological literature as a gap between the “law on the books” and the “law in action.”⁶⁰ And the law in action shows that when lawmakers make an

⁵⁹ See Bellin, *Defending Progressive Prosecution*, supra note __, at 224-25 (“Despite its popularity, the prosecutor-king narrative pioneered by Stuntz...is hyperbolic. Prosecutors are not unilaterally doling out America’s criminal justice outcomes. Contrary to the prominent voices quoted...in the academic literature, mass incarceration did not arise because increasingly aggressive prosecutors seized too much power from hapless legislators and judges.”).

⁶⁰ See, e.g., MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY : DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES (1980); Susan Silbey and Austin Sarat, *Critical Traditions in Law and Society Research*, 21 LAW AND SOC. REV. 165, 170-71 (1987) (With a self-consciously empirical commitment, itself a predictable move within the mainstream...scholars explored the consequences and implementation of law and found, much to their surprise, the ineffectiveness of law—the gap between the law on the books and the law in action”); Katherine Beckett, Lindsey Beach, Emily Knaphus, and Ana Seosti, *US Criminal Justice Policy and Practice in the Twenty-First Century: Toward the End of Mass Incarceration*, 40 LAW & POLICY 321 (2018).

overwhelming number of things criminal, other criminal justice actors determine what the law is.⁶¹ Stuntz's account is helpful largely because he details how prosecutors acquire power from decisionmakers who have similar incentives as prosecutors.⁶²

I should add that Stuntz's account is also helpful when we see precisely where he gets things wrong. I noted above that Stuntz argued that "institutional arrangement created incentives for prosecutors and legislatures to work together and diminish the importance of courts."⁶³ At the same time that he promoted prosecutors as the "real lawmakers," Stuntz demoted judges. On his account, when prosecutors and legislatures work together, they "push courts to the periphery."⁶⁴ The thought here is that when legislatures write broad statutes, and prosecutors have the ability to induce guilty pleas, judges don't have the power to do anything about it. He writes: "Guilty pleas, of course, avoid adjudication altogether; they leave courts very little role to play."⁶⁵ Thus, prosecutors are not merely the "real lawmakers," they are also "the system's real adjudicators."⁶⁶ By sidestepping trials, prosecutors take away the judiciary's power to regulate decisions made by prosecutors. The assumption behind this view is that judicial power fades because judges are powerless to veto decisions that are made outside of their courtroom.

That's a bad assumption. When a prosecutor recommends a sentence based on a plea bargain, what they put forward is really that: a recommendation. A judge still has adjudicative power. They can ask questions about the deal, go higher or lower than the recommended sentence, or even reject the plea altogether. Judges, in other words, need not sit by idly and accept every recommendation placed before them, especially when they regard the recommendation as inconsistent with their judicial responsibilities. Though prosecutors and defense attorneys negotiate the plea deal outside of the

⁶¹ Stuntz, *Pathological Politics*, supra note __, at 508 ("In a system structured as ours is, the law on the street may remain unchanged even as the law on the books changes dramatically").

⁶² Id. at 578 ("Legislative crime definition has a natural tendency to become, in practice, prosecutorial crime definition, as legislatures define broad nominal liability rules, leaving prosecutors to determine what behavior actually leads to conviction and punishment").

⁶³ See supra note __.

⁶⁴ Stuntz, *Pathological Politics*, supra note __, at 528 see also, Barkow, *Institutional Design*, supra note __, at 871 ("In the current era dominated by pleas instead of trials, federal prosecutors are not merely law enforcers. They are the final adjudicators in the vast majority of cases.").

⁶⁵ Id. at 528.

⁶⁶ Stuntz, *Pathological Politics*, supra note __, at 578. Even judges repeated this line at times. For instance, while commenting on the effect of plea bargaining on the criminal process, Judge Gerard Lynch stated that "the prosecutor, rather than a judge or jury, is the central adjudicator of facts (as well as replacing the judge as arbiter of most legal issues and of the appropriate sentence to be imposed)...the prosecutor...decides what sentence the defendant should be given in exchange for his plea." Gerard E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading Off?*, 55 STAN. L. REV. 1399, 1404 (2003).

courtroom, this does not mean that judges must necessarily assent. The picture of judges as powerless bystanders to prosecutorial decisionmaking, then, is inaccurate. When judges disagree with prosecutors, they have tools to do something about it.

The progressive prosecution movement has made this point difficult to miss. If judges really lacked the tools to combat prosecutorial actions, then when progressive prosecutors took office, they should have been able to successfully implement their reform policies without judicial intervention. They weren't. Instead, the deference that prosecutors long enjoyed while pushing a tough-on-crime agenda was quickly curtailed when they began to advance policies aimed at ending mass incarceration. As the sociologist Rachel Bowman puts it, "in response to the election of a progressive prosecutor, judges began exerting regulatory powers that they had not previously been using."⁶⁷ This includes "rejecting plea agreements, contesting dismissal decisions, and questioning decisions to not request cash bail."⁶⁸ One prosecutor described the experience as this: "It's gone from [judges] trusting us to do what we were supposed to do to wanting to question almost everything."⁶⁹ Another states that they "did not recall judges questioning prosecutors' dismissal decisions under the previous lead prosecutor—something that had become commonplace under the progressive administration."⁷⁰ Remarkably, not all prosecutors have this tenuous relationship with judges. Some attorneys working in jurisdictions led by progressive prosecutors note that their relationship with judges improves once they show they are "willing to 'take serious cases seriously.'"⁷¹ But this usually comes down to the fact that they will advance the traditional, non-reformist goals of prosecutors' offices. That is, they are able to avoid judicial roadblocks if they are "still being tough on serious, violent crime."⁷² In short, the progressive prosecution movement demonstrates that the power that prosecutors have is a contingent, not absolute, power that can vary depending on the goals they are pursuing.⁷³ When judges defer, prosecutors have a great deal of power; but when judges resist them, prosecutors are functionally less powerful. The movement, therefore, supplies a lesson for reformists operating on assumptions about how institutions conventionally function: don't mistake an institution's failure to exercise a power as

⁶⁷ Rachel Bowman, *Disruption in the Court Community: Understanding the Barriers to Prosecution Reform*, 53 CRIMINAL JUSTICE AND BEHAVIOR 678, 685 (2026).

⁶⁸ Id.

⁶⁹ Id.

⁷⁰ Id.

⁷¹ Id.

⁷² Id.

⁷³ Cf. William J. Stuntz, *Reply: Criminal Law's Pathology*, 101 MICH. L. REV. 828, 830 (2002) ("[T]here is nothing cyclical about prosecutorial power. At all times, it grow.... The number and scope of the delegations are constantly increasing. Prosecutorial power does not ebb and flow. It always flows.").

the institution not possessing the power. If judges are pushed “to the periphery,” it’s because they are comfortable sitting there.

And this is not a peculiarity of judicial power. Other decisionmakers too have demonstrated their own abilities to thwart prosecutors who no longer push a tough-on-crime agenda. In so doing, they have taken “actions that were never taken against traditional prosecutors.”⁷⁴ Governors have, for instance, taken away death penalty eligible cases from progressive prosecutors who have declined to pursue the death penalty.⁷⁵ And they have also relied on creative interpretations of existing laws to remove prosecutors from office when they have made blanket refusals to prosecute certain types of offenses.⁷⁶ Legislatures have likewise dampened traditional notions of prosecutorial power: they have created laws giving state attorney general offices concurrent jurisdiction over the prosecution of cases that progressive prosecutors fail to pursue and passed laws creating agencies with the power to remove elected prosecutors who decline to prosecute certain offenses.⁷⁷ This makes progressive prosecutors less effective—and sometimes leads to them stepping away from the project of progressive prosecution altogether. In one instance, Kimberly Gardner, the former Circuit Attorney of St. Louis who ran on a progressive platform, went so far as to broker a deal to block legislative takeover of the city’s prosecutor’s office if she resigned.⁷⁸ After her resignation, leaders from the Missouri House of Representatives issued a statement declaring the following: “We have achieved an important victory in restoring law and order in the City of St. Louis with this resignation...Addressing the violent crime crisis that has destabilized the St. Louis region has been one of our highest priorities this session which has included holding the Circuit Attorney accountable for the willful neglect of her constitutional duties.”⁷⁹ Police have also resisted progressive prosecutors. They have continued to overcharge and bring low-level cases forward even when they know prosecutors will not move forward with them, which create impediments for reforms by producing inefficiencies that force prosecutors to spend institutional resources on things unconnected to their progressive agenda.⁸⁰ Moreover, after

⁷⁴ Davis, *Undermining Discretion*, supra note __, at 603.

⁷⁵ Fryer, *Progressive Prosecution*, supra note __, at 787.

⁷⁶ Press Release, Off. of Governor Ron DeSantis, Governor Ron DeSantis Suspends State Attorney Andrew Warren for Refusing to Enforce Florida Law (Aug. 4, 2022), <https://www.flgov.com/eog/news/press/2022/governor-ron-desantis-suspends-state-attorneyandrew-warren-refusing-enforce>; Fla. Const. art. IV, § 7(a) (permitting the governor to suspend state officers “for malfeasance, misfeasance, neglect of duty, drunkenness, incompetence, permanent inability to perform official duties, or commission of a felony”); Davis, *Undermining Discretion*, supra note __, at 604.

⁷⁷ Fryer, *Progressive Prosecution*, supra note __, at 787.

⁷⁸ Davis, *Undermining Discretion*, supra note __, at 616.

⁷⁹ Summer Ballentine and Jim Salter, Embattled 1st Black St. Louis Prosecutor Kim Gardner Resigns (May 4, 2023), <https://apnews.com/article/st-louis-prosecutor-kim-gardner-6a1051e4c47bf7c2e423c8def86e23e5>.

⁸⁰ Bowman, supra note __, at 688.

progressive prosecutors publicly made commitments to not prosecute nonviolent offenses, police officers increasingly brought additional charges of assaulting a police officer along with those nonviolent offenses to perhaps increase the likelihood that a defendant would be prosecuted.⁸¹ And even the general public, who were long thought to be mere outsiders to the criminal process, have found a way into the game: recall efforts. In California, voters have successfully recalled a few progressive prosecutors, while voters elsewhere have made serious efforts to achieve the same.⁸² These powers did not become newly available when progressive prosecutors took office. Rather, they remained largely dormant until progressive prosecution exposed their existence.

In sum, the story began with a search for power. Reformists dissatisfied with criminal justice institutions discovered that prosecutors were the system's most powerful actor and decided to try to put that power to good use. Stuntz is often viewed as an important character in the story, though he is perhaps an odd authority for the proposition that prosecutors possess unilateral power to change the system: his account emphasized that prosecutorial power was created under political incentives that depended on legislatures deferring to prosecutors instead of contesting their choices. At the same time, however, Stuntz underestimated the power of other officials to disrupt prosecutorial power. This account may have made sense in the world it was meant to describe: a society where decisionmakers had a similar appetite for punishment. However, it was less useful when prosecutors began pursuing a reform agenda. Reformists then discovered that prosecutorial power was contingent on other actors not exercising their power of interference. When prosecutors refuse to advance the tough-on-crime agenda, judges can stop accepting their recommendations, police can resist, lawmakers can change the rules, and voters can intervene. What appeared as prosecutorial omnipotence was in fact something less dramatic: other decisionmakers were not so much powerless as agreeable—silently deferring because they happened to be onboard with the agenda prosecutors were pursuing.

II. The Reform Shell Game

Since prosecutors do not have the power to end mass incarceration, it may be tempting to ask whether another criminal justice actor does. Please, don't. I get how the argument would go.

⁸¹ Rachel E. Barkow, *Can Prosecutors End Mass Incarceration?*, 119 MICH. L. REV. 1365, 1377 (2021).

⁸² Davis, *Undermining Discretion*, *supra* note ___, at 625-637 (discussing recall efforts in California and Virginia).

Something like this: Stuntz is known for placing prosecutors centerstage, but his account contains an underappreciated supporting actor—lawmakers. If prosecutorial power depends in substantial part on legislature deferring to their actions, perhaps reformists have been looking at the wrong end of the transaction. Rather than concentrating on the actor who receives the power, reformers may want to instead look at the person who hands it over.

And lawmakers are not the only candidate for the job. Reformers have, at various times, identified nearly every institution in the criminal legal system as the place where they should focus their efforts to eliminate mass incarceration. There is some sense to this: different officials, at different moments, can change what happens in a criminal case. Police are viewed as the gatekeepers of the system: with their arrest power they control who enters the system. Judges appear to have a different kind of power: they interpret the laws that we all live by, deciding the reach of legal principles and determining what is, or is not, encompassed under them. Meanwhile, legislature write the laws defining what is criminal and what the penalty for violating the law should be. Each official, then, offers reformists a plausible point for change: if the problem is excessive policing, change the police; if it's restrictive judicial doctrine, change the judges; if it's overcriminalization, change the legislature; and if it is excessive prosecution, change the prosecutors. The approach is appealing in part because it gives reformists something concrete to do—identify the official with the consequential power and either remove their ability to exercise this power or try to get the official to exercise it differently.

The worry that I have with this approach is that it may simply relocate the problem rather than answering it. The issue is not that reformers are looking at prosecutors when they should be looking at legislatures (or police, or judges). It's that the powers that we tend to associate with a given institution are often shared with others. The apparent problem is that by advancing a reform project centered on prosecutorial power reformists misunderstood the actual power prosecutors possess. But the deeper problem is that institutional power is a lot less exclusive than our traditional legal categories make them out to be. Criminal law is often described in institutional terms. Police investigate, prosecutors charge, judges adjudicate, and legislatures define the boundaries of criminal law. These divisions are so familiar that it is easy to mistake them for territorial boundaries that define each institution's power. But the closer one looks the less clear the borders become. Scholars have recently focused a lot on the ways prosecutors exercise power that seems inherently legislative or adjudicative. But police also exercise powers that look prosecutorial. And judges have at different times exercised powers often viewed as belonging to police and prosecutors. And all of these institutions in some way

define what the law is. Some of these powers, however, may remain dormant when all institutions are collectively pursuing the same tough on crime agenda. When everyone is marching in the same direction, we don't notice who has the capacity to move the line. It is only when an institution changes course that the institution's supposedly distinctive power becomes visible in others.

The discussion below puts pressure on the conventional view and motivates the idea that reformers may, in effect, be caught up in a shell game: looking for the key to reform in one place only to find it resurface elsewhere. Two different features complicate the familiar institutional picture. First, power is *contingent*. This means an institution's ability to exercise its familiar powers often depend on institutional arrangements that other officials help create. Second, power is *overlapping*. This means the powers that institutions hold may not always be exclusive to the institution we commonly associate with it. These are two separate points. The first asks what makes an institution's power possible; the second asks who else possesses the ability to do something similar. Let's look at each in turn.

A. Contingent Power

One reason institutional power can be so difficult to locate is that it is often contingent. An official may appear to possess considerable power not because it belongs to their office alone, but because other decisionmakers have chosen to defer to them. What may look like power concentrated in one institution may in fact depend on the inaction, or acquiescence, of others.

The prior section points out the contingent nature of prosecutors. I have briefly made this point before, while challenging assumptions about prosecutors having the ability to unilaterally end mass incarceration.⁸³ I suggested that the reason it may appear that prosecutors possess this sort of power is because other officials who share common goals have reasons to defer.⁸⁴ And I noted that this power is likely to look less impressive when others stop accommodating it.⁸⁵ In so doing, I pointed

⁸³ Fryer, *Progressive Prosecution*, supra note ____.

⁸⁴ Id. at 786 ("Because of their unique position in our system, deferring to prosecutors is often cheap, efficient, and presents an image of legitimacy. For these reasons, legislatures are willing to accommodate prosecutors because expansive penal codes containing laws that are rarely enforced make crime control inexpensive. Judges are willing to accommodate prosecutors and permit broad plea-bargaining discretion so they can manage large caseloads and rapidly secure convictions. And the police are willing to accommodate prosecutors because, unlike most police officers, prosecutors are formally trained in law and could reasonably detect legal and evidentiary flaws that preclude prosecution and present the appearance that their decisions are legally sound.").

⁸⁵ Id. at 785-90. It is worth noting that I was writing in a relatively early part of the progressive prosecution movement and, as a result, some of my observations were about things that were happening in real time—but others were projections on what *may* happen if reformers put too much weight on prosecutor-centered reform movements. Since

out the imprecision that often characterizes the discussion of the concept of prosecutorial power. I said: “Statements about prosecutorial power are often lumped together in a way that makes it unclear whether scholars are discussing prosecutorial discretion (the decision not to exercise control), prosecutorial influence (the capacity to influence other officials), or prosecutorial primacy (the power prosecutors have relative to other officials). Indeed, sometimes scholars make no effort whatsoever to be clear about what they are referring to when they are discussing prosecutorial power, stating things such as: ‘prosecutors have awesome powers.’”⁸⁶ I then noted scholars’ fixation on the question of who is the “most powerful” actor in the criminal legal system and noted that one may get a different answer depending on which theory of power grounds their analysis.⁸⁷

My intervention may have invited interpretations somewhat different from the one I intended. It was not meant to suggest that prosecutors were less powerful than other decisionmakers; nor was I trying to suggest that prosecutors were alone in having contingent power. When commenting on my essay, however, Jeff Bellin writes: “It likely does not matter to the political actors driving the movement that prosecutors (writ large) are the fourth most powerful criminal justice actors, trailing legislatures (#1), police (#2), and judges (#3). Daniel Fryer’s contribution to the Symposium takes up this question in more detail, reaching similar, if distinct, conclusion.”⁸⁸ There are, no doubt, some similarities to our accounts,⁸⁹ but I wouldn’t want the point of convergence to obscure a more consequential difference between Bellin’s position and my own. On my view, it makes little sense speaking about a hierarchy of power when each decisionmaker’s power is itself contingent. Although it may have appeared that I punted on the issue beforehand when noting that “exactly who has the most power in the criminal justice system is a tricky matter that we need not get into.”⁹⁰ I

then, we have had more examples of decisionmakers asserting previously unused powers to thwart the effort of prosecutors and social scientists have confirmed my initial suspicions. While studying districts that have elected progressive prosecutors, for example, Rachel Bowman found that other decisionmakers responded to newly elected prosecutors pushing a reform agenda by “asserting previously unused regulatory power.” In other words, when prosecutors stopped pushing a tough on crime agenda, other actors did not simply follow suit—they changed what they were willing to do. See, e.g., Bowman, *supra* note __, at 685 (“The findings generally support Fryer’s (2020) assertion that prosecutorial power is contingent on other actors’ acquiescence. The election of a progressive lead prosecutor appears to have mobilized other court actors to maintain the status quo.”).

⁸⁶ Fryer, *Progressive Prosecution*, *supra* note __, at 780-81 (internal citations omitted).

⁸⁷ *Id.* at 782-83.

⁸⁸ Jeffrey Bellin, *Expanding the Reach of Progressive Prosecution*, 110 J. CRIM. L. & CRIMINOLOGY 707 (2020) [Bellin, *Expanding the Reach*].

⁸⁹ For instance, we both reject the idea that prosecutors could unilaterally end mass incarceration and criticize the academic rhetoric about prosecutorial power.

⁹⁰ Fryer, *Progressive Prosecution*, *supra* note __, at 785. I also suggested that reformists may be “better advised to focus on what is referred to as ‘power-to’ rather than ‘power-over.’”

simultaneously said that, for reform purposes, trying to figure out who is the most powerful actor in the criminal justice system is a largely futile exercise: “In an intricately interwoven system such as the current U.S. criminal justice system, trying to isolate an individual as the most powerful actor may prove to be a fruitless task for reformists.”⁹¹ Indeed, some conceptions of power are simply unfit to address the issue I was highlighting.⁹² If power is contingent in the way that I suggest, then figuring out the hierarchy of power is unhelpful for reformers: no actor’s power is entirely their own.⁹³

Put it this way: any institution can look omnipotent when the other institutions around them are content to defer. A legislature, for instance, would appear to “rule the criminal justice system”⁹⁴ if police, prosecutors, and judges devotedly carried out the laws they enacted based on legislative intentions. Police would appear as “*the* pivotal figure in the justice process”⁹⁵ if prosecutors brought forward every case that resulted in a police arrest, judges exercised extraordinary deference to police actions, and lawmakers wrote broad laws that gave them a lot of discretion as to whom to arrest. And judges can appear as “the leviathan”⁹⁶ if judicial opinions were treated as fixed instructions rather than explanations of a case to be interpreted and applied. In all of these examples, what looks like an extraordinarily powerful institution is, in part, an institution that everybody else has decided to empower. The danger for reformers is that they may mistake that deference as a fixed allocation of power—rather than recognizing the contingent nature of power in the criminal justice system. What institutions are able to do when they follow the prevailing tough-on-crime approach is different than what they can do when they push against it.

The upshot of this is that changing the behavior of one institution may not be enough if the power they hope to exercise depends on another institution *not* exercising its dormant power. This, of course, does not make institutional reform futile. But it does suggest that most reform efforts are going to be

⁹¹ Id. at 788 n.113.

⁹² For instance, Max Weber’s theory views power as “the probability that one actor within a social relationship will be in a position to carry out his own will despite resistance.” Id. at 782 (citations omitted). And Youngjae Lee opens up his recent book with a conception of power from Camus’s *The Fall*, which states the following: Somebody has to have the last word. Otherwise, every reason can be answered with another one and there would never be an end to it. Power, on the other hand, settles everything. Youngjae Lee, *Criminalizing Disobedience* (2026) (citing Albert Camus, *The Fall* (1956)). If one were to adopt these conceptions of power, it would seem that my analysis would suggest that most criminal justice actors have little—if any—power.

⁹³ Fryer, *Progressive Prosecution*, supra note __, at 788 n.113 (“Perhaps even less important is whether another individual has a bigger impact on the criminal justice system when it remains the case that those officials with a lesser impact could thwart prosecutors’ efforts at reform.”).

⁹⁴ Cf. supra __.

⁹⁵ Cf. supra __.

⁹⁶ Cf. supra __.

incomplete and possibly misleading. Reformers who focus too closely on the institution they hope to change may mistake the institution's customary role as an inevitable one—and may find, to their surprise, that power they sought to possess has simply moved to the next available institution.

B. Overlapping Powers

But contingency is only part of the problem. An additional complication is that powers that institutions possess are not always exclusive to that institution. Reform naturally invites institutional targeting. If legislatures are making too many things illegal, reformers target legislatures. If police are making too many arrests, reformers target police. If prosecutors are charging too many people, reformers target prosecutors. And if judges are interpreting the law in a way that advances mass incarceration, reformers target the judges. There is nothing irrational about these strategies. Still, they come with some risks. It is true that legislatures make the law, but other officials also make rules that shape criminal liability. Police may be the system's gatekeepers, but they aren't the only ones with control over the system's entry. Prosecutors charge, but they lack a monopoly on charging power. And judges interpret law, but they are not the only decisionmakers whose interpretations matter. The neat institutional boxes that we put these actors in appear to be a bit less neat when we discover that their content doesn't always stay in their assigned places. This matters for reform because it suggests that removing an institution from the mass incarceration equation may accomplish less than we hoped for if the power that they exercise is not exclusive to that institution. The power may—inconveniently—turn up somewhere else.

This point needs further explanation. Below I consider powers we ordinarily assign to lawmakers, police, prosecutors, and judges, and explain how other institutions may exercise those powers even if they don't typically do so.

1. Legislative Power

Let's start with the legislature. If lawmakers have any power, it's the power to make law. They decide what conduct is prohibited and set the boundaries of punishment. The conventional account appears to give legislatures a straightforward assignment of power: they make the rules, and other institutions carry them out. Since legislatures decide what conduct is criminal in the first place, they

can dictate what police may enforce, what prosecutors may charge, or what sentences judges may impose.

The overcriminalization literature often accepts this allocation of power as its starting point. In his essay coining the term “overcriminalization,” for instance, Sandy Kadish notes that “[t]he need for restraint seems to be recognized by those who deal with the criminal laws, but not by those who make them.”⁹⁷ In addition, Doug Husak’s influential account of criminalization posits that “[a] substantial amount of contemporary punishments are unjust because they are inflicted for conduct that should not have been criminalized at all.”⁹⁸ And as Daryl Brown points out, “Husak offers his thesis foremost as guidance to legislatures, in hopes they will police their own criminal lawmaking by adherence to a clarified set of normative commitments.”⁹⁹ Thus, Brown claims that “[o]vercriminalization is the term that captures the normative claim that governments create too many crimes and criminalize things that properly should not be crime.”¹⁰⁰ The reform impulse is, therefore, fairly intuitive: if the problem is too much criminal law, then we can fix the problem by focusing on the institution that created those laws.

This makes sense. Legislatures possess the formal authority to repeal offenses, reduce penalties, and simply not create any new criminal laws. But as many scholars have recognized, other decisionmakers in the criminal legal system have the practical power to set the boundaries of what law is. These officials govern who will be treated as a criminal, how broad or narrow a statute may be, and what sort of consequences one will receive for bad conduct. Although they are not writing the laws in the penal code, they are producing the rules governing criminal cases.

We have already seen how this plays out with prosecutors. There is a reason Stuntz dubbed them “the system’s real lawmakers.” They do not merely enforce the criminal law as it is handed to them, rather they play a critical role in determining the practical effect of the law. Suppose a legislature pursues a progressive reform agenda that includes repealing a series of harsh criminal laws, drastically reducing the penalties on others, and committing to not include additional violations to the criminal code. Prosecutors can still respond in ways that preserve some of the punitive effect lawmakers sought

⁹⁷ Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 157, 170 (1967).

⁹⁸ Husak, *Overcriminalization*, supra note __, at 3. More recently, Husak has stated that, “[c]riminal law has become a juristic embarrassment, and one goal of those who worry about overcriminalization should be to rectify this sorry state of affairs by imposing more order and structure on penal codes.” Douglas Husak, *Six Questions About Overcriminalization*, 6 ANN. REV. CRIMINOLOGY 265, 273 (2023) [Husak, *Six Questions*].

⁹⁹ Darryl K. Brown, *Can Criminal Law Be Controlled?*, 108 MICH. L. REV. 971, 973 (2010).

¹⁰⁰ Darryl K. Brown, *Criminal Law’s Unfortunate Triumph Over Administrative Law*, 7 J. L. ECON. & POLICY 657, 657 (2011).

to reduce. They can turn to other offenses that reach the same conduct, pursue a separate offense that the legislature left untouched, or exercise their charging and plea-bargaining power to impose consequences that the legislative reform was meant to take away. These routine actions may start to look less like a mere application of law and more like a creation of it. By determining which rules actually govern potential criminal defendants, prosecutors possess a form of lawmaking power.

Police provide another example. Like prosecutors, police have been referred to as “de facto lawmaker[s].”¹⁰¹ Their power to investigate and arrest gives them influence over who is treated as a criminal in society. Suppose, for instance, a legislature decriminalizes a particular conduct because they want few people arrested or harassed for engaging in that conduct. Police may still mitigate the effects of this reform by investigating and arresting people for other offenses arising from the same encounter. For instance, research on drug decriminalization has shown that when drug arrests declined, arrests for “other common misdemeanors increased.”¹⁰² And some have pointed out circumstances where “traffic decriminalization had little impact on diminishing the ability of police to control, stigmatize, and harm civilians in routine traffic stops.”¹⁰³ Part of the reason is captured by an observation Egon Bittner made long ago: “[i]n the typical case the formal charge justifies the arrest a patrolman makes but is *not* the *reason* for it.”¹⁰⁴ The point Bittner was making is that when they arrive on the scene, police are merely trying to handle a situation in the way that they see fit. Thus, “any policeman worth his salt is virtually always in a position to find a bona fide charge of some kind when he believes the situation calls for an arrest.”¹⁰⁵ Although the legislature may eliminate one basis for an arrest, they may not eliminate an officer’s ability to rely on another criminal statute to arrest people during the same encounter. This observation has led to some scholars being skeptical that any reduction of statutes would limit the police ability to make an arrest. Indeed, even Doug Husak—who, literally, wrote the book on overcriminalization¹⁰⁶—acknowledges that “[n]o amount of decriminalization is likely to alter this fact.”¹⁰⁷ In other words, the legislature has the formal power of making criminal law, but the police participate in making the law that people actually experience on the street.

¹⁰¹ Brandon Hasbrouck, *The Unconstitutional Police*, 56 HARV. C.R.-C.L. L. REV. 239 (2021).

¹⁰² Meghan Kozlowski et al., *Decriminalization and Depenalization of Marijuana Possession: A case Study of Enforcement Outcomes in Prince George’s County*, 20 *Criminology*, CRIMINAL JUSTICE, LAW & SOCIETY 109, 123 (2019).

¹⁰³ Jordan Blair Woods, *Decriminalization, Police Authority, and Routine Traffic Stops*, 62 UCLA L. REV. 672, 710 (2015)

¹⁰⁴ Egon Bittner, *Florence Nightingale in Pursuit of Willie Sutton: A Theory of the Police*, in *THE POTENTIAL FOR REFORM OF CRIMINAL JUSTICE* 17, 27 (Herbert Jacob ed., 1974).

¹⁰⁵ *Id.*

¹⁰⁶ Husak, *Overcriminalization*, *supra* note ____.

¹⁰⁷ Husak, *Six Questions*, *supra* note, at 272.

Judges too have their own lawmaking power. As Jeremy Waldron writes, “[w]e all know that judges make law as well as discover it.”¹⁰⁸ They do this under the heading “interpretation,” which makes the enterprise sound a lot less consequential than it really is. But, as Thomas Hobbes once observed: “by the craft of an Interpreter, the Law may be made to beare a sense, contrary to that of the Sovereign; by which means the Interpreter becomes the Legislator.”¹⁰⁹ Judges resolve ambiguities, define terms in a statute, and determine whether particular conduct is prohibited by a statute. This allows them to expand or contract the effects of legislative reform without technically touching the statutory text. Although the legislature supplies the statutory language, judges determine what that language means when the language is eventually applied to an actual defendant. Thus, judges “do [not] stay out of lawmaking through the interpretations they offer.”¹¹⁰

The upshot of this is that who possess lawmaking power may be less clear in practice. Legislatures draft criminal codes, but prosecutors dictate the scope of them through charging and plea bargaining, police determine which conduct forms the basis of an arrest, and judges determine what the criminal code actually means when applied to a defendant. None of them sit in the legislature’s chair, but they each have their own way of making law.¹¹¹ For reformers, this is where the shell game comes into view: targeting legislatures because of their lawmaking powers may simply result in another institution exercising its own power more prominently. Legislative reform means very little if the “lawmaking pea” can move elsewhere.

2. Police Power

Police too are a legitimate shell in this game because the powers that we often associate with them are not uniquely theirs. Consider arrest. As Rachel Harmon puts it, “[a]rrests are the paradigmatic police activity.”¹¹² Popular culture has underlined this point. Pick your favorite police drama. The

¹⁰⁸ Jeremy Waldron, *Separation of Power in Thought and Practice*, 54 B.C. L. REV. 433, 462 (2013) [Waldron, *Separation of Power*].

¹⁰⁹ Hobbes, *supra* note ____.

¹¹⁰ Ryan D. Doerfler & Samuel Moyn, *After Courts: Democratizing Statutory Law*, 123 MICH. L. REV. 867, 870 (2025).

¹¹¹ I should be clear that I am emphasizing what other officials can do; I’m not suggesting what officials should do. What I am indicating is consistent with the thought that the right approach is to not just comply with the law but treat it with a certain amount of respect as a reflection of our democratic process. Cf. JEREMY WALDRON, *LAW AND DISAGREEMENT* 100 (1999) (“When something is enacted as law or as a source of law, I believe it makes on us a demand not to immediately disparage it, or think of ways of nullifying it or getting around it, or mobilizing the immune system of the corpus juris so as to resist its incorporation.”).

¹¹² Rachel A. Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 307 (2016).

climatic point usually occurs with some iteration of the same scene: an officer sternly announces “you’re under arrest” before slapping the cuffs on a suspect and driving away in a police car. For many, this moment is a critical point to focus on if we want to reform our criminal legal system.¹¹³ And perhaps for a good reason. The United States arrest around 12 million people a year.¹¹⁴ Since police are controlling who we arrest, then they offer a natural way to control who enters the system. Thus, police status as the system’s “gatekeepers” has made them a common target of reform efforts.¹¹⁵ “Without police officers investigating offenses and bringing cases to prosecutors,” one scholar notes, “criminal courts would have little to do.”¹¹⁶ The thought here is that “[m]ass incarceration depends on the police because every person in jail or prison got there after being arrested.”¹¹⁷ Reform the gatekeeper, and you control who gets through the gates.

But the gatekeeper analogy starts to look less apt when we notice that there are other ways to get people in the system. An arrest is a distinctly police activity only if we treat the particular mechanism of an arrest—throwing cuffs on a person—as the thing that matters. But, as Harmon points out, an arrest is not necessary to perform many of the functions for which we use it. The gatekeeper analogy is based on our assumption that an arrest is necessary to get the criminal process started. But the process can also get started with a citation or summons.¹¹⁸ A summons is an order requesting a suspect to appear in court to answer for a criminal charge or violation.¹¹⁹ And they are often issued by judges or, in some jurisdictions,¹²⁰ prosecutors. My point here isn’t merely that there are alternatives to throwing people in cuffs. Rather, it’s that these alternatives expose a sleight of hand in the way we think about the power of police. We attribute to them the unilateral power to get the criminal process

¹¹³ Harmon, *supra* note __, at 308 (“When critics argue that we incarcerate far too many people for far too long and then continue to punish them after they are free, they view arrest as an important step towards incarceration and the use of arrest records as part of the extended punishment. And when they contend that the killings by law enforcement of Michael Brown, Walter Scott, Tamir Rice, Eric Garner, Freddie Gray, and Samuel Dubose represent a racist violence so extreme that it is analogous to lynching, they are often speaking of force used during arrests.”).

¹¹⁴ *Id.* at 310.

¹¹⁵ See Neusteter et al., *supra* note __.

¹¹⁶ JEFF BELLIN, *MASS INCARCERATION NATION* 95 (2022). Bellin’s entire statement is as follows: “Police are the gatekeepers to the criminal justice system. Without police officers investigating offenses and bringing cases to prosecutors, criminal courts would have little to do. Thus, the decisions made by police are critical to understanding Mass Incarceration.”

¹¹⁷ Barkow, *Justice Abandoned*, *supra* note __, at 7. But see Harmon, *supra* note __, at 334 (“But today, of course, not all criminal cases begin with an arrest....”).

¹¹⁸ Harmon, *supra* note __, at 334 (“[M]any criminal cases start with some form of summons or citation”).

¹¹⁹ *Id.*

¹²⁰ See, e.g., Wisconsin Stat. § 968.04 (“[T]he district attorney, after the issuance of a complaint, may issue a summons in lieu of requesting the issuance of a warrant.”)

started, but judges and prosecutors can do that too. The police may be the most visible person standing at the front door but they are not the only ones with a key.

3. Prosecutorial Power

We have already seen the ways in which the power of prosecutors is contingent. This means prosecutors' ability to exercise their familiar powers depends on institutional arrangements created by other actors. But we should also be cautious about assuming that the powers that prosecutors possess are uniquely theirs. Take charging, for instance. This is often considered the quintessential power of a prosecutor.¹²¹ Indeed, sometimes "prosecutorial power" is used simply as a shorthand for "charging power." And it is this sort of power that gets scholars to say that prosecutors, not police, are the real "gatekeepers" of the criminal legal system.¹²² Although police may bring someone into custody, it is the prosecutor that decides whether the case becomes a formal charge.

Yet prosecutors aren't always the only decisionmakers with the power to charge. Police, for instance, can file initial charges—and even prosecute cases¹²³—in some jurisdictions.¹²⁴ Likewise, there are states that allow judges to initiate criminal charges independent of prosecutors.¹²⁵ These judges can look remarkably like "prosecutors in robes" as they exercise powers we normally associate with the prosecutorial function.¹²⁶ And, as Emma Kaufman has recently observed, private citizens also retain the power to initiate prosecution in some jurisdictions.¹²⁷ Thus, the perception we have of "the

¹²¹ Barkow, *Institutional Design*, supra note __, at 898 ("Deciding what charges to bring is traditionally viewed as the core task of a prosecutor"); Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 408 (2001) ("The charging decision is arguably the most important prosecutorial power and the strongest example of the influence and reach of prosecutorial discretion.").

¹²² Joan E. Jacoby & Edward C. Ratledge, *THE POWER OF THE PROSECUTOR: GATEKEEPERS OF THE CRIMINAL JUSTICE SYSTEM* (2016).

¹²³ Alexandra Natapoff, *Misdemeanor Declination: A Theory of Internal Separation of Powers*, 102 TEX. L. REV. 937, 1004 (2024) ("In at least ten, and perhaps as many as fourteen U.S. jurisdictions, police are permitted to direct file formal charges in misdemeanor cases and then handle the prosecution, meaning they act as both police and prosecutors at the same time.").

¹²⁴ Gregory DeAngelo, Matthew Gornes, and Ruston Romaniuc, *Do Civilian Complaints Against Police Get Punished?*, 196 PUBLIC CHOICE 453, 468 (2023) (noting that in Cook County "law enforcement can file charges directly to the court without consulting the prosecutor's office").

¹²⁵ Darryl K. Brown, *The Judicial Role in Criminal Charging and Plea Bargaining*, 46 HOFSTRA L. REV. 63, 73 (2017) (discussing "a modest version of judicial power to initiate a criminal case independently of the prosecutor's office").

¹²⁶ Schuman, supra note __, at 631 (2025) ("Criminal law enforcement is traditionally considered a 'core executive power.' Yet federal district judges exercise this power tens of thousands of times a year by initiating proceedings to revoke probation and supervised release.").

¹²⁷ Emma Kaufman, *The Past and Persistence of Private Prosecution*, 173 U. PA. L. REV. 89 (2024).

government monopoly on prosecution is an ideology rather than a rule.”¹²⁸ All of this suggests that the many decisionmakers have the power to turn an alleged wrongdoing into a criminal charge. The point is not that these other institutions exercise power to the same extent as prosecutors. The point is that this power isn’t institutionally exclusive: in various jurisdictions, more than one actor can possess the power to charge, and even prosecute, a criminal case.

4. Judicial Power

Judges also possess a power that looks more exclusive on paper than it is in practice: the power of interpretation. Chief Justice Marshall famously put the point bluntly when stating “[i]t is emphatically the province and duty of the judicial department to say what the law is.”¹²⁹ In criminal cases, the power to say what the law is can amount to greatly influencing what the law does. We know that statutes do not arrive in courtrooms with their meanings helpfully attached. So, it’s up for judges to determine what the words in a statute mean, whether there are exceptions that apply to the prohibited conduct, and what to do when there is ambiguity. At times, this can result in judges determining whether conduct is indeed criminal at all. Lawmakers may make the law, and police and prosecutors may bring cases to the courts, but they cannot escape the interpretative questions that follow.

This interpretative power partly explains why judges often find themselves as the target of criminal justice reform efforts. Reform is, no doubt, not merely about changing the rules. The meaning of those rules is going to be determined by the people that give it content. Judges can dramatically alter a defendant’s experience with the criminal legal system, sometimes swaying whether someone is released on bail, what evidence is admitted in the courtroom, and what sentence defendants receive. In addition, they also set rules for the laws that are being made, the ways in which police investigate, and the punishments prosecutors pursue. As Rachel Barkow puts the point, “who sits on the bench makes an enormous difference in how criminal law looks in the United States.”¹³⁰ Carissa Hessick makes a similar point, noting that judges have “played an important role” in mass incarceration and

¹²⁸ Id. at 92.

¹²⁹ *Marbury v. Madison*, 5 U.S. 137 (1803).

¹³⁰ Rachel E. Barkow, *Criminal Justice Reform and the Courts*, U. CHI. L. REV. ONLINE (Oct. 15, 2019), <https://lawreview.uchicago.edu/online-archive/criminal-justice-reform-and-courts>.

claiming that there are “things that judges could do to help reverse that trend.”¹³¹ And Erwin Chemerinsky has indicted the Supreme Court for facilitating police misconduct, wrongful convictions, invasions of dignity, and racial inequality.¹³² The point is not merely that judges have opportunities to make a difference. Rather it is that the system is largely the product of interpretations. By targeting judges’ interpretative power, then, reformers can focus on the legal limits guiding other institutions’ behavior.

But even this interpretative power is not confined to judges. A judicial decision does not simply announce its meaning and dictate what everyone else must do to comply with it. Opposing lawyers will both give compelling reasons why their side should win under the language of the judicial opinion.¹³³ And other criminal justice officials must also understand, translate, and apply those words that judges supply. Put simply, other officials have to interpret the interpreters. Lawmakers decide whether they have to rewrite the rules to reach the conduct they wanted to target, police decide what it permits them to do on the street, and prosecutors must decide how it effects their charging, pleas, and trial practices. And what the decision actually means is more a consequence of how the legal field reacts to it than the words on the opinion. Courts make decisions about criminal cases. But “whatever courts will decide will always be, at least in part, appropriated and reinterpreted by a large community of social actors who will translate the meaning of the constitution into practice.”¹³⁴ Interpretation, then, is also an overlapping power.¹³⁵ Judges may announce what the law means, but other legal actors participate in what that meaning becomes.

¹³¹ Carissa Hessick, *Judges and Mass Incarceration*, 31 Wm. & Mary Bill Rts. J. 461, 461 (2022).

¹³² ERWIN CHERMERINSKY, *PRESUMED GUILTY: HOW THE SUPREME COURT EMPOWERED THE POLICE AND SUBVERTED CIVIL RIGHTS* (2021).

¹³³ Justin Driver, *The Insignificance of Judicial Opinions*, 113 CALIF. L. REV. 2181, 2183 (2025).

¹³⁴ Miguel Poiarés Maduro, *In Search of a Meaning and Not in Search of the Meaning: Judicial Review and the Constitution in Times of Pluralism*, 2013 WIS. L. REV. 541, 560 (2013). Justin Driver has recently made a slightly different point regarding judicial opinions. He argues that too much stock is put into judicial opinions, where it is the judicial decision that have formal authority. As Driver puts it, “[a]lthough lawyers frequently fetishize opinions, the content of those opinions plays precious little role in influencing their status—even among lawyers.” Driver, *supra* note __, at 2183. Discussing the famous Footnote Four of *United States v. Carolene Products Co.*, which has become a statement of constitutional law, Driver argues that “Footnote Four did not actually become Footnote Four...until the 1970s, or perhaps even the 1980s.” *Id.* at 2192. The significance of the footnote, in other words, did not merely come from Justice Stone’s 1938 opinion. It came from the importance the legal community subsequently gave to it. Thus, Driver concludes, [g]iving Footnote Four content is far from a self-executing enterprise because, of course, *judging requires judgment.*” *Id.* at 1293.

¹³⁵ *Huggins v. Isenbarger*, 798 F.2d 203, 208 (7th Cir. 1986) (Easterbrook, J., concurring) (“Each branch of the government interprets the law.”) (citing Learned Hand, *The Bill of Rights* 3-18, 27-30 (1958)).

C. Looking for the Reform Pea

Thus far, I have argued that power in the criminal legal system is contingent and overlapping. This form of power allows for the system to look like a shell game: once reformers are able to control, or contain, an institution they may discover that the same practice they attempted to change reappears through another institution. So, reforming one institution may not actually eliminate the underlying problem that reformers sought to prevent—it may simply encourage, if not create, an opportunity for a similar practice to appear through another institution.

The progressive prosecution movement provided a useful illustration: reformers placed their hopes in prosecutors based on the apparent power they possessed only to discover that other institutions retained dormant powers that they exercised once prosecutors no longer pursued the traditional punitive approach. If we go back a bit further in history, we see other versions of the same phenomenon. Take sentencing reform. For much of the twentieth century, the system provided judges with substantial discretion over how long a defendant would be imprisoned. However, reformists sought to constrain judges' ability to dish out disparate and lengthy sentences through sentencing guidelines, mandatory minimums, and other fixed penalties. However, the change to the system did not eliminate discretionary decisions or the power to impose disparate and lengthy sentences—it simply relocated a lot of that power to legislatures and prosecutors. Lawmakers increasingly specified rigid sentencing consequences for certain offenses; and prosecutors gained greater influence through charging and plea bargaining. Thus, the consequence of the reform movement seemed to empower other officials, worsen disparities, and make the criminal justice system even more draconian.¹³⁶ In other words, although reformers succeeded in constraining an institution's familiar power, the problem did not go away—it simply moved to other institutions. A similar pattern appeared in domestic violence reform. For decades, police officers were thought to exercise the power to determine whether domestic violence would be treated as a crime in the first place. When responding to domestic dispute calls, officers would decide whether the criminal process should be used to deal with the issue or whether something like mediation, separation, or counseling was more appropriate under the circumstances. A reform movement attacked the police's ability to determine whether to arrest domestic violence suspects on the grounds that the practice was ineffective and unequal. This led to jurisdictions adopting mandatory arrest policies aimed at constraining police power by limiting

¹³⁶ David Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 199 (2012).

their options. That is, police were required to make arrests rather than decide on their own whether the situation warranted criminal intervention. But these reforms did not make the discretionary decision disappear—it simply moved to prosecutors, who also perpetuated inequalities through their own decisionmaking process.¹³⁷ The reform simply solved one equality problem by creating a different institutional site at which judgments were made.

Again, all of this does not suggest that institutional reform is futile. Progressive prosecution, sentencing, and domestic violence reform all changed what *some* officials were permitted or expected to do. And reformers may still have good reason for targeting one of these institutions in isolation: they may, for instance, think that some reforms are just low-hanging fruit that doesn't come at much of a cost.¹³⁸ But it reveals an important insight about how reformers should think about unintended consequences of their reform efforts. The conventional account of institutional power encourages a relatively straightforward theory of reform: find the source of the problem, constrain it, and the problem should diminish. But the account of contingent and overlapping power presented above complicates this inquiry. The relevant analysis is not merely the institution being reformed, but the institutional network through which power can travel. One consequence of this is that criminal justice doesn't contain one institution that is simply more powerful than the others—though, it can often appear that way. Contrary, to what many scholars have proclaimed,¹³⁹ the system is still a system in some relevant respects. That is, “the system” contains several institutions with authority that matters, connected by frameworks that allow consequential decisions to move among them. Before targeting an institution, reformists should consider what particular decision they want to change, determine which institutional players possess the relevant authority to affect it, and consider how those actors' incentives may change if one of them behaves differently than expected. This sort of inquiry may reveal that a proposed reform has the potential to eliminate the problem, merely relocate it, or perhaps

¹³⁷ Margaret E. Martin, *Mandatory Arrest for Domestic Violence: The Courts' Response*, 19 CRIMINAL JUSTICE REVIEW 212, 220 (1994) (“Social factors were also associated with both prosecution and the failure to prosecute. Defendants who were women, who were married to the victim, who were white, or who committed the crime in the presence of children were less likely to be prosecuted than other defendants.”).

¹³⁸ See Sonja B. Starr, *On Prisoners, Politics, and the Administration of Criminal Justice*, 72 U. CHI. L. REV. 1775, 1782 (2021) (noting that “most criminal justice reforms have focused on low-hanging fruit (nonviolent crime, first-time offenders, marijuana)”; see also, Bellin, *Expanding the Reach*, *supra* note __, at 710 (“District Attorneys in cities with large progressive population are low hanging fruit”).

¹³⁹ See, e.g., Lawrence M. Friedman, *Crime and Punishment in American History* 461 (1993) (“[T]he criminal justice ‘system’ is not a system at all”); Walter J. Dickey and Peggy A. McGarry, *The Search for Justice and Safety Through Community Engagement: Community Justice and Community Prosecution*, 42 IDAHO L. REV. 313, 362 (2006) (“It is common wisdom that the criminal justice system is not a system. It is not organized and directed to seek and achieve a single goal. Rather, it is a collection of usually autonomous agencies, each pursuing its own aims.”).

produce a new distribution of power altogether. This won't be a one size fits all project. The answers will differ across jurisdictions and issues. Criminal justice doesn't put all of its power under one shell. There are several shells, several peas, and—perhaps most inconveniently—the same pea may be capable of hiding under many institutional shells.

III. Liberty is Not the Norm

I have one more thought to offer. It's this: when you have a criminal legal system of contingent and overlapping powers, liberty becomes the exception rather than the norm.¹⁴⁰ To see why, consider the warnings as to why concentrated power in our criminal legal system is unwelcomed. James Madison's words in *Federalist 47* are usually the starting point for this sort of analysis:

The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed, or elective, may justly be pronounced the very definition of tyranny.¹⁴¹

These words have been thought to have special relevance in criminal law. As Rachel Barkow notes, “[t]he separation of powers acts as a direct check against the accumulation of too much power in one branch and against the evasion of the process required of that branch.”¹⁴² On this picture, “each branch must agree before criminal power can be exercised against an individual. Congress must criminalize the conduct, the executive must decide to prosecute, and the judiciary (judges and juries) must agree to convict.”¹⁴³ Madisonian separation of powers, then, aims to provide a check against arbitrary implantation of the criminal law and make liberty the norm.

However, not everyone agrees that strict separation of powers is a good way to protect liberty interests. Dan Epps, for instance, argues that “understood in the Madisonian sense of a division of functional power between distinct political institutions, it is far from obvious that the separation of criminal powers will protect the values it is supposed to guarantee.”¹⁴⁴ Rather than insist on distinct

¹⁴⁰ Cf. *United States v. Salerno*, 481 U.S. 739, 755 (“In our society liberty is the norm.”).

¹⁴¹ *The Federalist* No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

¹⁴² Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 *Stan. L. Rev.* 989, 1017 (2006).

¹⁴³ *Id.* at 1017.

¹⁴⁴ Daniel Epps, *Checks and Balances in Criminal Law*, 74 *Vand. L. Rev.* 1, 83-84 (2021).

functional powers, Epps views the related idea of “checks and balances”¹⁴⁵ as having the potential to provide better protections against bad outcomes in the criminal legal system. The basic point here is that if we have institutions performing distinct roles, then any given institution is limited in its ability to veto other institutions’ decisions. Even if a judge may be sympathetic to a defendant’s cause, so long as a defendant’s conduct falls within the language of the statute, and the prosecution has not committed a violation that warrants dismissal, “the judiciary is powerless to act as a veto” if it stays in its separate lane.¹⁴⁶ As support for this view, Epps highlights the Supreme Court’s reasoning in *Brogan v. United States*, where the Court refused to recognize an “exculpatory no” defense to a federal statute criminalizing false statements.¹⁴⁷ “Because the defense was not contemplated by the plain text of the statute,” Epps writes, “it was Congress’s prerogative alone to create the defense; the role of a court is limited simply to interpreting the language Congress has written.”¹⁴⁸ Instead of having each decisionmaker with a narrowly defined role, we may be better served if decisionmakers performed overlapping functions.¹⁴⁹

I don’t want to get too deep into this debate. It is enough for my purposes to note that there is a sense in which this idea of contingent and overlapping power *could* be understood in a way that would provide us liberty protections. You may think, for instance, that if no institution could exercise power without others agreeing, and if the powers we typically associate with institutions are not exclusively theirs, then each institution would have a means of interfering with the other institutions in a way that would lead individuals to be free from arbitrary enforcement.¹⁵⁰ On this picture we get something that may surprisingly resemble the Madisonian ideal: institutional power is adequately checked because no single institution gets to exercise criminal powers against an individual simply because they are the institution we typically associate with that power.

¹⁴⁵ As Jeremy Waldron has noted, separation of powers does not operate as a single principle, but instead as a family of principles, which includes “separation of powers,” “division of power,” “checks and balances,” “bicameralism,” and “federalism.” Waldron, *Separation of Powers*, supra note __.

¹⁴⁶ Epps, supra note __, at 45.

¹⁴⁷ Id. at 17.

¹⁴⁸ Id.

¹⁴⁹ Id. at 70 (“Rather than confining each decisionmaker in the system to one narrowly defined role, it might be better to encourage decisionmakers to perform the *same* functions (or at least to have some overlapping jurisdiction) in order to increase the chance that more interests can have a role in any particular decision.”).

¹⁵⁰ Cf. PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 5 (describing being unfree as “having to live at the mercy of another, having to live in a manner that leaves you vulnerable to some ill that the other is in a position arbitrarily to impose”).

Sadly, the criminal legal system does not work like that. Its contingent and overlapping powers do not create checks to prevent criminal powers from being exercised against individuals; it instead creates backup plans for them. If one institution is incapable, or declines, to exercise its power against an individual, another one may possess a similar power producing comparable results that they may choose to deploy. Contingent and overlapping powers could mean that they are harder to contain. And this creates a problem for reform: targeting a single institution is often insufficient to receive the desired outcome. This suggests that the system is not one where checks and balances put a thumb on the scale for liberty. Instead, contingent and overlapping powers create an institutional structure with multiple ways to reach the same harmful outcome. The system is designed for power to get checked primarily when it is exercised in a way that is in tension with the punitive norm. In this sense, the contingent and overlapping power in the criminal legal system creates something that is nearly the opposite of the Madisonian ideal: it's not that you need every institution on board to exercise criminal powers against an individual; it's that you may need every institution on board to make sure that an individual is free from them. What we have, then, is a system where similar powers are dispersed without necessarily being checked in a way that protects people from criminal powers, which frustrates the liberty-protecting intuition that made the Madisonian picture attractive to begin with.

The consequence of this is that liberty becomes the exception, rather than the norm. Any institution can have the power to take away an individual's freedom; but all of them must agree to prevent criminal power from being exercised against that individual.

Conclusion: Is the Shell Game Winnable?

Reformers repeatedly search for the place where especially consequential power resides in the criminal legal system—in judges, legislatures, prosecutors, police, and increasingly back to judges again. Sometimes they do this without even noticing that we have already sat through this act. But the criminal legal system does not lend itself to an isolated institutional focus. It's contingent, meaning the power an institution possesses depends on what others permit it to do. And it's overlapping, meaning the powers we typically associate with one institution are also possessed, albeit in different forms, by others. These conditions make criminal justice reform feel like a shell game: reforming, or

constraining, one institution can alter its exercise of power without eliminating the possibility of a similar result occurring by another institution at another point in the process.

If that's right, then we must consider a slightly uncomfortable question for reformers: is the shell game winnable? The answer may depend on the success conditions of a reform project. If the goal is to defeat a particular exercise of power, then reform methods targeting specific institutions can be successful. Reformers can get legislatures to repeal a law, prosecutors to stop charging certain offenses, police to not arrest for certain conduct, or a judge to invalidate certain punishments. But if the purpose is to substantially change the ills of the system—its racial imbalance, its excessive punitiveness, or its propensity for error—then that task is considerably harder. Reformers are going to have to do more than win an institutional battle; they are going to have to make sure the system does not have the capacity to produce similar problems through alternate means.

At this point, we can hear the abolitionist chuckling on the sideline, thinking that the observations above are merely grist for their mills. But we needn't think my analysis suggests that our ultimate project must be to give up on these institutions altogether. Indeed, there is a way in which some forms of abolitionism are subject to a similar sort of phenomenon that I have identified. For instance, abolitionists have argued that we can greatly reduce harm and make the police obsolete by shifting funding and responsibilities to housing authorities, school districts, and mental health departments.¹⁵¹ But, as I have noted previously, the abolitionist project of switching responsibility wouldn't make much of a difference if those other entities possess the same punitive inclinations that contribute to the police's behavior.¹⁵² You get rid of the police, but another carceral-minded institution usually thought to be outside of the criminal legal system produces a similar harm.¹⁵³ Perhaps the more promising response, then, is not simply to give up on these legal institutions, but to remind ourselves that the criminal justice system is largely a reflection of the culture of people who

¹⁵¹ Amy Goodman, Angela Davis on Abolition, Calls to Defund Police, Toppled Racist Statues & Voting in 2020 Election, DEMOCRACY NOW (June 12, 2020),

https://www.democracynow.org/2020/6/12/angela_davis_on_abolition_calls_to (quoting Angela Davis saying “Well, the call to defund the police is, I think, an abolitionist demand, but it reflects only one aspect of the process represented by the demand. Defunding the police is not simply about withdrawing funding for law enforcement and doing nothing else.... It's about shifting public funds to new services and new institutions — mental health counselors, who can respond to people who are in crisis without arms. It's about shifting funding to education, to housing, to recreation.”).

¹⁵² Fryer, *Idealizing Abolition*, *supra* note __, at 567 n.89.

¹⁵³ *Id.*; see also, Christy E. Lopez, *Abolish Carceral Logic*, 17 STAN. J. C. R. & C. L. 379, 414 (2022) (“I have investigated housing authorities, school districts, and mental health departments that were as or more carceral-minded than the law enforcement agencies they worked alongside—and that caused similar harm. I find very little solace in the idea of not having police and shifting those responsibilities to agencies like those.”).

make up the society in which it operates.¹⁵⁴ These institutions that we sometimes treat as autonomous are a product of social attitudes reflecting crime and punishment. And when these institutions do not reflect our beliefs, society knows how to respond.¹⁵⁵ The public, then, may not be mere spectators to the shell game but the ones who have been orchestrating the game all along. Institutions may take turns concealing the ways to achieve substantive change in the criminal legal system, but perhaps it's the prevailing public sentiments about crime that have been setting the game's terms.

¹⁵⁴ DAVID GARLAND, *CULTURE OF CONTROL* (2001).

¹⁵⁵ See, e.g., Carissa B. Hessick, *Separation of Powers Versus Checks and Balances in the Criminal Justice System; A Response to Professor Epps*, 74 VAND. L. REV. EN BANC 182 (2021) (“In any event, when voters care enough about a particular issue, they seem quite capable of holding multiple branches and officials responsible. For example, when voters in Harris County, Texas were dissatisfied with the county’s abusive bail practices, they elected a new sheriff, new judges, and new country commissioners—all of whom supported bail reform.”).